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A Historical Review of the State Police Powers and Their Relevance to the COVID-19 Pandemic of 2020

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INTRODUCTION

At the time this article was written, in June 2020, the United States was five months into the 2020 COVID-19 pandemic. The United States Supreme Court, in a divided decision,[1] has turned away a challenge to state authority to impose general public health restrictions that did not exempt religious institutions. While most state and federal courts have also rejected challenges to public health orders, an unprecedented number of courts have sided with the challengers and substituted the courts' judgment on public health safety measures for that of the state or local public authorities. At this point in time, support for public health restrictions to slow the spread of the virus tends to follow the existing ideological divide in the country, reflecting either the President's skepticism of science and expert opinion and downplaying the risk of the pandemic, or accepting the need for dramatic shared sacrifice in the face of grave danger.

This article is a historical look at the judicial review of public health orders and statutes. Courts have almost always deferred to the judgment of public health authorities or legislatures in public health cases. In only two cases has the Supreme Court found such actions unconstitutional.[2] In both, the Court found

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1. South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.).
2. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Ferguson v. City of Charleston, 532 U.S. 67 (2001).

that the proffered public health justification was pretextual, with a significant racial/ethnic bias.

But while the judicial divide over the public health response to COVID-19 is unprecedented, the public controversy is not. Public health actions have always been controversial in the United States. There have always been vaccine resisters. Businesses resist anything that interferes with their operations. Individuals resist restrictions on personal behavior, whether that was wearing masks in 1918-1919 or being isolated for tuberculosis. Public officials also have sometimes failed to act because of public opposition. Public resistance to disease control measures during the 1918-1919 flu pandemic, for example, led to a second wave of cases and a dramatic increase in deaths.[3] And political opposition to public health actions greatly exacerbated the impact of the HIV/AIDS epidemic in the United States.

I. PLAGUES IN THE PAST

Infectious disease has shaped society from the earliest days. Infection made even minor injuries potentially fatal. When society shifted from small hunter gatherer groups to permanent farming communities, the increased population density provided a niche for diseases such as smallpox, which only spread among humans. Unsanitary food could sicken or kill individuals or an entire community if shared at a feast. Even if the fatality rate for a disease was not high in isolated cases, an epidemic could decimate a community, because simultaneous illness destroyed societal support systems: there would be no one who could prepare food or go for water. The classic book, *Rats, Lice and History*, provides a graphic view of this world:

> In earlier ages, pestilences were mysterious visitations, expressions of the wrath of higher powers which came out of a dark nowhere, pitiless, dreadful, and inescapable. In their terror and ignorance, men did the very things which increased death rates and aggravated calamity. . . . Panic bred social and moral disorganization; farms were abandoned, and there was shortage of food; famine led to . . . civil war, and, in some instances, to fanatical religious movements which contributed to profound spiritual and political transformations.[4]

As an invisible threat that could destroy a tribe or a civilization, disease was a natural focus of religion. Religious taboos provided the first public health codes. In the Judeo-Christian tradition, public health law starts in Genesis: "But of the tree of the knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof thou shalt surely die."[5] Leviticus provides is a more detailed

3. Brian Dolan, *Unmasking History: Who Was Behind the Anti-Mask League Protests During the 1918 Influenza Epidemic in San Francisco*, PERSPECTIVES IN MED. HUMANITIES (May 19, 2020).

4. HANS ZINSSER, RATS, LICE AND HISTORY 129 (Classics of Med. Libr. 1997) (1935).

5. *Genesis* 2:17.

public health code.[6] The Romans developed the discipline of sanitary engineering, building water works and sewers.[7] The growth of shipping and merchant nations such as Venice in the 1300s lead to the development of quarantine—holding potentially disease-carrying ships and their passengers offshore for 40 days.[8]

The English statutory and common law, which was carried into the colonies, recognized the right of the state to quarantine and limit the movement of plague carriers. (Plague in this period was a more general term than the specific disease indicated by plague today.) Blackstone observed that disobeying quarantine orders merited severe punishments, including death.[9] These penalties recognized the severity of the threat that plagues posed to the community. In *Plagues and Peoples*, the historian William H. McNeill documented this threat by showing the role of epidemic communicable diseases in destabilizing the feudal order in Europe and in the destruction of indigenous peoples by European invaders.[10] This is Blackstone's description of British law on quarantine and the penalties for violators:

> The fourth species of offenses, more especially affecting the commonwealth, are such as are against the public health of the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.
>
> 1. The first of these offenses is a felony . . . that if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it; he may be enforced . . . to obey such necessary command: and, if any hurt ensue by such enforcement, the watchmen are thereby indemnified. And further, if such person so commanded to confine himself goes abroad, and converses in company, if he has no plague sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behavior: but, if he has any infectious sore upon him uncured, he then shall be guilty of felony. . . . [T]he method of performing quarentine, or forty days probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly; and masters of ships, coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the lazarets, or places wherein quarentine is to be performed; and officers and

6. *See Leviticus* 11-16.

