Face Coverings and Other Protective Measures

Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905).

FACTS: 1902 Massachusetts statute authorized cities through local health boards to "require and enforce vaccination and revaccination of inhabitants" during health emergencies. The City of Cambridge, acting on the advice of its local health authority, ordered the vaccination of residents to combat a smallpox outbreak. Henning Jacobson was convicted for refusing to comply with the ordinance.

HELD: "[T]he rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." 197 U.S. at 29.

These powers are not unfettered, however. A state may implement measures that curtail constitutional rights during an emergency only "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.' " 197 U.S. at 25.

Under the *Jacobson* framework, courts may review whether a challenged emergency measure implemented by a state is arbitrary or unreasonable, and whether the measure "lack[s] basic exceptions for 'extreme cases." 197 U.S. at 28, 38-39.

But courts must take care not to "second-guess the wisdom or efficacy of the measures." "It is no part of the function of a court ... to determine [what is] likely to be the most effective for the protection of the public against disease." 197 U.S. at 28, 30.

It is, rather, the role of the people's elected representatives to determine, in light of the available information, the best course to combat a public health threat, and courts must be careful not to usurp that role. 197 U.S. at 30-31.

Recent United States Supreme Court Interpretations of *Jacobson v. Massachusetts*

South Bay United Pentecostal Church v. Newsom
590 U.S. _____, 2020

California emergency order limiting attendance to "public gatherings" (including church services) to twenty-five percent building occupancy or one hundred attendees, whichever is smaller. Retail commercial establishments (groceries, banks, laundromats) not subject to this restriction.

Chief Justice Roberts, concurring in denial of application for injunctive relief: "Our Constitution principally entrusts '[t]he safety and health of the people' to the politically accountable officials of the States 'to guard and protect.' When those officials 'undertake to act in areas fraught with scientific and medical uncertainties,' their latitude must be especially broad…." "That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground"

Calvary Chapel Dayton Valley v. Nevada
591 U.S ____ (2020)

Nevada emergency order limited "public gatherings" (including church services) to no more than fifty persons while casinos and other large venues were limited to fifty percent of the rated occupancy.

Justice Alito, dissenting rejected states distinction and argued that neither *Jacobson* nor *South Bay* permitted the state to discriminate in this manner.

Justice Kavanaugh, would limit the scope of *Jacobson* to due process claims and would impose a stricter standard whenever "constitutional red lines" such as "racial discrimination, religious discrimination, and content-based suppression of speech" are crossed.

COVID-19 era Federal Circuit Court of Appeals decisions applying the *Jacobson v. Massachusetts* analysis

In Re Abbott, 954 F.3d 772 (5th Cir. 2020)(Texas emergency order delaying all non-emergency surgical and medical procedures)

Adams & Boyle, P.C. v. Slattery, 956 F 3d 913 (6th Cir. 2020)(Tennessee emergency order mandating delay of surgical abortion procedures)

In Re Rutledge, 956 F. 3d 1018 (8th Cir. 2020)(Arkansas emergency order delaying elective and non-emergency surgical procedures)

South Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020)(California "stay-at-home" order challenged by church)

Robinson v. Attorney General, 957 F.3d 1171 (11th Cir. 2020)(Alabama statute mandating delay of all abortion procedures)

Practical Considerations

Extra-Constitutional Impediments

- Jurisdictional
  - Charter, statutory, and administrative authority
  - Extraordinary grants of authority
- Preemptive
  - Statutory preemption
  - Executive or administrative preemption

Practical Considerations

Resolution vs. Ordinance

How quickly must provision be enacted?

How long should it remain in effect?

Jurisdictional constraints; authority (express/implied)

Practical Considerations

Scope of Coverage

- Places
- Persons
- Exceptions

Practical Considerations

- Enforcement
  - Direct (fines)
  - Indirect (secondary measures)
  - Third Party Enforcement

Practical Considerations

Other

- Educational programs
- Community distribution