Weeding Out Disingenuous Emergency Orders: A Consistent Ethical Justification to Determine Whether to Apply Jacobson v. Massachusetts' Deferential Approach or the Tiered Scrutiny that Would Apply Absent an Emergency

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ABSTRACT

The most compelling ethical justification for the use of public health police power in an emergency is that the order enacted will have a profound, beneficial effect on the overall emergency: a tight causal nexus. The strong, causal relationship to a largescale goal should protect public health orders that are time sensitive and effective and should be evaluated under Jacobson's test regardless of the type of right infringed. With over 500,000 deaths from COVID-19, preparation for future emergencies should include legal and ethical clarity on which orders are evaluated under a deferential approach and which call for heightened or strict scrutiny.

Keywords: Emergency Orders, Emergency Police Power, Time Sensitive, Rights, Liberties

INTRODUCTION

Since the COVID-19 pandemic began, states and municipalities have used emergency police power, the traditional tool for public health and safety emergencies, disparately, exhibiting wide latitude. Some states enacted emergency measures that appear less likely to serve a substantial purpose and may represent overreach or abuse of power while others have taken measures more causally related to public health. The pandemic is coexisting with populism and a dangerous political trend that popularizes absolutism in religious, speech, second amendment, business, and even corporate rights. Yet other important rights are threatened by executive orders. It is difficult to sort out which of the many challenged emergency orders are justified. Distinguishing free exercise claims from all others or valuing a right to interstate travel above a right to reproductive health services generated confusion during the pandemic. Unjustified executive orders and orders that last too long, do not use the least restrictive means, or lack reasonable exceptions are evidence of government overreach and may unnecessarily threaten individual liberties.

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A consistent ethical justification and judicial analysis for emergency orders that infringe fundamental rights would ensure protection of civil liberties while making exceptions to save lives and contain the virus. This paper argues that regardless of the type of right infringed, the ethical factors that justify a temporary infringement of rights in an emergency are the goal of the state action, its relationship to the emergency, and the ability of the order to provide substantial relief. For future national emergencies, clear guidance would help shape the policies that infringe rights allowing those orders most significantly impacting public health and further scrutinizing ancillary ones. This approach differs from the current legal and ethical approaches where, in many courts, the fundamentalness of the right infringed governs the analysis applied. In the early stages of the COVID-19 pandemic, a rights-based outcry created hesitance to enact public health measures in some states and remained a pervasive voice that limited public health powers throughout the pandemic. Other executive orders less linked to overall outcome set in motion legitimate rights-based challenges. Currently, circuits are split on which analysis to apply to certain rights. There is an opening to balance the two competing needs: the need to limit government overreach and the need to protect the public.

ANALYSIS

I. The Ethical Justification for Infringing Rights in Public Health Emergencies

The moral justification for any order relies on its potential benefits and its ability to accomplish a legitimate public health goal in a reasonable way. Ending the pandemic, containment of the virus, and saving lives are appropriate policy goals that justify larger infringements. Ancillary policies may justify lesser intrusions. When the least restrictive means possible are employed, although not a legal requirement in emergencies, a balance between rights and public health should emerge. The ability to infringe rights severely, even to force people to quarantine, is well established, making the inconsistent treatment of certain rights over others suspect. Freedom to behave in ways that promote viral transmission and social conditions that encourage people to sue their elected officials over restrictions (and local representatives to sue governors) pose challenges to public health police power.

Public health emergencies are a long-recognized exception to the otherwise substantive applicable caselaw, even when they possibly infringe otherwise fundamental rights.[1] *Jacobson v. Massachusetts* which allows emergency executive and legislative action under police powers if the action is reasonable, sometimes controls emergency orders.[2] When applied to some liberty interest affected by an emergency order, courts interpret *Jacobson's* deferential rule to operate more like a rational basis test. Yet Courts apply heightened or strict scrutiny to emergency orders inconsistently based on the type of right. Rather than just a cut-out for religious practices, there is a mix of jurisprudence making valuable emergency public health measures increasingly vulnerable to preliminary injunctions. Recent circuit court and Supreme Court cases may have implications even beyond religious freedom. Other orders, like restrictions on abortion access, serve less important purposes in the emergency, and their surviving challenges may demonstrate an ethical or judicial lapse.