7. CHARLES FREDERICK BOLDUAN & NILS W. BOLDUAN, PUBLIC HEALTH AND HYGIENE 4 (1941).

8. The word "quarantine" derives from *quadraginta*, meaning 40. It was first used between 1377 and 1403 when Venice and the other chief maritime cities of the Mediterranean adopted and enforced a 40-day detention for all vessels entering their ports. *Id.* at 7.

9. 4 WILLIAM BLACKSTONE, COMMENTARIES *161-62.

10. WILLIAM H. MCNEILL, PLAGUES AND PEOPLES (1998).

> watchmen neglecting their duty; and persons conveying goods or letters from ships performing quarentine.[11]

The British system included the authorization for executive orders by local officials to impose disease control measures. This legal framework was carried to the British colonies in North America.

II. EPIDEMIC DISEASE IN THE AMERICAN COLONIES

Colonial public health law was shaped by Blackstone and by the local experience. Most colonial cities were built on waterways or along coastlines because trade traveled by water. These coastal areas were surrounded by marshes and wetlands, subjecting the colonies to mosquito-borne illnesses—yellow fever and malaria—as well as water-borne illnesses—typhoid and cholera—driven by poor drinking water sanitation.[12] Smallpox made regular appearances in colonial cities, as did other epidemic diseases, and tuberculosis (consumption) was a constant companion.[13] The first demographic study of life expectancy in the United States, *The Shattuck Report*, was done in Massachusetts in the late 1840s. This study showed that the life expectancy of a person living in Boston was 27.85 years between 1810 and 1820, and that it declined to 21.43 years between 1840 and 1845, as the city became more populous.[14] The primary cause of premature death was communicable disease.

Yellow fever or "yellow jack," as it was known at the time, was especially deadly. It is a mosquito-borne illness brought to the Americas from Africa through the slave trade. The first outbreak was in Yucatán in 1648. It was brought to Boston in 1693. It spread through the colonies and began yearly outbreaks, building in the summer and fall and disappearing during the winter along with the mosquitoes. Ten percent of the population of Philadelphia died of yellow fever between September and November 1793, leading to panic and a breakdown in civil order.[15] The flavor of that period was later captured in an argument before the Supreme Court:

> For ten years prior, the yellow-fever had raged almost annually in the city, and annual laws were passed to resist it. The wit of man was exhausted, but in vain. Never did the pestilence rage more violently than in the summer of 1798.

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11. 4 WILLIAM BLACKSTONE, COMMENTARIES *161-62.

12. *See* Alex Kreit & Aaron Marcus, *Raich, Health Care, and the Commerce Clause*, 31 WM. MITCHELL L. REV. 957, 983 (2005) (noting that epidemics such as smallpox, yellow fever, typhoid, and malaria swept the East Coast during the early nineteenth century).

13. *See id.* at 983.

14. LEMUEL SHATTUCK ET AL., REPORT OF THE SANITARY COMMISSION OF MASSACHUSETTS 1850 (1948), at 104.

15. JOHN H. POWELL, BRING OUT YOUR DEAD: THE GREAT PLAGUE OF YELLOW FEVER IN PHILADELPHIA IN 1793, at vi, 242-47, 282 (1949) (explaining that in 1793, 5,000 of Philadelphia's 55,000 inhabitants died of yellow fever, compelling the Assistant Committee to take Draconian measures to mount "resistance to disaster").

> The State was in despair. The rising hopes of the metropolis began to fade. The opinion was gaining ground, that the cause of this annual disease was indigenous, and that all precautions against its importation were useless. But the leading spirits of that day were unwilling to give up the city without a final desperate effort. The havoc in the summer of 1798 is represented as terrific. The whole country was roused. A *cordon sanitaire* was thrown around the city. Governor Mifflin of Pennsylvania proclaimed a non-intercourse between New York and Philadelphia.[16]

The impact of infectious diseases on the colonies is key to understanding the deference judges showed to legislatures and public health authorities in their efforts to control epidemics. Yellow fever provided a clear example of the breakdown of civil society that most frightened governments. The broad authority and severe penalties described in Blackstone arose from this fear of social disorder, not just the concern for loss of life. When colonial governments were faced with yellow fever and other outbreaks, they did not hesitate to use the full powers of the state to try to control the contagion. The Framers of the Constitution were familiar with the public health powers exercised by the colonial governments and the states under the Articles of Confederation. While it was not a great epidemic year, yellow fever in Philadelphia during the Constitutional Convention reminded the Framers of the threat that epidemic disease posed to the new nation. The powers of the state to protect public health thus can probably claim strong original intent.

