PUBLIC HEALTH DEFERENCE: RETHINKING THE JUDICIAL ENFORCEMENT OF CONSTITUTIONAL RIGHTS DURING A PANDEMIC

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ABSTRACT

Jacobson v. Massachusetts has long stood for the proposition that courts should generally uphold the government's public health policies even when they incidentally infringe constitutional rights protections. But the COVID-19 pandemic disrupted this traditional understanding, as many federal courts struck down or enjoined state and local pandemic-response policies, downplaying the applicability of *Jacobson*. Meanwhile, prominent legal scholars argued that judicial deference premised on *Jacobson* should be completely abandoned. This article argues that *Jacobson* must be reconsidered in light of COVID-19, but its posture of deference should not be abandoned.

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Instead, this article proposes a new theory of "Public Health Deference," which is the deference that courts should afford to the government's pandemic-response policies. This article argues that Public Health Deference should be premised on the quality of the processes by which the government creates and implements public health policies, even during an emergency. Courts should not blindly defer to the government's pandemic response; instead, they should evaluate the government's decision-making processes to ensure that they meet standards of transparency, accountability, public justification, and community engagement.

INTRODUCTION

In response to the COVID-19 pandemic, state and local governments in the United States implemented a wide array of pandemic-response policies, including business and school closures, limits on social gatherings, and rules governing the availability of medical treatment. Many of these policies impacted, either directly or indirectly, activities or interests that are protected by constitutional rights, including religious worship, political gatherings, voting, and access to abortion.

When legal challenges were brought against these policies, federal courts differed dramatically in their assessment of similar cases. Some courts upheld the government's pandemic response policies, arguing that judicial intervention during a public health emergency is out of place, while other courts sided with plaintiffs to strike down or enjoin enforcement of certain policies on the grounds that they violated constitutional rights.[1] In a notable example of the latter, a five-to-four majority of the U.S. Supreme Court blocked enforcement of New York's limits on in-person religious gatherings on constitutional religious freedom grounds.[2]

The rights-based challenges brought against pandemic response policies reflect a genuine normative dilemma. On the one hand, it may sometimes be necessary for the government to limit individual rights in order to contain the spread of a deadly infectious disease and so to protect the broader community. On the other hand, government policies that infringe individual rights, even under the auspices of emergency response, threaten the valuable interests that these rights are designed to protect. The U.S. legal system generally relies on courts to assess whether the government's rights-infringing policies

1. *See infra* relevant cases Section II.
2. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020).

are warranted, and to protect individual rights if not.[3] But given their inconsistent decisions, courts were arguably not well positioned to resolve the tension between individual rights and pandemic response policies during COVID-19.

In contrast with the normal pride of place given to courts in the enforcement of constitutional rights, the circumstances of a pandemic demand that courts share this institutional responsibility with other governmental actors. More specifically, this article proposes a new theory of "Public Health Deference" which is the deference that courts should afford to the government's policies in response to a pandemic or comparable public health emergency. According to the "process-based" approach that I defend, judicial deference is warranted when the government employs appropriate processes in designing and implementing its pandemic response policy. The government warrants such judicial deference only if it can demonstrate that the policy-making process meets certain standards of transparency, accountability, public justification, and community engagement. This emphasis on process in public health decision-making builds on normative research conducted by public health scholars and practitioners.

This article does not take a position on the correct policy responses to COVID-19, nor will it evaluate the scientific basis for any particular policy decision made in response to COVID-19. Given the specific features of COVID-19 and the virus that causes it (SARS-CoV-2), there is reasonable disagreement among citizens, scientists, and public health professionals about which policies are best able to balance the interests of all persons. On the view defended here, the best way to respond to a pandemic is not a question of law to be resolved by courts. Instead, courts can provide institutional support to the other branches of government that are more directly involved in the policy-making process. In order for courts to serve this purpose, however, it is necessary to develop a legal doctrine that clearly specifies the limits of their role in this context. This Article defends a theoretical starting point for developing such a doctrine.

3. *See, e.g.*, William H. Rehnquist, *An Independent Judiciary: Bulwark of the Constitution*, 9 N. ILL. UNIV. L. REV. 1, 1 (1988) ("The uniquely American contribution consisted of the idea of placing these [fundamental rights] guarantees in a written constitution which would be enforceable by an independent judiciary"). For a normative argument in support of this role for courts, *see* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011) 411–12.

I. *JACOBSON V. MASSACHUSETTS* AND PUBLIC HEALTH DEFERENCE PRIOR TO COVID-19

Prior to COVID-19, it was generally taken for granted that *Jacobson v. Massachusetts*, decided by the U.S. Supreme Court in 1905, stood for the principle that in a pandemic situation, courts should defer to the government's public health policies even if they infringe individual constitutional rights. In *Jacobson v. Massachusetts* the Supreme Court held that the state's public health interest in mandating the smallpox vaccine outweighed the plaintiff's constitutional right to bodily integrity.[4] Echoing a long tradition in liberal political philosophy that individual freedom has limits when it interferes with the freedom of others, the Court reasoned that the Constitution does not give individuals the right to endanger the community by refusing to participate in a public health intervention, like vaccination, that requires widespread compliance in order to be effective.[5] Moreover, the Court argued that the very freedom protected by the Constitution sometimes *requires* that limits be placed on the actions of individuals when they pose a danger to others.[6]

In light of these arguments, the Court proposed what appears to be a very permissive standard by which to review the government's public health policies. In particular, the *Jacobson* Court said that courts should "review" a public health statute only if the statute "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the [Constitution.]"[7] This standard has often been cited by subsequent courts as a "test" applied to public health measures.[8] The correct

4. Jacobson v. Massachusetts, 197 U.S. 11, 37–38 (1905).

5. *Id*. at 26.

6. *Id*. ("Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.").

7. *Id*. at 31. Note that the *Jacobson* Court also suggested, but did not directly apply, an apparently different standard, namely, that judicial intervention is warranted only when the government uses its public health authority in "an arbitrary, unreasonable manner," or when it goes "far beyond [is] was reasonably required for the safety of the public[.]" *See id*. at 28.

8. *See, e.g.*, Thomas Cusack Co. v. City of Chi., 242 U.S. 526, 531 (1917) (upholding municipal ordinance regulating the erection and maintenance of billboards in residence districts). *See also*, 16 OHIO JUR. 3D CONSTITUTIONAL LAW § 104 ("Although the courts have power to review a legislative determination as to what is a proper exercise of the police power, such review is limited, and courts are inclined to defer to the judgment of the state or municipal legislative body to which the matter is committed in the first instance. The courts will not interfere unless it is

interpretation of this *Jacobson* "test" remains unsettled, however, because the case predates many aspects of contemporary constitutional rights jurisprudence, including the development of tiered scrutiny.