More consistent rules can be developed to distinguish orders to which *Jacobson's* deferential approach, or a rational basis scrutiny should apply from those calling for heightened, or strict scrutiny even during the public health crisis. Rather than applying *Jacobson* inconsistently, the goal of the state action and its relationship to the emergency should govern, something aligned with the dissents in *Catholic Diocese of New York v. Cuomo* and *South Bay Pentecostal v. Newsom (2021),* which suggest deference to the state and to experts.[3] Public health emergencies by necessity call for public health expertise, consistent with the legislative and executive power *Jacobson* reserved for those with special knowledge of the crisis. In an

emergency, orders need to be enacted and enforced quickly to have the most impact on public health and safety. "The constitution is not a suicide pact."[4] The law should reflect the ethical justification, something that would preserve fundamental rights from arbitrary subjugation, while honoring the goals of public health and safety within a social compact. One important caveat is that the public health policy should be effective or have a high likelihood of success within a short duration. There should be no opportunity to extend a state of emergency or allow room for unnecessary public health police powers. The ethical obligation of public health officials is high when the public gives up rights to follow intrusive recommendations or requirements.

Some of the legal challenges to public health orders during the pandemic may reflect a lack of public trust in the public health officials advising government entities. The failure of some orders to adequately protect the population rightly opened the door to challenges, and incorrect assertions like the widespread public health official word that masks would be ineffective decrease public confidence in the entities that exist to protect the public in public health emergencies. The constitutional rights that we value so deeply should not be infringed for orders based on bad advice. This analysis should extend to those orders that are predictably substantially linked to the desired results.

II. *Jacobson v. Massachusetts* and Deference to Policymakers

Jacobson gives deference to legislatures and state executives in public health (police power).[5] In *Jacobson*, Justice Harlan wrote, "…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."[6] *Jacobson's* use of the term "social compact" supported deference to orders supporting public health. In dicta, the Court discussed both quarantines and requirements that people join the army against their will, saying "protecting the public collectively from danger" does not depend on "willingness" of the people.[7] Social compact language is a basis for public health laws and must be balanced to avoid infringing liberty superfluously. Rights absolutism has become part of the partisan populist culture, leading to an extreme view of the sanctity of rights and the degradation of social compact theory.

Jacobson confirms that rights are not absolute. Lindsay Wiley and Stephen Vladeck warn that *Jacobson* is used to suspend constitutional rights during emergencies, rights they assert should not be infringed without full judicial review.[8] Essentially, their argument favors the constitutional caselaw that would apply absent the emergency. Rather than suspending the constitution, I assert *Jacobson* operates within it, balances rights and the ability to protect the public, and includes language to prevent abuse of power. Although, there may be circumstances where strict scrutiny should apply rather than *Jacobson*. In the majority opinion, Justice Harlan said, "…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 … 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." The beginning of that quote is noteworthy: the *Jacobson* Court predicted that *Jacobson* could be misinterpreted to deny judicial review for arbitrary use of state police power, making it vulnerable to abuse. The *Jacobson* balance affirms state police power to protect public health but does not bar judicial review of legislation or orders to weed out those that do not serve a legitimate public health purpose, or that do so in too invasive a way.

