COVID–19 LITIGATION AND THE RATIONAL BASIS TEST

ILAN WURMAN†

In the vast majority of decided cases in which plaintiffs have challenged executive authority during the COVID–19 pandemic, courts have applied highly deferential tests.[1] One reason for such deference is *Jacobson v. Massachusetts*,[2] which courts miscite for the proposition that government should get wide latitude in a pandemic, including latitude to curtail constitutional rights.[3] The courts have "miscited" *Jacobson* because that case really had nothing to do with judicial deference in an emergency. The statute in *Jacobson* was a quasi-compulsory vaccination scheme that authorized local governments to impose vaccination requirements on penalty of paying a fine for refusal.[4] The United States Supreme Court upheld the law against a substantive due process challenge.[5] The very question was whether there was a constitutional right to be free of such vaccinations to begin with; not whether there was a constitutional right that the legislature may nevertheless curtail.[6] The Court's ruling in *Jacobson* is eminently sensible, unless one believes in robust judicial

---

† Associate Professor of Law, Arizona State University, Sandra Day O'Connor College of Law.

1. *See, e.g.*, Big Tyme Invs., L.L.C. v. Edwards, No. 20-30526, 2021 WL 118628 (5th Cir. Jan. 13, 2021); League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 126 (6th Cir. 2020); New Orleans Catering, Inc. v. Cantrell, Civil Action No. 20-3020, 2021 WL 795979, (E.D. La. Mar. 2, 2021); Tandon v. Newsom, No. 20-CV-07108-LHK, 2021 WL 411375 (N.D. Cal. Feb. 5, 2021); Desrosiers v. Governor, 158 N.E.3d 827 (Mass. 2020); *see generally Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID–19) Pandemic, 2020–2021*, BALLOTPEDIA, https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021#Noteworthy_lawsuits [http://web.archive.org/web/20210531024048/https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_%28COVID-19%29_pandemic,_2020-2021] (last visited May 5, 2021) (summarizing lawsuits and noting the application of rational basis deference).

2. 197 U.S. 11 (1905).

3. *See, e.g.*, *In re* Abbott, 954 F.3d 772, 783 (5th Cir. 2020), *cert. granted*, *vacated sub nom.* Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021) (citing *Jacobson* for the proposition that that case establishes "the framework governing emergency exercises of state authority during a public health crisis," and for the proposition that "when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'").

4. *Jacobson*, 197 U.S. at 26.

5. *Id.* at 26–32.

6. *Id.*

enforcement of judicially created rights nowhere found in the text of the Constitution.[7]

There is a much more widely used deference standard, however, and that is the rational basis test. Dozens of courts around the country have deployed this test in analyzing various COVID–19 restrictions, at least those affecting economic liberty, which comprise the vast majority of such restrictions.[8] The rational basis test in these cases is standard fare. The test is a staple of modern equal protection doctrine and provides that a classification should be upheld "if there is any reasonably *conceivable* state of facts that *could* provide a rational basis for the classification."[9] The test is probably a little less deferential than what most judges and scholars perceive to be the standard of deference demanded by *Jacobson*, but it is nevertheless an extraordinarily deferential test.[10]

To the originalist,[11] however, there are at least two reasons to think that the rational basis test—at least in its highly deferential formulation—should not apply to many of the COVID–19 restrictions to which it has been applied. The first is that the test has historically applied to the actions of state legislatures, and the second is that something like the rational basis test has historically applied when analyzing claims similar to substantive due process claims, that is, to unwritten constitutional limits. Both of these principles suggest that the test should not apply to governors acting alone, or to cases involving written constitutional limits.

As to the first, in the antebellum period, courts routinely invalidated municipal regulations for being unreasonable exercises of the police power. I have catalogued such cases in my prior scholarship.[12] Summarizing these cases, Judge John F. Dillon, in his treatise on municipal corporations, wrote, "what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable," but "where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance

---

7. This seems to be the thrust of Justice Gorsuch's view of the case. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

8. *See, e.g.*, cases cited *supra* note 1.

9. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (emphasis added).

10. *See* New Orleans Catering, Inc. v. Cantrell, Civil Action No. 20-3020, 2021 WL 795979, at *6 (E.D. La. Mar. 2, 2021) (describing the rational basis test as the "laxest tier of constitutional scrutiny").

11. By which I mean, one who believes the Constitution should be interpreted with its original meaning. *See* ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 11–21, 25–44, 84–96 (2017).

12. Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 826–36 (2020).

passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid."[13]

One of the justifications for such review was that municipal corporations exercised only delegated power—that is, power delegated by the state legislature. If the legislature had expressly authorized unreasonable actions, then there was nothing a court could do to enjoin such actions, absent an express constitutional prohibition.[14] But where the legislature delegated power more broadly—for example, when it delegated power to regulate the public health—any exercise of power had to be reasonable, the theory being that the legislature did not intend to delegate the power to do unreasonable things.

