

The *Jacobson* Question

Individual Rights, Expertise, and Public Health Necessity

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I INTRODUCTION

Individuals and organizations asserting their personal liberty and economic interests have always challenged public health authority. Since the founding of the republic, state legislatures have used their police power to enact sweeping public health statutes.¹ State and local executive branch officials (some of them appointed for their particular expertise) have used the broad authority granted to them by statutes to issue regulations and orders to protect the public's health. People and organizations affected by these public health laws (statutes, regulations, and orders) have called on the judicial branch to review them – to determine whether the legislative and executive branches have complied with constitutional and statutory limits on their power.

Some litigants claim that public health laws violate the civil liberties protected by constitutional provisions and certain statutes. Some litigants rely on the separation of powers enshrined in the structure of the federal and state constitutions to claim that executive branch officials have overstepped the bounds of authority properly delegated to them by statutes.

Since 1905, *Jacobson v. Massachusetts* has guided courts when they adjudicate challenges to public health laws.² *Jacobson* upheld a state statute that authorized local health boards to make smallpox vaccination compulsory if, in the opinion of the medical experts on the board, it was necessary for public health. *Jacobson* supported public health necessity as a counterweight that justifies encroachments on civil liberties under at least some circumstances. It also recognized the constitutional authority of state legislatures to protect the public's health – including by delegating power to executive branch officials – without unwarranted interference from federal judges.

¹ A state's police power is its inherent authority to exercise reasonable control over people and property, within its jurisdiction, for the protection of the general public's health, safety, and welfare, subject to limits imposed by the Constitution. Public health laws are a subset of police power regulations.

² 197 U.S. 11 (1905).

In 2020, legal disputes over COVID-19 emergency orders put *Jacobson* to the test.³ In one of the first major lawsuits challenging a COVID-19 restriction, the Fifth Circuit Court of Appeals developed a novel interpretation of *Jacobson*. The Fifth Circuit (and the many courts that followed its lead) held that during a public health emergency, *Jacobson* requires judges to suspend the standards they would ordinarily apply to civil liberties claims and instead apply the specific (and highly deferential) standard the Supreme Court set forth in 1905. In this chapter, I refer to the Fifth Circuit's 2020 interpretation of *Jacobson* as the "public health emergency suspension doctrine," or the "suspension doctrine" for short.⁴ From April to November 2020, judges relied on the suspension doctrine in dozens of cases upholding orders prohibiting gatherings, restricting business operations, limiting interstate travel, requiring people to stay at home, and mandating face masks. On November 25, 2020, the Supreme Court weighed in on the question of which level of deference the courts should give to executive orders in a public health emergency. It rejected the suspension doctrine and cast doubt on the future of *Jacobson* as a modern precedent.

In the post-2020 era, litigants are calling on courts to answer the *Jacobson* question: Is *Jacobson v. Massachusetts* still a valid precedent?⁵ This chapter argues that the foundational principles enshrined in *Jacobson* endure, but public health advocates will need to craft new arguments that incorporate these principles within modern (and sometimes less deferential) standards of judicial review.

II THE EVOLUTION OF JACOBSON

Prior to 2020, *Jacobson* was not on the short list of cases famous among non-lawyers. It was not even particularly well known among the wider legal community. But for more than a century, specialists have revered *Jacobson* as the foundational authority for laws that protect the public's health.

In 2020, a flood of lawsuits challenging COVID-19 mitigation efforts put *Jacobson* in the public spotlight. Hundreds of news stories, op-eds, and podcasts mentioned the case by name.

Beginning in April 2020, many federal judges interpreted *Jacobson* in a novel way, relying on it as the basis for a new doctrine governing the level of deference that courts should grant executive branch officials and legislatures during a public health emergency. These courts set aside modern precedents and suspended ordinary standards of judicial review, using *Jacobson* as a shortcut for upholding

³ Wendy E. Parmet, Rediscovering Jacobson in the Era of COVID-19, 100 *B.U.L. Rev. Online* 117 (2020).

⁴ Lindsay F. Wiley & Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, 133 *Harv. L. Rev. F.* 179, 181.

⁵ See, for example, *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592 (7th Cir. 2021).