III. PUBLIC HEALTH LAW AT THE TIME OF THE DRAFTING OF THE CONSTITUTION

At the time of the framing of the Constitution, state governments and, more importantly, the governments of major cities had a long history of public health statutes and regulations passed in response to waves of deadly epidemic disease dating back to the earliest colonial days.[17] These were based on the jurisprudential principle of a state's police powers. As analyzed in Justice Cooley's classic work, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*, they represent the fundamental power of a state to protect its people:

> Blackstone defines the public police and economy as "the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." Jeremy Bentham, in his General View of Public Offences, has this definition: "Police is in general a system of precaution, either for the prevention of crimes or of

16. Smith v. Turner, 48 U.S. (7 How.) 283, 340-41 (1849).

17. For example, epidemic disease was a major factor in the failure of the Jamestown Colony. *See* Karen Ordahl Kupperman, *Apathy and Death in Early Jamestown*, 66 J. AM. HIST. 24 (1979).

> calamities. Its business may be distributed into eight distinct branches: 1. Police for the prevention of offences; 2. Police for the prevention of calamities; 3. Police for the prevention of endemic diseases; 4. Police of charity; 5. Police of interior communications; 6. Police of public amusements; 7. Police for recent intelligence; 8. Police for registration."[18]

These broad powers push back against traditional property rights. (Bentham's eight branches of policing seem very modern, with the current calls for restructuring the police.) Colonial regulations covered the gamut of traditional public health—abatement of nuisances, quarantine for communicable diseases, and regulation of the sale of food and drink.[19] In Boston, for example, statutes and regulations to control smallpox outbreaks were in place before 1721.[20]

Quarantine was strictly enforced. One of Paul Revere's children was infected during the smallpox epidemic of 1764. Under the public health ordinances, she would have had to be moved to the pesthouse, or the entire family would be quarantined. Out of concern for her well-being, Revere refused to allow her to be taken to the pesthouse.[21] He and his family were therefore confined in their house for the duration of the infection. During this period (more than a month), a quarantine flag was hung in front of the house, and a guard was posted to keep the Reveres in and others away from the house.[22]

The historical record shows that the police powers were well developed in the states at the time of the framing of the Constitution. Looking back from our current period, it is critical to distinguish these police powers, which provided the understanding of police powers for the Framers, from the powers of contemporary police forces. During the colonial period, police as we know them today did not exist:

> Police are relative newcomers to the Anglo-American criminal justice system. The Constitution does not mention them. Early city charters do not mention them, either, for the simple reason that, as we know them, police had not been invented. Instead, cities had loosely organized night watches and constables who worked for the courts, supplemented by the private prosecution of offenders through lower-level courts. The night watch and day constable, dating from the Middle Ages, were familiar comic figures in Shakespeare's plays and were not replaced until the 1820s, when London police were reorganized by Robert Peel. The police precedent for the United States, as is well known, came from the establishment of the Metropolitan Police of London in 1829.

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18. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 572 n.1 (2d ed. 1871) (citations omitted).

19. Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 285-302 (1992).

20. John B. Blake, *Smallpox Inoculation in Colonial Boston*, 8 J. HIST. OF MED. & ALLIED SCIENCES 284 (1953).

21. *See* Kirk v. Wyman, 83 S.C. 372, 65 S.E. 387, 388 (1909) (pesthouse described as "coarse and comfortless . . . adjoin[ing] the city dumping grounds").

22. ESTHER FORBES, PAUL REVERE AND THE WORLD HE LIVED IN 76-77 (1942).

> Peel used his military experience in Ireland to create a social control organization midway between a military and a civil force.[23]

The modern police force corresponds to Bentham's police to prevent offences.[24] It exercises police powers not yet developed at the time of the drafting of the Constitution. In the traditional view of federalism, the Constitution leaves the police powers to the states.[25] These are the Blackstone/Bentham police powers, which were primarily public health powers as implemented by the colonies at the time of the Constitution. If there is any proposition about which the original intent of the Framers is clear, it is that the states have broad powers over public health and safety, and that the federal role should be secondary to that of the states:

> Every state has acknowledged power to pass, and enforce quarantine, health, and inspection laws, to prevent the introduction of disease, pestilence, or unwholesome provisions; such laws interfere with no powers of Congress or treaty stipulations; they relate to internal police, and are subjects of domestic regulation within each state, over which no authority can be exercised by any power under the Constitution, save by requiring the consent of Congress to the imposition of duties on exports and imports, and their payment into the treasury of the United States.[26]

IV. THE POST-CONSTITUTION PUBLIC HEALTH CASES

The judicial decisions in public health cases after ratification of the Constitution reflect this understanding of states' police powers. Almost all the cases review state actions, because, with few exceptions, the federal government until fairly recently left public health measures to the states. When those state measures reflected the broad understanding of police powers at the end of the eighteenth century, the courts upheld them. The courts struck down state actions, however, when they interfered with fundamental constitutional interests, as when they interfered with interstate commerce or were used as a pretense for racial discrimination.