Drawing on *Jacobson*, a number of prominent legal scholars have argued that contemporary courts should develop a permissive but clearly articulated standard of review for public health policies. For example, Professor Scott Burris argued that under *Jacobson*, courts should apply a modified rational basis test that upholds health-related policies that are "necessary actions bearing a reasonable medical relation to a demonstrable health threat."[9] Along similar lines, Professor Lawrence O. Gostin distilled from *Jacobson* a standard of review that would allow the government to employ compulsory public health interventions when such interventions represent a "reasonable" and "proportional" means to address a demonstrable "threat to the community," without imposing a health risk on the subject of the intervention.[10]

On the other hand, some legal scholars reject the idea that *Jacobson* should stand for a doctrinal "test." For example, Professor Wendy E. Parmet argues that *Jacobson* owes its lasting importance to the fact that it "eschewed simple tests."[11] Instead, *Jacobson* can be interpreted as standing for a jurisprudential "rule of thumb" recommending that courts employ deference towards the government when it is acting in the interest of the public health. On this reading of the case, while judicial deference must have limits, *Jacobson* does not itself specify these limits. Professor Parmet suggests that *Jacobson* ought to remind courts to be "deferential to the need to protect public health" while at the same time "vigilant against abuses of public health powers."[12]

The deferential rule of thumb—which may be labeled the "Deference Principle"—directs courts to grant the government some unspecified extra leeway when constitutional rights challenges are

clear that the statute or ordinance has no real or substantial relation to the public health, morals, safety, or welfare or is unreasonable or arbitrary and infringes rights secured by the fundamental law.").

9. Scott Burris, *Rationality Review and the Politics of Public Health*, 34 VILL. L. REV. 933, 965–66 (1989) (arguing that the "doctrinal basis [of *Jacobson*] has eroded" but acknowledging its continuing sway in public health cases).

10. Lawrence O. Gostin, Jacobson v. Massachusetts *at 100 years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 579 (2005).

11. Wendy E. Parmet, *Rediscovering* Jacobson *in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 131 (2020).

12. *Id*. at 132.

brought against the government's public health policies. This Deference Principle is premised on the separation of powers and the recognition that the judicial branch has limited public health competence. As the *Jacobson* Court put the point: "the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case."[13] The role of the courts is to interpret and apply the law, not to protect people from infectious disease.

The limited competence of courts to determine appropriate public health policy is especially evident in the context of a public health emergency when lives are at stake, critical information is limited, and effective response requires widespread implementation. *Jacobson* itself dealt with a vaccine mandate in response to a smallpox epidemic, which was a very serious crisis at the time, calling for swift action and widespread vaccine administration. The Court duly recognized that it was "appropriate" for the local Cambridge board of health, acting on the authorization of the state legislature, to "determine for all what ought to be done in such an emergency."[14] In an emergency situation, courts should be wary of disrupting the government's efforts to save lives.[15] For example, *Jacobson* was cited in support of imposing quarantine on individuals who may have been exposed to Ebola.[16] And although *Jacobson* dealt specifically with a mandatory vaccination policy, prior to COVID-19 it had also been cited for the more general proposition that courts should defer to the government's public health policies.[17]

In short, prior to COVID-19, there was a general consensus that *Jacobson* generated precedent in favor of upholding the government's

13. Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905).

14. *Id.* at 27.

15. In subsequent cases, the Supreme Court has periodically noted the importance "in emergency situations" of conducting "prompt inspections, even without a warrant," of property that could pose a danger to the public. Camara v. Mun. Ct. of S.F., 387 U.S. 523, 539–40 (1967) ("[N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. . . . On the other hand, in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day.").

16. *See* Hickox v. Christie, 205 F. Supp. 3d 579, 591–93 (D. N.J. 2016) (relying in part on *Jacobson* to uphold State's imposition of quarantine on nurse returning from treating Ebola patients in Sierra Leone).

17. *See* Gostin, *supra* note 10, at 578 (canvassing sixty-nine total Supreme Court cases that cited to *Jacobson v. Massachusetts* between 1905 and 2004, of which sixty exemplified the principle of deference to public health policy).

public health policies even when they infringe constitutional rights. There were differing opinions, however, about how best to read *Jacobson*, and whether it supported a "test" resembling rational basis review, or a less rigorous "rule of thumb" recommending judicial deference. Both interpretations faced challenges, as *Jacobson* predated the tiered scrutiny framework, and the appropriate limits the *Jacobson*-inspired Deference Principle remained unclear. Moreover, prior to COVID-19, *Jacobson* had never been tested against a nationwide response to a pandemic.[18] Once faced with COVID-19, *Jacobson*'s uncertain legacy led to uncertainty and inconsistency among federal judges, as will be described in the subsequent section.

II. THE COVID-19 CASES

This section describes and contrasts the two main approaches adopted by federal courts in deciding constitutional challenges brought against pandemic response policies during the COVID-19 pandemic. I will illustrate these approaches through an analysis of two types of cases about which judges disagreed: cases involving access to abortion and cases involving restrictions on religious worship. Courts generally adopted either a deferential approach, inspired by *Jacobson v. Massachusetts*, or a non-deferential employment of "regular" judicial review. The cases described in this section illustrate the difficulty that courts faced in crafting a consistent approach to pandemic-response cases. These cases also show that courts were generally unable to avoid the tension between individual rights and pandemic response policies described above. They were forced to either abandon their role in protecting individual rights or else disrupt the government's pandemic responses effort.

The first significant group of COVID-19 cases involved state orders banning non-urgent surgeries in an effort to preserve hospital capacity and limited stores of personal protective equipment (PPE), and to reduce the spread of the virus causing COVID-19 in healthcare facilities. While many states issued orders of this kind, a total of eleven states specifically targeted abortion procedures, arguing that abortions are non-urgent (or "elective") and so should be postponed

18. *See* Wendy E. Parmet, *The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers During a Partisan and Polarized Pandemic*, 57 SAN DIEGO L. REV. 999, 999–1000 (2020) ("What powers do states have to protect the public from a public health emergency? For most of the last 100 years, the protracted and robust debate about that question has been largely hypothetical." (emphasis omitted)).

indefinitely.[19] Abortion providers challenged the states' authority to dramatically restrict their patients' access to abortion in this way, citing to the constitutional right to abortion first recognized by the Supreme Court in *Roe v. Wade*.[20] State officials, for their part, argued that during a pandemic, courts must defer to their decisions about how best to balance the benefits and burdens of pandemic response. (These cases arose prior to the Supreme Court's decision overturning *Roe* in *Dobbs v. Jackson Women's Health Organization*.[21])

Faced with these cases, federal district courts in six states (Alabama, Arkansas, Ohio, Oklahoma, Tennessee, and Texas) held that their abortion bans likely violated the plaintiffs' constitutional rights.[22] These courts issued injunctions preventing the abortion bans from taking effect. Four federal circuit courts heard appeals on this issue, resulting in an apparent circuit split: the Sixth and Eleventh Circuits agreed with the district courts, allowing most abortion procedures to proceed in Alabama, Ohio, and Tennessee.[23] But the

19. *See* Laurie Sobel et al., *State Action to Limit Abortion Access During the COVID-19 Pandemic*, KAISER FAM. FOUND. (Aug. 10, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/.

20. *See* Roe v. Wade, 410 U.S. 113, 166 (1973).

21. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

22. *See* Preterm-Cleveland v. Yost, 394 F. Supp. 3d 796, 803 (S.D. Ohio 2019) (granting preliminary injunction); S. Wind Women's Ctr. v. Stitt, 455 F. Supp. 3d 1219, 1231 (W.D. Okla. 2020), *appeal dismissed as moot*, 808 F. App'x 677 (10th Cir. 2020); Adams & Boyle, P.C. v. Slatery, 455 F. Supp. 3d 619, 628 (M.D. Tenn. 2020), *aff'd in part, modified in part*, 956 F.3d 913 (6th Cir. 2020), *and modified*, No. 3:15-CV-00705, 2020 WL 2026986 (M.D. Tenn. Apr. 27, 2020); Little Rock Fam. Plan. Servs. v. Rutledge, 454 F. Supp. 3d 821, 833 (E.D. Ark. 2020), *vacated in part*, No. 4:19-CV-00449-KGB, 2020 WL 2079224 (E.D. Ark. Apr. 22, 2020); Robinson v. Marshall, 454 F. Supp. 3d 1188, 1203 (M.D. Ala. 2020) (granting preliminary injunctions), *appeal dismissed sub nom*. Robinson v. Att'y Gen. of Alabama, No. 20-11401-W, 2020 WL 3989457 (11th Cir. May 5, 2020); Planned Parenthood Ctr. For Choice v. Abbott, No. A-20-CV-323-LY, 2020 WL 1815587, at *20 (W.D. Tex. Apr. 9, 2020) (granting temporary restraining order), *mandamus granted, order vacated in part sub nom*. *in re Abbott*, 956 F.3d 696, 724 (5th Cir. 2020), *and appeal dismissed sub nom*. Sw. Women's Surgery Ctr. v. Abbott, 802 F. App'x 150, 151 (5th Cir. 2020).

23. *See* Robinson v. Att'y Gen. of Alabama, 957 F.3d 1171, 1183 (11th Cir. 2020) (upholding preliminary injunction against Alabama's abortion ban); Pre-Term Cleveland v. Att'y Gen. of Ohio, No. 20-3365, 2020 WL 1673310, at *7 (6th Cir. Apr. 6, 2020) (upholding injunction against Ohio's abortion ban); Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 930 (6th Cir. 2020) (upholding a narrow preliminary

Fifth and Eighth Circuits upheld the abortion bans in Texas and Arkansas, respectively.[24] As a result, it was nearly impossible to obtain most abortion procedures in Texas until April 22, 2020,[25] and in Arkansas, the ban remained in effect until August 1, 2020.[26] Both of these courts cited to *Jacobson v. Massachusetts* for the proposition that during a pandemic, courts should defer to state governments rather than enforce individual rights.[27]

These abortion cases are significant for many reasons, especially the lack of access to medical resources suffered by women living in states where abortion bans were allowed to take effect. The background politics surrounding abortion is undoubtedly relevant, as is the appearance of ideological opportunism on the part of anti-abortion government officials.[28] But this line of cases also illustrates diverging opinions among federal judges about how to evaluate constitutional rights challenges to pandemic-response policies. Moreover, largely in response to these cases, a number of prominent legal scholars argued that courts have abused the *Jacobson* precedent to license an unwarranted "suspension" of constitutional rights during the pandemic. Professors Lindsay F. Wiley and Stephen I. Vladeck, for example, argue that, "broadly deferential judicial review of government responses to public health emergencies is neither

injunction against Tennessee's abortion ban), *vacated sub nom.* Slatery v. Adams & Boyle, P.C., 141 S. Ct. 1262 (2021).

24. *See in re* Rutledge, 956 F.3d 1018, 1032 (8th Cir. 2020) (overturning injunction against enforcement of Arkansas' abortion ban); *in re* Abbott, 956 F.3d 696, 723–24 (5th Cir. 2020) (overturning injunction against Texas abortion ban).

25. *See* Sabrina Tavernise, *Texas Allows Abortions to Resume During Coronavirus Pandemic*, N.Y. TIMES, (April 22, 2020), https://www.nytimes.com/2020/04/22/us/coronavirus-abortion-texas.html.

26. *Governor Hutchinson Announces Directive on Resuming Elective Procs., Phase IV*, ARK. HOSP. ASS'N, https://www.arkhospitals.org/Online/News/News_Stories/Governor-Hutchinson-Announces-Directive-Resuming-Elective-Procedures-PhaseIV.aspx (last visited Dec. 21, 2022).

27. *See in re* Rutledge, 956 F.3d at 1032 (overturning injunction against enforcement of Arkansas' abortion ban); *in re* Abbott, 956 F.3d at 723–24 (overturning injunction against Texas abortion ban).

28. *See* B. Jessie Hill, *Essentially Elective: The Law and Ideology of Restricting Abortion During the Covid-19*
Pandemic, 106 VA. L. REV. ONLINE 99, 102 (2020).

normatively defensible nor compelled by precedent."[29] Professors Wiley and Vladeck go on to argue that *Jacobson* has too often stood for a "suspension principle" according to which courts, wrongly in their view, fail to adequately enforce constitutional rights protections in an emergency context.[30] Professors Wiley and Vladeck are undoubtedly correct that constitutional rights should not be "suspended" during a pandemic, but there remains an open question whether a more limited form of judicial deference is appropriate.

A similar split within the federal judiciary occurred in cases brought by religious persons and organizations against restrictions placed on in-person religious gatherings, including religious worship. After many states limited large gatherings, certain non-essential businesses, churches and other religious groups around the country filed suit claiming a right to hold in-person worship services under the First Amendment's Free Exercise Clause and arguing that they unfairly faced greater restrictions than comparable secular institutions. On the other hand, state governments argued that *Jacobson* requires deference to their pandemic response efforts, citing evidence that in-person religious worship creates a risk of a super-spreader event.[31]

After the Ninth Circuit upheld California's limits on church capacity, a challenge brought by the South Bay United Pentecostal Church of San Diego reached the Supreme Court in late May 2020.[32] The Church argued that California's 100-person limit on in-person worship posed an irreparable harm to its ability to celebrate Pentecost Sunday, which was May 31.[33] Because the church sought a temporary injunction on an expedited basis, the Supreme Court did not have time to fully consider the merits of this case.[34] Instead, the Church's request

29. Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARVARD L. REV. F. 179, 194 (2020).

30. *Id.*

31. *See, e.g.*, Lea Hamner et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice – Skagit County, Washington, March 2020,* 69 MORBIDITY & MORTALITY WKLY. REP. 606, 607 (2020) (available at https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6919e6-H.pdf).

32. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (upholding California's stay-at-home order prohibiting in-person religious services); Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169, 2020 WL 4274901, at *1 (9th Cir. July 2, 2020) (injunction pending appeal denied), *cert. denied*, 141 S. Ct. 1285.

33. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613, 1615.