COVID-19 mitigation orders without grappling with the thorny legal questions that some of these orders raised. In November 2020, when the Supreme Court rejected this interpretation of *Jacobson*, it cast a shadow on the continued vitality of the case as a whole.

To protect *Jacobson* as a precedent for current and future disputes, public health advocates must parse its meaning carefully. In this section, I provide a chronology of *Jacobson*'s evolution, identifying the specific interpretation of it that the Supreme Court majority rejected in 2020 and separating that from foundational principles that courts can and should rely on in the post-2020 era.

A *Jacobson* in 1905

Around the turn of the twentieth century, life-threatening communicable diseases put the public's health in more or less constant peril. To control the spread of disease, state and local officials routinely brought their police power to bear against businesses and individuals. For smallpox, the availability of an effective vaccine – the first ever developed – prompted state and local governments to require individuals to submit to vaccination under penalty of fines, exclusion from school, and even by force.⁶ To cope with frequent smallpox outbreaks, the Massachusetts legislature passed a statute authorizing local health boards to require residents to be vaccinated if, in the opinion of the medical experts on the board, it was “necessary for the public health.”⁷ The statute imposed a penalty of five dollars for anyone over the age of twenty-one who failed to comply with a local health board's vaccination requirement. In 1902, the board of health of the city of Cambridge, Massachusetts adopted a regulation requiring smallpox vaccination in response to a worsening outbreak. Henning Jacobson, the pastor of a church in Cambridge, refused to be vaccinated. In a criminal proceeding the city initiated to collect the fine, Jacobson claimed that requiring vaccination violated the Due Process Clause of the Fourteenth Amendment, among other provisions.⁸ Jacobson argued that the state vaccination 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 way as to him seems best.”⁹ The case eventually made its way to the Supreme Court, resulting in one of the first major decisions where the Court applied the Fourteenth Amendment to a police power regulation.

⁶ Parmet, *supra* note 3, at 121.

⁷ *Jacobson*, 197 U.S. at 12 (quoting the applicable statute).

⁸ The Due Process Clause of the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law.” In 1915, the Supreme Court was still decades away from holding that the First Amendment's proscription against laws “prohibiting the free exercise of religion” applied to state governments at all. Therefore, Jacobson's argument that the law violated his religious freedom did not get very far, and the Supreme Court did not address it.

⁹ *Jacobson*, 197 U.S. at 26.

The Supreme Court rejected Jacobson's arguments and upheld the state vaccination law. In an opinion written by Justice John Marshall Harlan, the *Jacobson* Court recognized that the Fourteenth Amendment does impose limits on the state's police power. Harlan reasoned that the

power of a local community to protect itself against an epidemic ... might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.¹⁰

The Court directed that judges should overturn police power laws only in cases where "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."¹¹ Yet the Court reasoned that "liberty regulated by law"¹² subjects individual rights to "restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."¹³ Under the circumstances, the Massachusetts vaccination law was reasonable, proportionate to the threat, and consistent with public health necessity; consequently, the Court upheld the statute.

Although the Cambridge Board of Health had acted in response to a smallpox outbreak, the *Jacobson* Court did not clearly limit its holding to public health emergencies – or even to public health regulations. The standard of judicial review that the Court articulated and applied in *Jacobson* was, at the time, commonly applied by state courts in challenges to police power regulations generally (of which public health laws are a subset).¹⁴ In a dissenting opinion that Justice Harlan authored shortly after *Jacobson*, he argued that the definitive standard of review for any police power regulation was the one set forth in *Jacobson*.¹⁵ Several months later, in a case upholding state regulations governing the sale of milk, the Court's majority opinion cited *Jacobson* for the proposition that "the state has a right, by reasonable regulations, to protect the public health and safety," without any reference to epidemics or other exigencies.¹⁶ *Jacobson* was "the Court's first systematic statement of individual rights as limitations imposed on government."¹⁷ It is best understood as having "established a floor of constitutional protection" that courts have subsequently

¹⁰ *Id.* at 28.

¹¹ *Id.* at 31.

¹² *Id.* at 27.

¹³ *Id.* at 29.

¹⁴ See, for example, *Keith v. Johnson*, 59 S.W. 487, 488 (Ky. 1900); *State v. Dist. Ct. of Wyman Co.* 103 N.W. 744, 744 (Minn. 1905).