Three basic questions are addressed in these cases. First, has the state exceeded the scope of its police powers? Second, does the state's exercise of its police power interfere with a constitutionally protected interest, or conflict with a federal law? Third, has the state properly implemented the action through legislation or executive action?

In the early cases, the question was usually whether the state action interfered with interstate commerce. Later cases, such as the vaccine cases and the personal restriction cases, were based on the violation of individual rights. The Constitution is silent on how government will function on a day-to-day basis, that is, it is silent

23. Eric H. Monkkonen, *History of Urban Police*, 15 CRIME & JUST. 547, 549 (1992).
24. COOLEY, *supra* note 18, at 572.
25. *Id.*
26. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 616 (1840).

on administrative law. As the courts decided these cases on the implementation of the police powers, they also established part of the framework for modern administrative law.

These cases addressed conflicts between federal and state power. The Framers did not contemplate the size and complexity of the contemporary federal government. The president was given broad national security powers to deal with external threats, and Congress was given the power to regulate interstate commerce. While the Commerce Clause has become the major source of congressional power, the Framers saw it as giving the federal government the power to prevent trade wars among the states—the using of state police and taxing powers to disadvantage out of state businesses and favor local businesses.

V. *GIBBONS V. OGDEN*: DO POLICE POWERS SURVIVE THE COMMERCE CLAUSE?

The key early case in federal judicial review of state police powers is *Gibbons v. Ogden*, which was decided in 1824.[27] New York State had passed a law requiring permits for steamships to sail to New York ports and on New York waterways. The permits were intended to generate revenue and to allow the state to limit and regulate steamships. The permits were limited, however, creating a monopoly for their holders. Ogden had a New York permit, and Gibbons did not. Ogden sought an injunction in the New York courts to prevent Gibbons from operation steamboats in New York waters. When the New York court ruled for Ogden, Gibbons appealed to the U.S. Supreme Court.

Gibbons argued, through his attorney Daniel Webster, with support from the Attorney General, that his federal permit, issued pursuant to a congressional statute, preempted the state's authority to bar him from New York waters. The case raised what were then novel questions of the definition of commerce, the effect of the supremacy clause, and the extent of federal control of navigable waters. All the questions were decided in favor of federal power and are now foundational constitutional law.

The important police power question was the extent to which state police powers survive when they overlap with the federal power to regulate commerce. The arguments of counsel are included with the opinion in the official reporters. They provide an extensive review of existing state police power regulations directed at disease control, food sanitation, and other areas where there was a potential conflict with the federal power to regulate commerce. The Court was clear that the powers may coexist to the extent that Congress has not specifically spoken and reserved an area for federal control. The Court gave the example of federal statutes supporting state quarantine laws.[28] It pointed out that while New York did not have the power to restrict commerce on navigable waters, it could

27. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
28. *Id.* at 205.

regulate and inspect cargos to prevent threats to the public health. This might include a quarantine or the destruction of contaminated cargo.[29]

Gibbons v. Ogden established the supremacy of federal law when Congress has specifically spoken, and it established that the federal government broadly regulates commerce. The state public health laws were coextensive with this power, the Court said, and the states could take action that would affect commerce as long as it was done for proper police power reasons. The states frequently used health and safety concerns to justify more stringent regulation of state businesses, however. The result was a line of cases distinguishing good faith public health actions from improper restrictions on interstate commerce, and establishing a general principle that barred discrimination against interstate commerce.

VI. THE QUARANTINE CASES

Smith v. Turner, cited earlier for its descriptive history of yellow fever in the United States, is one of a pair of cases contesting state taxes on ships from foreign ports. The tax was a head tax on all passengers from a foreign port, and it was to be paid by the master of the ship. Smith was master of a ship contesting the tax as exacted by New York, and Norris was contesting the tax imposed by the City of Boston.[30] The tax was used to pay for the operation of the state-run quarantine station at each port.[31] In supporting the right of states to tax and control entry at their ports, the attorneys for the states remind us that state police powers were often put to racist and xenophobic ends:

> We entertain no doubt whatever that the States, in virtue of their general police power, possess full jurisdiction to arrest and restore runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers. . . .
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> . . . We think it competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease.[32]

The Court discussed in detail the use of the state's police powers to protect the public health.[33] As in *Gibbons*, it addressed a federal statute as well as the federal government's constitutional power over commerce and foreign relations.

29. *Id.* at 203.
30. Smith v. Turner, 48 U.S. (7 How.) 283, 298-300 (1849).
31. *Id.* at 403.
32. *Id.* at 329-330 (citations omitted).
33. *Id.* at 329-36.

