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Is Jacobson v. Massachusetts Viable After a Century of Dormancy? A Review in the Face of COVID-19

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IS *JACOBSON V. MASSACHUSETTS* VIABLE AFTER A CENTURY OF DORMANCY? A REVIEW IN THE FACE OF COVID-19

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ABSTRACT

The COVID-19 pandemic has stretched us into the vast unknowns, emotionally, logically, politically, and legally. Relying on their police power, governments inched into the darkness of the powers' fullest extent, leaving many to wonder whether the exercise of this power was constitutional. This Article examines the extent of the police power that both the federal and state governments have, and how *Jacobson v. Massachusetts*[1] was the "silver bullet" for governments across the United States. Further, this Article provides an overview of police power, and the status of COVID-19 mandates. This Article additionally examines quarantine case law and provides an analysis of *Jacobson*. Finally, this Article discusses *Jacobson*'s efficacy and future. While the rationale of *Jacobson* has in some instances been limited, its reasoning has in other ways been expanded, as seen in its application with respect to rationalizing COVID-19 mandates in the interest of protecting the public's welfare.

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[1] 197 U.S. 11 (1905).

I. INTRODUCTION

The COVID-19 pandemic ("Pandemic") has affected all lives and all corners of the Earth, and human resilience has been tested time and time again. The Pandemic has stretched us into the vast unknowns, and the legal field is no exception. During the Pandemic, governments—both federal and state—have pushed the envelope of exercising their power to protect the general welfare using pandemic curbing mandates.[2] But the question is, was this constitutional? This Article examines the extent of the police power federal and state governments have and how *Jacobson* was the silver bullet for governments across the United States.[3] Part I provides a background of police power as well as the status of mandates used to curb the spread of COVID-19. Part II examines quarantine case law and gives an analysis of *Jacobson*. Eventually, this article discusses *Jacobson*'s efficacy in a small sample of states. Finally, Part III discusses *Jacobson*'s application in future litigation. It is hypothesized, here, that *Jacobson* remains valid law, and has been generously interpreted by the states to protect the well-being of their citizens.

A. Understanding Police Power

Police power is arguably one of the most enigmatic features of modern legal philosophy. Santiago Legarre, in his discussion about the etymology of the word "police," stated the etymological roots of "police" in "police powers" can be traced back to the Latin word "politia," or "civil administration or government."[4] He explained that "in Medieval Latin a variant politia emerged, which became the French term 'police' that was to be taken over by English."[5] As Legarre pointed out, it was not until the English language adopted "police" to mean "policy" specifically, "in the sense of commonwealth or organized state."[6] Legarre later noted

[2] For a discussion about state and federal mandates in response to the Pandemic, see *infra* Sections II.C & II.D.
[3] *See id*.
[4] Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 748-49 (2007).
[5] *Id.* at 749.
[6] *Id.*

> This flexible use of the language suggests that Blackstone uses the terms "public polity" and "police" in two senses: a broader one synonymous with commonwealth, where they include public justice, peace, commerce, health, and police; and a narrower and more specific meaning, which comprises only part of what concerns the common-wealth.[7]

Using Legarre's above-stated interpretation of Blackstone's broader definition of "police," we can infer a more general idea of police power as using state means to protect the general welfare of its citizens.[8] This recognition of inherent powers was held by the British colonies' government to maintain a functional territory.[9] During the First Continental Congress, where "the expression was used several times[,]" the United States highlighted the difference in powers of the American Colonies and the Crown.[10] Although there was a period of dormancy,[11] it was not until the adoption of the Articles of Confederation,[12] where the idea of state sovereignty made a resurgence.[13] Article II specifically states "[e]ach State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[14] The idea of internal policy expanded into the states, as Legarre pointed out, New York and South Carolina's early constitutions referenced internal police or policy.[15] Legarre also argued that the Constitution's lack of reference to internal police should be viewed in the totality, "clearly confirmed that internal police remained with the states."[16] Justice Phillip Talmadge, of the Washington Supreme Court, similarly argued that the federal government was to be limited to certain listed powers and that police power was "an essential

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[7] *Id.* at 759.
[8] *Id.* at 759-60 ("Over time, public health would become one of the goods typically to be promoted by the police power.").
[9] *Id*. at 770-71.
[10] *Id.* at 773.
[11] *Id.* at 774 (stating that the Declaration of Independence "contains no explicit reference to internal polity").
[12] *See generally* ARTICLES OF CONFEDERATION of 1781.
[13] *Id.* at 774.
[14] *Id*. (quoting ARTICLES OF CONFEDERATION of 1781, art. II).
[15] *Id.* at 775.
[16] *Id.* at 777.

attribute of government sovereignty."[17] The Tenth Amendment reaffirmed the notion of police power for the states.[18] Yet it was not until 1823, in *Gibbons v. Ogden*,[19] where Chief Justice Marshall stated that "[t]he right to use all property, must be subject to modification by municipal law . . . [and] belongs exclusively to the local State Legislatures, to determine how a man may use his own, without injuring his neighbour."[20] Shortly after, in 1827, the term "police power" was first used by the United States Supreme Court.[21] Simply put, police power concerns the government's authority "to regulate public health and safety, maintain the peace, and provide for the general welfare."[22] In *Mayor, Aldermen & Commonalty of the City of New York v. Miln*,[23] the Court stated:

> The object of all well-regulated governments is, to promote the public good, and to secure the public safety; and the powers of that legislation necessarily extends to all those objects; and unless, therefore, in any particular case, the power is given to the general government, it necessarily still remains in the states. It is under these principles, that the acts relative to police, which may operate on persons brought into a state, in the course of commercial operations, and the laws relative to quarantine and gunpowder, are within the power of the states.[24]

The Court also noted that in both *Gibbons v. Ogden*[25] and *Brown v. State of Maryland*,[26] the government's use of police power was upheld, even though "they are stronger examples" of regulations than what was presented in the case.[27]

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[17] Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 868 (2000).
[18] U.S. CONST. amend. X; *see also* Legarre, *supra* note 4, at 778.
[19] 22 U.S. (9 Wheat.) 1 (1824).
[20] Talmadge, *supra* note 17, at 865-66.
[21] *Id.* at 857 n.1 (citing Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 443 (1827)).
[22] *Id.* at 857.
[23] 36 U.S. (11 Pet.) 102 (1837).
[24] *Id.* at 128-29.
[25] *See generally Gibbons*, 22 U.S. (9 Wheat.) 1.
[26] 25 U.S. (12 Wheat.) 419 (1827).
[27] *Miln*, 36 U.S. at 141-42 (stating that *Gibbons* regarded "quarantine laws," and that *Brown* concerned "the removal of gunpowder"); *see also id.* at 130-31 (discussing

How did the government push the police power aside to push forward legislation? And, perhaps more importantly, what are the limitations with police power? Although states had police power, the use of the Commerce Clause[28] in post-World War I legislation gave Congress a larger reach.[29] As discussed later in this Article,[30] as well as by Legarre,[31] *United States v. Lopez*[32] "sought to put a limit to the ever-expanding reading of the Commerce Clause and reaffirm the basic principles of federalism."[33] *Lopez* "shows that the Court will place some limits on the police power of the federal government at a time when the federal government is outlawing more and more activity that is traditionally delegated to the states."[34] While the power vested in the Commerce Clause is similar to police power, it is not identical to the police power vested in the states.[35] David Schwartz, who discussed the flaws of "enumerationism" of the Constitution, argued that only powers that are explicitly stated within the Constitution are the ones

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that the statute in question regarded New York's requirement that all ships must have manifest of passengers).

[28] U.S. CONST. art. I, § 8, cl. 3.

[29] Legarre, *supra* note 4, at 779.

[30] *See* discussion *infra* Section II.D (discussing the principles of *Lopez v. United States* as a potential argument for federal mandates); *see also* United States v. Lopez, 514 U.S. 549 (1995).

[31] Legarre, *supra* note 4, at 779.

[32] 514 U.S. 549 (1995).

[33] Legarre, *supra* note 4, at 779.

[34] Beth M. Bollinger, *Defending Dual Prosecutions: Learning How to Draw the Line*, 10 CRIM. JUST. 16, 56 (1995).

[35] *See* United States v. Darby, 312 U.S. 100, 114-15 (1941) ("Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use . . . Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."); *see also* Stephen Ganter, *Did United States v. Lopez Turn Back the Clock on the Commerce Clause?*, 21 T. MARSHALL L. REV. 343, 354 (1996) ("In fact, *NLRB, Wickard, Darby, and Heart of Atlanta*, all stand for the proposition of invoking congressional police power when Congress feels that a particular activity may affect interstate commerce, even though such activity may not be entirely economic. This regulatory power is akin to police power which had traditionally been reserved to the states.").

granted to the federal government.[36] He contended that there are "two interpretative constraints" to enumeration,[37] the first being that "powers must be interpreted to stop short of a complete 'police power'[,]"[38] and the second being "the *expressio unius* canon, which guarantees that the list of enumerated powers cannot be added to."[39] Adhering to this line of logic, the federal government is only limited to the four corners of the Constitution, and nothing may be added from interpretation.[40]

At the federal level, the United States Supreme Court has seen its ebbs and flows of dictating what are valid exercises of state police power.[41] Talmadge stated that "[f]ederal courts uphold state regulations as valid exercises of the police power if the measures bear a reasonable relationship to a proper legislative purpose and are neither arbitrary nor capricious."[42] Talmadge posits that police power, specifically in Washington, is

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[36] David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 575 (2017).
[37] *Id.* at 576.
[38] *Id.*
[39] *Id.* at 575-76.
[40] *See* Schwartz, *supra* note 36, at 622 (arguing that Congress works around this using the "*means-ends reversal*—using an enumerated power as means to regulate an end that is not enumerated. Congress has no enumerated power to regulate health, safety, or morals; indeed, such regulation is an archetypal example of state police powers"); *id.* at 623-24 (warning that this method should be rejected because "[p]ermitting the use of enumerated powers for unenumerated ends overwhelms the supposed limits" and "limited-enumerated means could be bootstrapped into a general police power, one not even limited by a general-welfare principle").
[41] Talmadge, *supra* note 17, at 877-80 (discussing how the *Slaughter-House Cases* were a valid use of state police power. But *Lochner v. New York* was deemed an over-step of police power when it came to working hours. However, in *West Coast Hotel Co. v. Parrish*, the minimum wage for women was viewed as a valid exercise of state police power); *see, e.g.,* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); Lochner v. New York, 198 U.S. 45 (1905), *overruled by* Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), *and abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[42] Talmadge, *supra* note 17, at 879-80; *see also* Jeffrey W. Strouse, *Redefining Trademark Alteration Within the Context of Aesthetic-Based Zoning Laws: A Blockbuster Dilemma*, 53 VAND. L. REV. 717, 722-23 (2000) ("In fact, case law reveals that the limits of police powers have been determined more by societal values than by legal precedent.").

> A valid exercise of the police power [which] must promote the health, safety, morals, welfare, education, or peace of the general public. Additionally, the police power measure must serve its purpose by means that are reasonably necessary for the accomplishment of that purpose. Courts broadly construe the police power and place on the party challenging the validity of a statute the burden of proving a regulation exceeds the proper scope of the power.[43]

Richard Norton and Nancy Welsh assert that police power is limited by the states' own legislatures and constitutions;[44] however, police power is "unique to state governments in that the federal government does not enjoy similar powers under the U.S. Constitution."[45] Katharine Rudish asserts that the state police power is only limited to "the general health, welfare, and safety of their citizens[.]"[46] This limitation, coupled with Talmadge's point that there needs to be a reasonable purpose,[47] indicates that state police power is far and wide. This further enhances the idea that states enjoy more freedom in police power, compared to the federal government which is shackled to the Constitution. However, both the state and federal governments have

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[43] Talmadge, *supra* note 17, at 885-86. A valid exercise, in Washington, would pass a two-prong test: (1) promoting interests of the general public, and (2) the methods used to achieve the goals are in reasonable and substantial relation to the public interest or general welfare. *Id.* at 886-87.

[44] Richard K. Norton & Nancy H. Welsh*, Reconciling Police Power Prerogatives, Public Trust Interests, and Private Property Rights Along Laurentian Great Lakes Shores*, 8 MICH. J. ENVT'L & ADMIN. L. 409, 426 (2019).

[45] *Id.*; *see also* Katharine M. Rudish*, Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest*, 81 FORDHAM L. REV. 1485, 1489 (2012) ("In the U.S. federal system, the U.S. Constitution grants the federal government limited, enumerated powers. For example, the Constitution explicitly grants Congress the power to raise taxes, coin money, and regulate interstate commerce. Congress has the power to pass laws and regulate using legislation that is "necessary and proper" to achieve these and other enumerated ends explicitly listed in the Constitution.") (internal citations omitted); Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 535-36 (2012) ("The same does not apply to the States, because the Constitution is not the source of their power. . . . Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'").

[46] Rudish, *supra* note 45, at 1491.