¹⁵ *Lochner v. New York*, 198 U.S. 45, 67 (1905) (Harlan, J., dissenting).

¹⁶ *New York v. Van De Carr*, 199 U.S. 552 (1905).

¹⁷ Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint* 214 (3d. ed. 2016).

built upon in cases ranging far beyond the epidemic context in which the regulation upheld in *Jacobson* was adopted.¹⁸

When *Jacobson* was decided, the Supreme Court had not yet developed the tiered levels of review (rational basis review, intermediate scrutiny, and strict scrutiny) that courts now use to adjudicate federal constitutional rights. Beginning in the mid-twentieth century, the Court developed these varying levels of judicial review for different types of civil liberties claims.¹⁹ The intermediate and strict scrutiny standards that now determine the outcome in some types of cases are far less deferential to the factual determinations and policy choices of the legislative and executive branches. In modern cases that infringe on fundamental rights, judges are supposed to probe the government's asserted interests and the suitability of fit between its chosen means and stated ends more deeply, rather than refraining from overturning any law that is arguably reasonable.

B *Jacobson* in 2020

In the early weeks of the COVID-19 pandemic, state and local officials across the United States issued hundreds of unprecedented executive orders closing businesses, restricting travel, ordering the general public to stay at home, and implementing other measures in hopes of avoiding the devastation experienced in Wuhan, Lombardy, and New York City. Coronavirus mitigation measures adopted in 2020 and 2021 differed from those implemented in the 1918 flu pandemic and mid-century polio outbreaks in important ways. Relying on authority delegated in general emergency and disaster management statutes that largely date to the 1960s and 1970s, governors, not boards of health, typically took the reins on coronavirus mitigation orders.²⁰ Many coronavirus mitigation orders remained in place longer than the average length of closures in 1918. In addition, coronavirus mitigation orders included innovative measures that had not been implemented in response to previous epidemics.

One innovation was restrictions on elective medical procedures. Most governors either ordered or recommended that health care providers cease procedures deemed elective, nonessential, or not lifesaving. These measures were intended to reduce close contacts among people who could transmit infection and to preserve medical resources for the treatment of COVID-19 patients. In Texas, the state attorney general interpreted Governor Abbott's executive order to effectively bar all abortions as elective medical procedures. Providers and patients filed suit challenging the order's constitutionality.

¹⁸ *Id.*

¹⁹ Wiley & Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, *supra* note 4, at 193 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, n.4 [1938]).

²⁰ Lindsay F. Wiley, Democratizing the Law of Social Distancing, 19 *Yale J. Health Pol'y, L. Ethics* 50, 69 (2020).

In *re Abbott*, decided by the Fifth Circuit in April 2020, was one of the first major court decisions upholding a COVID-19 mitigation order.²¹ The plaintiffs were abortion providers who filed a lawsuit arguing that to the extent that the Texas emergency order banned abortions, it violated the Fourteenth Amendment's Due Process Clause. The district court judge who initially heard the case granted a temporary restraining order to the plaintiffs (barring Texas from enforcing its prohibition on abortions while litigation continued) without referencing *Jacobson* at all.²² The judge held that under the Supreme Court's abortion precedents dating back to *Roe v. Wade*, "[t]here can be no outright ban on such a procedure."²³ He referred only obliquely to the defendant's argument that *Jacobson* supplied the correct standard, not *Roe* or subsequent cases establishing abortion rights: "This court will not speculate on whether the Supreme Court included a silent 'except in a national emergency clause' in its previous writings on the issue [of abortion]."²⁴

The Fifth Circuit stepped in to stay the lower court's decision, effectively lifting the restraining order and permitting the state to enforce its restrictions on abortion while litigation continued. The appellate court accepted the defendant's argument and interpreted *Jacobson* in a new way. Describing *Jacobson* as imposing "the controlling standards, established by the Supreme Court more than a century ago, for adjudging the validity of emergency measures," the majority set aside the prevailing test for abortion laws – that is, whether the regulation at issue imposes an "undue burden" on the right to choose an abortion. The court suspended the standard of review that would ordinarily apply to restrictions on abortion in favor of a rule that "the scope of judicial authority to review rights-claims" during "a public health crisis" is limited to cases where "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."²⁵ In dicta, the court suggested that this minimal level of scrutiny applies equally to "one's right to peaceably assemble, to publicly worship, to travel, and even to leave one's home."²⁶ The appellate court turned the lower court's reasoning on its head, arguing that if the Supreme Court had intended for *Roe* or its subsequent cases on abortion rights to be exceptions to the general rule that in a public health emergency the *Jacobson* test applies, it would have said so in specific terms.²⁷ In the months that followed, dozens of

²¹ *In re Abbott*, 954 F.3d 772 (5th Cir. 2020), vacated, *Planned Parenthood Ctr. for Choice v. Abbott*, 141 S.Ct. 1261 (2021).

