UNT DALLAS COLLEGE *of* LAW

2020 ON • THE • CUSP 2021

LAW REVIEW

"COVID-19, CIVIL LIBERTIES, & *JACOBSON*: THE CASE AGAINST PANDEMIC-LAW"

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Authorities throughout the United States have tried to limit the spread of coronavirus (COVID-19) through a variety of state actions. Some of these actions have limited the fundamental liberties Americans have enjoyed for centuries—such as the freedom to attend in-person religious services or peacefully assemble—due to concerns that these gatherings will spread the virus. As the pandemic has dragged on, these restrictions have been challenged in courts across the country. Central to the debate over how to enforce constitutional rights during a public health crisis is a 115-year-old Supreme Court opinion: *Jacobson v. Commonwealth of Massachusetts.* Some courts have construed *Jacobson* as standing for the proposition that constitutional challenges are evaluated under a unique framework that is highly deferential to the state during a public health crisis. Other courts construe *Jacobson* as merely standing for the proposition that a public health crisis is a compelling interest that can justify state action within existing constitutional frameworks. Despite multiple opportunities to weigh in, the U.S. Supreme Court has not resolved the split. Thus, for courts, states, and potential litigants, the law remains hopelessly unclear. What is clear, however, is that challenges to pandemic restrictions will continue as long as the COVID-19 pandemic continues.

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This article argues that courts have misread *Jacobson* by ignoring the cases on which *Jacobson* relies. When read with the proper context, Jacobson is far from a radical case and instead stands for the uncontroversial proposition that a public health crisis is a compelling interest that can justify state action within existing constitutional frameworks. This article further argues that courts need not be afraid of holding the state to the standards set by the Constitution during a public health crisis. Rather, by taking a sophisticated view of what it means for government action to be narrowly tailored during a crisis by considering what is possible under evolving circumstances, courts can properly balance public safety and individual rights and can do so within the law as it stands.

I. INTRODUCTION

"'These are the times that try men's souls.' Illinois, the nation, and the world are in the grip of a deadly pandemic the likes of which haven't been experienced in more than a century."[1] Such are the sobering thoughts with which Judge Gettleman opened his opinion in *Elim Romanian Pentecostal Church v. Pritzker*, a challenge by an Illinois church against the state's COVID-19 related restrictions on conducting religious services.[2]

Authorities throughout the United States and around the world have tried to limit the spread of this deadly disease through a variety of state actions. Some of these have limited the fundamental liberties Americans have enjoyed for centuries, such as the freedom to attend in-person religious services or peacefully assemble, due to concerns that these gatherings will spread the virus. As the pandemic continues to drag on, Americans have challenged these restrictions in courts across the country. Central to the debate over how to enforce constitutional rights during a public health crisis is a 115-year-old Supreme Court opinion: *Jacobson v. Commonwealth of Massachusetts*.[3] Some courts have construed *Jacobson* as standing for the proposition that constitutional challenges are evaluated under a unique framework during a public health crisis, while other courts construe *Jacobson* as merely standing for the proposition that a public health crisis is a compelling interest that can justify state action within existing constitutional frameworks. Despite multiple opportunities to weigh in, the Supreme Court has not resolved the split. Thus, for courts, states, and potential litigants, the law remains

[1] Elim Romanian Pentecostal Church v. Pritzker, No. 20 C 2782, 2020 WL 2468194, at *1 (N.D. Ill. May 13, 2020), *aff'd,* 962 F.3d 341 (7th Cir. 2020) (quoting Thomas Payne, *The Crisis* (December 23, 1776)).
[2] The general term "COVID-19" refers to severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which in turn causes coronavirus disease 2019 (COVID-19). *See Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, WORLD HEALTH ORG., https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it.
[3] 197 U.S. 11 (1905).

hopelessly unclear. What is clear, however, is that challenges to pandemic restrictions will continue as long as the COVID-19 pandemic continues.