[47] Talmadge, *supra* note 17, at 879-80, 885-86.

been limited by the Takings Clause.[48] The Takings Clause acts as a balance to eminent domain.[49] Federal courts have limited police power through substantive due process.[50] Although both the state and federal governments have limitations, states governments are afforded more police power, while the federal government is not.[51] However, in a time of crisis, such as a pandemic or disease outbreak, how far can police power go? Will the limits that held back the federal government still be upheld? Does the fact that an outbreak change how far local governments can go "to regulate public health and safety, maintain the peace, and provide for the general welfare[?]"[52] That is, will the police power bestowed during the Pandemic be subjected to the internal limits of the concept or external limitations, such as federal law or the United States Constitution?

B. Current State of Mandates

The world entered a new age when the World Health Organization declared a global pandemic.[53] As of March 10, 2023, over 676 million cases of COVID-19 have been reported.[54] As of March 10, 2023, and the Pandemic has claimed over 6.8 million lives worldwide.[55] This included over 103 million cases and over 1.1 million lives just in the United States alone.[56] However, a sliver of hope is that over 13.1 billion doses of the vaccine have been administered worldwide,

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[48] Talmadge, *supra* note 17, at 888, 894; *see also* U.S. CONST. amend. V.
[49] Talmadge, *supra* note 17, at 889; *see also* U.S. CONST. amend. V.
[50] Talmadge, *supra* note 17, at 894-95.
[51] Norton & Welsh, *supra* note 44, at 426 ("The police power creates plenary authorities, circumscribed by particularized constitutional and legislative constraints imposed by states themselves rather than expounded by exhaustive recitations of what they encompass. These authorities are also unique to state governments in that the federal government does not enjoy similar powers under the U.S. Constitution."); *see also id.* at 426 n.63 ("[T]he U.S. Supreme Court has made clear nonetheless that the federal government is a government of enumerated powers and that it does not enjoy broad authorities to promote the general welfare; it has no inherent police power authority.") (citing United States v. Morrison, 529 U.S. 598 (2000)).
[52] Talmadge, *supra* note 17, at 857.
[53] Kathy Katella, *Our Pandemic Year—A COVID-19 Timeline*, YALE MED. (Mar. 9, 2021), https://www.yalemedicine.org/news/covid-timeline.
[54] *COVID-19 Dashboard*, CTR. SYS. SCI. ENG'G, JOHN HOPKINS UNIV. & MED., https://coronavirus.jhu.edu/map.html (last visited Oct. 30, 2023).
[55] *Id.*
[56] *Id.*

including over 667 million doses in the United States.[57] Several states, such as California,[58] New York,[59] and Illinois[60] have issued some form of vaccination requirement.[61] Furthermore, vaccination mandates have been implemented before.[62]

In the 1905 seminal case, *Jacobson v. Commonwealth of Massachusetts*,[63] the United States Supreme Court held that, during an outbreak, a smallpox vaccine mandated for residents of Cambridge, Massachusetts was a valid exercise of the state's police power.[64] Since 1905, however, there has been no serious test of that decision, leaving some to wonder whether it remains good law, in terms of its

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[57] *Id.*

[58] *State Public Health Officer Order of August 5, 2021*, CALIF. DEP'T PUB. HEALTH (Aug. 5, 2021), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx; *see also State Public Health Officer Order of August 11, 2021*, CALIF. DEP'T PUB. HEALTH (Aug. 11, 2021), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Vaccine-Verification-for-Workers-in-Schools.aspx.

[59] *Governor Cuomo Announces COVID-19 Vaccination Mandate for Healthcare Workers*, PRESS OFFICE, NY.GOV (Aug. 16, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-vaccination-mandate-healthcare-workers.

[60] STATE OF ILL. EXEC. DEP'T, EXEC. ORDER NO. 2021-20 (Aug. 26, 2021).

[61] *See supra notes* 58-60.

[62] *See* Charlotte LoBuono, *History of Vaccine Mandates in the US*, STACKER (Oct. 14, 2022), https://stacker.com/stories/21994/history-vaccine-mandates-us (noting that, in 1777, to combat a smallpox outbreak, "the Continental Congress authorized Gen. Washington to require his troops to get vaccinated." In 1813, there was the establishment of the United State Vaccine Agency. Further, a city in Ohio, in 1867, required "citizens to get available vaccines in the event of future epidemics." Moreover, in 1922, the Supreme Court in *Zucht v. King* upheld a mandate requiring vaccinations as a prerequisite to attending school. And later, in *Prince v. Massachusetts* in 1944, the Supreme Court stated that "parental authority . . . can be restricted if doing so is in the child's best interest."); *see also* Zucht v. King, 43 S. Ct. 24, 25 (1922) ("Long before this suit was instituted, Jacobson v. Massachusetts . . . had settled that it is within the police power of a state to provide for compulsory vaccination. . . . In view of these decisions we find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error."); Prince v. Massachusetts, 64 S. Ct. 438, 442 (1944) ("It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.").

[63] *See generally* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[64] *Id.* at 35.

applicability.[65] Because this Nation has not faced a persistent threat requiring such measures to be taken, it is possible that, due to the similarities between the *Jacobson* and COVID-19 mandates, it is best to leave *Jacobson* undisturbed. Erwin Chemerinsky and Michele Goodwin argue that "*Jacobson* ignore[s] this fundamental development in constitutional law and uncritically appl[ies] rational basis review and great judicial deference even when there are claims of infringement of fundamental rights."[66] They further question why a court has not provided an explanation for its favoritism towards *Jacobson*.[67]

It is hypothesized here that *Jacobson* remains valid law and states have liberally interpreted *Jacobson* so that states are not limited in their functions to allow health mandates.[68]

II. *JACOBSON*'S RELATIONSHIP TO HEALTH MANDATES

A. Quarantine Case Law

The Pandemic is not the first instance in which this Country grappled with quarantine laws.[69] Litigation over quarantine laws can

[65] Erwin Chemerinsky & Michele Goodwin, *Civil Liberties in a Pandemic: The Lessons of History*, 106 CORNELL L. REV. 815, 834 (2021) ("No court has explained why the Jacobson approach is more preferrable than applying a contemporary approach to rights protected by the Constitution. We cannot think of another situation in which the social context, rather than the right involved, determines the level of scrutiny and, most important, does so for all the different areas of constitutional law."); *see also* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 186 (2022) ("The narrow scope of Jacobson is linked to the narrow regime from Cambridge as applied to Jacobson's specific dispute. The holding was expressly limited to this dispute. Jacobson's final sentence is worth repeating: 'We now decide only that the statute covers the present case. . . . Over the next century, many judges would largely ignore this statement and extend Jacobson to circumstances even Justice Harlan could not have fathomed.").

[66] Chemerinsky & Goodwin, *supra* note 65, at 834.

[67] *Id.*

[68] *See* discussion *infra* Section II (discussing *Jacobson*'s application to non-health mandates in New Mexico, Wisconsin, New York, and California).

[69] *See, e.g.,* Morgan's Louisiana & T.R. & S.S. Co. v. Bd. of Health, 118 U.S. 455 (1886); Ferrari v. Bd. of Health, 24 Fla. 390 (1888) (discussing quarantine laws prior to the 1900s).

be traced back to the Nineteenth Century.[70] In *Johnson v. Pearce*,[71] a cattle herd owner sold an animal which was infected with Bang's Disease, and after not complying with the requisite testing, the owner's herd was quarantined.[72] The *Johnson* court explained that the state's regulation aligned with "similar provisions of the federal government" to eliminate the disease,[73] and further explained that an agency can create policy using science at the time, especially "in a time when that science is changing and progressing too rapidly for the legislature to adopt any detailed long-range program."[74] Referring to the state's police power, the court held the regulations to be valid.[75] A Court of Special Appeals in Maryland stated "quarantine is a *permissible* alternative in the event that a valuable wild animal bites a human, not a mandatory alternative."[76] While these cases specifically contend with animal quarantines,[77] the constitutionality and validity of human quarantines has also been addressed.[78]

In *Jew Ho v. Williamson*,[79] in response to the deaths that were credited to the bubonic plague, the Health Officer and Board of Supervisors in San Francisco established a quarantined district.[80] The complainant argued that the "resolution is enforced against persons of the Chinese race and nationality only, and not against persons of other races" and only businesses owned by people of Chinese origin were subjected to the order,[81] and thus were "deprived of the equal protection of the laws, and of their rights and liberties under the constitution of the United States[.]"[82] The complainant also noted that the

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[70] *See* Compagnie Francaise de Navigation a Vapeur v. Bd. of Health, 51 La. Ann. 645, 660 (1899), *aff'd sub nom.* Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186 U.S. 380 (1902) (finding that a Louisiana law, which included quarantining ships, to be constitutional, stating "[i]t is the right and duty of the different states to protect and preserve the public health").
[71] 313 So. 2d 812 (La. 1975).
[72] *Id.* at 814.
[73] *Id.* at 819.
[74] *Id.*
[75] *Id.*
[76] Raynor v. Md. Dep't Health & Mental Hygiene, 676 A.2d 978, 986 (Md. Ct. Spec. App. 1996).
[77] Johnson v. Pearce, 313 So. 2d 812 (La. 1975); *Raynor*, 676 A.2d at 980-82, 986.
[78] *See* Jew Ho v. Williamson, 103 F. 10, 13-14, 26 (C.C.N.D. Cal. 1990).
[79] 103 F. 10 (C.C.N.D. Cal. 1990).
[80] *Id.* at 12-13.
[81] *Id.* at 13.
[82] *Id.* at 14.

quarantined did not have a case of the bubonic plague within thirty days before filing their complaint.[83] The court held that the

> [Q]uarantine cannot be continued, by reason of the fact that it is unreasonable, unjust, and oppressive, and therefore contrary to the laws limiting the police powers of the state and municipality in such matters; and, second, that it is discriminating in its character, and is contrary to the provisions of the fourteenth amendment of the constitution of the United States.[84]

However helpful these cases may be, one case has been the focal point throughout the Pandemic.[85]

B. Overview of *Jacobson*

The issue in *Jacobson*, was the constitutionality of Massachusetts' smallpox vaccine mandate.[86] The relevant law stated that a city's board of health "shall require and enforce the vaccination and revaccination of all the inhabitants thereof[.]"[87] Those who were capable of receiving the vaccination but refused were punished with a five-dollar fine; however, there was an exemption for children who were unable to receive the vaccination.[88] In 1902, Cambridge, Massachusetts' Board of Health issued a vaccine mandate relating to the smallpox outbreak, stating:

> Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the

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[83] *Id.*
[84] *Id.* at 26.
[85] Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905) ("This case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to vaccination."); *see also* Chemerinsky & Goodwin, *supra* note 65, at 830 ("Because there is so little precedent concerning the government's power to stop the spread of communicable disease, it is not surprising that courts have relied on *Jacobson v. Massachusetts* in evaluating government actions to stop the spread of COVID-19.").
[86] *Jacobson*, 197 U.S. at 11, 12.
[87] *Id.* (noting that the law in question was chap. 75 § 137).
[88] *Id.*

> opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants habitants of the city who have not been successfully vaccinated since March 1st, 1897, be vaccinated or revaccinated.[89]

Jacobson was an adult charged with failure to comply for not receiving the vaccination despite living in Cambridge and having a vaccine provided free of charge.[90] Jacobson argued that the law, which allowed for the Cambridge vaccine mandate, violated his rights under the Fourteenth Amendment of the United States Constitution and the Constitution's preamble.[91] The jury found Jacobson guilty, and the Massachusetts Supreme Judicial Court affirmed the decision.[92]

The Supreme Court stated that Jacobson's "rights" in the Preamble of the Constitution were not rights at all.[93] Justice Harlan stated, "[a]lthough that preamble indicates the general purpose for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government[.]"[94] Thus, due to a lack of rights, Jacobson's claims under the Preamble were not entertained by the Court.[95]

The Court found that a state can implement a law, such as the one here, through its police power.[96] The Court has extended the state's police power to allow "laws that relate to matter completely within its territory and which do not . . . affect people of other states."[97] These include "quarantine laws and 'health laws of every description.'"[98] The police power, as the Court held, "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" so long as there is no infringement of a Constitutional right.[99] While Jacobson argued that the vaccine mandate is an infringement of

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[89] *Id.* at 12-13 (quoting the city of Cambridge's vaccine regulation).
[90] *Id.* at 13.
[91] *Id.* at 13-14.
[92] *Id.* at 14.
[93] *Id.* at 22.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 24-25.
[97] *Id.* at 25.
[98] *Id.*
[99] *Id.*

his free will to do whatever he wishes to his body, the Court said that those rights are "subject for the common good" and the well-being of the state.[100] The Court noted that the police power from the Constitution of Massachusetts states that the "government is instituted 'for the common goods, for the protection, safety, prosperity, and happiness of the people . . . .'"[101] Further, the Court stated that the needs and inconveniences of the few were greatly outweighed by the protection of the many.[102] As the Court noted, however, this was not the first time vaccinations have been mandated—vaccines are required to attend public schools.[103]

Interestingly, the Court also found that there is no judicial review of police power, unless the law was enacted under the guise of public welfare, but with "no real or substantial relation to those objects" or if there was a blatant violation of an individual's protected right.[104] The Court noted:

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[100] *Id.* at 26.
[101] *Id.* at 27.
[102] *Id.* at 28-29.
[103] *Id.* at 31-32; *see also* Drew DeSilver, *States Have Mandated Vaccinations Since Long Before COVID-19*, PEW RSCH. CTR. (Oct. 8, 2021), https://www.pewresearch.org/fact-tank/2021/10/08/states-have-mandated-vaccinations-since-long-before-covid-19/?amp=1 (noting that a Pew Research Center review revealed that in addition to every state, including Washington, D.C., requiring vaccinations for diphtheria, tetanus, pertussis (whooping cough), polio, measles, rubella, and chickenpox several states require additional vaccination for school-aged children). Notably, the mumps vaccination is not required in Iowa. *Id.* Twenty-six states (including Washington, D.C.) require that K-12 student get the Hepatitis-A vaccine. *See id.* Forty-eight states, including Washington, D.C., require K-12 student to get the Hepatitis B vaccine. *See id.* Four states, including Washington, D.C., require the students to get the Human Papillomavirus vaccine. *Id.* Thirty-three states, and Washington, D.C., require that students receive the Meningococcal ACWY vaccine. *Id.* Interestingly, Virginia is the only state to require the four additional vaccinations, and Massachusetts and Vermont only require the Meningococcal ACWY vaccine for "residential students." *See id.* Furthermore, the survey found that the vaccination requirements for children in childcare, day care, and preschool greatly vary. *Id.* Most notably, South Dakota does not mandate any of the five vaccinations examined (Hepatitis A, Hepatitis B, Rotavirus, Hib, Pneumococcal conjugate, Influenza) for children. *Id.* Four states require all five of these vaccines (Delaware, Ohio, Pennsylvania, and Rhode Island). *Id.* West Virginia and Louisiana only require one vaccination (Hepatitis B) and Alabama (Hib, Pneumococcal conjugate) and Indiana require two vaccinations (Hepatitis A and B). *Id.*
[104] *Jacobson*, 197 U.S. at 31.