34. *Id.* at 1614.

appeared on the Court's emergency docket, also known as the "shadow docket"—that is, cases in which the Court issues orders, or grants or denies motions, without full briefing and argumentation.[35]

In this case, a five-Justice majority, consisting of Justices Ginsburg, Breyer, Kagan, and Sotomayor, together with Chief Justice Roberts, upheld California's 100-person limit.[36] Chief Justice Roberts authored a short concurring opinion arguing that, under *Jacobson*, the "question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," and as such, courts should cede decisions about "the safety and the health of the people to the politically accountable officials of the States."[37]

In late November, not long after the seating of Justice Amy Coney Barrett, the Court again considered an application for an injunction against a state's limits on in-person religious gatherings. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court enjoined enforcement of New York's limits on in-person gatherings against plaintiff religious organizations.[38] At issue in the case was the Governor's executive order that limited "houses of worship" in "red zones" to a maximum capacity of 25% or 10 people, and in "orange zones," to 33% or 25 people, whichever is fewer.[39] In a per curiam opinion, the Court held that plaintiffs were likely to prevail on their First Amendment Free Exercise claims because the restrictions "single out houses of worship for especially harsh treatment" as compared with essential businesses—which were allowed to remain open in both zones—and some non-essential businesses that were apparently allowed to operate without capacity restrictions in orange zones.[40]

35. For the term "shadow docket," see William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015); *see also* Steve Vladeck, *The Supreme Court's Most Partisan Decisions Are Flying Under the Radar*, SLATE.COM, (Aug. 11, 2020, 12:12 PM), https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html.

36. *S. Bay United Pentecostal*, 140 S. Ct. at 1613.

37. *S. Bay United Pentecostal*, 140 S. Ct. at 1614 (Roberts, C.J., concurring) (citing Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905).

38. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020).

39. N.Y. State Exec. Order No. 202.68: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency (March 7, 2020) (available at https://www.governor.ny.gov/sites/default/files/atoms/files/EO202.68.pdf).

40. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66.

The *Roman Catholic Diocese* case occasioned significant disagreement among the Justices about the appropriate level of deference that judges should afford to government officials responding to a pandemic. Writing in concurrence, Justice Kavanaugh acknowledged that federal courts must "afford substantial deference to state and local authorities . . . during the pandemic," but went on to say that "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication . . . "[41]

Going further, Justice Gorsuch argued that *Jacobson* is inapplicable on three distinct grounds. First, he argued that the *Jacobson* Court "essentially applied rational basis review to Henning Jacobson's challenge," and 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."[42] As such, Justice Gorsuch concluded that "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so."[43] Second, Justice Gorsuch argued that the Court's treatment of Jacobson's "right to bodily integrity," which is found in the "Constitution's penumbras," has no bearing on how the Court should treat "the textually explicit right to religious exercise."[44] And third, Justice Gorsuch argued that the small fine at issue in *Jacobson* was "relatively modest" compared to New York's in-person worship limits, which, in his characterization, amount to a "ban all traditional forms of worship in affected 'zones' whenever the Governor decrees and for as long as he chooses."[45] In short, according to Justice Gorsuch, there is no doctrinal basis for *Jacobson* deference, and even if there were, it would only apply to "modest" restrictions of rights that are not made "textually explicit" in the Constitution.

Writing in dissent, however, Justice Breyer, together with Justices Sotomayor and Kagan, argued that "courts must grant elected officials broad discretion when they undertake to act in areas fraught with medical and scientific uncertainties."[46] Chief Justice Roberts also

41. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 74 (2020) (Gorsuch, J., concurring).

42. *Id*. at 70.

43. *Id*.

44. *Id*. at 70–71.

45. *Id*. at 71.

46. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 78 (Breyer, J., dissenting) (citing to S. Bay United Pentecostal v. Newsom, 140 S. Ct. 1613 (2020).

dissented, noting that, on his view, an injunction should not be granted because the restrictions at issue had subsequently been relaxed by the state, and were no longer in effect. But he also reaffirmed his commitment to *Jacobson* deference and expressed concerns about judicial overreach, noting that "it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic."[47]

Much like the abortion restriction cases, the religious worship restriction cases reflect stark and seemingly intractable differences among the federal judiciary. These cases, not coincidentally, also turn on issues—namely abortion and religious freedom—about which there is massive political disagreement and polarization. As Professor Mark L. Movsesian has argued with respect to the religious worship restriction cases, the lack of political consensus about religious freedom created a vacuum that was inevitably filled by the personal political beliefs of the judges tasked with deciding the various cases.[48] As Movsesian puts the point:

> In the absence of shared cultural understanding, judges inevitably rely on their "own moral backgrounds" and commitments and weigh interests differently. As a result, judicial balancing becomes "unpredictable" and legal doctrine "incoherent." One would expect this to be the case especially in an emergency, where access to reliable information is uncertain and the potential consequences severe, and where the sense of crisis swamps the effect of professional training that might otherwise encourage greater judicial detachment.[49]

I would add only that the absence of consensus about the correct interpretation of *Jacobson*—the lack of a settled constitutional doctrine—also contributed to the fact that judges defaulted to their background moral beliefs.

In summary, the cases described in this section suggest that faced with challenges to pandemic response policies—especially abortion restrictions and religious worship restrictions—courts were forced to either accept or reject the principle of judicial deference extracted from *Jacobson v. Massachusetts*, often with very little doctrinal basis for making their decisions. But we should be dissatisfied by both of these extremes. *Jacobson*-inspired judicial deference arguably gives

47. *Id*. at 75 (Roberts, C. J., dissenting).

48. *See* Mark L. Movsesian, *Law, Religion, & the Covid Crisis*, 37 J. L. & RELIGION 9, 11 (2022).

49. *Id*. at 14–15 (internal citations omitted).

too little protection to individual rights, and too much opportunity for ideologically motivated officials to curtail those rights during a public health emergency. Advocates of both abortion rights and religious freedom can agree that an absolutist interpretation of *Jacobson*'s Deference Principle allows too much space for poorly motivated or indifferent state and local governments to trample on dearly held and constitutionally protected interests of individuals. But dispensing with *Jacobson* deference fairs no better. The specter of courts second-guessing pandemic-response policy would hang over every decision, significantly hindering the ability of state and local governments to respond quickly and decisively, even if lives are at stake and the situation is constantly changing. Fearing such litigation, many state and local governments would quite understandably be chilled into indecision and inactivity.

Rather than adopting one of these two approaches, we should rethink the relationship between individual rights and public health, and the role of courts in a pandemic. While *Jacobson v. Massachusetts* may retain some relevance in our present crisis, the disagreement surrounding its doctrinal legacy runs deep. We will need to develop a new shared understanding about the relationship between constitutional rights and pandemic response. We need, in short, a new theory of Public Health Deference, to help guide courts, public health officials, and the community as a whole, through both this current pandemic and the next one.