This article, thus, strives to clarify. First, to clarify that when read with the proper context, *Jacobson* is far from a radical case and instead stands for the uncontroversial proposition that a public health crisis is a compelling interest that can justify state action within existing constitutional frameworks. And second, to clarify that courts need not be afraid of holding the state to the standards set by the Constitution during a public health crisis. Rather, by taking a sophisticated view of what it means for government action to be narrowly tailored during a crisis by considering what is possible under evolving circumstances, courts can properly balance public safety and individual rights and can do so within the law as it stands.

II. THE *JACOBSON* DIVIDE

Since the outbreak of COVID-19, courts have divided over whether *Jacobson* establishes a unique framework when analyzing constitutional claims during a public-health crisis or whether *Jacobson* merely stands for the uncontroversial proposition that an emergency is a compelling governmental interest that may justify temporary constraints within normal constitutional standards.[4] Two cases epitomize these divergent approaches: the majority opinion in *In re Abbott* (*Abbott II*)[5] and Judge Collins's dissenting opinion in *South Bay United Pentecostal Church v. Newsom*.[6]

Abbott II concerned a challenge to a Texas Executive Order that limited access to pre-viability abortions. On March 22, 2020, Greg Abbott, the Governor of Texas, issued an executive order that postponed all surgeries and procedures that were "not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician" until 11:59 pm on April 21, 2020.[7] The order included an exception for "any procedure that, if performed in

[4] *Compare* Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 284 (D. Me. 2020), appeal dismissed, 984 F.3d 21 (1st Cir. 2020) ("[W]hile such an epidemic is ongoing, the "traditional tiers of constitutional scrutiny do not apply.") *with* S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting) ("[A]n emergency may justify temporary constraints *within* [normal constitutional] standards.").

[5] 954 F.3d 772 (5th Cir. 2020) cert. granted, judgment vacated sub nom. *Planned Parenthood v. Abbott*, 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021). The Supreme Court ordered the Fifth Circuit to dismiss this case as moot in January 2021 because Texas replaced the challenged executive order with a new one that allowed abortions to resume. While no longer precedential, the Fifth Circuit's approach was cited by many courts in the early days of the pandemic, including the Eight Circuit in *In re Rutledge* and numerous district courts, and epitomizes a significant approach to *Jacobson*.

[6] 959 F.3d 983 (9th Cir. 2020). Out of an abundance of caution, the author would like to make it clear that he is not taking any position on the legal issues at play in the cases discussed in this article beyond how, if it at all, constitutional analysis changes during a public health crisis.

[7] Tex. Exec. Order GA-09 (Mar. 22, 2020), https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-09.pdf.

accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster."[8] Failure to comply with the order could result in administrative or criminal penalties, including a fine of up to $1,000, confinement in jail for a term of up to 180 days, or both.[9] The Executive Order's stated justification was to preserve medical resources at the onset of the COVID-19 pandemic.[10] In the days before Governor Abbott issued the Executive Order, the President of the United States declared a national state of emergency, Governor Abbott declared a state of disaster, and cases of COVID-19 were rapidly increasing throughout the state and around the country.[11]

The day after Governor Abbott issued his Executive Order, Ken Paxton, the Attorney General of Texas, issued a press release interpreting the Executive Order entitled "Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic[.]"[12] On March 25, 2020, various Texas abortion providers filed suit against Texas officials challenging the Executive Order, as interpreted by the Attorney General in his press release, on Substantive Due Process and Equal Protection grounds.[13] On March 30, 2020, Judge Yeakel of the Western District of Texas granted Plaintiffs' Motion for Temporary Restraining Order and temporarily restrained Texas state officials from enforcing the Executive Order.[14] Key to Judge Yeakel's opinion was he found that Plaintiffs had a substantial likelihood of success on the merits because he found the Executive Order "effectively bann[ed] all abortions before viability[,]" which he found was unconstitutional under *Roe v. Wade* and *Planned Parenthood v. Casey*.[15] On the evening of March 30, 2020, Texas state officials filed a petition for a writ