> [T]hat 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.[105]

Courts may, however, interfere if a state's methods go "far beyond what was reasonably required[,]"[106] meaning, that the Court will intervene if the manners to implement the regulation are not reasonable. Ultimately, the Court held that one's freedoms and liberties may be limited if the limitation is supported by "reasonable regulations, as the safety of the public may demand."[107] Generally, these regulations will be upheld, except when there is a constitutional violation, as seen later in this discussion, as well as in *Jew Ho*.[108]

Jacobson stands for the principle that if faced with a danger, that threatens the welfare of the public, a state may exercise its police power to address the danger, even if that entails some rights and liberties to be curtailed, in this case with a smallpox vaccine mandate.[109] However, a state may not have unyielding power over its people.[110] There must be some reasonable measures that are put into place, and as Samuel Soref described, "a reasonable relationship must exist between the character of the legislation and the policy to be subserved."[111] Soref asserts that the police power will always be tied to

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[105] *Id.* at 38.
[106] *Id.* at 28.
[107] *Id.* at 29.
[108] *See* discussion *infra* Section II.C (discussing *Jacobson* in light of constitutional challenges in various states); Jew Ho v. Williamson, 103 F. 10, 26 (C.C.N.D. Cal. 1990).
[109] *See* Clarence Manion, *Liberty and the Police Power*, 3 NOTRE DAME L. REV. 240, 242-43 (1928) ("[A]s early as 1887 the Supreme Court affirmed the proposition that a State might take the life, liberty or property of its citizens without due process of law and in spite of the prohibitions of the [F]ourteenth [A]mendment, provided that such takings was in the general interest of the public health, morals or safety.").
[110] *See* Randy E. Barnett, *The Proper Scope of Police Power*, 79 NOTRE DAME L. REV. 429, 434 (2004) (stating that, due to the Fourteenth Amendment, "state governments no longer can claim a plenary power to restrict the liberties of the people subject only to their constitutions and any express restrictions in the original Constitution.").
[111] Samuel M. Soref, *The Doctrine of Reasonableness in the Police Power*, 15 MARQ. L. REV. 3, 5 (1930).

the reasonableness of the measure.[112] By asserting "[t]hat the application of the doctrine of reasonableness is a matter of no little difficulty and may be illustrated by various conflicting holdings of the courts,"[113] Soref effectively stated that courts are to be the arbiter in determining if a law is reasonable.[114] Courts continue to grapple with the consistency of reasonableness, with a set of circumstances being reasonable in one court but unreasonable in another.[115] Soref argued there is an underlying idea of "a presumption in favor of the reasonableness of the legislative action. . . . [T]he legislative act should clearly appear to be unreasonable before it is declared invalid."[116] However, not every use of a state's police power has been found to be reasonable.[117] Soref also argued that police powers are subject to the constitutionality of the action.[118] However, reasonableness and constitutionality should be kept "separate and distinct" from one another.[119] This includes the rights found in the Fourteenth Amendment and the substantive due process "right to body integrity."[120]

In the context of vaccination, "[n]onconsensual HPV vaccination violates the recipient's right to bodily integrity."[121] Using *Jacobson*, Lucas argued that a HPV vaccination requirement is unnecessary due to the availability of alternative testing and that children are unlikely to contract HPV in a classroom.[122] Furthermore, Lucas contended that an HPV vaccination mandate would be unreasonable

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[112] *Id.*
[113] *Id.* at 6.
[114] *Id.* at 6-7.
[115] *See id.* at 8; *see also* Barnett, *supra* note 110, at 434 ("Determining the propriety of state laws is more problematic than with federal powers, however, because there is no list of enumerated powers the original meaning of which can be used to distinguish proper from improper exercises of power. Indeed, there is nothing in the Constitution that speaks to the issue of the proper scope of state powers.").
[116] Soref, *supra* note 111, at 15.
[117] *Id.* at 8-11 (citing several cases where a state's exercise of police power was deemed unreasonable, such as in instances pertaining to: specific labelling of goods made, prohibition of certain beverages, criminalizing giving foods as a gift, labor union membership, the maximum occupancy of a boarding house room, becoming an embalmer, where alcohol could be sold).
[118] *Id.* at 11.
[119] *Id.* at 13.
[120] Allison Lucas, *Mandated Human Papillomavirus Vaccination: An Overextension of Jacobson v. Massachusetts*, 10 T.M. COOLEY J. PRAC. & CLINICAL L. 253, 257-58 (2008).
[121] *Id.* at 258.
[122] *Id.* at 273.

(because the strains of HPV that the vaccine prevents are not as prevalent and there has never been a mandated vaccine for a virus that is passed via sexual contact), not proportional (because a mandate would cause "a false sense of protection in females"), and insufficient in the state's interest (because the cervical cancer caused by HPV does not appear until later in life).[123] However, Lucas's arguments do not apply to COVID-19. Unlike the HPV vaccine, both men and women have received the COVID-19 vaccine; thus, there is no unfair burden on one sex specifically.[124] The University of Maryland Medical System states that "with each new variant, the COVID vaccines and their boosters remain our most powerful tool to fight all the strains of COVID-19 because the vaccines continue to significantly reduce the severity of the illness."[125] Thus, Lucas's argument regarding unreasonableness fails for COVID-19. Finally, Lucas's argument relating to latency of HPV cannot translate to COVID-19. Within days of exposure to COVID-19, patients show symptoms; thus, it is within the state's interest to curb the infections as they come.[126]

The question remains, with over a century of near dormancy, how will a country, with different political views and beliefs, address *Jacobson* as the United States is faced with a similar situation? Similarly, are the actions taken by state government bodies, namely stay-at-home orders, masking mandates, and quarantine mandates, justified under *Jacobson*'s police power explanation? Where is the line drawn with *Jacobson*, does the Court's ruling still apply to vaccines, in this case COVID-19 vaccines? Simply put, is *Jacobson* still good law or has its age expired its precedential value?

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[123] *Id.* at 273-75.

[124] *See generally Covid Data Tracker*, CDC, https://covid.cdc.gov/covid-data-tracker/#vaccination-demographic (last visited Oct. 30, 2023) (noting that as of April 6, 2022, over 132 million women and over 121 million men in the United States have received at least one dose).

[125] *COVID Variants and the Vaccine,* UNIV. OF MD. MED. SYS., https://www.umms.org/coronavirus/covid-vaccine/facts/strain (last visited Oct. 30, 2023).

[126] *If You've Been Exposed to the Coronavirus*, HARV. HEALTH PUBL'G., (Feb. 8, 2023), https://www.health.harvard.edu/diseases-and-conditions/if-youve-been-exposed-to-the-coronavirus.

C. Is *Jacobson* Still Good Law?

During the Pandemic, the lengths of *Jacobson*'s rationale were tested by the states. These challenges raised questions concerning where states were drawing the line with *Jacobson*. Is *Jacobson* teetering on the verge of becoming precedent that is unreversible?

The following is a survey of decisions from New Mexico, Wisconsin, New York, and California, which have begun to shed light on *Jacobson*'s strength.[127] These states were selected due to their early litigation of the extent of police power in their respective mandates. Furthermore, these states address unique and key aspects of limitation of health mandates. These cases provide an indication of how states have viewed *Jacobson* in the face of a variety of state-level mandates that are meant to curb the onslaught of COVID-19. This discussion primarily focuses on the Constitutional issues and claims made.

1. New Mexico

In *Pirtle v. Legislative Council Committee of New Mexico Legislature*,[128] in the early stages of the Pandemic, Governor Grisham of New Mexico issued a series of mandates which "restricted mass gatherings and various business operations."[129] Each of the mandates issued by Governor Grisham reinforced the notion that New Mexico's government needed to take steps to curb the virus and that the State's citizens should remain home except for necessary travel.[130] Prior to a special legislative session, the defendant, the Legislative Council, "passed—with bipartisan support and no opposition—a directive prohibiting on-site, public attendance at the special session, while allowing some, but not unlimited, in-person media coverage of the event."[131] The petitioners argued that the directive violated New Mexico's Constitution as well as the "due process right to 'participate in the legislative process.'"[132] New Mexico's Constitution stated, in relevant part, that:

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[127] *See* discussion *infra* Section II.C.1-4 (discussing cases from New Mexico, Wisconsin, New York, and California regarding *Jacobson* and COVID-19).
[128] 492 P.3d 586 (N.M. 2021).
[129] *Id.* at 589.
[130] *Id.*
[131] *Id.* at 589-90.
[132] *Id.* at 590 (discussing that the provision in question was Article IV, Section 12).

> All sessions of each house shall be public. Each house shall keep a journal of its proceedings and the yeas and nays on any questions shall, at the request of one-fifth of the members present, be entered thereon. The original thereof shall be filed with the secretary of state at the close of the session, and shall be printed and published under his authority.[133]

The Supreme Court in New Mexico relied on *Jacobson*'s standard of review to manage the mandamus proceedings and their relation to public health law.[134] The court stated that *Jacobson*'s standard for judicial review is applied when there is no nexus between the law and the current emergency.[135] The court held that "[p]etitioners' submission to this court was insufficient as a matter of law to demonstrate a clear cognizable constitutional right to physically attend the special legislative session," and stated that *Jacobson* does not apply when "no constitutionally protected rights are determined to have been violated in the first place."[136] Moreover, the court declined to apply the deferential standard in *Jacobson* because of the "meritless due process claim[.]"[137] However, the majority quickly dismissed the dissent's conclusion that the Council's decision was unconstitutional, stating, "[o]ne would have thought it incumbent on the dissent to address the hot-button *Jacobson* issue before proclaiming the Council's pandemic-related directive unconstitutional[.]"[138] As such, the court "decline[d] in these circumstances to address those issues sua sponte or to craft any constitutional interpretation arguments on Petitioners' behalf[,]"[139] and concluded that the challenge "was not shown to violate a clear and indisputable legal duty."[140]

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[133] N.M. CONST. art. IV, § 12.
[134] *Pirtle*, 492 P.3d at 598.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 607.
[138] *Id.*
[139] *Id.* at 604.
[140] *Id.* at 607. The court stated that attendance in a legislative proceeding was not a protected right under the U.S. Constitution and two circuits came to the same conclusion. *Id.* at 598-99. As such, there is no constitutional claim. *Id.* at 600. When analyzing the New Mexican Constitution, the court stated the phrase "public" in the provision in question is too ambiguous to determine the drafters' intent. *Id.* at 601. Additionally, the court stated that "public" could be "denoting known or notorious—as in the opposite of private—and the other relating to access." *Id.* at 601.