Congress had established quarantine hospitals, a rare example of early direct federal public health efforts, and had limited state control over foreign goods and passengers.[34] While the Court recognized the preeminence of state law in quarantine and communicable disease control, it found that the federal government's right to regulate international commerce trumped the states' power to tax foreign travelers, even if this tax supported public health measures.[35]

In *Railroad Co. v. Husen*, the Court considered a Missouri statute that was intended to prevent the spread of disease by cattle transported though the state.[36] Diseased farm animals pose a risk to the humans who eat or work with them, but they also pose an economic risk to the farming community. Until universal pasteurization of milk was required, milk from diseased cows was a major vector for human tuberculosis. The introduction of diseased livestock into a community may then require that all the livestock in the community be destroyed to control further spread of the disease. The state is not required to pay compensation for the livestock because they constitute a public nuisance under the Takings Clause. Thus, the state has a strong interest in preventing the importation of diseased livestock.

The Missouri law at issue prohibited the importation into the state of Texas, Mexican, or Indian (likely meaning from the Indian Territory) cattle from the first day of March until the first day of November. The railroad was allowed to transport cattle through the state if they were not unloaded, but the railroad was liable if infection broke out along the transportation route.[37] The plaintiffs argued that the law was overbroad, because it created a presumption that if any diseased cattle were found along the transportation route, the shipping companies were responsible if they had shipped any cattle.[38] Plaintiffs claimed that this effectively banned the shipping of all cattle through Missouri from March through October, and thus it violated the Interstate Commerce Clause.[39]

The *Husen* Court reiterated the broad powers of the state to impose quarantines and to prohibit the transportation and sale of diseased livestock and other goods, even if these actions interfered with commerce. But the Court found that the Missouri law was not a valid inspection or quarantine law, because it created a blanket ban on shipping into the state and potential liability for shipping through the state. It was set by the calendar, rather than being triggered by the detection of disease. There was no inspection to determine whether diseased livestock were being transported. The Court found that to survive the presumption against laws that interfere with interstate commerce, a law must be narrowly tailored to specifically target diseased livestock.[40]

34. *Id.* at 424-25.
35. *Id.* at 414-17.
36. 95 U.S. 465, 468-69 (1877).
37. *See id.* at 469.
38. *Id.*
39. *Id.* at 466-67.
40. *Id.* at 472-73.

The Court returned to the question of quarantine station fees in 1886 in *Morgan's Steamship Company*, a case challenging fees charged ships by the quarantine stations of the City of New Orleans.[41] At the time, New Orleans was still one of the largest cities and ports in the United States. As the Court noted, the city's position on the Gulf of Mexico made it the prime entry point for ships from tropical countries bringing diseases of warm climes, as well as for international shipping that brought more general disease threats.[42]

The Louisiana quarantine station statute set out a fee schedule based on the type of boat or ship, and the fee was assessed against all vessels, both domestic and foreign. The fees were directly related to services provided by the quarantine station, which included inspection of the ship, and quarantine and fumigation if necessary. Each ship's master benefited from this system, both because it provided services that he would otherwise have to provide, and because if the ship were found to be disease free, he would get a clean bill of health and be allowed to continue to his destination.[43]

The Court reviewed the federal quarantine statute discussed in *Smith* and found that it did not displace the state's right to run quarantine stations, and that the federal government depended on state quarantine stations. The Court asked whether the fees were applied in a way that discriminated against interstate or foreign commerce. It concluded that because the fees were applied uniformly to all vessels and were used to provide legitimate quarantine services, they did not violate the Constitution.[44]

The next important quarantine case, in 1900, raised a question important today: whether a state may bar or restrict the entry of citizens of another state to prevent the spread of disease? While the quarantine stations and public health hospitals are now gone, the differential spread of COVID-19 has caused some states to impose restrictions on travel into those states by residents of other states. This was the question in *Louisiana v. Texas*: could Texas bar entry by people traveling from New Orleans?[45]

In 1895, the Texas legislature passed a law authorizing the governor and/or the state health officer to establish quarantines to protect the residents of the state from communicable diseases. In 1899, when a case of yellow fever (whose mode of transmission was still unknown) was reported in New Orleans, the health officer embargoed all commerce between New Orleans and Texas.[46] The original order included the U.S. mail. It was then modified to allow the mail, and to allow people to enter the state if they spent 10 days at the state quarantine station and

41. Morgan's Louisiana & T.R. & S.S. Co. v. Bd. of Health of State of Louisiana, 118 U.S. 455 (1886).

42. *Id.* at 459-460.

43. *Id.*

44. *Id.* at 467.

45. Louisiana v. Texas, 176 U.S. 1 (1900).

46. *Id.* at 4.

allowed their luggage to be fumigated. No goods from New Orleans were allowed into Texas, without regard for their identity or relation to disease transmission.

