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HEALTH CARE LAW ADVISOR ALERT: DID THE UNITED STATES SUPREME COURT JUST SUGGEST A CHANGE TO THE ESTABLISHED PUBLIC HEALTH CONSTITUTIONAL FRAMEWORK?

American law long has recognized the authority of government officials to address public health emergencies. Almost 200 years ago, the U.S. Supreme Court ruled that, under the 10th Amendment to the U.S. Constitution, the power to address public health emergencies generally is held by the states rather than the federal government. *See Gibbons v. Ogden*, 22 U.S. 1, 205 (1824) (recognizing the "power of a State, to provide for the health of its citizens"). And more than a century ago, the U.S. Supreme Court decided the seminal case on the power of the states to respond to a public health crisis in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). There, the Court affirmed the constitutionality of a state statute authorizing local health boards to require that residents be vaccinated against smallpox or pay a five-dollar fine.

As the Court explained in *Jacobson*, the authority to respond to a public health crisis must be "lodged somewhere," and it is "not an unusual, nor an unreasonable or arbitrary, requirement," to vest that authority in officials "appointed, presumably, because of their fitness to determine such questions." *Id.* at 27. The Court intermittently emphasized the necessity of the state public health regulation, as well as the utilitarian aspect of rules protecting the many at the expense of the few, but ultimately seemed to rely on the basic police power of the state to regulate public health as the basis for its decision. *Id.* at 26, 28, 29, 31. Thus, while the *Jacobson* decision shows the high level of deference courts may give to the actions of states faced with a public health crisis, it does not set forth a clear framework for today's courts or governmental officials, in part because the decision arose before the development of modern due process jurisprudence.

In its recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S. Ct. 63 (2020), the U.S. Supreme Court may have begun to minimize the impact of *Jacobson today*. There, the Court enjoined an executive order by New York's governor establishing certain occupancy limits to combat the spread of COVID-19. The Court noted that although "[m]embers of this Court are not public health experts, and we should respect the judgment

of those with special expertise and responsibility in this area … even in a pandemic, the Constitution cannot be put away and forgotten." *Id.* at *3.

In a concurrence, Justice Neil Gorsuch distinguished *Jacobson from the case before the Court*, stating it "hardly supports cutting the Constitution loose during a pandemic." *Id.* at *5 (Gorsuch, J., concurring). He noted that people affected by the mandatory vaccination order at issue in *Jacobson* could avoid taking the smallpox vaccine by paying a small fine or identifying a basis for exemption and stated that *Jacobson*'s imposition on individual rights therefore was "avoidable and relatively modest" and "easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors." *Id.* at *6. He concluded by calling *Jacobson* a "modest decision." *Id.*

On the other hand, Chief Justice John Roberts quoted a line from *Jacobson* in his dissent, stating that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Id.* at *9 (Roberts, C.J., dissenting) (quoting *Jacobson*, 197 U.S. at 38). He concluded that "it is not clear which part of this … quotation today's concurrence finds so discomforting." *Id.*

Jacobson and the cases that followed it analyzing past public health emergencies continue to provide guidance today about how to administer public health measures to combat contagious diseases, including current COVID-19 programs. This established law has guided government officials, public health experts, physicians, the public, attorneys and the courts for over a century. But the SARS-CoV-2 virus that causes COVID-19 (and the vaccines and treatments for it) are new. The novel nature of COVID-19, as well as the significant advances in medicine and science since the *Jacobson* decision was issued over a century ago, may lead to new and differing public health jurisprudence governing public health measures to combat the spread of disease. While the recent discussion of the limits of public health authority found in the *Roman Catholic Diocese* does not change established public health precedent, the comments made in the decision suggest the Court may be open to some sort of change in the law in the future.

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