²² *Planned Parenthood Ctr. for Choice v. Abbott*, 450 F.Supp.3d 753 (W.D. Tex. 2020).

²³ *Id.* at 758.

²⁴ *Id.*

²⁵ *In re Abbott*, 954 F.3d at 784 (quoting *Jacobson*, 197 U.S. at 31).

²⁶ *Id.* at 778.

²⁷ *Id.* at 786.

additional courts adopted the *Jacobson* suspension doctrine to uphold orders closing businesses, limiting gatherings, directing the general public to stay at home, and restricting interstate travel.

In brief opinions accompanying a series of preliminary orders beginning in May 2020, individual Supreme Court justices revealed their positions on *Jacobson's* relevance to COVID-19 disputes. In the first such case, *South Bay United Pentecostal Church v. Newsom*,²⁸ Chief Justice John Roberts authored an opinion concurring with the majority's decision to leave California's limits on religious services in place while litigation continued. Roberts cited *Jacobson* favorably for the general proposition that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"²⁹ His opinion indicated that he believed California's restrictions would pass muster under ordinary standards of review. Justice Brett Kavanaugh wrote a dissenting opinion, joined by Justices Clarence Thomas and Neil Gorsuch. The Kavanaugh dissent indicated that these three justices would have provided injunctive relief to the plaintiff church because they believed that California's restrictions failed to satisfy ordinary standards of review. Neither of the opinions discussed the suspension doctrine that had taken hold among many lower courts.

In a similar case in July, the Supreme Court again denied preliminary injunctive relief to a church challenging COVID-19 restrictions. In his dissenting opinion in *Calvary Chapel Dayton Valley v. Sisolak*, Justice Samuel Alito explicitly discussed the suspension doctrine. Alito (writing for himself, Kavanaugh, and Thomas) argued that "it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic."³⁰

In October, the Court refused to stay a lower court order enjoining limits on mail-in voting. In *Democratic National Committee v. Wisconsin State Legislature*,³¹ Kavanaugh (writing in dissent to indicate that he would have overturned the lower court decision and let the limits on mail-in voting stay in place) endorsed "a limited role of the federal courts in COVID-19 cases."³² Kavanaugh quoted Roberts's earlier invocation of a basic principle from *Jacobson*, but without attribution to Roberts or *Jacobson*. His version replaced "officials" with "legislatures."³³

In November 2020, shortly after Justice Amy Coney Barrett replaced the late Justice Ruth Bader Ginsburg on the Court, the new majority changed the course of the Court's religious liberty jurisprudence and rejected the suspension doctrine – for

²⁸ *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020).

²⁹ *Id.* at 1613 (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38).

³⁰ *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2608 (Alito, J., dissenting).

³¹ *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S.Ct. 28 (2020).

³² *Id.* at 32, 34 (Kavanaugh, J., concurring).

³³ *Id.* at 28, 32 (Kavanaugh, J., concurring) ("This Court has consistently stated that the Constitution principally entrusts politically accountable state legislatures, not unelected federal judges, with the responsibility to address the health and safety of the people during the COVID-19 pandemic.").

First Amendment religious liberty claims, at least.³⁴ In *Roman Catholic Diocese of Brooklyn v. Cuomo*,³⁵ the Court granted preliminary relief to the houses of worship who filed suit, enjoining New York from enforcing occupancy limits on religious services. In a per curiam (unsigned) opinion, the majority applied strict scrutiny – the highest standard of review. Under the suspension doctrine, the Court would not have applied strict scrutiny. But it need not have done so under ordinary standards of review either. To trigger strict scrutiny, the majority found that New York’s COVID-19 mitigation orders were not neutral laws of general applicability, but rather “single[d] out houses of worship for especially harsh treatment.”³⁶ This determination departed from the Court’s past religious liberty precedents. It also misrepresented the facts on the ground.