Jacobson, a 1905 case, was heard before the development of the levels of scrutiny now applied to constitutional cases,[9] making it arguably outdated and ripe for clarity. *Jacobson's* tone and wording sound a lot like the later developed rational basis, the low-level scrutiny often applied to economic or other statutes and orders that infringe rights but do not call for heightened scrutiny.[10]

III. COVID-19 Cases Vary in Their Application of *Jacobson*

a. COVID-19 Religion Cases

In *Roman Catholic Diocese of New York v. Cuomo*, the Supreme Court *per curiam* ordered an injunction preventing New York from enforcing an executive order limiting occupancy at religious services.[11] Gorsuch approached it as a straightforward free exercise case arguing that while some commercial venues deemed essential services had no capacity limits imposed, religious services were being capped at 10 to 25 persons. According to Gorsuch, the executive order singled out religion in violation of the First Amendment, and he admonished the potential use of *Jacobson* to avoid the traditional strict scrutiny test. Yet Gorsuch failed to apply *Employment Division, Department of Human Resources of Oregon v. Smith*,[12] which holds that states may require individuals to comply with neutral laws. *Smith* confirms that a law that does not target a religion may be upheld. Instead, Gorsuch looked to *Church of Lukumi Babalu Aye*, *Inc*. v. *Hialeah.*[13] In *Roman Catholic Diocese of New York*, Justice Kavanaugh declared the New York order not neutral and found it violated *Smith.* Kavanaugh extends *Smith's* neutrality argument beyond reason, as Justice Sotomayor points out.[14] While restrictions in many states treat religious services like other similar events and need not treat them like grocery stores or other businesses where people do not linger, sing, or gather for extended periods, the Kavanaugh view broadens the comparable peer group for the sake of the religious neutrality and whittles away at *Smith*.

The cases arguably indicate favoritism of religious gatherings. With the use of technology and the varying tests on how integral attending services is to the practice of a particular religion, religion may not have been impacted wrongly or fundamentally, something outside the scope of this article, and specific to peoples' sincere religious beliefs. Like quarantining, which is much more intrusive, the public health benefits of suspending or limiting the size of gatherings are great. In *South Bay Pentecostal Church v. Newsom* (2021)[15] Kagan, joined by Breyer and Sotomayor, warns against armchair epidemiology, a warning that comports with deference to health departments, scientists, and experts aligning with *Jacobson's* holding, yet not mentioning it.[16] The Kagan, Breyer, and Sotomayor view alleviates the need to apply *Lukumi* or *Smith*.

In one case, a federal court held *Jacobson* does not cover religious liberty, suggesting a limited carve out that may comport with the Gorsuch and Kavanaugh positions.[17] Then, the issue not truly resolved yet is whether courts should apply varying degrees of scrutiny like they would in non-emergencies to other constitutional rights as well.

b. Application Beyond Religious Freedom

In *National Association of Theatre Owners v. Murphy*, a COVID-19 business closure case, a New Jersey court cited *Jacobson* for its rational basis scrutiny, a view that asserts *Jacobson* comports with the later developed rational basis test,[18] also saying, "the COVID-19 pandemic is the very sort of health crisis envisioned in *Jacobson*."[19] The New Jersey court cited Roberts' concurrence in *South Bay Pentecostal* (2020)[20] to back up its assertion that courts must defer to elected officials, something accomplished by applying *Jacobson*. An ethical analysis of business closures should justify them according to their substantial impact on reducing transmission.

In *Bayley's Campground v. Janet Mills*,[21] tourism businesses and travelers sued Maine challenging Executive Order 64 which required a 14-day quarantine for people entering Maine. The judge took the view that *Jacobson* is inapplicable and too lenient, and that the tiered structure of modern constitutional jurisprudence makes *Jacobson* inapplicable, and perhaps not even good law. Judge Walker, the federal district court judge,

stated, "the permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review."[22] As all states do, Maine had "compelling interests in managing the fallout from the pandemic."[23] The First Circuit affirmed. As a matter of law, whether the court was correct to apply the scrutiny based on cases governing the right to interstate travel or the deferential *Jacobson* justification for the use of public health power is unsettled among the circuits. As a matter of ethics, the relationship to the pandemic justified the intrusion.