III. TOWARDS A GENERAL THEORY OF JUDICIAL DEFERENCE

In working toward a new theory of Public Health Deference, this section describes a "general theory of judicial deference"—that is, a theory of when, why, and to whom courts should defer to the decisions made or conclusions reached by the other branches of government, government agencies, or other nongovernmental institutions. In developing such a general theory for U.S. constitutional law, this article will rely on the work of Professor Paul Horwitz, who has identified several important features of judicial deference, as well as the primary precedents and constitutional doctrines on which judicial deference is grounded.[50]

Drawing on the work of Ronald Dworkin, Horwitz describes judicial deference as a "transsubstantive doctrine" or a general "principle" of constitutional law, that can be theorized in its own

50. *See* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1061 (2008) [hereinafter Horwitz, *Three Faces of Deference*].

right.[51] In keeping with Dworkin's overall theory of law, the theory of such a transsubstantive doctrine should not only describe its doctrinal basis, but also identify its formal (conceptual) features and its normative ground or justification.[52] For an anti-positivist such as Dworkin, this normative justification forms part of the content of the doctrine itself.[53] Even a positivist legal theorist, however, may accept that the normative justification of a legal principle is among the materials that judges incorporate into their interpretation of the law.[54] Moreover, legal theorists of either stripe can agree that constitutional law *should* develop in a way that accords with sound normative and conceptual analysis. This article will assume, therefore, that a normative and conceptual analysis of judicial deference is potentially relevant to the future development of constitutional doctrine.

Horwitz first identifies two main "categories" or types of determinations about which judges could defer to some other entity: determinations of fact and determinations of law.[55] A court defers to another finder of fact, for example, by entering the verdict reached by a jury. And courts defer to determinations of law reached by another—e.g., the *Chevron* deference judges show to agencies interpretations of a statute it is tasked with administering.[56] As Horwitz acknowledges, however, these determinations can bleed together, especially when legal conclusions depend on factual determinations.[57] In evaluating a constitutional challenge to a pandemic-response policy, for example, a judge might be forced to consider both the factual basis for the policy—such as the virology and epidemiology on which it is based—

51. *Id*. at 1067, 1070 ("We need an examination of deference's role in constitutional law that is both sufficiently abstract *and* sufficiently practical to shed some light on this pervasive doctrinal tool, and that might at least lead to its being recognized as a central subject of constitutional law.") (citing Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. STATE L. J. 353, 356–57 (1997)).

52. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986).

53. *See, e.g.*, Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L. J. 1288, 1300 n. 29 (2014); *see also* Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 158 (2004).

54. *See, e.g.*, Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325,1353 (2018).

55. Horwitz, *Three Faces of Deference*, *supra* note 50, at 1068 ("the Court's use of deference may be divided into two principal categories: deference on the grounds of the legal authority of the deferred-to institution, and deference on the grounds of the superior knowledge, or epistemic authority, of the institution.").

56. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

57. Horwitz, *Three Faces of Deference*, *supra* note 50, at 1073.

as well as the legal permissibility of restrictions premised on these facts. In such cases, the object of judicial deference could be the government's determinations of fact, determinations of law, or both.

Additionally, Horwitz identifies three general features of judicial deference, that are shared by different types or categories of deference across a range of constitutional doctrines. The discussion of these three features will form the structure of this part of the article. First, deference implies (potential) disagreement—that is, the court should not make its deference conditional on reaching the same conclusion or determination as the person or institution to whom deference is granted, i.e., the "deferee." (This disagreement could be about facts, about the legal conclusions premised on these facts, or both.) Second, judicial deference is not mere "obedience" to the deferee, but is instead conditioned on the deferee meeting certain conditions or obligations, which will differ depending on the context. And third, deference is premised, in part, on the *actual employment* of a special procedural role or competence possessed by the deferee. The deferee's special competence or expertise alone is not sufficient to ground deference, but must be actually employed in reaching the deferred-to conclusion of fact or law.

I largely follow Professor Horwitz's account of judicial deference but will go on to apply this general theory to the context of a public health emergency to determine the form of judicial deference that is appropriate to that context. That is, the general theory of judicial deference provides a basis for the special theory of "Public Health Deference," which is a form of judicial deference that Professor Horwitz does not himself discuss.

A. Deference Leaves Room for Disagreement

According to Professor Horwitz, a judge or court engages in deference by "setting aside its own judgment and following the judgment of another decisionmaker" even if the judge "might have reached a different decision."[58] On this view, judicial deference does not depend upon disagreement, but disagreement must be possible in the sense that the judge could have reached a different determination if considering the issue on its own.[59] To put it another way, judicial deference does not require that the judge independently reaches the same determination as the deferee.

58. *Id.*

59. *Id.* (citing Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983)).

On Horwitz's view, then, judicial deference is distinct from epistemic weighting or putting a "thumb on the scales" in favor of the determination reached by the deferee, or a lowering of the bar that the deferee must clear in order to make their case.[60] Placing a "thumb on the scales" is often a useful epistemic technique—a way of incorporating the "weight" of the judgment of another into one's own decision-making matrix.[61] Likewise, it is often useful for judges, in certain contexts, to consider the viewpoints of legal scholars, amici, or other government officials into their legal analysis. But recognizing the potential epistemic weight of another's determination is not deference, since, in the end, the decision stays with the primary decision-maker (in this case the judge) and is not deferred to another.

A related point is that judicial deference is not premised on "obedience" or an obligation to accept the determination reached by another because they possess higher rank or authority.[62] Judicial deference differs from the obligation of a junior officer to obey the orders issued by a superior officer, for example, or the deference that an employee shows to an employer. Similarly, judicial deference differs from the lawyer's role-specific obligation to abide by her client's decisions about how to proceed with a case or dispose of property, etc. The lawyer is subject to a role-based obligation to comply with the determinations reached by the client.[63]

As a further illustration of judicial deference, consider three different ways that a court may employ prior precedent in reaching a determination. First, a lower court's acceptance that a higher court's decision has binding force over it not judicial deference, but a recognition of the institutional obligations that flow from the lower court's role within the organizational structure of the judicial system. But appealing to another court's prior decision as persuasive precedent is not judicial deference, either, since it is conditioned on agreement with the other court. A court's recognition of stare decisis with respect to its own prior decisions could be characterized as judicial deference, however, depending on one's theory of stare decisis. On one possible

60. *Id*. at 1073.

61. *See, e.g.*, JENNIFER LACKEY, LEARNING FROM WORDS: TESTIMONY AS A SOURCE OF KNOWLEDGE (2008).

62. Horwitz, *Three Faces of Deference*, *supra* note 50, at 1075–77.

63. *See, e.g.*, MODEL RULES OF PRO. CONDUCT, r. 1.2 (AM. BAR ASS'N 1980) (stating "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . a lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities").

characterization of stare decisis, the court accepts the determination of another, i.e., the prior version of itself, but this acceptance is based on neither a strict obligation, nor agreement with the reasoning, but a form of deference toward the prior court.