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Abbott II*, 954 F.3d 772, 779 (5th Cir. 2020) cert. granted, judgment vacated sub nom. Planned Parenthood v. Abbott, 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021). On March 19, 2020, the CDC reports that there were 15,219 diagnosed cases in the United States, excluding cases among persons repatriated to the United States from China and Japan. *United States COVID-19 Cases and Deaths by State*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited April 6, 2020). By April 6, 2020, the day before the Fifth Circuit issued *Abbott II*, the number of cases reported had risen to 330,891. *Id.*
[12] *See* Press Release, Ken Paxton, Att'y Gen. of Tex., Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic (Mar. 23, 2020), https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all.
[13] *See* Planned Parenthood Ctr. for Choice v. Abbott, 450 F. Supp. 3d 753, 756 (W.D. Tex. 2020), *vacated,* No. A-20-CV-323-LY, 2020 WL 1808897 (W.D. Tex. Apr. 8, 2020) ("To the extent the attorney general's interpretation is consistent with the Executive Order, Plaintiffs challenge the Executive Order itself.").
[14] *Id.* at 759.
[15] *Id.* at 757 (citing Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833 (1992) *and* Roe v. Wade, 410 U.S. 113 (1973)).

of mandamus in the Fifth Circuit, asking the federal appeals court to overturn Judge Yeakel's ruling.[16]

The Fifth Circuit granted the state officials' petition for mandamus, and in so doing found that the district court "clearly abused its discretion by failing to apply (or even acknowledge) the framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago in *Jacobson v. Commonwealth of Massachusetts*[.]"[17] According to the Fifth Circuit, although "individual rights secured by the Constitution do not disappear during a public health crisis," under *Jacobson* "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.'"[18] This standard, the Fifth Circuit found, supplants normal constitutional analysis when the state is faced with a public health crisis.[19] Because the district court had not applied the *Jacobson* standard when issuing the Temporary Restraining Order, the district court had abused its discretion and mandamus was warranted.

In *South Bay Pentecostal*, a church challenged the Governor of California's Executive Order that limited its ability to hold in-person services.[20] On March 19, 2020, the Governor of California issued Executive Order N-33-20.[21] That Executive Order required "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors."[22] The federal list of critical infrastructure sectors did not include churches.[23] The California public health officer issued a list of "Essential Critical Infrastructure Workers," which designated clergy as essential but only if they were holding services "through streaming or other technologies that support physical distancing and state public health guidelines."[24]

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[16] *Abbott II*, 954 F.3d at 781.
[17] *Id.* at 796, 783.
[18] *Id.* at 784 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)).
[19] *Abbott II*, 954 F.3d at 786 ("*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency. We could avoid applying *Jacobson* here only if the Supreme Court had specifically exempted abortion rights from its general rule. It has never done so."). *Accord* In re Rutledge, 956 F.3d 1018 (8th Cir. 2020); Adams & Boyle P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020); Robinson v. Att'y Gen., 957 F.3d 1171 (11th Cir. 2020).
[20] 959 F.3d at 940.
[21] Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), https://perma.cc/FC3J-PETS.
[22] *Id.*
[23] *See Identifying Critical Infrastructure During COVID-19*, CYBERSECURITY AND INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19.
[24] *Essential Workforce* (April 28, 2020), https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf.

On April 28, 2020, the Governor of California announced a four-stage "Reopening Plan."[25] At Stage One, the Governor's stay-home order exempted only "essential workplaces."[26] At Stage Two, curbside retail, manufacturing, and offices that could not telework would be permitted to reopen.[27] Stage Two entities also included ones that would reopen at a later date within that stage, such as schools in an adapted form.[28] At Stage Three, "higher risk environments" like churches could reopen, along with movie theaters, hair salons, and gyms.[29] And at Stage Four, concerts, conventions, and sports with live audiences could reopen.[30]

Plaintiffs sued the Governor, several other state officers, and various local officials, alleging, among other things, that the Reopening Plan's decision to place churches within Stage Three instead of Stage Two violated the Free Exercise Clause of the First Amendment.[31]