One of the clearest accounts of this justification from the antebellum period comes from *City of St. Paul v Laidler*[15] out of Minnesota.[16] The city enacted an ordinance prohibiting the sale or exposure for sale of fresh meat at any time and place except in the public market.[17] The city would rent out stalls in the public market to the highest bidder, with a minimum rent established by the ordinance.[18] The city's charter expressly granted it the power to "establish a public market," to "make rules and regulations for the government of the same," and to "license and regulate butcher stall shops."[19] The court held:

> [T]he ordinance . . . cannot be sustained upon principle or authority. And, while the right is conceded to municipal corporations to adopt such regulations as may be necessary and reasonable, to protect the lives, health, property or morals of its citizens, the exercise of this right should be carefully guarded, *and limited within the clear intent of the grant of power for such purpose*; and, where a question arises as to any particular ordinance which it is claimed interferes with the rights of individuals, as enjoyed under the common law or by statute, *the burden of proof should be on the corporation to show that it has not exceeded its authority* in framing such ordinance.[20]

Thus, as a corporate body exercising only delegated powers, when the municipality "interfere[d] with the rights of individuals," the burden was

13. JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 84 (1872).
14. *See* DILLON, *supra* note 13 and accompanying text.
15. 2 Minn. 190 (1858).
16. This paragraph is adapted from Wurman, *supra* note 12, at 826–28.
17. *Laidler*, 2 Minn. at 201–02.
18. *Id.* at 201–03.
19. *Id.* at 203 (quoting St. Paul City Charter §§ 18–19 (1858)).
20. *Id.* at 209 (emphasis added).

on the municipality to show authority to do so.[21] The general idea was that the legislature likely did not intend such power to be exercised to the detriment of individual rights. In another case, the Massachusetts Supreme Court held, in invalidating an ordinance: "[t]here is nothing in the language of the statute, from which it can be inferred, that it was the intention of the legislature to delegate to the selectmen and town of Charlestown the power of imposing upon the citizens of the Commonwealth such an unreasonable restraint . . . ."[22]

The application to COVID–19 restrictions should be obvious. Governors exercising power pursuant to broad delegations of emergency authority are more similarly situated to municipal corporations than to state legislatures. They exercise *delegated* power. The legislature should perhaps get the benefit of the rational basis test—who better to decide on questions of the health, safety, welfare, and morals of the people? The legislature represents constituencies from various parts of the state. Its members must deliberate. And they are "checked and balanced" by an executive with veto power. But a governor has none of those attributes conducive to policymaking. A governor exercising vast delegated powers need not deliberate with anyone and is not checked and balanced by the legislature. Why should one person acting alone get such immense deference? It is highly unlikely that the legislature would have intended to delegate the power to do unreasonable things, and therefore the courts must assess the reasonableness of a governor's actions to ensure consistency with the delegation.

Even if the rational basis test should apply no matter the governmental actor exercising power, in many cases arising from COVID–19 restrictions there are *written* constitutional prohibitions that have come into play under the state constitutions, and when enforcing such prohibitions, courts also should not apply the rational basis test. As I have also argued in prior scholarship, although state legislatures were not generally limited to reasonable exercises of police power—only municipal corporations were so limited, as noted—the courts *did* monitor the reasonableness of state legislative acts when they potentially conflicted with express prohibitions in the Federal Constitution. The two principal prohibitions in the antebellum period were the Commerce Clause and the Contracts Clause.[23]

---

21. *Id.*

22. Austin v. Murray, 33 Mass. 121, 124 (1834).

23. *See infra* notes 24–27 and accompanying text; *see also* Wurman, *supra* note 12, at 837–47.

The commerce power, for example, was generally assumed to be exclusive to the national government.[24] What would happen, then, when a state legislature enacted a law imposing a quarantine on goods coming in from other states? Such a law appears to be a police power regulation in pursuance of the public health and safety. But it also appears to be a regulation of interstate commerce—exactly what is exclusive to Congress and prohibited to the states. The cases generally held that so long as the state legislature *frankly* exercised its power, that is, legitimately exercised its power in genuine pursuit of a police power purpose, then it would be *deemed* a regulation of police, which was permitted, rather than a regulation of interstate commerce, which was prohibited.[25] Relatedly, a state legislature could make general police power regulations—it could prohibit the sale and use of alcohol or gambling, for example—even if it thereby incidentally impaired existing contracts involving alcohol or lottery ticket sales.[26]

In summarizing these doctrines, the future Justice Oliver Wendell Holmes—very much an opponent of substantive due process—explained in a footnote to Chancellor Kent's Commentaries that an exercise of police power affecting interstate commerce or contractual obligations had to be strictly necessary. "[A]cts which can only be justified on the ground that

---

24. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 209–10 (1824) (Chief Justice Marshall presuming, but not deciding, that the power is exclusive to Congress); *id.* at 235 (Johnson, J., concurring) (arguing that the power is exclusive).