But if judicial deference is not premised on either independent agreement or an overarching obligation, then what, exactly, is the basis for the court's acceptance of the determination of another? Judicial deference must be based on some justifiable basis, or else deference would reduce to abdication of the court's rightful responsibility to "say what the law is," and apply it to the case before it.[64]

Upon reflection, it is evident that something analogous to judicial deference is also present in other normative domains. In the contexts of a friendship, partnership, or a close personal relationship, it is often both permissible and wise to defer to decisions made by the other person. One is not obligated to defer to the friend or partner. And one may often disagree with the decision—about small things like what is for dinner as well as big things about where to relocate or whether to start a family. In such contexts, deference is premised on the value of the relationship itself, and the importance of coordinating activities despite the potential disagreement. And if the deferring party is under an obligation, it would be better described as an "imperfect duty" as opposed to a "perfect duty." The duty is "imperfect" because, even if the deferee is deserving of deference, they cannot *claim* it—much as a benefactor may deserve gratitude but may not claim it.[65]

Judicial deference, therefore, is an acceptance of the determination of another that is not premised on independent agreement or prior obligation, but that is based instead on the deservingness of the deferee. In short, deference is *earned*. The next question, then, is what must a potential deferee do in order to earn the deference it wishes to receive from the court?

64. *See, e.g.*, Miller-El v. Cockrell, 537 U.S. 322, 324 (2003) ("[D]eference does not imply abandonment or abdication of judicial review"); Rostker v. Goldberg, 453 U.S. 57, 67 (1981) ("We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.").

65. *See generally* Barbara Herman, *Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality*, 109 J. OF PHILOSOPHY 391 (2012).

B. Deferees Have Obligations

In order to *earn* judicial deference, a deferee obviously must live up to certain standards or meet certain expectations. As Professor Horwitz puts the point, "deference carries with it significant obligations on the part of the deferred-to party."[66] That is, judicial deference is conditioned on the deferee being subject to and meeting certain obligations, and, at the same time deferees bear significant obligations as a condition to receiving judicial deference, either prior to or possibly after deference is granted. Formally speaking, deference is conditioned on the "obligation on the part of the recipient of deference to exercise its own authority responsibly within the boundaries of that deference."[67] The exact nature of the deferee's obligation depends upon the nature of the deference. For example, deference to a friend is conditioned upon the friend's acting "responsibly" within the boundaries of the deference afforded to friends.

Horwitz illustrates with a doctrinal example. In *Grutter v. Bollinger*, the Supreme Court considered a challenge to the University of Michigan Law School's policy of considering race as "one factor among many" in making admissions decisions.[68] The Court applied strict scrutiny, but held that the Law School's interest in creating a diverse student body was a "compelling governmental interest" sufficient to justify its explicitly race-based admissions policy.[69] In an opinion written by Justice O'Connor, the Court based its decision upon deference to the Law School's determination that student-body diversity was, in fact, a compelling interest: "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[70]

In *Grutter*, the Court's deference to the Law School did not involve lowering the standard of review or applying a thumb to the scale in favor of the university. The Court did not feel obligated to

66. Horwitz, *Three Faces of Deference*, *supra* note 50, at 1069.

67. *Id.* at 1072.

68. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

69. *Id.* at 334.

70. *Id.* at 328 ("The Court bases its unprecedented deference to the Law School—a deference antithetical to strict scrutiny—on an idea of 'educational autonomy' grounded in the First Amendment."). *See also id.* at 362 (Scalia, J., dissenting).

defer to the Law School, nor did it fail to perform its rightful responsibility in evaluating the constitutional challenge brought against the admissions policy. Instead, the Court applied its "regular" standard of review for race-based classifications, but deferred to the Law School's determination that diversity was a "compelling interest."[71] This deference was premised on the Law School's special obligations, which the Court does not share, to build an institution that advances the educational and scholarly pursuits of its community consistent with the standards of academic excellence. The Law School earns deference from the Court by its ability to fulfill its academic commitments, and where these obligations are unmet, the grounds for judicial deference disappear.

Horwitz appeals to *Grutter* as an example of judicial deference conditioned on the obligations of the deferee. In particular, Horwitz claims that "courts should defer substantially to universities' own judgment about what their academic mission requires, provided that they are actually making an academic decision . . ."[72] On Horwitz's view, then, *Grutter* deference illustrates a more general feature of judicial deference, namely, that judges should defer to the determination of a deferee only when that determination goes to the deferee's ability to fulfill its special obligations—and, as such, deference depends upon the deferee actually being able to fulfill these obligations.

One additional feature of the *Grutter* case stands out. In applying strict scrutiny, the Court deferred to the Law School's determination that racial diversity was a compelling interest, but conducted its own analysis of whether the Law School's policy was "narrowly tailored" to serve that interest.[73] The Court's deference could be seen, then, as a form of shared decision-making—a partnership with the Law School to reach the best possible legal decision. The Court incorporated the Law School's unique perspective and normative judgement, informed by its special institutional role.

Again, the judicial deference described in *Grutter* is analogous to the deference that one might show a friend or a partner. When one disagrees with the determination of a friend, but accepts it anyway, it is often because the friend has earned this deference by their ability to

71. *Grutter*, 539 U.S. at 343.

72. Horwitz, *Three Faces of Deference*, *supra* note 50, at 1129. *See also*, Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1549 (2007).

73. *See Grutter*, 539 U.S. at 334.

undertake and fulfill special obligations in upholding their part of the relationship. Deference, in such a case, can be a valuable form of shared decision-making that adds value to the relationship and benefits both parties. Perhaps it is overly optimistic to imagine that judicial deference will always resemble a friendship in this way, but the underlying normative structures may be quite similar.

C. Deference Depends on Process

The obligations of deferees are linked to the third general feature of judicial deference, namely, process. That is, in order to warrant judicial deference, the deferee must demonstrate to the court that its determination is, in fact, a responsible exercise of its authority in fulfillment of its specific obligation. That is, the deferee must undertake, and be prepared to demonstrate, the appropriate processes on which it relied in reaching its determination. For doctrinal support of the process requirement, Horwitz references *United States v. Mead Corp.*, a case in which the Supreme Court held that a tariff classification determined by the United States Customs Service was entitled not to "deference" but instead, to "respect according to [degree of] its persuasiveness."[74] The tariff classification was not entitled to deference, the Court held, because it had not progressed through the formal rule-making process required of most agency regulations: "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[75] The Court went onto allow that formal notice-and-comment rule making procedures are not the only basis on which a court should defer to the determinations made by an agency.[76] But the process by which a determination is reached matters, and judicial deference is generally premised, in part, on the quality of the deferee's process.

In *Mead*, the agency's process, not just its decision-making output, is relevant to justifying judicial deference, because in the absence of independent agreement "on the merits," process is needed to show that the agency is, as Horwitz puts it, "operating according to a process that best ensures the sound application of its epistemic

74. *See* United States v. Mead Corp., 533 U.S. 218, 221 (2001).
75. *Id*. at 229–30.
76. *Id*. at 231.

authority."[77] Horwitz goes onto say that "the deferee should take some pains to explain its reasons and its process in a way that provides a similar assurance that its conclusions are the result of a meaningful, full, and fair exercise of its expertise."[78]

To summarize, this section elaborated three key features of a "general theory" of judicial deference: first, judicial deference implies (potential) disagreement with the deferee, i.e., it is not premised on agreement or obedience; second, deferees must fulfill obligations in order to "earn" deference; and third, deference requires that the deferee engages in a robust and normatively significant process while creating and implementing its policy.