On May 15, 2020, the Southern District of California denied Plaintiffs' Motion for a Temporary Restraining Order.[32] The district court also denied Plaintiffs' Motion for an Order to Show Cause why a preliminary injunction allowing the Church to hold in-person services should not issue.[33] Plaintiffs' filed an interlocutory appeal and concurrently moved for a preliminary injunction in the Ninth Circuit.[34] That injunction would have allowed Plaintiffs to hold in-person services while their appeal was pending.[35]

The majority in *South Bay Pentecostal* issued a short order denying Plaintiffs' Emergency Motion for Injunctive Relief pending appeal.[36] The majority concluded that Plaintiffs had not demonstrated a sufficient likelihood of success on appeal.[37] The state action at issue did not infringe on the Plaintiffs' religious practices because of their religious motivation, and did not, in a selective manner, impose burdens only on conduct motivated by religious belief.[38] The extent of the majority's analysis of how the law was affected by an ongoing public health crisis

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[25] *See* Press Release, Gavin Newsom, Governor of California, Governor Newsom Provides Update on California's Pandemic Resilience Roadmap (Apr. 28, 2020), https://www.gov.ca.gov/2020/04/28/governor-newsom-provides-update-on-californias-pandemic-resilience-roadmap/.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Complaint, S. Bay United Pentecostal Church v. Newsom, 2020 WL 2305040 (S.D. Cal. May 8, 2020) (No. 20-CV-865).
[32] *S. Bay United Pentecostal Church v. Newsom*, No. 20-CV-865, 2020 WL 2814636, at *1 (S.D. Cal. May 15, 2020).
[33] *Id.*
[34] *S. Bay Pentecostal*, 959 F.3d 938, 941.
[35] *Id.* at 939.
[36] *Id.* at 940.
[37] *Id.* at 939 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 543 (1993)).
[38] *Id.*

was to note that COVID-19 is "a highly contagious and often fatal disease for which there presently is no known cure" and to quote Justice Jackson's famous admonition that if a court "'does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.'"[39]

Judge Collins dissented, concluding that Plaintiffs were "highly likely to succeed on the merits of their Free Exercise Clause claim."[40] Although the state argued that *Jacobson* established a special, "highly deferential" standard for evaluating constitutional claims during a pandemic, Judge Collins found that "[n]othing in *Jacobson* supports the view that an emergency displaces normal constitutional standards."[41] Rather, in Judge Collins's view, *Jacobson* merely stands for the proposition that "an emergency may justify temporary constraints within those standards."[42] Thus, Judge Collins concluded, insofar as *Jacobson* articulates a deferential standard of review, it is only relevant in the context of a Substantive Due Process challenge like the one at issue in *Jacobson*.[43] Because the Plaintiffs in *South Bay Pentecostal* were challenging the Executive Order and the Reopening Plan on Free Exercise grounds and not Substantive Due Process grounds, *Jacobson* was inapplicable, and ordinary Free Exercise principles governed the case.[44]

Following the Ninth Circuit's opinion, the Plaintiffs applied to the Supreme Court for injunctive relief.[45] The Court denied the application.[46] Chief Justice Roberts wrote a brief concurrence in which he did not analyze the question of what standard of review to apply to constitutional challenges during a public health crisis other than to stress the importance of deference to the political branches.[47] Thus, the Supreme Court's guidance to the lower courts was non-precedential and limited.