Arguably, for consistency, if cases that limit access to abortions reached the Supreme Court, the justices would have to evaluate them according to the appropriate scrutiny. In *In re Abbott,*[24] the Fifth Circuit applied *Jacobson* avoiding the *Planned Parenthood v. Casey* undue burden test. Later, the Eighth Circuit similarly justified an Arkansas law.[25] This is inconsistent with the Supreme Court analysis in *Catholic Diocese of New York*, where the Court did not defer to *Jacobson,* although religion is the distinction. Like the reasoning in *Catholic Diocese*, the Eleventh and Sixth circuit courts held that the *Casey* undue burden test should govern,[26] just like *Smith* or *Lukumi* should govern free exercise cases.[27]

Throughout the states, cases during the pandemic have been brought to protect personal freedoms[28] including second amendment rights,[29] the right to attend school (basic education and educational equality),[30] to be free from unconstitutional takings,[31] to keep businesses open,[32] to be free of wearing a mask,[33] to stay home,[34] to block or hold a campaign rally,[35] rights of other organizations to have equal status in treatment as churches,[36] and many other issues. The constitutional challenges indicate how common rights-based objections to limitations on freedom are.[37] The heightened or strict scrutiny analysis of religious freedoms could extend to other constitutional claims (as it was applied to the right to travel in *Bayley's Campground*), as many plaintiffs have asserted. That trend may indicate populist views of absolutism of certain rights beyond the rightful protection of long recognized rights. The liberal justices' approach would weigh the input of elected officials relying on experts more, while the conservative justices' approach would apply the same level of scrutiny that would apply absent an emergency. As long as there is a tight causal relationship to harm reduction and an end to the crisis, and the orders are tailored to the goal, the dissent in *Catholic Diocese* provides a more workable, practical solution that has potential to save many more lives. Checks on that power are necessary and exist within the *Jacobson* framework. The justification for reliance on health experts is limited to their ability to deliver on meaningful policies that protect the public. An overuse of *Jacobson* to justify public health laws in the realm of non-emergencies may have contributed to public distrust, something outside the scope here.

IV. Strength of the Causal Relationship to the Big Picture Solution, Harm Reduction, and Life Saving

a. Justifying Time-Sensitive Outcome-Determinative Orders of Limited Duration

Among time-sensitive orders, a distinction between actions or executive orders with a *direct relationship* to a big picture goal in an emergency and those with an *indirect relationship* could bring the ethics and the law closer. Time sensitive emergency orders which are immediately and obviously beneficial, even when they infringe what ordinarily could not be infringed, could be analyzed under the *Jacobson* test that is quite a bit like the rational basis standard found throughout constitutional law, or, if they are analyzed under strict scrutiny, may also be found to serve a compelling interest. They may not, of course, be arbitrary or single out a protected class. The justification for giving a strict scrutiny analysis to free exercise claims but not to other fundamental rights is an inconsistency that should be remedied. Yet, under any analysis only those orders tethered to a legitimate goal would survive.

All emergency measures violate normally held rights—quarantining and stay-at-home orders are arguably larger intrusions on protected rights than an inability to attend church in person, yet a quarantine's legality is settled law. The ethical justification should be saving many lives and overall containment serving to end the pandemic. Pandemic policies, applied fairly, and for a very short time, aiming to eliminate super spreader events should not result in a rights-based outcry, and when they do, arguably courts should use consistent analyses to find the appropriate limitations to those rights.

b. Availability of the Normal Legislative Process and Accountability for Orders That Are Not Time Sensitive or That Solve a Less Pressing Need