In general, the deferee *earns* judicial deference based on its willingness and ability to fulfill its special obligations, and the deferee demonstrates this willingness and ability through the quality of the processes by which it reaches its determination. So understood, judicial deference does not involve an abdication of responsibility, but a conscious choice to accept the judgment of another because of the value generated by this acceptance. In the ideal case, judicial deference can be thought of, then, as a form of shared decision-making whereby the court partners with the deferee to reaffirm the determination reached by the deferee, adding value to both the determination and the relationship between the court and the deferee. The ideal case may not always be realized, but it provides a template against which applications of judicial deference might be evaluated. The subsequent section will employ this general theory of judicial deference to begin sketching a new doctrine of Public Health Deference.

IV. DEVELOPING A NEW THEORY OF PUBLIC HEALTH DEFERENCE

Drawing on the general theory of judicial deference described in the preceding section, this section will propose three key pillars or principles that should be central to this new theory of Public Health Deference.

First, courts should defer to the determination of a government public health agency or official only if the government earns this deference. In general, judicial deference is neither obedience nor

77. *See* Horwitz, *Three Faces of Deference*, *supra* note 50, at 1103.

78. *Id*. at 1102 ("[C]ourts . . . regularly demand, and condition their deference upon, evidence that the agency has in fact responsibly considered the question fully and on the merits.") (citing Joseph Vining, *Authority and Responsibility: The Jurisprudence of Deference*, 43 ADMIN. L. REV. 135, 140 (1991)).

agreement, but an opportunity for cooperation and shared decision-making that is valuable within a given context. Ideally, judicial deference may be a way to add value to the government's overall emergency response. During a public health emergency, judicial deference may add value when it creates opportunities for cooperation between courts and public health agencies or officials, by helping each to better balance proffered deference may encourage the public health officials to grapple with the importance of the constitutional rights at stake, while the expertise and information available to the public health agency helps the court evaluate the vast array of rights and interests at stake.

On this view of Public Health Deference, constitutional rights do not disappear in a public health emergency. But the responsibility for their realization and enforcement sometimes shifts from courts to the government agency best positioned to respond to the emergency in light of all available evidence and considerations. Constitutional rights are not the sole purview of courts, even if courts have a special relationship to their interpretation and enforcement.[79] The other branches of government share responsibilities to uphold constitutional rights. But courts may be able to aid in this effort, in part, by offering deference to the other branches when they undertake to faithfully discharge these responsibilities. As Professor Horwitz notes, by "deferring to other actors, courts open up a space for shared legal and constitutional interpretation by other actors who may be closer to the facts on the ground."[80]

This point leads to the second key principle of Public Health Deference, namely, that courts should defer to a public health agency or official only if that agency or official is able to responsibly exercise its authority and fulfill its obligations. In *Grutter v. Bollinger*, recall, the Supreme Court deferred to a university's determination about the importance of racial diversity for its academic mission.[81] Judicial deference in this case was premised on the university's good faith efforts to fulfill its obligations as an institution of higher education. Similarly, judicial deference to a public health agency should be

79. *Cf.* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1264 (1978) (arguing that the nonjudicial branches of government, e.g., Congress, are sometimes tasked with upholding constitutional norms).

80. Horwitz, *Three Faces of Deference*, *supra* note 50, at 1066.

81. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

premised on the agency's good faith efforts to fulfill its specific obligations, such as responding to a pandemic.

On the other hand, judicial deference in the public health context is not appropriate when the agency or official makes decisions or takes actions that do not in fact respond to the emergency in question. Thus, courts should generally not defer to the government's omissions or failures to act in the face of an emergency. For example, in a COVID-19 case involving the Orange County jail Justice Sotomayor argued that the jail's failure to take steps to protect inmates from COVID-19, together with its misrepresentations of this fact, rendered it unworthy of judicial deference.[82] Although a wait-and-see approach is sometimes the best policy, inaction without explanation in the face of an emergency situation suggests a failure to responsibly exercise one's authority. Likewise, policies that have no plausible basis in public health policy provide no grounds for deference. In another recent case, *Food & Drug Administration v. American College of Obstetricians & Gynecologists*, Justice Sotomayor again declined to defer to the government's determination, arguing that the government's utter failure to explain why in-person clinic visits are necessary for prescribing medicated abortions, but not for prescribing opioids, undermined its claim to deference.[83]

The third key principle of Public Health Deference is that courts should be sensitive to the process that the government employs in reaching its determination. In *United States v. Mead*, for example, the Court did not defer to an agency's determination when its process lacked rigor compared to traditional notice-and-comment rulemaking.[84] Likewise, in the context of public health, courts should be more willing to defer to determinations reached by the government

82. *See* Barnes v. Ahlman, 140 S. Ct. 2620, 2621 (2020) (Sotomayor, J., dissenting from grant of stay). *See also id*. at 2623–24 ("[C]ourts must be sensitive to . . . the need for deference to experienced and expert prison administrators, [they] may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") (citing Brown v. Plata, 563 U.S. 493, 511 (2011)).

83. *See* Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578, 584–85 (2021) (Sotomayor, J., dissenting grant of application for stay) ("The Government has not submitted a single declaration from an FDA or HHS official explaining why the Government believes women must continue to pick up mifepristone in person, even though it has exempted many other drugs from such a requirement given the health risks of COVID–19. There simply is no reasoned decision here to which this Court can defer.").

84. United States v. Mead Corp., 533 U.S. 218, 231 (2001).

when the process used to reach those determinations conform to the highest standards of the field.

Courts are not on their own in evaluating public health processes, as scholars and practitioners have already developed standards and best practices for decision-making in the public health context. Many public health scholars and practitioners have described the tension between promoting public health and individual rights, and have recognized the need to incorporate a normative analysis of this and related tensions into public health decision-making.[85] For example, public health scholars such as Professor Nancy E. Kass have developed frameworks and tools that are designed to guide public health officials and practitioners through the process of evaluating proposed policies in light of ethical considerations.[86] Some of these public health decision frameworks have been developed and adapted specifically for pandemic-response situations.[87]

Many public health scholars have emphasized the importance of process-based values such as transparency, accountability, public justification, community engagement, and an opportunity to revise policies or change course in light of new information and feedback. In a seminal article, Professor James F. Childress and number of prominent colleagues have argued that public health policy decisions must be premised on a "process-oriented approach to public accountability" because a transparent public justification of public health policies is essential to their legitimacy in a democratic society.[88] Childress and his colleagues argue, in particular, that "public health agents should offer public justification for policies in terms that fit the overall social contract in a liberal, pluralistic democracy."[89]

On this view, robust public health processes are a necessary to meet the obligations that public health officials have to their

85. *See, e.g.*, James F. Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 J. L., MED. & ETHICS 170, 176 (2002); Ronald Bayer & Amy L. Fairchild, *The Genesis of Public Health Ethics*, 18 BIOETHICS 473, 473–92 (2004); Dorothy Puzio, *An Overview of Public Health In The New Millennium:* Individual *Liberty vs.* Public *Safety*, 18 J. L. & HEALTH 173, 173–98 (2003).