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[39] *Id.* (quoting Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949)).
[40] *Id.* at 946 (Collins, J., dissenting).
[41] *Id.* at 942 (Collins, J., dissenting).
[42] *Id.* (Collins, J., dissenting).
[43] *Id.* (Collins, J., dissenting).
[44] *Id.* at 943 (Collins, J., dissenting). Notably, other circuits have reached the same conclusion that ordinary Free Exercise principles govern even during a pandemic without conducting the same in-depth analysis of *Jacobson*. *See, e.g.*, Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020); *but see* Adams & Boyle P.C. v. Slatery, 956 F.3d 913, 924–27 (6th Cir. 2020) (citing *Jacobson* for the proposition that ordinary constitutional standards do not apply in a pandemic and analyzing a constitutional claim under a pandemic-only standard).
[45] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).
[46] *Id.*
[47] *Id.* (Roberts, C.J., concurring) ("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. 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." *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427, 94 S. Ct. 700, 38 L. Ed.2d 618

Since *South Bay*, the Supreme Court has not clarified whether *Jacobson* established a special standard for evaluating constitutional challenges during a public health crisis despite multiple opportunities to do so. In *Calvary Chapel Dayton Valley v. Sisolak*, Justice Alito issued a dissent that warned against taking "*Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic."[48] In *Roman Catholic Diocese of Brooklyn v. Cuomo*, Justice Gorsuch and Chief Justice Roberts, in a concurrence and a dissent respectively, issued dueling opinions over whether *Jacobson* controlled the outcome of that case.[49] And, most recently, in *Tandon v. Newsom*, the Supreme Court applied ordinary free exercise doctrine in enjoining California from enforcing regulations on in-home prayer meetings that California justified by the need to combat COVID-19.[50] But the Supreme Court did not reference *Jacobson* at all in its analysis. Thus the Court still has not provided a clear statement in a precedential opinion about what *Jacobson* means or what standard states can expect courts to apply to their efforts to combat public health crises.

Let us then turn to *Jacobson* ourselves and ask what that opinion stands for and whether it mandates extraordinary deference to the political branches.

III. Jacobson *and the Rule of Constitutional Avoidance*

In *Jacobson*, Massachusetts passed a law that empowered cities to require residents to get vaccinated when necessary to protect public health.[51] In Cambridge, Massachusetts, to deal with a smallpox outbreak, the city required its residents to get vaccinated pursuant to the powers given to it by state law.[52] However, there was an exception for "children who present a certification, signed by a registered physician, that they are unfit subjects for vaccination."[53] Those who violated the law would be fined five dollars.[54]

Jacobson did not get vaccinated and was criminally prosecuted.[55] To defend himself, Jacobson argued, among other things:

(1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985).")

[48] 140 S. Ct. 2603, 2608 (2020) (Alito, S., dissenting).

[49] *Compare* 141 S. Ct. 63, 70–71 (Gorsuch, J., concurring) *with* 141 S. Ct. 63, 75–76 (Roberts, C.J., dissenting).

[50] 141 S. Ct. 1294, 1296–98 (2021).

[51] Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).

[52] *Id.* at 12–13.

[53] *Id.*

[54] *Id.* at 12.

[55] *Id.* at 13.

> That his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.[56]

Today, we would describe this as a Substantive Due Process claim under the Fourteenth Amendment.[57] Jacobson was convicted, and his appeal went to the Supreme Court.[58]

The Court made it clear that "[a]ccording to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[59] But the Court also made it clear "that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument."[60] At least as to a Substantive Due Process claim like Jacobson's, the Supreme Court held that when a state is "arbitrary" or "oppressive" in exercising its police powers, "interference of the courts to prevent wrong and oppression" is justified.[61] Nevertheless, the Court found that the vaccine requirement at issue in the case was "necessary in order to protect the public health and secure the public safety," was neither arbitrary nor oppressive, and, therefore, was not unconstitutional.[62]

Although the Court held that the vaccination requirement was not unconstitutional and upheld Jacobson's conviction,[63] it appears to set out three different tests to determine when a measure to combat a public health crisis is unconstitutional. First, the Court says:

> Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as

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[56] *Id.* at 26.
[57] *See Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (citing *Jacobson* for "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . . .").
[58] Jacobson v. Massachusetts, 197 U.S. 11, 14 (1905).
[59] *Id.* at 25.
[60] *Id.*
[61] *Id.* at 38.
[62] *Id.* at 28.
[63] *Id.* at 39.

> matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all *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.*[64]

This "reasonably required test" appears to say that if in combatting a public health crisis the state uses its police power arbitrarily or in a way that is not sufficiently narrowly tailored, courts are empowered to strike those state actions as unconstitutional. Notably, the Court decided *Jacobson* before the modern structure of constitutional challenges took shape.[65] Accordingly, it is not formally a part of the modern Supreme Court's tiered review system of rational basis, intermediate review, and strict scrutiny tests. Nevertheless, this test largely resembles the way courts analyze constitutional challenges today. This test takes for granted that combatting a public health crisis is a legitimate governmental interest and then asks whether the means by which the government is combatting that public health crisis are narrowly tailored or arbitrarily implemented.

Similarly, at the end of *Jacobson*, the Court recapitulates like this:

> Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—*that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.* Extreme cases can be readily suggested. . . . It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition

[64] *Id.* at 28 (emphasis added).
[65] Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review* 133 HARV. L. REV. F. 179, 193 (2020) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

> of his health or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned.[66]

But in the middle of the opinion, the Court appears to set forth a different test:

> 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, and thereby give effect to the Constitution.*[67]

Abbott II cites the above portion of *Jacobson* and other current cases for the proposition that *Jacobson* establishes a unique framework for constitutional challenges during a pandemic.[68] Particularly, based on the statement that a court should strike down a public health measure only when it is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law," courts infer that *Jacobson* announces a new, highly deferential standard only applicable during a public health crisis.[69] But *Jacobson* cites three earlier cases for this proposition:

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[66] *Jacobson,* 197 U.S. at 38–39 (emphasis added).
[67] *Id.* at 25 (citations omitted) (emphasis added).
[68] *See, e.g.*, *Abbott II*, 954 F.3d 772, 779 (5th Cir. 2020) cert. granted, judgment vacated sub nom. Planned Parenthood v. Abbott, 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021) (The bottom line is this: 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." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.); *see also* In re Rutledge, 956 F.3d 1018, 1025 (8th Cir. 2020) (adopting the Fifth Circuit's reasoning from *Abbott II*); Luke's Catering Serv., LLC v. Cuomo, No. 20-CV-1086S, 2020 WL 5425008, at *7 (W.D.N.Y. Sept. 10, 2020) (holding that *Jacobson* review applies); Calvary Chapel of Bangor, 459 F. Supp. 3d 273, at *7 (D. Me. May 9, 2020); Cassell v. Snyders, 458 F. Supp. 3d 981, at *6 (N.D. Ill. May 3, 2020) ("During an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply.").
[69] *Jacobson,* 197 U.S. at 31.

Mugler v. Kansas,[70] *Minnesota v. Barber*,[71] and *Atkin v. Kansas*.[72] And although each of these cases states a similar rule, none of the issues arose during a public health crisis.

Mugler arose out of a challenge to a conviction for violation of Kansas's prohibitory liquor law.[73] *Barber* arose out of a criminal conviction for having sold 100 pounds of fresh, uncured beef from an animal slaughtered in Illinois but not inspected and certified by a Minnesota inspector before it was sold in Minnesota.[74] And *Atkin* challenged Kansas's 1891 eight-hour maximum workday law for state and municipal employees "except in cases of extraordinary emergency . . . ."[75]

What these earlier cases make clear is that courts should not take the "plain, palpable invasion of rights" language articulated in the middle of *Jacobson* as the announcement of a new test for assessing constitutional claims during a public health crisis. Rather, the Court is using shorthand to call back to a generally applicable principle of deference to the political branches. In *Mugler*, the Court said that:

> [w]hile every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. . . . If, therefore, 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 a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.[76]

In other words, courts should follow the well-established doctrine of constitutional avoidance, which "provides that when a serious doubt is raised about the constitutionality of an act of Congress, [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[77] Only after a court determines that no interpretation of the statute avoids

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[70] 123 U.S. 623, 8 S. Ct. 273 (1887).
[71] 136 U.S. 313 (1890).
[72] 191 U.S. 207 (1903).
[73] 8 S. Ct. at 273.
[74] 136 U.S. at 317.
[75] 191 U.S. at 207–08.
[76] 123 U.S. at 661.
[77] Nielsen v. Preap, 139 S. Ct. 954, 971 (2019) (citations omitted); *see also* Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

the constitutional question and that a statute is a plain, palpable invasion of rights secured by the Constitution is a court permitted to strike down a law.