In *Grisham v. Romero*,[141] Secretary of New Mexico's Department of Health, Kathyleen Kunkel issued a health order which "restricted mass gatherings and the operations of certain businesses, requiring some to close entirely."[142] The Secretary relied on various gubernatorial orders, emergency acts, and "inherent constitutional police power" to issue the order.[143] As COVID-19 cases again rose in the state, the order was reinstated, and further prohibited indoor dining.[144] A group of restaurant and bar owners sought a temporary restraining order and a permanent injunction against the order, arguing that the actions were unenforceable, "[u]nreasonable, [a]rbitrary, and [c]apricious."[145]

The *Romero* court held that the actions of the Secretary and Governor were within their scope of authority and enforceable.[146] Among other reasons, the court cited to a line of cases, including *Jacobson*, which rationalized that "[s]uch a delegation of substantial discretion and authority to the executive branch (including state or local health boards) to respond to health emergencies has a long history in the United States."[147] Although the court stated other courts may narrow *Jacobson*, due to its age, the court firmly asserted that "*Jacobson* is still good law, as reflected by the heavy reliance placed on its deferential review standard by many courts addressing challenges to state restrictions imposed during the COVID-19 pandemic."[148] The court held that the order was not arbitrary, again relying on *Jacobson* by showing a "real and substantial relation" between COVID-19 cases and the orders.[149] Interestingly, the concurring opinion stated that simply by issuing an order, the court "recognizes that there is, in fact, an emergency" which would trigger the police power of the state.[150] However, in the concurring opinion, Justice Thomson cautioned against setting a precedent, stating, "[t]he executive must be allowed

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[141] 483 P.3d 545 (N.M. 2021).
[142] *Id.* at 549.
[143] *Id.*
[144] *Id.* at 550 (noting that the order was later relaxed to twenty-five percent capacity).
[145] *Id.*
[146] *Id.* at 559, 563.
[147] *Id.* at 557.
[148] *Id.* at 561.
[149] *Id.* at 562.
[150] *Id.* at 563, 565 (Thomson, J., concurring). Justice Thomson also noted that "*Jacobson* provides excellent guidance to this country facing a public health crisis emerging nearly 105 years after its writing." *Id.* at 656 n.24.

to act with some flexibly in times of true emergency and the means to address it. However, this does not relieve the executive of its obligation to show, subject to scrutiny and verification, that the stated emergency and the means to address it are reasonable."[151] Curiously, the court also noted that it was not deciding "*Jacobson*'s outer limits" because the case was in line with *Jacobson*.[152]

Finally, in *State v. Wilson*,[153] a group of small business owners argued that the orders given by Governor Grisham and Health Secretary Kunkel violated New Mexico's Constitution as well as the Public Health Emergency Response Act.[154] This constitutional section discussed providing compensation for the taking of property.[155]

The *Wilson* court recognized the existence of police power and its connection to a public health crisis, and relied on many cases, including *Jacobson*, stating that "a reasonable exercise of the police power comports with due process."[156] The court stated that guidance about claims under New Mexico's constitutional takings clause comes from the United States Constitution's Takings Clause because often times the courts will uphold broad use of the police power to abate nuisances, such as a pandemic, noting the "state Constitution provides similar protection[.]"[157] The *Wilson* court, which relied on *Jacobson*'s reasonability standard among other authorities,[158] found that the

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[151] *Id.* at 563.
[152] *Id.* at 561 n.23 (majority opinion).
[153] 489 P.3d 925 (N.M. 2021).
[154] *Id.* at 929 (noting that the Constitutional claim was based on Article II, Section 20 and Section 12-10A-15 of the Public Health Emergency Act).
[155] N.M. CONST. art. II, § 20.
[156] *Wilson*, 489 P.3d at 934.
[157] *Id.* at 935 (quoting Primetime Hosp., Inc. v. City of Albuquerque, 2009-NMSC-011, ¶ 19 n.1, 146 N.M. 1, 206 P.3d 112; Bd. of Educ., Moriarty Mun. Sch. Dist. v. Thunder Mountain Water Co., 2007-NMSC-031, ¶ 8, 141 N.M. 824, 161 P.3d 869). The court applied a three-part test to determine the constitutional claims: determining if the "exercise of the State's police power are reasonably related to their stated purpose." *Id*. at 937. If so, "then the purpose of the exercise may be determinative of insulation from takings analysis, as argued by the State"; however, if not, then compensation must be determined by examining all the facts. *Id*. Finally, it relied on *Lucas* to determine if an "otherwise proper regulatory exercise of the police power may be found to violate the categorical rule of compensability." *Id*. (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992)).
[158] *Wilson*, 489 P.3d at 938 (applying the reasonableness test from Lawton v. Steele, 152 U.S. 133 (1894); the court rejected the petitioner's use of State ex rel. State Highway Dep't v. Kistler-Collister Co., 539 P.2d 611 (1975)).

actions taken were in fact a reasonable use of police power.[159] The *Wilson* court noted that the small business owners were still able to show that takings were "arbitrary or capricious" because that argument "is never foreclosed," citing *Jacobson*.[160] However, the court used *Jacobson* specifically and stated that there is "a heavy burden to produce evidence—or at least make offers of proof—sufficient to raise questions of material fact as to whether the State's actions are objectively improper or arbitrary and capricious as a matter of public health science."[161] The court eventually held that the orders did not violate the takings clause of the New Mexico constitution.[162]

Pirtle indicates that for the courts to implicate *Jacobson*, "constitutionally protected rights" must be violated by the government's actions.[163] Moreover, the court insinuated that the violated right needs to be one that is recognized by the Constitution.[164] At a minimum, as the *Pirtle* court hinted at,[165] if the violated right stems from the State's constitution, the right needs to be unambiguous.[166]

Although the *Romero* court stated it was not providing an outer limit to *Jacobson*, it inadvertently did.[167] *Jacobson*'s original rationale applied to only the smallpox vaccine mandate in the city of Cambridge.[168] However, both *Pirtle* and *Romero* upheld non-vaccine orders which applied statewide.[169] So, while the New Mexican courts are not necessarily expanding the underlying law of *Jacobson*, the application of *Jacobson* has continued to grow.

Wilson clarified that, although not completely relying on *Jacobson*, public health orders are fairly insulated from New Mexico's takings clause.[170] Tangentially, the court further clarified that, due to

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[159] *Id.*
[160] *Id.* at 939.
[161] *Id.*
[162] *Id.* at 942.
[163] Pirtle v. Legis. Council Comm. N.M. Legislature, 492 P.3d 586, 598 (N.M. 2021).
[164] *Id.*; *see also Wilson*, 489 P.3d at 935, 942.
[165] *Pirtle*, 492 P.3d at 598.
[166] *Id.*
[167] *Id.* at 607; *see also* Grisham v. Romero, 483 P.3d 545, 561 n.23 (N.M. 2021).
[168] Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).
[169] *Romero*, 483 P.3d at 561 n.23.
[170] The court in *Commonwealth of Massachusetts v. Agler* stated that eminent domain is "the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor." Commonwealth v. Alger, 61 Mass. 53, 85 (Mass. 1851). Whereas police power is "the power vested in the legislature

the amount of protection offered by the United States Constitution, New Mexico would frame its takings clause analysis consistently with the United States Constitution.[171] As in *Pirtle* and *Romero*,[172] the court did not explicitly expand the protections offered by *Jacobson*; however, the court implicitly expanded the protections by shielding health orders from takings clauses.[173] Interestingly, the court added a quasi-limit to *Jacobson* by stating that evidence of arbitrary actions is not excluded.[174]

In New Mexico, *Jacobson* is still valid law and its protection has expanded beyond vaccine mandates.[175]

2. Wisconsin

During the early months of 2020, in response to the Pandemic, Governor Tony Evers issued a public health emergency in Wisconsin.[176] Shortly thereafter, Andrea Palm, Secretary-Designee of the Department of Health Services (DHS), issued an order which mandated "the closure of all public and private Wisconsin schools for purposes of [in-person] instruction and extracurricular activities."[177] Secretary Palm then issued a "Safer at Home Order," which barred non-essential travel and closed schools,"[178] which was later extended to close the schools for the remainder of the 2019-20 academic year.[179] In a separate, yet related, litigation, *Wisconsin Legislature v. Palm*,[180] many guidelines of the "Safer at Home Order" were struck down; however,

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by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." *Id.* at 85. The court also stated, "[r]ights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." *Id.*

[171] State v. Wilson, 489 P.3d 925, 935 (N.M. 2021).

[172] *Pirtle*, 492 P.3d at 598; *Romero*, 483 P.3d at 561 n.23.

[173] *Wilson*, 489 P.3d at 942.

[174] *Id*. at 939.

[175] *Id*.; *Romero*, 483 P.3d at 561; *Pirtle*, 492 P.3d at 598.

[176] James v. Heinrich, 960 N.W.2d 350, 355 (Wis. 2021).

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] Wis. Leg. v. Palm, 942 N.W.2d 900 (Wis. 2020).

the court did not rule on the provisions regarding school closures.[181] Later, Janel Heinrich, a health official in Dane County, issued a series of orders implementing COVID-19 protocols in schools—specifically Emergency Orders #3 and #5—providing "some schools in Dane County opened for in-person instruction (or were preparing to open for in-person instruction)."[182] Heinrich issued another health order which closed schools for students in third grade through twelfth grade, and exempted Kindergarten through second grade, "so long as the schools provided an alternative virtual learning option."[183] This Order "allowed all higher education institutions to remain open for in-person instruction," as long as the school had policies in place, and a variety of different types of business, so long as there was social distancing.[184] Petitioners argued that the orders were an excessive use of statutorily proscribed power and violated the Free Exercise clause of Wisconsin's Constitution.[185]

Heinrich argued that *Jacobson* authorized the issuance of these orders.[186] However, the court explicitly held, "the Wisconsin Constitution—not *Jacobson*—controls the question, and those portions of the Order restricting or prohibiting in-person instruction are unconstitutional because they violate a citizen's right to the Free Exercise of religion guaranteed in Article I, Section 18 of the Wisconsin Constitution."[187]

The *James* court laid out four specific reasons why *Jacobson* was inapplicable to the current case.[188] First, this court recognized that the issue here was with the Free Exercise Clause of the Wisconsin Constitution and not substantive due process as in *Jacobson*.[189] Next, the

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[181] *See generally* Wis. Leg. v. Palm, 942 N.W.2d 900 (Wis. 2020) (discussing the unenforceability of Emergency Order 28); *see also James*, 960 N.W.2d at 355 (stating in *Palm*, school closures were not addressed).
[182] *Id.* at 356.
[183] *Id.* at 356-57 (discussing that the rationale was that younger-aged children are less likely to contract COVID).
[184] *Id.* at 357.
[185] *Id.* at 358 (specifically discussing Article 1, Section 18 of Wisconsin's Constitution).
[186] *Id.* at 367.
[187] *Id.*
[188] *Id.*
[189] *Id.* ("[T]he constitutionality of the Order is couched entirely within Article I, Section 18 of the Wisconsin Constitution—a provision containing Wisconsin's Free Exercise clause. In contrast, in *Jacobson* the defendant asserted that the compulsory

court stated that in *Jacobson*, there was no mention of "free exercise of religion under the First Amendment or any state constitution."[190] In contrast, the Petitioners challenged the government's infringement of their constitutionally-protected right to the free exercise of their religion."[191] Thus, *Jacobson*'s rationale did not apply to cases involving Free Exercise.[192]

Third, unlike *Jacobson*, *James* "invokes a state constitutional provision that affords heightened protections for the free exercise of religion compared to its federal counterpart."[193] The court noted that Wisconsin's Constitution offers more protection than the United States Constitution, and thus forces the court to examine the claims under the Wisconsin's constitution and not the United States Constitution on which the *Jacobson* court relied.[194] Finally, the court stated that, unlike *Jacobson*, in Wisconsin, "constitutional rights do not expand the police power; they restrict the police power."[195] The court found that the provision in the constitution was intended to protect any potential infringement of Free Exercise.[196]

The *James* court affirmed that it "construes Article I, Section 18 as 'more prohibitive than the First Amendment of the United States Constitution.'"[197] The court examined the Free Exercise using four factors:

> (1) that [the petitioner] has a sincerely held religious belief, and (2) that such belief is burdened by the application of the . . . law at issue. Upon this showing the burden shifts to the state to prove (3) that the law is based upon a compelling state interest (4) that cannot be served by a less restrictive alternative.[198]

The *James* court eventually held that the health orders were unconstitutional as they violated the Free Exercise clause of Wisconsin's

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vaccination law violated an implied 'substantive due process' right to 'bodily integrity' in violation of the Fourteenth Amendment.").

[190] *Id.* at 367.

[191] *Id.*

[192] *Id.*

[193] *Id.* at 368.

[194] *Id.*

[195] *Id.* (quoting State v. Hamdan, 665 N.W.2d 785, 798 (2003)).

[196] *Id.*

[197] *Id.* at 369 (quoting King v. Vill. of Waunakee, 517 N.W.2d 671, 685 (1994)).

[198] *Id.* (quoting Coulee Cath. Schs. v. Lab. & Indus. Rev. Comm'n, Dep't of Workforce Dev., 768 N.W.2d 868, 886 (2009)).

constitution.[199] The court stated, "[e]ven in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution."[200]

The *James* decision appears to reign in *Jacobson*'s deferential influence on a state's police power.[201] The *James* court effectively limited the applicability of *Jacobson*, stating that *Jacobson* does not apply to public health mandates if there is an infringement on Free Exercise of religion, and the state's constitution will govern.[202] It appeared that the court insinuated that *Jacobson*'s applicability is limited to substantive due process claims only.[203] Furthermore, the decision limited *Jacobson* in the sense that claims borne out of state constitutional claims are not afforded the same level of deference as that of *Jacobson*.[204] This was because the level of protection in the state constitution, at least in Wisconsin, was greater for free exercise than it is at the United States Constitution level.[205] Wisconsin has essentially drawn a line in the sand for the outer bounds of *Jacobson*.[206] This appeared to be the new framework for *Jacobson*: all is fair until religion, or a similar fundamental right, is attacked.