Orders that last too long or that only indirectly help with containment, but that interfere with a constitutional right should rightly fail unless held to the same amount of accountability as nonemergency public health laws. For example, lumping abortion restrictions in an order delaying elective procedures while arguably disingenuous, is also not ethically justified because the goal of the policy does not concern ending the pandemic or containment. It concerns the limited goal of saving a very small portion of a state's medical resources and personnel for COVID-19 care, something that may be achieved many ways. Similarly, but pertaining to arguably less fundamental rights, orders preventing people from entering contracts, evicting tenants, and accessing non-pandemic related elective healthcare have only *indirect* benefits to the overall public health emergency. Those orders fulfill worthy narrower goals, but they do not necessarily call for special deference; the goal may not justify the infringement and there may be time for a legislative process as well as a judicial one. In a different emergency, like a hurricane with potential for risking the lives of the population and of rescue workers, a few days of curfew or evacuation enacted to prevent loss of life could be governed by *Jacobson*, while a two-month curfew that would have no direct impact on the immediately pressing emergency even if it had public health benefits and served the common good, e.g., by making clean up easier, calls for more scrutiny.

CONCLUSION

The most compelling ethical justification for the use of public health police power in an emergency is that the order enacted will have a profound, beneficial effect on the overall emergency: a tight causal nexus. The strong, causal relationship to a largescale goal should protect public health orders that are time sensitive and effective and should be evaluated under *Jacobson's* test regardless of the type of right infringed. Ancillary intrusive public health orders should not get *Jacobson's* deferential approach. The language Gorsuch used to justify strict scrutiny could curtail previously recognized police power and cost lives for the sake of liberty, the precise result *Jacobson* sought to avoid in its "social compact" language. Populism is coinciding with the COVID-19 pandemic. As things are now, one result could be that, in the beginning of the next public health emergency, theaters, lecture halls, schools, and group fitness classes would be closed but churches open despite their similar risk of disease transmission. The result also could be the wrongful and unnecessary infringement of other rights when the policy is not likely to be outcome-determinative. If the full range of rights exercised absent emergencies remains owed to the people in emergencies, or courts continue disparate analyses of orders infringing those rights, many orders could face preliminary injunctions before they can save lives, while other orders could unnecessarily restrict liberty. That result further undermines trust in public health experts and elected officials. While civil liberties are the pillar of liberal democracy, a temporary (an established shortest possible period) decrease in liberties is imperative to the future enjoyment of those civil liberties. With over 500,000 deaths from COVID-19, preparation for future emergencies should include legal and ethical clarity on which orders are evaluated under a deferential approach and which call for heightened or strict scrutiny. There is a decisive question: Will the order contain

the virus, save many lives, or bring the crisis to an end using reasonable means under the circumstances? If so, the order likely deserves the *Jacobson* analysis.

[1] They do not equate to suspending constitutional rights; in emergencies, public health policies can infringe on liberty in the short time in accordance with limitations on constitutional rights. *But see* Lindsay F. Wiley and Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, Harvard Law Review Forum, Vol. 133, No. 9, July 2020. https://harvardlawreview.org/2020/07/coronavirus-civil-liberties-and-the-courts/ (arguing Jacobson represents the suspension of rights and should not supplant caselaw that addresses rights absent emergencies.)

[2] Jacobson v. Massachusetts, 197 US 11 (1905).

[3] Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. ____at ___ (per curiam); South Bay Pentecostal Church v. Newsom, 592 US __ (2021).

[4] Smith, George P., II, "Re-shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage," 18 *Annals of Health Law* 1 (2009). citing *Terminiello v. Chicago*, 337 US 37 (1949) (Jackson, J., dissenting). Smith also refers to Posner, Richard A., Not a Suicide Pact: The Constitution in a Time of National Emergency, Oxford University Press (2006).

[5] Wendy K. Mariner, George J. Annas, and Leonard Glantz, "Jacobson v Massachusetts: it's not your great-great-grandfather's public health law." *American journal of public health* vol. 95,4 (2005): 581-90. doi:10.2105/AJPH.2004.055160 (Most Supreme Court citations of Jacobson are for public health deference and social compact theory.) "Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety." n *Jacobson*, a smallpox vaccination was required, and those not in compliance were fined five dollars. The vaccination had a clear, obvious relationship to public health.

[6] Jacobson, at 27. "Upon 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."

[7] Jacobson, at 29.