Plaintiffs argued that this embargo was a subterfuge intended to hurt businesses in New Orleans, which was the dominant commercial center in the South and a major competitor of the Port of Galveston. Plaintiffs also insisted that, as in *Railroad Co. v. Husen*, the order was not tailored to any disease threat but was an unjustifiable blanket prohibition on commerce. They put on evidence showing that the health officers of several similarly situated southern states had agreed on a protocol for yellow fever travel restrictions, and that the Texas order did not follow this protocol.

While the claim might have been brought by business interests in New Orleans, it was instituted instead by the State of Louisiana, invoking the Supreme Court's original jurisdiction. But the Court was concerned that original jurisdiction was limited to claims by a state on its own behalf, such as disputes over transboundary waters. In this case, the state was acting in its role as *parens patriae*, litigating on behalf of New Orleans businesses injured by the embargo.

The Court ultimately held that it did not have jurisdiction to hear the case, but it provided dicta that indicate how it might have ruled.[47] The court repeated the language of prior cases stating that state quarantine and embargo powers survive to the extent that they are not in conflict with a federal law. But if a state seeks to impose a substantial restriction on interstate or international commerce, it must be applied in a nondiscriminatory way and only to the extent necessary to control a specific disease outbreak. Texas's blanket ban, like the one in *Husen*, would likely have failed because it was not meaningfully linked to the threat of yellow fever from New Orleans.

The Court was not finished with New Orleans. The last of the quarantine cases, *Compagnie Française de Navigation à Vapeur v. Bd. of Health of State of Louisiana*, addressed the use of a *cordon sanitaire*—a ban on travel into as well as out of a quarantined area.[48] Plaintiff was a French shipping company that transported cargo and passengers. Its ship, S.S. *Britannia*, stopped at the New Orleans quarantine station at issue in *Morgan Steamship Company* and was inspected by the station's health officer. It was given a clean bill of health, which permitted it to dock in New Orleans or upriver ports on the Mississippi. Before it could dock, however, it was served with an order from the Louisiana State Board of Health forbidding it to dock in New Orleans or other ports in the region. The ship was ultimately forced to disembark its passengers in Pensacola, Florida, and then return to Louisiana to discharge its cargo. The shipowner then sued the Board of Health and its members for damages representing the excess costs caused by the delay and rerouting of the vessel.

The plaintiff attacked the Board's order as an unwarranted restraint of interstate and international commerce, and as a violation of a treaty preventing discrimination

47. *Id.* at 22.
48. 186 U.S. 380 (1902).

against French shipping. It argued that since the ship had a clean bill of health, it should not have been subjected to further public health restrictions.

The Court looked at the 1799 federal quarantine law discussed in the earlier police power cases and at its revision through time. None of these revisions displaced the state's quarantine power, the Court found, and the most recent revisions clearly indicated that federal agents should assist with a state quarantine.[49] Having determined that Congress had not displaced the state's quarantine power, and that the Board of Health's action was properly grounded in Louisiana law, the Court then turned to the rationale for allowing state quarantine law to interfere with interstate and international commerce. Counsel for the Board argued, with support from older cases, that this was not a question of commerce at all:

> Turning now to the decisions of this court, it will be found that the basis upon which it has upheld the exclusion, inspection, and quarantine laws of various states, is that criminals, diseased persons and things, and paupers, *are not legitimate subjects of commerce*. They may be attendant evils, but they are not legitimate subjects of traffic and transportation, and therefore, in their exclusion or detention, the state is not interfering with *legitimate* commerce, which is the only kind entitled to the protection of the Constitution.[50]

The Court recognized that this formulation was apt in the case of products that are completely banned. According to the Court, however, it provided no standards when the question was testing the state's action to balance public health protection with the constitutional right of interstate and international commerce. If something could be rendered outside of commerce simply by a state's declaration of an epidemic, there would be no meaningful restriction on the state's police power until Congress legislated a limit.

Plaintiffs argued that since the ship had a clean bill of health, the state's action constituted a taking without due process. The Court rejected this view, holding instead that it should "look into the operation and effect of the statute to discern its purpose."[51] The Court did not talk in modern terms about levels of scrutiny, but recognized that since interstate and international commerce were involved, the review would be more critical than our modern rational relationship test.

Looking into the operation of the statute and its intent, the Court found that it was reasonable for the state to limit the entry of uninfected persons into a quarantined area. It accepted the state's argument that this would increase the number of persons who might be infected, and that some of these persons, coming from areas without yellow fever, might be more susceptible to the disease. The Court thus relied on the expertise of the state health department in determining the best way to manage the epidemic. This deference to expertise became a core part of public health jurisprudence and an underlying principle of modern administrative law. Having decided

49. *Id.* at 388-89.
50. *Id.* at 391 (emphasis in original).
51. *Id.* at 392.

that the state's action was a proper limitation on commerce, the Court found that as long as it was being uniformly applied, it could be used to restrict international as well as interstate commerce. It thus dismissed the plaintiff's claims.