25. Wurman, *supra* note 12, at 837–45; Gibbons, 22 U.S. at 204 ("So, if a State, in passing laws on subjects acknowledged to be within its control, and with *a view to those subjects*, shall adopt a measure of the same character with one which Congress may adopt," Marshall explained, "it does not derive its authority from the particular power which has been granted [the commerce power], but from some other [the police power], which remains with the State, and may be executed by the same means.") (emphasis added); *id.* at 235 (Johnson, J., concurring) ("The[] different purposes [of the police power and the commerce power] mark the distinction between the powers brought into action; and *while frankly exercised*, they can produce no serious collision.") (emphasis added).

26. Wurman, *supra* note 12, at 845–47; *see also* Manigault v. Springs, 199 U.S. 473, 480 (1905) ("It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.").

they are police regulations" because they affect existing contracts or interstate commerce, in apparent contradiction to the prohibitions in the Federal Constitution, Holmes wrote, "must *be so clearly necessary* to the safety, comfort, or well-being of society, or so *imperatively required* by the public necessity, that they must be taken to be impliedly excepted from the words of the constitutional prohibition."[27]

Many of the COVID–19 restrictions similarly trigger express constitutional prohibitions. For example, in a case in which I am involved in Arizona, bar owners argued that the Governor's restrictions on a narrow category of bars violates the State's Equal Privileges or Immunities Clause. The clause provides, "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation . . . , privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."[28] When exercising its police powers by making distinctions among similarly situated persons, the courts themselves, the bars argued, have to ensure that the legislature has acted reasonably. Otherwise, the legislature would have violated the express textual prohibition—much like early cases policed the boundaries of state legislative acts that affected interstate commerce or existing contracts. The practical difference between the rational basis test and the test the bar owners proposed is this: courts must analyze for *themselves* the reasonableness of the restriction, *on the basis of evidence adduced at trial*.

This is very different from the modern rational basis test which provides that a court must uphold the regulation if there is *any* conceivable set of facts that *could* support a rational basis for the classification.[29] There is no name for the proposed "test," but one could call it a police powers analysis, a reasonableness analysis, or rational basis with "bite."[30] Such a test would be more consistent with practice under the Commerce and Contracts Clauses, and with Holmes's dictum that the exercise of power coming into conflict with such express constitutional prohibitions must be *so clearly necessary* or *imperatively required*.[31]

To be sure, the Equal Protection Clause is also an express constitutional prohibition, and the rational basis test is a staple of equal protection analysis. That is why I have suggested before that when analyzing equality claims under the Fourteenth Amendment—which for the originalist more properly fit under the Privileges or Immunities

---

27. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 411 n.2 (Oliver Wendell Holmes Jr., ed., Little, Brown 12th ed. 1873) (emphasis added).

28. ARIZ. CONST. art. 2, § 13.

29. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)

30. *See* Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–21 (1972).

31. *See* KENT, *supra* note 27.

Clause[32]—the rational basis test probably should not apply.[33] The important point in this regard, however, is that a deferential standard still would apply to substantive due process claims. *Lochner* was still wrongly decided because in that case the state imposed a regulation equally applicable to all citizens pursuing the same activity.[34] But where there is a *discrimination*—where some citizens are given more privileges or immunities than other similarly situated citizens—then the rational basis test has no place.[35]

32. *See* ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020).

33. Wurman, *supra* note 12, at 871–78.

34. Lochner v. New York, 198 U.S. 45 (1905).

35. To be sure, the difference between a regulation and a discrimination can be a fine one. But there are some obvious examples of each. A distinction on the basis of skin color is a classic discrimination because an individual cannot change skin color to conform to the purported regulation. A monopoly is also a classic discrimination for that same reason: those outside the monopoly have no ability to take actions to conform to the purported regulation, which grants exclusive and special privileges. In *Lochner*, in contrast, there was a regulation generally applicable to all bakers (the maximum hours law), and anyone who desired to conform to the regulation could do so. There was no distinction made, in other words, among similarly situated citizens. Of course, some persons or industry participants will have an easier time conforming to regulations than others. That is why the line between regulation and discrimination can be so tenuous. The touchstone of the analysis, however, is whether similarly situated persons are treated differently. If they are, then any such difference in treatment must be reasonable, otherwise it would be a discrimination. That is also why a blanket prohibition on an activity may be very unreasonable, but it would not be discriminatory.