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[199] *Id.* For the first factor, the court held that the petitioners' beliefs (the requirement of in person education for religious teaching and receiving Communion) were sincerely held. *Id.* at 370. For the second factor, the court stated the health order "incontrovertibly burdens Petitioners' beliefs" because the order prevented students from attending religious activities. *Id.* The court found that the state had a compelling interest for the order with the ongoing Pandemic. *Id.* at 371. However, the order, as the court found, "does not impose the 'least restrictive' means of doing so." *Id.* The court noted several discrepancies in standards, notably that previous orders had less restrictive means, such as "specifying classroom student limits, mandating the use of masks, and requiring social distancing." *Id.* Furthermore, the court noted that rationale for the orders stated children were not likely to contract COVID and yet grades 3-12 were not allowed to attend in person. *Id.* Additionally, the order did not "explain why college-aged students could continue to live, learn, and socialize in close communities, while students in grades 3-12 were consigned to computer screens." *Id.*

[200] *Id.* (quoting S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (granting in part an application for injunctive relief) (statement of Gorsuch, J.) (internal quotations omitted) (emphasis in original)).

[201] *James*, 960 N.W.2d at 367, 368.

[202] *Id.* at 358.

[203] *Id*. at 367.

[204] *Id*.

[205] *Id.* at 367, 368.

[206] *Id.*

3. California

In *South Bay United Pentecostal Church v. Newsom*,[207] applicants petitioned the United States Supreme Court for injunctive relief to prevent the enforcement of Governor Gavin Newsom's Executive Order which "places temporary numerical restrictions on public gatherings[.]"[208] Within the Executive Order was a limitation on places of worship, setting the maximum capacity to "25% of building capacity or a maximum of 100 attendees."[209] The Court's ruling was as brief as it gets, stating that the request was denied and providing no further explanation.[210]

In his concurring opinion, Chief Justice Roberts acknowledged the restrictions on places of worship, but stated that "those restrictions appear consistent with the Free Exercise Clause of the First Amendment."[211] Furthermore, the Chief Justice noted that similar restrictions were imposed for places of non-worship but those restrictions do not apply to "grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods."[212] Using *Jacobson*, the Chief Justice deferred to the "politically accountable officials" to make decisions regarding the health of the general public.[213] The Chief Justice went on and stated that the decisions should not be questioned by one who "lacks the background, competence, and expertise to assess public health and is not accountable to the people."[214]

However, Justice Kavanaugh, along with Justices Thomas and Gorsuch, dissented on the ground that the denial was discrimination against places of worship.[215] Justice Kavanaugh noted that "comparable" non-religious businesses are exempt from the capacity limitations.[216] Although there was a compelling interest in curbing COVID-19 in California, the issue arose where the "restrictions inexplicably applied to one group and exempted from another do little to further

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[207] 140 S. Ct. 1613 (2020) [hereinafter *South Bay I*].
[208] *Id.* at 1613 (Roberts, C.J., concurring).
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.* at 1614 (Roberts, C.J., concurring).
[215] *Id.* (Kavanaugh, J., dissenting).
[216] *Id.*

these goals and do much to burden religious freedom."[217] Justice Kavanaugh argued that California had alternatives to setting a capacity that could be applied to churches, but it could not impose a higher standard on religious places, without "a compelling justification."[218]

Following the injunction application, the Court was faced with another injunction application and determined that the government was "enjoined from enforcing the Blueprint's Tier 1 prohibition on indoor worship services against the applicants pending disposition of the petition for a writ of certiorari."[219] In granting the application,

> Justice Alito would have the stay lift in 30 days unless California could show that nothing short of those measures will reduce the community spread of COVID–19 at indoor religious gatherings to the same extent as do the restrictions the State enforces with respect to other activities it classifies as essential.[220]

In his concurrence, Chief Justice Roberts explained that even though deference should be given to those with the requisite knowledge,[221] allowing zero tolerance attendance policy in places of worship was an "insufficient appreciation or consideration of the interests at stake" and not based on the requisite knowledge.[222] The Chief Justice asserted that "[d]eference, though broad, has its limits."[223]

In a separate opinion, Justice Gorsuch noted that California's Tier 1 plan specifically prohibits indoor worship, and that California is the only such state to impose that stringent of a restriction.[224] The state argued that the difference in treatment is acceptable because "religious exercises involve (1) large numbers of people mixing from different households; (2) in close physical proximity; (3) for extended periods; (4) with singing."[225] Justice Gorsuch argued that the state did not

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[217] *Id.* at 1614-15 (Kavanaugh, J., dissenting) (quoting Roberts v. Neace, 958 F.3d 409, 414 (2020) (per curiam) (internal quotes omitted)).
[218] *Id.* at 1615 (Kavanaugh, J., dissenting).
[219] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) [hereinafter *South Bay II*].
[220] *Id.*
[221] *Id.*
[222] *Id.* at 716-17.
[223] *Id.* at 717.
[224] *Id.*
[225] *Id.*

consider that the four factors would be applicable in non-religious activities.[226]

Justice Gorsuch exclaimed that the methods the state took were not the least restrictive means because stores and businesses were still allowed even though there was the potential for large groups of people.[227] He argued, while religious activities do not have to be done in large groups, the state assumed "that worship inherently involves a large number of people[.]"[228]

Furthermore, when discussing "physical proximity," Justice Gorsuch explained the state "does not force [hairstylist or manicurist] or retailers to do all their business in parking lots and parks" and the state was "suggesting that worshippers might enjoy more space outdoors[.]"[229] Justice Gorsuch elaborated that the state "singles out religion for worse treatment than many secular activities. At the same time, the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests."[230] Additionally, Justice Gorsuch noted how Hollywood was exempt from the "singing ban" arguing that there is a "considerable effort to protect lucrative industries," similar to Vegas casinos; yet there was no rationale to indicate that this was the appropriate regulation.[231]

In her dissent, Justice Kagan asserted that the Court was going against its defined roles and ignoring those who provide guidance.[232] Citing Chief Justice Roberts's concurrence in the previous injunctive relief proceedings, Justice Kagan stated that religious and non-religious categories are under the same general category and subject to capacity requirements based on COVID rates.[233] Moreover, Justice Kagan stated that judges are, by no means, well-versed in COVID expertise, and thus should not doubt the experts with their own opinions.[234] Justice Kagan questioned to what extent the majority's ruling has an effect on future indoor bans.[235]

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[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.* Secular activities mentioned by Justice Gorsuch include "lingering in shopping malls, salons, or bus terminals." *Id.* at 719.
[231] *Id.*
[232] *Id.* at 720 (Kagan, J., dissenting).
[233] *Id.* at 721.
[234] *Id.* at 723.
[235] *Id.*

South Bay initially allowed for deferential treatment to the state with police power.[236] Although *Jacobson* was not readily cited in the concurring opinion, the mere usage of *Jacobson* could have insinuated an expansion of deference.[237] Chief Justice Roberts's usage of *Jacobson* appeared to be more of a common-sense argument, stating that deference should be to elected officials and not to those without the requisite knowledge.[238] However, the Court, and specifically Chief Justice Roberts, did a complete 180-degree turn once the religious arguments were made.[239] It appeared that once a Free Exercise claim is made, the deference is halted.[240] In *South Bay*, the Court was more willing to set aside deference to examine the types of regulations in place and how they relate to non-religious activities.[241] *Jacobson*'s principle of deference seemed to be limited, in California, by any infringement of the Free Exercise Clause of the First Amendment.[242]

4. New York

In *Bocelli Ristorante Inc. v. Cuomo*,[243] the plaintiffs filed for injunctive relief against Governor Andrew Cuomo's Executive Orders which required all restaurants in New York City to be at a maximum capacity of twenty-five percent, "while restaurants in the remainder of the State were permitted to open for indoor dining at 50% indoor capacity since June 2020."[244] The plaintiffs argued that this Order violated the Fifth and Fourteenth Amendments of the United States Constitution, as well as Sections 7 and 11 of Article 1 of the New York Constitution.[245]

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[236] *South Bay II*, 141 S. Ct. 716.
[237] *Id.*
[238] *South Bay I*, 140 S. Ct. at 1613.
[239] *South Bay II*, 141 S. Ct. at 716-17.
[240] *Id.* at 717-18.
[241] *Id.* at 716, 718.
[242] *Id.* at 716-17.
[243] 139 N.Y.S.3d 481 (2020).
[244] *Id.* at 483.
[245] *Id*. Section 7 refers to New York's Takings Clause. N.Y. CONST. art. I, § 7. Section 11 references New York's Equal Protection Clause. N.Y. CONST. art. I, § 11. Plaintiffs also alleged a violation of New York State Executive Law § 29-a. *Bocelli Ristorante Inc.*, 139 N.Y.S.3d at 483.

The court relied on *Jacobson* to show the state's proper use of police power in order to protect the general public.[246] However, again relying on *Jacobson*, the court stated that the measures taken cannot go against the Constitution, but the rights of the people are not "wholly free from restraint."[247] The court emphasized that "*Jacobson* remains the law to this day more than 115 years after it was decided."[248] Interestingly, the court cited to Chief Justice Roberts's lack of deference to the judiciary's deficiency in expertise argument from *South Bay*.[249] The court, relying on *Jacobson* and another case, rationalized the twenty-five percent capacity at restaurants with the transmissibility of the virus, and stated the court should not dwell on the Governor's decision or dissect the order.[250] Nonetheless, and again relying on *Jacobson*, the court agreed that "the State was within its right to pass quarantine laws for the protection of the public's life and health within its limits to prevent suffering from a contagious disease."[251] Curiously, the court held that the Governor's order was not "a plain and palpable invasion of rights."[252] Furthermore, the court declared that the restaurants did not have "a constitutionally recognized general right to do business without conditions," nor was there an infringement of a substantive due process right.[253]

In the United States Supreme Court decision of *Roman Catholic Diocese of Brooklyn v. Cuomo*,[254] the church and Agudath Israel of America sought to prevent the enforcement of the Governor's Executive Order, which restricted the attendance capacity of religious services to either ten or twenty-five people, depending on the classification.[255] The two religious entities argued that the Order was a violation of the Free Exercise Clause in the First Amendment.[256] Agudath Israel accused the Governor of "gerrymander[ing] the boundaries" so that the

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[246] *Id.* at 487-88 ("Accordingly, the State was within its right to pass quarantine laws for the protection of the public's life and health within its limits to prevent suffering from a contagious disease.").
[247] *Id.* at 487.
[248] *Id.*
[249] *Id.* at 488.
[250] *Id.*
[251] *Id.*
[252] *Id*.
[253] *Id.*
[254] 141 S. Ct. 63 (2020).
[255] *Id.* at 65-66.
[256] *Id.* at 66.

strictest regulations encompassed the "Orthodox Jewish community[.]"[257] The church and the synagogue argued that they are treated "much more harshly than comparable secular facilities" and have complied with all the guidelines.[258]

The Supreme Court noted that, in the ten maximum capacity areas, essential businesses "may admit as many people as they wish," while places of worship are capped at ten people.[259] Because of the different treatment the places of worship were receiving, "the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."[260] Furthermore, in the twenty-five maximum capacity areas, non-essential businesses could make a discretionary call on the number of people they may admit, while places of worship are restricted.[261] The Court stated that the Executive Order was not narrowly tailored, citing the churches' and synagogues' excellent track record for combating spread of the virus.[262] The Court found it incredulous that allowing more than ten people in a church or synagogue would "create a more serious health risk than the many other activities that the State allows."[263] Thus, "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services."[264] If the restrictions were allowed, those who wanted to participate in the religion's activities would not be allowed to; as such, there was clearly "irreparable harm" suffered.[265]

Moreover, while the Court conceded it is not an expert, it stated that "even in a pandemic, the Constitution cannot be put away and forgotten" and that the restrictions "strike at the very heart of the First Amendment's guarantee of religious liberty."[266] The Court concluded that, because less restrictive means could be implemented, there would be no harm to the public.[267]

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[257] *Id.* at 65-66.
[258] *Id.* at 66.
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.* at 67.
[263] *Id.*
[264] *Id.*
[265] *Id.* at 67-68.
[266] *Id.* at 68.
[267] *Id.*

In his concurrence, Justice Gorsuch first argued that the *South Bay* decision was incorrectly decided, and then that *South Bay* should not be relied on due to different circumstances,[268] specifically pointing out Chief Justice Roberts's reliance on *Jacobson*.[269] He stated that, although *Roman Catholic Diocese of Brooklyn* is different from *Jacobson*, the decision in *Jacobson* "hardly supports cutting the Constitution loose during a pandemic."[270] Justice Gorsuch maintained that the *Jacobson* Court's use of what is now known as the rational basis standard was appropriate for a Fourteenth Amendment claim, and that the *Jacobson* Court did not "seek to depart from normal legal rules during a pandemic," analogizing to what this Court was doing.[271] Justice Gorsuch later argued that, because Jacobson stated he had a "right to 'bodily integrity'" under the Fourteenth Amendment, restrictions could be placed on unenumerated rights;[272] however, those same restrictions should not be applied to enumerated rights.[273] Justice Gorsuch also noted that, in *Jacobson*, there were three options to the smallpox vaccine mandate (get vaccinated, pay a fine, or provide an exemption rationale) which is why the mandate survived rational basis.[274] However, due to the binary nature of the Governor's Order, the Governor chose to ban worship for as long as he saw fit.[275] This measure was contrary to the one in *Jacobson*, which was allowed because it did not violate any right in the Constitution.[276] Finally, Justice Gorsuch stated that the heavy reliance on *Jacobson* is due to a "judicial impulse to stay out of the way in times of crisis."[277]

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[268] *Id.* at 70 (Gorsuch, J., concurring).
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.* (Justice Gorsuch explains that "[r]ational basis review is the test this Court normally applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right . . . Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest".).
[273] *Id.* at 70-71.
[274] *Id.* at 71.
[275] *Id.*
[276] *Id.*
[277] *Id.* In his dissenting opinion, Chief Justice Roberts questioned why Justice Gorsuch had an issue with reference to *Jacobson* in *South Bay*. *Id.* at 75-76 (Roberts, J., dissenting).