86. Nancy E. Kass, *An Ethics Framework for Public Health*, 91 AM. J. PUB. HEALTH 1776, 1777 (2001).

87. *See, e.g.*, Nancy E. Kass, *An Ethics Framework for Public Health and Avian Influenza Pandemic Preparedness*, 78 YALE J. BIOLOGY & MED. 239, 246 (2005); JUSTIN BERNSTEIN ET AL., AN ETHICS FRAMEWORK FOR THE COVID-19 REOPENING PROCESS (2020) (available at https://jscholarship.library.jhu.edu/handle/1774.2/).

88. Childress, *supra* note 85, at 173–75.

89. *Id.* at 173.

communities. Professor Childress and colleagues go on to emphasize the importance of public input and community engagement, arguing that "as an expression of justice and fairness," public accountability must include "input from the relevant affected parties in the formulation of policy."[90] Incorporating community input and engagement into public health decision-making is a way to acknowledge and respect the reasonable disagreement that citizens and stakeholders have about the best way to navigate the tension between individual rights and community-wide interests in an emergency situation.

Along similar lines, a number of leading public health scholars, working under the auspices of the Association of Bioethics Program Directors, published guidance designed to help public health officials navigate the ethical challenges posed by responding to the COVID-19 pandemic.[91] These scholars emphasized, among other things, the importance of incorporating community engagement into pandemic response policymaking and implementation.[92] As the directors explain: "[C]ommunity engagement is potentially valuable across a range of functions, from setting achievable objectives for health-related initiatives to enhancing public awareness and understanding of complex matters and eliciting public concerns and priorities."[93] The directors point out, moreover, that "community engagement strategies" in the public health context can "engender and promote mutual trust and shared accountability" between government officials, healthcare providers, and members of the community.[94]

During the COVID-19 pandemic there were some successful examples of community engagement strategies of this sort.[95] For example, the Oregon Citizens' Assembly on COVID-19 Recovery was a partnership between Healthy Democracy, a nonprofit organization, and a community group called Oregon's Kitchen Table

90. *Id*. at 173–74 (citing Norm Daniels, *Accountability for Reasonableness*, 321 BMJ 1300, 1300–01 (2000)).

91. Amy L. McGuire et al., *Ethical Challenges Arising in the COVID-19 Pandemic: An Overview from the Association of Bioethics Program Directors (ABPD) Task Force*, 20 AM. J. BIOETHICS 15, 16 (2020).

92. *Id*. at 21 ("Community engagement has long been integral to public health and specifically to planning for pandemics").

93. *Id.*

94. *Id.*

95. *See generally* Ole F. Norheim et al., *Difficult Trade-offs in Response to COVID-19: The Case for Open and Inclusive Decision Making*, 27 NATURE MED. 10 (2021) (for an overview of COVID-19 strategies).

based at Portland State University.[96] Individuals were selected as panelists (meant to represent different demographic categories) and gathered seven different times via Zoom to discuss, deliberate, and develop a set of recommendations for Oregon's recovery from the COVID-19 pandemic and the economic and social aftermath.[97] The panelists focused on K-12 education and rent/mortgage assistance as their two main COVID-19 recovery topics.[98] As they deliberated on those two topics, they were also responding to a question from a state senator about how the pandemic has highlighted and exacerbated racial and economic inequities and what might be done to address those inequities.[99]

Adopting a different approach, Scotland employed a crowdsourcing public engagement framework that employed an online platform to collect ideas and comments regarding COVID-19 policy directly from citizens.[100] Beginning in April 2020, the Scottish government partnered with an online platform called Delib to host a topical message board to solicit asynchronous input from the public.[101] The Delib team then compiled a daily briefing to share with government officials, helping them to assess public ideas and viewpoints.[102] This public engagement platform contributed to government transparency, community-engagement, and consensus-building.[103]

In short, public health scholars and practitioners have recognized the importance of process in public health decision-making, and many of the process-based standards for public health decision-making processes are understood to be core aspects of the public health profession. But the importance of public health processes has not been

96. *See* OR.'S KITCHEN TABLE, CITIZEN ASSEMBLY ON COVID-19 RECOVERY 1 (2020) (available at https://www.oregonskitchentable.org/sites/default/files/results/OCA_2020COVIDrecovery_OKTreport.pdf).

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* Dani Topaz, *The Wisdom of Crowds: Scotland's National COVID Conversation*, DELIB (Sept. 3, 2020), https://newsroom.delib.net/the-wisdom-of-crowds-scotlands-national-covid-conversation/.

101. *Id.*

102. *See* Dani Topaz, *The Wisdom of Crowds, Part II: From Conversation to Policy*, DELIB (Sept. 22, 2020), https://newsroom.delib.net/the-wisdom-of-crowds-part-ii-from-conversation-to-policy/.

103. *Id.*

recognized by courts as the basis for judicial deference in a public health emergency. In the aftermath of COVID-19, courts must understand and evaluate the nuances of public health decision-making processes in order to accurately assess the worthiness of a given public health determination for judicial deference in a specific situation.

CONCLUSION

The COVID-19 pandemic has caused significant changes to many aspects of American society, and constitutional law is no exception. The future direction of judicial intervention in state and local pandemic response remains murky, but one thing seems certain: government officials can no longer expect unqualified judicial deference under *Jacobson v. Massachusetts*.[104] As described in this article, the COVID-19 cases have revealed sharp disagreement among federal judges, with some rejecting *Jacobson* deference while others continue to embrace it.

But the disagreement about *Jacobson* risks side-lining what is most significant morally and politically: namely, how our society should respond to a pandemic, taking adequately into account not only constitutionally protected rights and interests, but also the wellbeing of the community as a whole. In service of this greater end, this paper aims to rethink the institutional role of courts during a pandemic, in order to make them better partners in ensuring ethical and effective pandemic response.

By drawing on the "general theory" of judicial deference developed by Paul Horwitz, this article identifies three key propositions on which a new theory of Public Health Deference should be based: first, judicial deference is a privilege earned by public health agencies and officials, not a form of obedience or abdication on the part of courts; second, judicial deference depends on the ability of public health agencies and officials to responsibly exercise their

104. *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 723 (2021) (Kagan, J., dissenting) ("When are such capacity limits permissible, and when are they not? And is an indoor ban never allowed, or just not in this case? Most important—do the answers to those questions or similar ones turn on record evidence about epidemiology, or on naked judicial instinct? The Court's decision leaves state policymakers adrift, in California and elsewhere. It is difficult enough in a predictable legal environment to craft COVID policies that keep communities safe. That task becomes harder still when officials must guess which restrictions this Court will choose to strike down.").

authority and to fulfill their obligations to the public; and third, judicial deference should be sensitive to the process by which public health determinations are reached, paying special attention to virtues like transparency, accountability, and community engagement. This process-based approach of Public Health Deference will help to clarify the role of courts in a pandemic, streamline legal analyses, and allow courts to avoid questions of epidemiology and to focus their attention on the more tractable and productive questions of the processes by which the government makes its policy decisions.