[8] Lindsay F. Wiley and Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, Harvard Law Review Forum, Vol. 133, No. 9, July 2020. https://harvardlawreview.org/2020/07/coronavirus-civil-liberties-and-the-courts/

[9] United States v. Carolene Products Company, 304 U.S. 144 (1938), footnote 4, (Court applies rational basis test and footnote 4 limits deference to legislatures and the states in economic matters but suggests that legislation that infringes certain fundamental rights should get more serious scrutiny.) See Dandridge v. Williams, 397 U.S. 471 (1970), Justice Marshall, dissenting (Even if strict scrutiny does not apply, intermediate levels should, establishing a less binary approach to rational basis or strict scrutiny.)

[10] Jacobson, at 25. ("Reasonable regulations"). Jacobson has been applied to two distinct subject matters: police power and public health regulation. Judges have cited it to justify many state powers including water fluoridation Kraus v. Cleveland, 163 Ohio St. 559 (1953), nonemergency mandatory vaccination for school Zucht v. King, 260 U.S. 174 (1922). and a 24 hour wait time before abortions (in a dissent) Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), Justice O'Connor, dissenting. But see, Richards v. Texas, 757 S.W. 2d 723 (1988)(Case challenging seat belt requirement; Judge Teague, dissenting cites Jacobson for its reference to arbitrary laws, "…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." And Teague continues, "Given the lack of any evidence that might reflect that the seat belt law has a real substantial relation to the general public health and general public safety, the police power rationale is certainly not applicable to this case according to settled principles that the police power of a state must be held to embrace such reasonable regulations established directly by legislative enactment as will protect the general public health and the general public safety, and not just the health and safety of a few individuals. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 203, 6 L. Ed. 23, 71.")

[11] Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. ____at ___ (per curiam).

[12] 494 U.S. 872, (1990)

[13] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 546 (1993).

[14] Roman Catholic Diocese, Sotomayor dissent (joined by Kagan).

[15] South Bay Pentecostal Church v. Newsom, 592 US __ (2021). (Roberts confirms his view of state power but limits it to preclude a ban on religious services. He would defer to the state in the capacity limitation and ban on chanting and singing. Gorsuch, joined by Thomas and Alito, simply applies strict scrutiny as he would for any First Amendment case, pandemic or not. Barrett, with Kavanagh, comments only to say the singing and chanting ban may be acceptable based on facts, but that she otherwise agrees with Gorsuch. In sum, the shifting balance of the Court demonstrates that post Ruth Bader Ginsburg, free exercise may receive more deferential treatment than public health experts.)

[16] South Bay Pentecostal Church v. Newsom (2021) (dissent).

[17] Wendy E. Parmet, "Rediscovering Jacobson in the Era of COVID-19," 100 B.U. L. Rev. Online 117 (2020) http://www.bu.edu/bulawreview/files/2020/07/PARMET.pdf (citing First Baptist Church v. Kelly, No. 20-cv-01102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020).)

[18] National Association of Theatre Owners v. Murphy, Case No. 3:20-cv-8298 (BRM) (TJB) 31 (D.N.J. Aug. 18, 2020); see https://ij.org/cje-post/a-tale-of-two-cases-and-two-pandemics/

[19] Nat'l Assoc. of Theatre Owners, at 30.

[20] Nat'l Assoc. of Theatre Owners, at 30-31 citing *S. Bay United Pentecostal Church v. Newsom* (2020) Roberts concurring.

[21]Bayley Campgrounds v. Mills, No. 2:20-cv-00176-LEW, 463 F. Supp. 3d, 22 (D. Me. 2020) Order on plaintiff's motion for preliminary injunction https://www.courthousenews.com/wp-content/uploads/2020/05/bayley.pdf. Bayley's Campground Inc v. Mills, No. 20-1559 (1st Cir. 2021) (First circuit affirms without mentioning *Jacobson*.)