In the following New York cases, the courts clarified the extent of *Jacobson*'s reach.[278] In *Bocelli Ristorante Inc.*,[279] the court's use of *Jacobson* and its deference to police power insinuated that the plaintiff's various claims under the United States Constitution and New York Constitution were unlikely to prevail.[280] The court explicitly declared that *Jacobson* was still viable law, even after over 100 years.[281] It appeared that, in New York, the court was more willing to provide deference to *Jacobson* and police power with respect to challenges of substantive due process, if alleged.[282] Additionally, the *Bocelli Ristorante Inc.* court hinted that, in order to bring challenges, there needs to be a recognizable right that is being infringed.[283]

On the other hand, *Roman Catholic Diocese of Brooklyn* limited a state's police power when the right of free exercise was infringed.[284] Accordingly, the Court was more likely to side with the Free Exercise Clause rather than give deference to the state's policy, even in a pandemic.[285] Justice Gorsuch laid out the distinguishing factors between *Jacobson*'s Fourteenth Amendment claim and a free exercise claim.[286] Namely, Free Exercise would warrant a higher level of scrutiny, *Jacobson* had multiple alternatives if one chose not to get the vaccine, and free exercise is a recognized and enumerated right.[287] However, it should be noted here that *Roman Catholic Diocese of Brooklyn* was decided by the United States Supreme Court rather than the New York's Court of Appeals.[288] The United States Supreme Court drew a line in the pandemic sands with the threshold being free exercise.[289] Moreover, Justice Gorsuch indicated that deference under

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[278] *See generally* Bocelli Ristorante Inc. v. Cuomo, 139 N.Y.S.3d 481 (2020); *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 63.
[279] *Bocelli Ristorante Inc.*, 139 N.Y.S.3d 481.
[280] *Id*. at 487, 488.
[281] *Id.* at 487.
[282] *Id.* at 488.
[283] *Id.* However, it should be noted that this case did not have issues relating to free exercise of religion.
[284] *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66, 68.
[285] *Id.* at 68, 70-71 (Gorsuch, J., concurring)
[286] *Id.*at 70, 71 (Gorsuch, J., concurring).
[287] *Id.* at 70-71.
[288] *Id.* at 63.
[289] *Id.* at 68.

Jacobson would halt once the claim is of an enumerated right under the United States Constitution.[290]

D. Federal Government Attempts

However, state governments are not the only governing bodies that have implemented, or at least attempted to implement, mask and vaccine mandates. On January 20, 2021, President Biden issued Executive Order 13991,[291] mandating that "on-duty or on-site Federal employees, on-site Federal contractors, and other individuals in Federal buildings and on Federal lands should all wear masks[.]"[292] Furthermore, Section 2(d) stated that exceptions are allowed so long as they are "necessary or required by law, and consistent with applicable law."[293] However, if an exception were to be made, alternative measures are needed to maintain safety, "such as additional physical distancing measures, additional testing, or reconfiguration of workspace, consistent with applicable law. Heads of agencies shall document all exceptions in writing."[294]

In addition to Executive Order 13991,[295] on September 9, 2021, President Biden issued a subsequent Executive Order 14043,[296] which mandated "vaccination[s] for all of its Federal employees, with exceptions only as required by law."[297] The Order specifically stated that

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[290] *Id.* at 71 (Gorsuch, J., concurring) ("Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson* explained that the challenged law survived only because it did not 'contravene the Constitution of the United States' or 'infringe any right granted or secured by that instrument.'") (quoting Jacobson v. Massachusetts, 197 U.S. 11, 25).

[291] 86 Fed. Reg. 7,045, 7,045 (Jan. 20, 2021).

[292] *Id*. Within the order, government agency heads are to set guidelines, consistent with the Centers for Disease Control and Prevention's guideline. *Id.* Specifically, the order mandates compliance with masking, distancing, and "other public health measures." *Id.* Moreover, the order calls for the Secretary of Health and Human Services to create a plan for testing, which includes "address[ing] the populations to be tested, testing types, frequency of testing, positive case protocols, and coordination with local public health authorities for contact tracing." *Id.* at 7,047.

[293] *Id.* at 7,045.

[294] *Id.*

[295] 86 Fed. Reg. 7,045, 7,045 (Jan. 20, 2021).

[296] 86 Fed. Reg. 50,989 (Sept. 9, 2021).

[297] Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 9, 2021).

every agency must "require COVID-19 vaccination for all of its Federal employees[.]"[298]

Finally, on November 5, 2021, the Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard ("ETS") which applied to employers that had 100 or more employees.[299] Section (d)(1) states that the employer needs to "develop, implement, and enforce a mandatory COVID-19 vaccination policy[.]"[300] The ETS also required employers to verify the vaccination status of all employees, and an employee that was not vaccinated must get tested once every seven days.[301] OSHA specifically cited the previous Executive Orders by stating that if a company was compliant under those orders, it is compliant under ETS.[302] On the same day, the Department of Health and Human Services' Centers for Medicare & Medicaid Services (CMS) issued their own rule, specific to Medicare and Medicaid providers.[303] Put simply, "in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff—unless exempt for medical or religious reasons—are vaccinated against COVID–19."[304]

Similar to what has been seen with the states, these Orders and agency actions have been met with strong pushback. These cases

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[298] *Id.* On September 9, 2021, President Biden also issued Executive Order 14,042 (under the authority of the Federal Property and Administrative Services Act), which required that federal contractor contracts must have a clause that states:

> [T]hat the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), . . . if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting.

Exec. Order No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021). Interestingly, this Order, unlike the previously mentioned Orders, focuses on more economic benefits as well as worker health and safety.

[299] 29 C.F.R. § 1910.501 (2022).

[300] *Id.* Interestingly, the ETS explicitly stated that those who are in a healthcare setting (subject to 29 C.F.R. § 1910.502) or work remotely are not subject to the requirements. 29 C.F.R. § 1910.501(b) (2022).

[301] *Id.* at §§ 1910.501(d)(1), 1910.501(g).

[302] 86 Fed. Reg. 61,402 (Nov. 5, 2021).

[303] 86 Fed. Reg. 61,555 (Nov. 5, 2021).

[304] Biden v. Missouri, 142 S. Ct. 647, 650 (2022).

highlight the limitations on executive agencies that the federal government may impose.[305]

In *National Federation of Independent Business. v. Department of Labor, Occupational Safety & Health Administration*,[306] the United States Supreme Court heard a challenge to OSHA's rule.[307] Before the case was heard by the Supreme Court, "the Fifth Circuit stayed OSHA's rule pending further judicial review" and the Sixth Circuit ended the stay.[308] The Supreme Court eventually held that the stay was warranted.[309] Because the rule that OSHA implemented affected so many lives, the Court determined that the rule was "a significant encroachment."[310] The Court noted that OSHA's authority to handle issues relating to workplace hazards does not extend to matters of "public health . . . which falls outside of OSHA's sphere of expertise."[311] When distinguishing these two concepts, the Court noted that COVID-19's spread was not limited to the workplace, but can happen anywhere, in which OSHA does not have the authority to do so.[312] Furthermore, the Court stated that OSHA has the authority to regulate COVID-19 in the sense that they can "regulate researchers who work with the COVID-19 virus."[313] However, the current mandate was too broad and not in line with what is prescribed in OSHA's authorizing act.[314]

Starting his concurrence, Justice Gorsuch (joined by Justices Thomas and Alito) acknowledged that states have some "general power of governing" its people, but that right is not afforded to the federal government.[315] He stated that the government must cite an "enumerated source of authority to regulate in this area" and must "act consistently with the Constitution's separation of powers."[316] Justice

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[305] *See, e.g.,* Nat'l Fed'n Indep. Bus. v. Dep't Labor, Occupational Safety & Health Admin., 142 S. Ct. 661 (2022); *Missouri*, 142 S. Ct. 647; Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022).
[306] 142 S. Ct. 661 (2022).
[307] *Id.* at 664.
[308] *Id.*
[309] *Id.*
[310] *Id.* at 665.
[311] *Id.*
[312] *Id.*
[313] *Id.* at 665-66.
[314] *Id.* at 666.
[315] *Id.* at 667 (Gorsuch, J., concurring) (quoting Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (opinion of Roberts, C. J.)).
[316] *Id*. at 667 (Gorsuch, J., concurring).

Gorsuch stated that if an agency was delegated the ability to make "decisions of vast economic and political significance," Congress would have said so.[317] Specifically, Justice Gorsuch noted that, during the Pandemic, "Congress has adopted several major pieces of legislation aimed at combating COVID-19," but in none of those, did OSHA's authority expand "to issue a vaccine mandate" and the Senate "voted to *disapprove* OSHA's regulation."[318] Although OSHA cited a provision in its Act giving it the authority,[319] Justice Gorsuch stated that the agency would need more than one provision, and this was coupled with the fact that previous usage of the provision was to combat issues that are "uniquely prevalent inside the workplace, like asbestos and rare chemicals."[320] OSHA even admitted in a prior case that OSHA's reach does not extend past the workplace, but Justice Gorsuch noted that OSHA is trying to do that with this rule.[321]

Most notably in his concurrence, Justice Gorsuch stated, "[h]istorically, such matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers. Meanwhile, at the federal level, OSHA arguably is not even the agency most associated with public health regulation."[322] Justice Gorsuch cited both the major question and nondelegation doctrine and stated:

> OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.[323]

The dissent, on the other hand, stated that ETS fell "within the core of the agency's mission: to 'protect employees' from 'grave danger' that

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[317] *Id.* (quoting Ala. Ass'n Realtors v. Dep't Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (internal quotation marks omitted)).
[318] *Id.* at 667-68 (Gorsuch, J., concurring).
[319] *Id*. at 668 ("According to the agency, this provision supplies it with 'almost unlimited discretion' to mandate new nationwide rules in response to the pandemic so long as those rules are 'reasonably related' to workplace safety.") (quoting 86 Fed. Reg. 61402, 61405 (2021) (internal quotation marks omitted)).
[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] *Id.* at 669 (emphasis in original).

comes from 'new hazards.'"[324] They noted that the ETS allows for vaccination or testing, has exceptions based on work environment and religious or medical exceptions, and that the program only lasts for six months.[325]

Justice Breyer focused on the language of 29 U.S.C. § 655(c)(1) and stated that each of the key phrases in the provision is met with the Pandemic.[326] Specifically, the Justice focused on whether the ETS "is 'necessary' to address the dangers of COVID-19," and affirmed that the policy, backed up by science, listed in the ETS were "highly effective—indeed, essential—tools for reducing the risk of transmission, hospitalization, and death," and that "OSHA showed no lesser policy[.]"[327] The dissent noted that in the past, OSHA has regulated risks that were well past the workplace and combating a virus "is no different" from addressing the issues with noise or water, which OSHA had done before.[328] Interestingly, the dissent pointed out that in the past, OSHA's rules had affected "all or nearly all workplaces in the Nation, affecting at once many tens of millions of employees," by enacting rules related to vaccinations and masking.[329] Furthermore, the dissent affirmed that OSHA had the authority by saying the ETS "protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA's authority. It is part of what the agency was built for."[330]

What Justice Gorsuch alluded to here is that the same police power that was offered to the states was not offered to the federal agencies unless it is delegated.[331] This was due to the fact that Congress prescribed the authority of the agency and kept it within reasonable limits of the four corners.[332] This was unlike what was seen with state governments that do not respond to Congress in the same way a federal agency must.[333] Justice Gorsuch also observed that the statute cited by

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[324] *Id.* at 670 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (quoting 29 U.S.C. § 655(c)(1)).
[325] *Id.* at 671.
[326] *Id.* at 672.
[327] *Id.*
[328] *Id*. at 673.
[329] *Id.* at 674.
[330] *Id.* at 675.
[331] *Id.* at 667.
[332] *Id.* at 665-67 (Gorsuch, J., concurring).
[333] *Id.* at 667; *see also* Norton & Welsh, *supra* note 44, at 426.