The majority opinion did not discuss *Jacobson* or the suspension doctrine explicitly, but several justices did discuss it in their concurrences and dissents. Gorsuch concurred in the decision to grant injunctive relief. In an opinion joined by no other justice, Gorsuch harshly criticized the suspension doctrine and accused Roberts of endorsing it by citing *Jacobson* in his *South Bay* concurrence. Gorsuch argued that “*Jacobson* didn’t seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue.”³⁷ Gorsuch implied that rational basis review would be the proper test for a Fourteenth Amendment challenge to a vaccination law under modern precedents because a requirement to get vaccinated, pay a fine, or establish that one qualified for an exemption would not implicate a fundamental right that would trigger heightened review.

In their *Roman Catholic Diocese of Brooklyn* dissent, Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor quoted Roberts’ *South Bay* concurrence (from May 2020) favorably. They appeared to agree with Roberts “that courts must grant elected officials ‘broad’ discretion when they ‘undertake to act in areas fraught with medical and scientific uncertainties.’”³⁸

Roberts wrote a separate dissent in *Roman Catholic Diocese of Brooklyn* to distinguish between the suspension doctrine and the basic principles of *Jacobson* that he had previously endorsed in *South Bay*. He defended himself against Gorsuch’s accusations. Arguing that “the actual proposition [he] asserted” (and cited *Jacobson* in support of) in his *South Bay* concurrence “should be uncontroversial,” Roberts concluded that Gorsuch’s “concurrence must reach beyond the

³⁴ Several justices who have discussed the suspension doctrine have specifically confined their analysis to First Amendment claims. It is possible they would endorse the use of *Jacobson*’s highly deferential standard of review for Fourteenth Amendment claims (including claims asserting abortion rights that the same justices disfavor).

³⁵ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020).

³⁶ *Id.* at 66.

³⁷ *Id.* at 70 (Gorsuch, J., concurring).

³⁸ *Id.* at 78 (Kagan, J., dissenting).

words themselves to find the target it is looking for.”³⁹ Roberts appeared eager to distinguish his own view of *Jacobson* from that of the lower courts who had adopted the suspension doctrine.

In my view, the Supreme Court was correct to reject the suspension doctrine in favor of applying ordinary standards of review.⁴⁰ The point is not that the emergency orders were not justified; rather, suspending ordinary judicial review is the wrong way to evaluate them. I strenuously object to the Fifth Circuit’s novel interpretation of *Jacobson*, which I have characterized in previous work with constitutional law expert Steve Vladeck as deeply misguided.⁴¹ We argued that the vast majority of COVID-19 mitigation orders (but probably not the across-the-board ban on abortions challenged in *In re Abbott*) would have passed muster under ordinary standards of review. Subsequent cases bore out this prediction. The vast majority of COVID-19 cases that rejected the suspension principle and applied modern standards of review ultimately upheld emergency measures.

The balancing and proportionality tests that modern standards direct the courts to employ are adaptable to emergency conditions. During an emergency, the government’s purpose becomes far more compelling and the evidence a court will expect it to present will understandably and appropriately be less well developed. By interpreting *Jacobson* as a directive to suspend ordinary standards of judicial review during a public health emergency, many lower courts in 2020 sidestepped important legal questions. They abdicated their constitutional responsibility for “forc[ing] the government to do its homework – to communicate not only the purposes of its actions, but also how the imposed restrictions actually relate to and further those purposes.”⁴² Ironically, by using *Jacobson* as a kind of rubber stamp and failing to require government officials to justify their orders in the ordinary way, these courts robbed government officials of firm precedents to support similar orders in the future.

Fortunately, some lower courts rejected the suspension principle and applied ordinary standards of review throughout 2020. As a result, when the Supreme Court rejected the suspension doctrine in November 2020, at least some federal courts had already upheld every major type of COVID-19 mitigation order pursuant to ordinary standards of review.⁴³

³⁹ Id. at 76 (Roberts, C.J., dissenting).

⁴⁰ As discussed above, I believe the majority in *Roman Catholic Diocese of Brooklyn* was wrong about which ordinary standard of review to apply, because I do not believe the challenged restrictions singled out religious services for particularly harsh treatment relative to comparable gatherings.