The dissenters in *Compagnie Française*, including Justice Harlan, were unwilling to defer to the expertise of the state health department. Instead, they engaged in their own analysis of the effectiveness of the *cordon sanitaire* in managing the epidemic. They found that it was merely speculative to assume that reducing the number of persons who might be infected within the quarantine area could help control the epidemic. This rejection of the expertise of the agency is reflected in modern calls to limit *Chevron* deference, and is echoed in contemporary court decisions that reject public health directives during the COVID-19 outbreak.

VII. THE VACCINE CASES

Jacobson v. Massachusetts, the 1905 Supreme Court decision on mandatory vaccinations, is the public health law case best known to COVID-19 courts and commentators.[52] During the first phase of the current pandemic, *Jacobson* was stretched to address legal issues arising from quarantines and business restrictions that are better understood by reference to other cases discussed in this essay. It will be a critical case for the second phase of the pandemic, when COVID-19 vaccinations become part of the control strategy.

Jacobson was a response to the anti-vaccine movement of its day. It is important now in part because the prospect of mandatory COVID-19 vaccinations has activated the anti-vaccination movement anew, raising the possibility that a large enough percentage of the population might not be inoculated to effectively stop the spread of the disease.

To understand *Jacobson*, we must go back to the beginnings of vaccinations in the United States, although until the 1930s, the only vaccine subject to general mandates was smallpox vaccine. And the key legal precedents all involve challenges to smallpox vaccination laws.[53]

In the late eighteenth century, the English physician Edward Jenner observed that dairymaids who had been infected with cowpox, a mild pustular infection, thereafter were immune to smallpox.[54] In 1796, Jenner famously inoculated a young man with cowpox, and the boy developed smallpox immunity.[55] His finding led to widespread inoculation with cowpox starting in the nineteenth century. The effectiveness of smallpox vaccination and the fear of smallpox epidemics soon led states to adopt mandatory vaccination laws.[56]

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52. 197 U.S. 11 (1905).

53. Charles L Jackson, *State Laws on Compulsory Immunization in the United States*, 84 PUB. HEALTH REP. 787, 788 (1969).

54. EDWARD JENNER, THREE ORIGINAL PUBLICATIONS ON VACCINATION AGAINST SMALLPOX (1798), https://perma.cc/56XX-BH5F.

55. *Id.* at 258.

56. *See* Allegany County Comm'rs v. McClintock, 60 Md. 559 (1883); City of Ft. Wayne v. Rosenthal, 75 Ind. 156 (1881); Schmidt v. Bd. of County Comm'rs of Stearns Co., 24 N.W. 358 (Minn. 1885); Scripps v. Foster, 3 N.W. 216 (Mich. 1879); McIntire v. Town of Pembroke, 53 N.H. 462 (1873);

These laws were resisted from the beginning.[57] People argued that they should not be vaccinated without their permission, but their claims were rejected by courts in the 19th and early 20th centuries. Medical autonomy, which is now a core ethical and legal principle, was not highly valued by the courts until after adoption of the Nuremberg Code following World War II.[58]

Claims based on the dangers of the vaccine were more persuasive. While contemporary vaccines are very safe, smallpox vaccine in the 19th and early 20th century was not. It was prepared using an unsanitary method that contaminated the vaccine with dangerous bacteria that could and did lead to sepsis and death. The live virus in the vaccine, while not smallpox, could cause serious or fatal illness in persons with weakened immune systems. The public and the courts were aware that vaccination carried real risks.

There was also anti-scientific argument that the vaccine did not prevent smallpox or might even cause smallpox. As with contemporary denials of science, there were experts prepared to testify that vaccination was useless.

Yet despite the real dangers of the vaccine and the false claims that it was useless, most of the public and the politicians supported mandatory vaccination laws. While it is hard to imagine contemporary politicians mandating a dangerous vaccine, times then were different. In the 1800s, smallpox was still present, and most of the public had seen its terrifying consequences.

In *Jacobson*, the statute at issue provided a criminal fine for those who refused to be vaccinated. Reverend Jacobson refused to be vaccinated and was prosecuted.[59] He was found guilty, and appealed to the Massachusetts Supreme Judicial Court, which upheld the conviction.[60] In an appeal to the U.S. Supreme Court, Jacobson argued that compulsory vaccination violated the Preamble to the United States Constitution and the spirit of the Constitution.[61]

The Supreme Court started with a traditional police power analysis.[62] It stated that it was appropriate for the Massachusetts legislature to refer the issue of what is necessary for the public health and safety to the Board of Health, and under the circumstances it would not adjudge the Board's vaccination requirement unnecessary.[63]

> We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its

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Com. v. Pear, 66 N.E. 719 (Mass. 1903), *aff'd sub nom.* Jacobson v. Massachusetts, 197 U.S. 11 (1905); Carr v. Bd. of Educ. of Columbus, 1 Ohio N.P. (n.s.) 602 (Ohio Com. Pl. 1903).