OSHA does not confer this amount of power.[334] The dissent strictly rejected this notion, stating that if requirements of the provision were met, then OSHA had the authority to act.[335] While it is interesting that the dissent did not talk about the police power as the concurrence did,[336] the fact that the dissent discussed prior actions by OSHA[337] shows that its actions should not be questioned if the agency previously acted in this manner. However, an important question to ask is: what if Congress had specifically proscribed OSHA from having such power in its authorizing act? This hypothetical essentially hinges on the idea that OSHA could have control over all citizens. As the majority stated, that would be a vast expansion of OSHA's jurisdiction in workplaces.[338] OSHA was squared away to focus on the workplace.[339] Giving it the authority to operate on the lives of everyone (by way of stating that everyone is somehow connected to workplaces) was a gross exercise of power. At that point, OSHA would be akin to the federal government itself. A federal agency is no place for a general mandate.

However, the Court held that if a healthcare facility were to receive Medicare and Medicaid, it could be contingent on complying with a vaccination mandate.[340] The Secretary of Health and Human Services set out the requirements certain facilities, such as "hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities, and more" need to fulfill in order to receive Medicare and Medicaid.[341] The Secretary subsequently declared an additional hurdle to receive Medicare and Medicaid, requiring "facilities ensure that their covered staff are vaccinated against COVID–19."[342] This new condition did provide religious and remote work exemptions; however, "failure to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the programs."[343] The Secretary rationalized this decision by stating that

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[334] *Nat'l Fed'n Indep. Bus.*, 142 S. Ct. at 668.
[335] *Id.* at 670, 672 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).
[336] *Id. Compare id.* at 667 (Gorsuch, J., concurring), *with id.* at 672 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).
[337] *Id.* at 673 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).
[338] *Id.* at 665.
[339] *Id.* at 665-66.
[340] Biden v. Missouri, 142 S. Ct. 647, 653 (2022).
[341] *Id.* at 650.
[342] *Id.* at 651 (citing 86 Fed. Reg. 61561) (issued Nov. 5, 2021)).
[343] *Id.*

unvaccinated workers "pose a serious threat to the health and safety of patient" and "the COVID-19 virus can spread [quickly] among healthcare workers and from them to patients, and . . . spread is more likely when healthcare workers are unvaccinated."[344] The Secretary also cited reasons such as Medicare and Medicaid recipient vulnerabilities, skipping medical attention due to potential spread, and staff shortage.[345] Missouri and Louisiana "filed separate action[s] challenging the rule" in the Eighth and Fifth Circuits, respectively. Both Circuits "denied the Government's motion" to stay the injunction.[346]

The Supreme Court stated that the Secretary had the power to "impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services'" and that power was conferred by Congress.[347] The Court noted that imposing conditions is not a novel feature to receive funding and the Secretary has the ability to impose them on personnel.[348] Furthermore, vaccination has been a requirement in the healthcare setting.[349] Ultimately, the Court held that "the Secretary did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19."[350]

Justice Thomas's dissent argued that Congress did not give the authority for the CMS to issue vaccine mandates, because Congress would have explicitly stated so.[351] Additionally, Justice Thomas stated that "if I were to accept that Congress could have hidden vaccine-mandate power in statutory definitions, the language in these 'health and safety' provisions does not suggest that Congress did so," arguing for a more contextual analysis.[352] Furthermore, Justice Thomas asserted that Congress should use "exceedingly clear language if it wishes to significantly alter the balance between state and federal power."[353] He

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[344] *Id.*
[345] *Id.*
[346] *Id.* at 651-52.
[347] *Id.* at 652 (quoting 42 U.S.C.S. § 1395x(e)(9)).
[348] *Id.* at 652-53.
[349] *Id.* at 653.
[350] *Id.*
[351] *Id.* at 656-57 (Thomas, J., dissenting).
[352] *Id.* at 657.
[353] *Id.* at 658 (quoting Ala. Ass'n Realtors v. Dep't Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (internal quotation marks omitted)).

concluded by noting that "vaccine mandates also fall squarely within a State's police power" and Congress needed to give the CMS authority to issue such a mandate.[354] Justice Alito echoed similar apprehensions by raising the concern that Congress makes laws for citizens, but that duty has been shipped to "unelected administrators."[355]

Missouri stands for the idea that if the government can tie the public health mandate to an aspect of an industry that is related to the mandate, the mandate is given more weight.[356] However, as the dissents point out, there needs to be some form of statutory authority behind it.[357] Understandably, this may lead to coercive practices by the government.[358] The Thomas dissent would stand for the proposition to leave the mandates for the States, as this is an issue of federalism and police power.[359] Justice Alito made a very similar argument in his dissent.[360] However, the issue here was whether the Secretary, not the President, had the authority to implement such a rule.[361]

Finally, *Kentucky v. Biden*[362] addressed, as a larger analysis of the propriety of a stay, whether the Federal Property and Administrative Services Act[363] gave President Biden the power to issue Executive Order 14,902.[364] The Sixth Circuit analyzed specifically §§ 101 and 121(a), which the government asserted grants the President the power to issue such a mandate.[365] If there was ambiguity, the court stated that

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[354] *Id.*

[355] *Id.* at 659 (Alito, J., dissenting). Justice Alito attacked the process CMS took, which skipped the notice and comment periods. *Id.* He concluded with: "The Executive Branch already touches nearly every aspect of Americans' lives. In concluding that CMS had good cause to avoid notice-and-comment rulemaking, the Court shifts the presumption against compliance with procedural strictures from the unelected agency to the people they regulate." *Id.* at 660.

[356] Biden v. Missouri, 142 S. Ct. 647, 653 (2022).

[357] *Id.* at 656-57, 658 (Thomas, J., dissenting).

[358] *See* South Dakota v. Dole, 483 U.S. 203 (1987).

[359] *Missouri*, 142 S. Ct. at 658 (Thomas, J., dissenting).

[360] *Id.* at 659 (Alito, J., dissenting).

[361] *Id.* at 650-51, 652.

[362] 23 F.4th 585 (6th Cir. 2022).

[363] 40 U.S.C. § 101.

[364] *Kentucky*, 23 F.4th at 589, 593, 590, 603 (noting that the Safer Federal Workforce Task Force issued a guidance, which required federal contractors to get the COVID-19 vaccine and wear masks).

[365] *Id.* at 603. The court noted that the government's reliance on the Act's statements of purpose is misplaced because they "are not themselves those operative provisions, so they cannot confer freestanding powers upon the President unbacked by operative language elsewhere in the statute." *Id.* at 604. Furthermore, the text in § 101 only

the "'federalism canon'—the notion that Congress must use 'exceedingly clear language if it wishes to significantly alter the balance between federal and state power'" would weaken the government's case.[366] However, the court, citing *Jacobson* among many other cases, stated this police power belongs to the states and the federal government was trying to take that away.[367] The court concluded that states "may validly complain when the federal government seeks to usurp those roles by doing something that it has no traditional prerogative to do[.]"[368]

What these three cases highlight was the strict limitations on the federal government's police power in a time of a pandemic.[369] But, at the same time, there was a slight expansion of the federal powers.[370] For instance, if the mandate was connected to some form of relevant financial incentive, it appears that mandate would be upheld. Specifically, they emphasized the effect Presidential Orders may have and the agencies' responses to those orders.[371] It appeared that the federal government was severely limited in the scope of its police power.[372] However, the federal government's police power was not completely stymied by federalism.[373] If the federal government were to provide some incentive with its vaccine mandates (such as Medicare and Medicaid funding), and tie it to a provision in the governing statutes, the mandate would be more successful, although not guaranteed. These cases showed that the federal government, unlike the states, would need to connect, its orders and rules to specific statutory language. It can also be said that state governments, rather than the federal government,

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allowed the President to "implement an 'economical and efficient' method of contracting—a 'system,' in other words—to obtain nonpersonal services;" and this power does not extend to implementing a method "to make them more 'economical and efficient.'" *Id.* The court stated that § 121(a) does not carry much weight considering the President did not have the power he thought he had. *Id.* at 606.

[366] *Id.* at 608-09 (quoting Ala. Ass'n Realtors v. Dep't Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

[367] *Id.* at 609.

[368] *Id.* at 610.

[369] Nat'l Fed'n Indep. Bus. v. Dep't Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 666 (2022); Biden v. Missouri, 142 S. Ct. 647, 653 (2022); *Kentucky*, 23 F.4th at 608-09, 610.

[370] *Missouri*, 142 S. Ct. at 653 (tying Medicare and Medicaid funding with a vaccine mandate).

[371] *Nat'l Fed'n Indep. Bus.*, 142 S. Ct. at 666; *Kentucky,* 23 F.4th at 610.

[372] *Id.*

[373] *Missouri,* 142 S. Ct. at 652, 653.

know what is best for their citizens. So, if the Executive Branch cannot issue a mandate that would affect a large swath of the population, the next logical step is to ask: can the Legislative Branch enact a law that would fulfill the goals of the Executive Branch? Since the Pandemic has been greatly intertwined with interstate commerce, could the Legislative Branch use the Commerce Clause as a vehicle? As we have seen in the past, that argument would likely be rejected.[374]

The Patient Protection and Affordable Care Act was enacted in 2010.[375] The Act imposed a penalty on those who did not purchase healthcare.[376] The Eleventh Circuit stated that the Act was not supported by the Tax or Commerce Clauses.[377] In rejecting the Commerce Clause argument as governmental control over the nonparticipating consumer, the Supreme Court famously stated:

> The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of

[374] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).
[375] *Id*. at 538.
[376] *Id*. at 539 (noting that the Act called it a "[s]hared responsibility payment").
[377] *Id.* at 540. The Court noted that "The Sixth Circuit and the D.C. Circuit upheld the mandate as a valid exercise of Congress's commerce power" and "[a] majority of the Fourth Circuit panel reasoned that the individual mandate's penalty is a tax within the meaning of the Anti–Injunction Act, because it is a financial assessment collected by the IRS through the normal means of taxation." *Id.* at 541. Under the Medicare provision, the Eleventh Circuit allowed the provision via the Spending Clause, while stating that it was not "coercing them [the States] into complying with Medicaid expansion." *Id.* at 542.

> federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.[378]

Furthermore, the Court concluded that, through police power, states have the discretion to "regulate individuals as such, as opposed to their activities" and not the federal government.[379]

Additionally, the Court held that the penalty was actually a tax because the payment would be less than the actual insurance cost and the federal government is not setting up a special method of collecting these taxes.[380] The Court stated that because the penalty would be issued as a part of the income tax, "this process yields the essential feature of any tax: It produces at least some revenue for the Government."[381] The Court concluded that this was within the federal government's taxing power.[382]

With respect to a vaccine mandate, the issue turns on whether the federal government, specifically Congress, can rely on the Commerce Clause and the Taxing Power. The strongest argument that Congress could make is that non-participation in a vaccine mandate would affect interstate commerce, similar to *Sebelius*.[383] However, a key

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[378] *Id.* at 552.

[379] *Id.* at 557. The Court also rejected the use of the Necessary and Proper Clause for a lack of previous enumerated power, stating "the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power." *Id.* at 560, 535-36 ("The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments . . . . But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government . . . even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'").

[380] *Id.* at 566.

[381] *Id.* at 563-64.

[382] *Id.* at 574.

[383] *See id.* at 652 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting); *see also id.* at 547-58 (opinion of Roberts, C.J.) (providing arguments regarding the Commerce Clause); *id.* at 563 ("This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'") (quoting U.S. CONST. art. I, § 8, cl. 3).

distinguishing point is the cost that the "consumer" would have to incur. With healthcare, the consumer would have to pay for an actual plan, which presumably would have a monthly premium associated with the plan. However, with the COVID-19 vaccine, the consumer incurs no such cost.[384] Although according to Minnesota Department of Health, there may be an administration fee that facilities pass to insurance companies.[385] Additionally, "[e]ach two-dose Pfizer/BioNTech regimen currently costs the government approximately $39. Moderna's vaccine is priced at about $32 per two-shot regimen, and Johnson & Johnson's one-shot dose costs $10."[386] However, if Congress were to rely on these arguments, they are highly distinguishable from *Sebelius* because the consumer is not absorbing any of the costs.[387] It is not the consumers' fault that the government purchases a large quantity of vaccines only to have its citizens not participate in their administration. Perhaps there is an argument that if people do not get the vaccine, there would be potential decrease in goods consumption because no one is going to shops or spending money, thus affecting interstate commerce.[388] However, such theoretical arguments are akin to what was argued in *Lopez*.[389] These are arguments based on what-ifs and not substantially backed up by data.[390] Furthermore, the potential arguments for a vaccine mandate because people are too

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[384] *Getting Your Covid-19 Vaccine*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/no-cost.html (last updated Jan. 26, 2023).

[385] *About COVID-19 Vaccine*, MINNESOTA DEP'T OF HEALTH, https://www.health.state.mn.us/diseases/coronavirus/vaccine/basics.html#cost (last visited Oct. 30, 2023).