⁴¹ 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/>; Wiley & Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review, *supra* note 4.

⁴² Wiley & Vladeck, COVID-19 Reinforces the Argument for “Regular” Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis, *supra* note 41.

⁴³ Wiley, *supra* note 20, at 86.

III THE ENDURING MEANING OF JACOBSON IN 2021 AND BEYOND

Jacobson's specific formulation of the standard that should guide judicial review may have been characteristic of a bygone era of constitutional jurisprudence, but it has enduring relevance to contemporary disputes. Indeed, lower courts have continued to rely on it to uphold vaccination requirements in the aftermath of *Roman Catholic Diocese*. They have applied the modern standard of rational basis review (which is similar to, but not entirely synonymous with, the standard applied in *Jacobson*) to cases that do not involve religious liberty challenges.⁴⁴

Jacobson should be known (as it was among public health law experts prior to 2020) not for its specific (and outdated) description of the standard for judicial review, but for its assertion of the common good as a counterweight to individual liberties. It also provides support for legislative delegations of broad authority to local boards of health guided by the standard of public health necessity.

A The "Second Language" of Community

Advocates often struggle to build support for public health interventions because individualistic cultural norms tend to dominate political debates. Robert Bellah and colleagues have described individualism as the "first language" of American culture, "centered on the values of freedom, self-determination, self-discipline, personal responsibility, and limited government."⁴⁵ Public health scholars have noted that the "second language" of America identified by Bellah et al. – "a language of interconnectedness[,] egalitarian and humanitarian values, of interdependence and community" – is the "first language" for public health.⁴⁶ *Jacobson* is a Rosetta Stone by which these two languages are connected in American public health jurisprudence.

The enduring meaning of Justice Harlan's "nuanced and Delphic opinion" in *Jacobson* is that in emergencies,⁴⁷ as in routine times, individual liberties should be balanced against collective needs. The Court put "the duty" of "every well-ordered

⁴⁴ Klaassen, 7 F.4th (declining to enjoin a vaccination requirement for COVID-19 for public university students); *W.D. v. Rockland Co.*, 521 F.Supp.3d 358 (S.D.N.Y. 2021) (upholding an emergency order excluding children who had not been vaccinated for measles from school, public gatherings, and places of public accommodation); *Dahl v. Bd. of Trs. of W. Mich. Univ.*, No. 1:21-cv-757, 2021 WL 3891620 (WD Mich. Aug. 31, 2021), appeal denied, 15 F.4th 728 (6th Cir. 2021) (applying rational basis review to an employee's claim that infection-acquired immunity should exempt her from a vaccination requirement for COVID-19 but applying strict scrutiny to student athletes' claims that they should be given a religious exemption).

⁴⁵ Lawrence Wallack & Regina Lawrence, *Talking About Public Health: Developing America's "Second Language,"* 95 *Am. J. Pub. Health* 567, 567 (2005) (citing Robert N. Bellah et al., *Habits of the Heart* [2d. ed. 1996]).

⁴⁶ *Id.*

⁴⁷ *Parinet*, supra note 3, at 119 (2020).

society” to “conserv[e] the safety of its members” on an equal footing with the right of “the individual” to “assert the supremacy of his own will” and to “dispute the authority ... of any free government existing under a written constitution, to interfere with the exercise of that will.”⁴⁸ *Jacobson* offered a ringing endorsement of the social compact in which cooperative efforts to ensure the public’s health and safety are important counterweights to individual rights. “There are manifold restraints to which every person is necessarily subject for the common good,” the Court reasoned.⁴⁹ “On any other basis organized society could not exist with safety to its members.”⁵⁰

Even if *Jacobson*’s highly deferential standard no longer applies to laws that infringe on fundamental rights under modern precedents, the basic principles of public health necessity and proportionality that the *Jacobson* Court set forth remain relevant.⁵¹ Modern standards of review may calibrate the scales differently, but collective necessities still serve as counterweights when courts exercise their duty to protect individual rights. In the post-2020 era, public health advocates will need to craft new arguments that incorporate the basic principle that collective needs may outweigh individual rights within the bounds of modern standards of review that require the government to articulate in more compelling terms its purpose and why the means it has chosen are likely to further that end.