Similarly, *Barber* discusses the rule of constitutional avoidance and cites *Mugler* for support. After carefully examining *Mugler*, the *Barber* court found that *Mugler* stood for the proposition that "every possible presumption is to be indulged in favor of the validity of a statute," but that "the judiciary must obey the constitution, rather than the law-making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the constitution have been passed."[78]

Finally, the Court in *Atkin* held that:

> it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But [it] is equally true-indeed, the public interests imperatively demand-that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.[79]

As this trio of cases makes clear, constitutional avoidance is not a special rule only applied during public health crises; it is a general principle courts apply today and have applied since before *Jacobson*.[80]

Circling back to *Jacobson*, if one reads this "plain, palpable invasion of rights" language as merely an instruction for courts to interpret statutes according to the rule of constitutional avoidance, *Jacobson* is more coherent. Rather than stating three different tests for assessing constitutional challenges during a public health crisis at the beginning, middle, and end of the opinion, *Jacobson* announces a single test: A public health regulation that might normally infringe on citizens' Substantive Due Process rights is permissible if (1) there is a real public health need (in modern constitutional law terms we might call this a compelling interest); (2) the regulation has a "real or substantial relation" to that need (in modern constitutional law terms we might call this narrow tailoring); and (3) regulation and enforcement is not arbitrary.[81] Furthermore, *Jacobson* says that courts should be mindful of the rule of constitutional avoidance when applying this test.[82] This

[78] 136 U.S. at 320.
[79] 191 U.S. at 223.
[80] *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 426 (2012).
[81] Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905).
[82] *Id.* at 28.

reading not only makes *Jacobson* coherent, but it also makes *Jacobson* cohere with constitutional law as it has developed over the last century.

Moreover, interpreting the "plain, palpable invasion of rights" language from *Jacobson* as a new test makes little sense. First, such a test would be circular. It says that something violates the Constitution if something violates the Constitution. Second, to the extent that the test would not be circular, it says that something violates the Constitution in a public health crisis if it would be an egregious constitutional violation under normal circumstances. But that is not how courts judge constitutional violations. Whether something is or is not unconstitutional is a binary choice; it is not a question of degrees. Although colloquial, lawyers might say something is "flagrantly unconstitutional," though that is not how a court judges constitutionality. Third, it cannot be the test under *Jacobson* itself. *Jacobson* approvingly acknowledges that the Supreme Court has signed off on "the authority of a state to enact quarantine laws."[83] In ordinary times, a quarantine order would be a plain and palpable violation of citizens' rights to assemble and to freely associate under the First Amendment—and likely other constitutional rights. Nevertheless, a quarantine order is permissible in a public health crisis. In contrast, reading *Jacobson*'s "plain, palpable invasion of rights" language as an endorsement of courts applying constitutional avoidance turns that language into a coherent rule that courts can and do apply in circumstances inside and outside of a pandemic.

IV. Crises, Constitutional Review, and Deference

As the COVID-19 pandemic drags on, it tests almost every aspect of American society and law. Although various commentators have called for courts to engage in ordinary review of constitutional claims even during the pandemic,[84] courts, including the Supreme Court, have often been reluctant to scrutinize actions taken by the political branches to combat the pandemic. That reluctance is understandable given that public health regulation and epidemiology are not, generally speaking, within courts' core competencies. But the longer a crisis continues and the more it becomes a so-called "new normal," the less justifiable it is for courts to decline to engage in judicial review.