[22] The district judge, Lance Walker, cites Lindsay Wiley for the assertion that individual rights deserve the substantive constitutional analysis. Despite the judge's disagreement with the Maine governor's application of Jacobson, the judge does not issue the injunction the plaintiffs are seeking due to uncertain likelihood of success on the merits.)

[23] Bayley (1st Cir.), at 16.

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

[25] In re Rutledge, No. 20-1791 (8th Cir. 2020).

[26] Lindsay F. Wiley and Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, Harvard Law Review Forum, Vol. 133, No. 9, July 2020. (citing Robinson v. Attorney General 957 F.3d 1171 (11th Cir. 2020) and Adams & Boyle, P.C. v. Slatery, 956 F. 3d 913 (6th Cir. 2020)) https://harvardlawreview.org/2020/07/coronavirus-civil-liberties-and-the-courts/; See also Herbert H. Slatery III, Attorney General of Tennessee, et al., Petitioners v. Adams & Boyle, P.C., et al. https://www.law360.com/cases/5f874cc95a7879003429af84?article_sidebar=1 and Planned Parenthood Center for Choice, et al., Petitioners v. Greg Abbott, Governor of Texas, et al. https://www.law360.com/cases/5f5928526e30c200346ec69f?article_sidebar=1 The Supreme Court in January vacated two circuit court abortion decisions (now moot) that applied *Jacobson* to laws that do not on their face further an obvious government purpose in the pandemic.

[27] 508 U. S. 520, 546 (1993) (requiring a compelling interest and use of the least restrictive means if treating churches differently from comparable secular organizations)

[28] "Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic, 2020-2021," bollotpedia.org

https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021 (a list of COVID-19 lawsuits concerning restrictive policies.)

[29] NRA brought lawsuits in many states where gun stores were closed during broad shutdowns of nonessential businesses. For example, see Brandy, NRA, et al. v. Villanueva, (Central Dist. Ca. 2020) Case 2:20-cv-02874, Complaint for Injunctive and Declaratory Relief (Case closed on failure of plaintiff's to correct a discrepancy.) https://d3n8a8pro7vhmx.cloudfront.net/firearmspolicycoalition/pages/5562/attachments/original/1585333514/2020-3-27-ca-brandy-complaint.pdf?1585333514

[30] Looney v. Newsom (lawsuit by parents for right to basic education and educational equality; argued against hybrid and online school.) https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021

[31] Auracle Homes, LLC v. Lamont, No. 3:20-cv-00829 (VAB) (D. Conn. Aug. 7, 2020) CT (right to privately contract, to evict, to use courts for evictions; court denies preliminary injunction); Brown v. Azar, CIVIL ACTION NO. 1:20-CV-03702-JPB (N.D. Ga. Oct. 29, 2020)(plaintiffs argue CDC eviction moratorium violates limits on supremacy clause, anti-commandeering, and access to courts. Court denies preliminary injunction.)

[32] Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020) (challenge to Pennsylvania's strict business closures. Court denied stay; held order was within governor's broad emergency powers and statutory authority.)

[33] Neville v. Polis (Col) (Petition filed August 26, 2020 challenging Colorado Disaster Emergency Act and state executive orders. Dismissed and Colorado court refused to hear appeal.) https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021

[34] DeSantis v. Fla. Educ. Ass'n, No. 1D20-2633 (Fla. Dist. Ct. App. Dec. 21, 2020)(Florida teachers challenged state order to keep schools open arguing local school boards have authority.)

[35] State of Florida ex rel. Jackson v. Donald J. Trump for President, Inc. https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021

[36] Illinois Republican Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020) (Republican party claim First and Fourteenth Amendment violations because a state order favored one type of speech over another. District Court relied on Jacobson. 7th Circuit emphasized importance of free exercise yet denied preliminary injunction.)

[37] Anthony Sanders, "A Tale of Two Cases and two Pandemics," Institute for Justice https://ij.org/cje-post/a-tale-of-two-cases-and-two-pandemics/ (as of September 2020, 120 cases had cited Jacobson since the pandemic began.)