[386] Joshua Cohen, *Profiting from Success: The Future of Covid-19 Vaccine Pricing*, (Apr. 2, 2021, 10:31 AM) https://www.forbes.com/sites/joshuacohen/2021/04/02/profiting-from-success-the-future-of-covid-19-vaccine-pricing/?sh=50b3dc521bf5.

[387] See *Sebelius*, 567 U.S. at 547, where the Government argued "[t]o recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums."

[388] Karen Weise, *Amazon's profit soars 220 percent as pandemic drives shopping online*, N.Y. TIMES (updated May 12, 2021) https://www.nytimes.com/2021/04/29/technology/amazons-profits-triple.html (noting that during the Pandemic, Amazon reported profits had "an increase of 220 percent.").

[389] United States v. Lopez, 514 U.S. 549, 564 (1995).

[390] *See id.* at 564 ("[U]nder the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.").

reluctant to participate in commerce is too far beyond interstate commerce.[391] The reluctance of getting a vaccine is similar to what *Sebelius* referred to as becoming a part of an economic activity through compulsion.[392] As *Sebelius* stated, allowing for a vaccine mandate under the Commerce Clause would open the door for Congress to regulate other non-participating activities regardless of whether a consumer incurred a cost.[393] The issue with passing legislation under Congress's Taxing Power is that there would be nothing to base the tax on. In *Sebelius*, the tax imposed would be less than what the insurance would actually cost.[394] Following the taxing logic in *Sebelius* just laid out,[395] and the vaccine costing consumers nothing, there would be nothing to tax. Because there is no tax and therefore no revenue generated for the government, the Taxing Power would be an ineffective method. If, for some reason, the government would impose a tax, based on a free vaccination, it would be seen as a tyrannical abuse of power. When viewing the aggregate, if Congress were to enact some vaccine mandate, there is no vehicle or clause on which the government could rely to survive litigation.

III. WHAT IS THE FUTURE OF *JACOBSON*?

While the Pandemic continues to wreak havoc on the United States, the courts have laid out important guidelines for the 116-year-old case's powers.[396] As more cases relating to Pandemic restrictions

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[391] *See id.* at 561 ("Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.").

[392] *See Sebelius,* 567 U.S. at 552 (stating that "It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce").

[393] *See id.* at 553 (stating that "[t]he farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce").

[394] *See id.* at 566 (noting that the "shared responsibility payment" is "a tax, not a penalty," and "for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more").

[395] *Id.*

[396] *See* discussion *supra* Sections II.C & II.D (discussing court decisions on state and federal mandates).

are being litigated, it appears that there is not an unequivocal rule or formula for courts to follow. Nevertheless, this small sample of cases and state practices have provided a basic framework for *Jacobson*'s deference.

Foremost, although *Jacobson* is over a century old, cases in New Mexico and New York have explicitly stated that *Jacobson* remains good law.[397] In the majority of the four states examined, by relying on *Jacobson*, the courts have implicitly declared that it remains good law.[398] Although one Wisconsin court declined to follow *Jacobson* and affirmed that the state's constitution will govern over *Jacobson*,[399] there is no clear invalidation of the law, especially with a decision by a state court on a Supreme Court decision. Perhaps, as Justice Gorsuch stated,[400] courts do not want to interfere as the Pandemic continues and a more appropriate time to determine *Jacobson*'s validity would be not at the Pandemic's height. Conceivably another reason to continue to validate *Jacobson* would be the reluctance of governments to act due to fear of being sued.

With each state, it appeared as though courts have slowly made the guidelines and limits for courts to follow as it pertains to *Jacobson* and the Pandemic. In each of the states, a non-vaccine related mandate was examined, and for the most part upheld using *Jacobson*.[401] Both New Mexico[402] and New York[403] courts have held that a recognizable right needs to be violated in order to cross over the deference hurdles of *Jacobson.*[404] Furthermore, New Mexico has implied that the right violated must be recognized by a constitution.[405] This limitation is supported by Justice Gorsuch's concurrence in which he stated that *Jacobson*'s police power deference is checked if one of the enumerated

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[397] Grisham v. Romero, 483 P.3d 545, 561 (N.M. 2021); Bocelli Ristorante Inc. v. Cuomo, 139 N.Y.S.3d 481, 487 (2020).
[398] Pirtle v. Legis. Council Comm. N.M. Legislature, 492 P.3d 586, 598 (N.M. 2022); *Romero*, 483 P.3d at 557, 561, 562; *South Bay I*, 140 S. Ct. 1613, 1613; *Bocelli Ristorante Inc*., 139 N.Y.S.3d at 487, 488.
[399] James v. Heinrich, 960 N.W.2d 350, 367-68 (Wis. 2021).
[400] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020).
[401] *Compare Pirtle*, 492 P.3d at 598, 607; *Romero*, 483 P.3d at 559, 562; *Wilson*, 489 P.3d at 935; *South Bay I*, 140 S. Ct. at 1613; *Bocelli Ristorante Inc*., 139 N.Y.S.3d at 730 (upholding non-vaccine mandates using *Jacobson*) *with James*, 960 N.W.2d at 367, 368 (striking down a mandate and rejecting *Jacobson*).
[402] *See generally Pirtle,* 492 P.3d 586.
[403] *See generally Bocelli Ristorante Inc.*, 139 N.Y.S.3d 481.
[404] *See Pirtle*, 492 P.3d at 598, 607; *Bocelli Ristorante Inc*., 139 N.Y.S.3d at 488.
[405] *Pirtle*, 492 P.3d at 598; *Wilson*, 498 P.3d at 935, 938, 942.

rights of the United State Constitution is violated.[406] This guideline is not surprising, given that Justice Harlan in *Jacobson* stated deference will be given as long as the Constitution is not infringed.[407] New Mexico's *Pirtle* decision takes the recognizable right requirement step further by stating that an alleged infringement of a state constitutional right needs to be "colorable" or "a clear cognizable constitutional right," which is similar to what other courts have hinted at.[408]

For the next guideline, the courts examined gave deference to the state's police power—finding the exercise reasonable—when it was challenged by a substantive due process claim.[409] It appeared that the Supreme Court would apply a rational basis standard so long as the mandates are rationally related to the purpose or goal for what states may or may not do.[410] However, one clear distinction, such as religious freedom, that raises the traditional rational basis standard to a strict scrutiny standard.[411] The Wisconsin[412] and New York[413] courts have implicitly held that a state's actions are shielded because of *Jacobson* from substantive due process claims.[414] Similar results were seen in *Jacobson* itself, when the Court asserted that personal rights and liberties are not unyielding.[415] Interestingly, a New Mexico court decided that even a Takings Clause violation may not be sufficient to overcome *Jacobson*.[416] However, regulations implemented in Wisconsin,[417] California,[418] and New York[419] were limited by the Free Exercise Clause,

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[406] *Roman Catholic Diocese of Brooklyn,* 141 S. Ct. at 70-71 (Gorsuch, J., concurring).
[407] Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).
[408] *Pirtle*, 492 P.3d at 598, 600; *see also Bocelli Ristorante Inc*., 139 N.Y.S.3d at 732.
[409] *Wilson*, 489 P.3d at 934, 935, 942; *Bocelli Ristorante Inc*., 139 N.Y.S.3d at 731. *See also* James v. Heinrich, 960 N.W.2d 350, 367 (Wis. 2021) (noting that *Jacobson* is limited to substantive due process claims).
[410] *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67, 68, 70-71 (Gorsuch, J., concurring) (discussing why *Jacobson* survived rational basis); *see also Jacobson,* 197 U.S. at 31.
[411] *South Bay II*, 141 S. Ct. at 716, 717-18; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66, 68, 70-71 (Gorsuch, J., concurring).
[412] *See generally James*, 960 N.W.2d 350.
[413] *See generally Bocelli Ristorante Inc*. 139 N.Y.S.3d 481.
[414] *Bocelli Ristorante Inc*., 139 N.Y.S.3d at 488; *James*, 960 N.W.2d at 367.
[415] *Jacobson*, 197 U.S. at 26.
[416] State v. Wilson, 489 P.3d 925, 939, 941-42 (N.M. 2021).
[417] *See generally James*, 960 N.W.2d 350.
[418] *See generally South Bay II*, 141 S. Ct. 716.
[419] *See generally Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 63.

whether that was by the state or United States Constitution.[420] Wisconsin's decision to hold *Jacobson* to a higher standard because the state's Free Exercise Clause offered more protection could signal future litigation.[421] If a state construed its constitution to provide more protection than the United Stated Constitution,[422] it may be possible that *Jacobson*'s deference may be invalidated, due to heightened protection, especially with the Free Exercise Clause.[423] Due to the inherent restrictions and pressures the regulations placed on places of worship, *Jacobson*'s deference may not withstand a free exercise claim, thus, limiting *Jacobson*.[424] In Justice Gorsuch's concurrence in *Roman Catholic Diocese of Brooklyn*, he essentially laid out the distinguishing factors from a regulation that oversteps the Free Exercise Clause and a regulation that is found in *Jacobson*.[425] In terms of occupancy orders, the order may survive the scrutiny of free exercise infringement if the order does not apply additional hurdles on places of worship.[426] Additionally, applying the orders specifically in areas with places of worship would fail the free exercise analysis.[427]

These cases show a simultaneous expansion and limitation of *Jacobson*.[428] In modern court decisions, *Jacobson* deference has been

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[420] *James*, 960 N.W.2d at 367, 368; *South Bay II*, 141 S. Ct. at 716, 717, 718; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 68.
[421] *James*, 960 N.W.2d at 368.
[422] *See* Minnesota v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (Because section 16 [of the Minnesota constitution] "precludes even an infringement on or an interference with religious freedom" and limits the permissible countervailing interests of the government, Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the First Amendment of the federal Constitution).
[423] *James*, 960 N.W.2d at 368.
[424] *Id.* at 367, 368; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 68, 71 (Gorsuch, J. concurring).
[425] *Id.* at 67, 68, 70-71 (discussing why *Jacobson* survived Rational Basis).
[426] *South Bay I*, 140 S. Ct at 1613 (Roberts, C.J., concurring).
[427] *See generally South Bay II*, 141 S. Ct. 716; *Roman Catholic Diocese of Brooklyn,* 141 S. Ct. 63; *see also* Biden v. Missouri, 142 S. Ct. 647, 651-52 (2022) (noting that Secretary of Health and Human Services issued conditions for Medicare and Medicaid funding, namely a vaccine mandate, which had a religious exemption).
[428] *See, e.g., Pirtle*, 492 P.3d 586; *Romero*, 483 P.3d 545; *Wilson*, 489 P.3d 925; *South Bay I*, 140 S. Ct. 1613; *Bocelli Ristorante Inc.*, 139 N.Y.S.3d 481; *James,* 960 N.W.2d 350; *South Bay II*, 141 S. Ct. 716; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 63.

expanded past the vaccine mandate to non-vaccine mandates.[429] While on one hand, deference had been expanded to different aspects of a constitution (the Takings Clause and "rights" under the Substantive Due Process Clause), the courts clearly drew a line with respects to religious freedoms.[430]

However, important questions still remain with *Jacobson*. While the *Jacobson* Court stated that rights are not inflexible,[431] how far will one's rights have to bend before one's rights break? *Jacobson*'s central issue was a smallpox vaccine for Cambridge, Massachusetts; however, the cases examined here are non-vaccine mandates for states. Would a state vaccine mandate be deemed constitutional?[432] One thing is for certain; *Jacobson* has ballooned out past the smallpox vaccine for a city and now covers a large variety of regulations.[433] There needs to be some outer limits beyond which *Jacobson* cannot be applied. If not, it may be possible that *Jacobson* will be the proverbial Golden Ticket or the "one-size-fits-all" which states and courts will use in times of pandemic-like conditions to impose more regulations.[434] As the Pandemic rages on and governments continue to issue mandates, the courts will have to determine how far *Jacobson* will reach.

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[429] *See generally, e.g.,* Pirtle, 492 P.3d 586; *Romero*, 483 P.3d 545; *Wilson*, 489 P.3d 925; *South Bay I*, 140 S. Ct. 1613; *Bocelli Ristorante Inc.*, 139 N.Y.S.3d 481.

[430] *See, e.g., James,* 960 N.W.2d 350; *South Bay II*, 141 S. Ct. 716; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 63.

[431] *See Jacobson*, 197 U.S. at 26 ("[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.").

[432] *See* Doe v. Mills*,* 142 S. Ct. 17, 18 (2021) (Gorsuch, J., dissenting) (denying an application for injunctive relief for Maine's vaccine mandate "requiring certain healthcare workers to receive COVID–19 vaccines if they wish to keep their jobs.").

[433] *See generally* discussion *supra* Section II.C.

[434] Chemerinsky & Goodwin, *supra* note 65, at 835 ("[I]t is a mistake to use *Jacobson* in analyzing government restrictions that are imposed to deal with COVID-19, or for that matter, any crisis. An overarching test for all areas of constitutional law, and one that defers to the government, is a serious mistake. Courts should apply the traditional legal test or level of scrutiny used for the particular right in question.").