B *Deference to Democratic Delegation*

Though it has primarily been relied on in cases asserting individual liberties, *Jacobson* also offers enduring counsel for courts adjudicating claims that public health measures violate the structural constraints imposed by constitutional commitments to separation of powers.⁵² Concluding that “[t]he authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body,” the Court in *Jacobson* approved the legislature’s choice “to refer that question, in the first instance, to a board of health composed of persons ... appointed ... because of their fitness to determine such questions.”⁵³ Thus, the Court endorsed judicial deference to the scientific findings of experts exercising delegated authority, noting that the statutory standard authorized local officials to

⁴⁸ *Jacobson*, 197 U.S. at 29.

⁴⁹ *Id.* at 26.

⁵⁰ *Id.*

⁵¹ Wiley & Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, *supra* note 4, at 182–83.

⁵² Gostin & Wiley, *supra* note 17, at 126 (“In balancing individual rights against the common good, the Court in *Jacobson* relied on separation of powers and federalism to stake out a deferential stance toward the legislative branch and the states.”).

⁵³ *Id.* at 27; see also Van De Carr, 199 U.S. at 561 (describing *Jacobson* as having “sustained a compulsory vaccination law which delegated to the board of health of cities or towns the determination of the necessity of requiring the inhabitants to submit to compulsory vaccination”).

make vaccination compulsory “only when, in the opinion of the board of health, that was necessary for the public health or the public safety.”⁵⁴

As a statutory guardrail, the standard of public health necessity has an impressive pedigree. State public health statutes typically delegate authority to health officials to take measures they deem “necessary” to prevent or slow the spread of communicable disease during a declared emergency. Indeed, the public health necessity standard provides more guidance to executive branch officials (and the courts reviewing their actions) than many of the general emergency or disaster management statutes on which governors frequently relied during the COVID-19 pandemic. Some governors used general emergency management statutes to prohibit local government measures – and even private business policies – that were more protective of public health than the governor preferred, arguing that these statutes give unfettered discretion to the state executive to manage emergencies as they see fit.⁵⁵ Courts have not typically relied on *Jacobson* in recent cases interpreting the breadth of officials’ authority under these provisions and whether they run afoul of the constitutional doctrine that legislatures cannot delegate their authority to the executive branch without providing sufficient principles to guide officials’ exercise of discretion. But the courts can and should rely on the basic principles set forth in *Jacobson* when they are called on to interpret public health statutes.

IV CONCLUSION

As Lawrence Gostin and I have previously commented: “[p]ublic health has always been politically controversial. And public health law – which concerns the extent of government authority to intervene to protect the public’s health – lives in the thick of this controversy.”⁵⁶ There have been many calls throughout the COVID-19 pandemic for elected leaders to “follow the science” and for judges to defer to them when they do. But public health policy cannot be determined exclusively through scientific methods. Decisions about the public health goals that we collectively pursue and how we pursue them should be informed by scientific risk assessments, but these decisions also involve assessments of competing values and interests that require open, forthright, and inclusive deliberation. Delegations of authority to health officials who have been appointed in part based on their scientific expertise embody this balance between science and policy and are wholly consistent with the structural constraints embodied in the federal and state constitutions. The limits

⁵⁴ *Jacobson*, 197 U.S. at 27.

⁵⁵ See, for example, Tex. Exec. Order GA-15 (Apr. 17, 2020); Tex. Exec. Order GA-25 (Apr. 5, 2021) (relying on the Texas Disaster Act of 1975, which empowers the governor to meet “the dangers to the state and people presented by disasters,” to preempt local authority to impose social distancing requirements and vaccination mandates, and to prohibit private businesses from asking patrons to provide proof of vaccination).

⁵⁶ Gostin & Wiley, *supra* note 17, at 532.

that judicial protection of individual rights imposes on majoritarian rule are not absolute. They are flexible and adaptable. Setting aside ordinary standards of review, rather than articulating how they apply under exigent circumstances, diserves the social compact that is at the heart of *Jacobson*. The ability of a free, democratic society to rise to the challenge of taking “action in concert” (during an emergency and after it has ended) is dependent upon, rather than being hindered by, respect for individual rights and the rule of law.⁵⁷

⁵⁷ Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* xv (2009).