At first blush, *Jacobson* appeared to give courts an out. But as this article has shown, there is not a pandemic constitution and a normal constitution; there is just the Constitution. What then are courts to do when faced with constitutional claims during a public health crisis?

Commentary tends to divide into two camps—either in favor of suspending ordinary judicial review in times of crisis or continuing the practice. In a recent

[83] *Jacobson*, 197 U.S. at 25.
[84] Wiley & Vladeck *supra* note 65; Ilya Somin, *The Case for "Regular" Judicial Review of Coronavirus Emergency Policies*, REASON (Apr. 15, 2020), https://reason.com/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus -emergency-policies/.

article, Professors Wiley and Vladeck make a strong case against suspending judicial review during the COVID-19 pandemic.[85] Rather than rehash all that Professors Wiley and Vladeck discuss, or that others have said in this long-standing debate, I would like to note and elaborate on one point Professors Wiley and Vladeck make in their piece: the notion that ordinary judicial review will be too harsh is false.

As an initial matter, there is no dispute that combatting a once-in-a-century pandemic like COVID-19 is a compelling governmental interest. Indeed, it is hard to imagine a more compelling governmental interest. Thus, under many constitutional frameworks, the question then becomes whether the government's action in response to the pandemic is sufficiently narrowly tailored under the relevant standard of review.

What courts ought to do is take a sophisticated view of what it means for government action to be narrowly tailored during a crisis by considering what is possible under the circumstances and then being sensitive to how what is possible changes as circumstances change. Even in ordinary times, when courts speak of "least restrictive means," or a similar test depending on the level of scrutiny applied, courts are implicitly acknowledging that they mean the least restrictive means *possible*. This leaves open the possibility that there will be even less restrictive means in the future and that those means would be preferable, and potentially required, should the court be asked to revisit the issue. Thus, when faced with a crisis, what qualifies as narrow tailoring ought to evolve as a crisis evolves. This development would and should be driven by changing facts and not by a changing legal standard.

COVID-19 provides a useful example. At the beginning of the pandemic, everyone was scrambling to understand how the virus spread and how dangerous it was. Considering that information, blanket lockdowns were as sophisticated a response as governments could manage. But as we have learned about the efficacy of masks, the limited risks of gathering outdoors, and the more serious risks posed by indoor gatherings, governmental regulations have generally become more particularized to allow as many activities as possible. Such an evolution is ideal. And as information about a crisis develops, and the government is better able to particularize regulations in this way, courts ought to hold the government accountable for particularizing regulations in a non-arbitrary and non-discriminatory manner.

Of course, there are other constitutional tests. But even those other tests typically incorporate some consideration for possibilities under the circumstances. For example, the Supreme Court has repeatedly stated that "the Fourth Amendment's ultimate touchstone is reasonableness[.]"[86] On the other hand, the

[85] Wiley and Vladeck *supra* note 65.
[86] Brigham City v. Stuart, 547 U.S. 398, 398 (2006).

few constitutional tests that do not consider context are bedrock guarantees that should not evaporate under any circumstances, such as prohibiting racial segregation in public education.[87] In the case of the former, courts should adopt the sensitive approach advocated for. For the latter, courts need to hold the line.[88]

V. CONCLUSION

There is no doubt that COVID-19 is a world-historic crisis that has put a strain on people and institutions around the globe. The pandemic has not spared American courts. Instead, our courts have been drawn into conflicts between public health regulations and individual rights. Many courts have misinterpreted *Jacobson* as standing for a particularly strong form of deference to the political branches during a public health crisis. But the proper context clarifies that *Jacobson* stands for no such principle, and—even during a crisis—courts cannot pass on their duty to interpret the law accurately. Because Americans rely on our courts to defend against governmental overreach, especially when our institutions are under pressure, our courts should be that bulwark.

[87] Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 495 (1954), *supplemented sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955) ("Separate educational facilities are inherently unequal.").

[88] *See* Somin *supra*, note 8484 (noting that "In many countries around the world, authoritarian leaders are using the pandemic as an excuse to expand their power and crush dissent.").