57. *See* MILTON W. TAYLOR, VIRUSES AND MAN: A HISTORY OF INTERACTIONS 1, 8 (2014).

58. *See* "Permissible Medical Experiments" in 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 181-82 (1949).

59. *Jacobson*, 197 U.S. at 13.

60. *Id.* at 21.

61. *Id.* at 22.

62. *Id.* at 24.

63. *Id.* at 27.

> constituted authorities, acting in good faith for all, under the legislative sanction of the state.[64]

A core issue in *Jacobson* was whether Reverend Jacobson would be allowed to present evidence opposing the scientific basis of the mandatory vaccine law, thereby asking the Court to substitute its assessment of the risk and necessity of mandatory smallpox vaccinations for that of the Board of Health.[65] (Although the Court's discussion focused on the legislature's power, this power was actually delegated to and exercised by the Board; the statute was not self-executing.[66]) The Court rejected the collateral attack on the legislative findings and the decision by the Board.[67] The *Jacobson* standard was later articulated in *Williams v. Mayor of Baltimore*, in what has become a standard formulation for judicial review of public health decisions:

> It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way.[68]

Jacobson specifically endorsed the legislation's grant of discretion to the Board of Health to tailor the requirements of the law to prevent the potential injustice of applying a perfectly equal law to a population with differing needs. The Court pointed out that "[t]he legislature assumed that some children . . . might not be fit subjects of vaccination, and it is suggested—and we will not say without reason—that such is the case with some adults."[69] The Court also noted that the agency had the discretion to apply the law only when the community was threatened with smallpox. It found that it would work an injustice, and call into question the validity of the law, if it were applied without regard for the needs of individuals and the community.[70] Justice Harlan, writing for the Court, noted that Jacobson never had offered to prove that he himself was not a fit subject of vaccination.[71] The opinion went on to state that to exempt the defendant because the vaccine often injured people who were deemed fit to be vaccinated

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64. *Id.* at 37.

65. *Id.* at 23-24.

66. *Id.* at 27. The Revised Laws of that commonwealth, c. 75, §137, provide that "the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit $5." *Id.* at 12.

67. *Id.* at 30-31.

68. 289 U.S. 36, 42 (1933) (citations omitted).

69. *Jacobsen*, 197 U.S. at 36.

70. *Id.* at 20.

71. *Id.* at 36-37.

> would mean that compulsory vaccination could not in any conceivable case be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers, that a system of general vaccination was vital to the safety of all.[72]

While vaccination laws for school entry were not at issue in *Jacobson*, the Court noted their existence and cited state court decisions upholding them. The Court reviewed the constitutionality of such laws in the 1922 case of *Zucht v. King*.[73] There the plaintiff was excluded from school under a municipal ordinance requiring proof of smallpox vaccination for school entry. She argued that on its face the ordinance violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and that, as applied, it denied her the equal protection of the laws. Citing *Jacobson*, the Court ruled that the ordinance was a valid exercise of the police power. Finding no evidence that the ordinance was applied in a discriminatory way, the Court dismissed the claim.

The Court has not directly ruled on whether there is a constitutional right to a religious exemption to vaccination laws, but it raised the issue in 1944 in dicta in *Prince v. Massachusetts*:[74]

> Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.[75]

While it did not generate any police power case law, the swine flu vaccination campaign of 1976 illustrates the political costs of a failed vaccine program. The swine flu scare started in January of 1976 with a respiratory illness among several new recruits at Fort Dix, New Jersey. When samples were sent to the CDC labs, a previously unidentified strain of swine flu was detected.[76] The 1976 strain of swine flu resembled the strain that caused the great Spanish Influenza pandemic of 1918-1919. CDC feared that the country faced a deadly national flu pandemic

72. *Id.* at 37.
73. 260 U.S. 174 (1922).
74. 321 U.S. 158 (1944).
75. *Id.* at 166-67.
76. RICHARD E. NEUSTADT & HARVEY V. FINEBERG, THE SWINE FLU AFFAIR: DECISION-MAKING ON A SLIPPERY DISEASE (1978), https://perma.cc/7ADM-AXYY.

during the next flu season.[77] It urged the White House to implement a nationwide emergency vaccination program.

President Ford and Congress went on a war footing to get the vaccine developed and to establish a national immunization program. The vaccine was rolled out in record time, and the nation began to be vaccinated. The vaccination program became a public relations nightmare when a serious neurologic disease was thought to be associated with the vaccine.[78] When the expected swine flu outbreak then did not materialize, the public saw the CDC and the White House as having poisoned them with a bad vaccine for no reason. The ensuing scandal discredited public health authorities and undermined political support for strong public health actions.[79] The long shadow of this failed effort likely heightened conservative politicians' skepticism of the CDC and flu experts at the beginning of the COVID-19 pandemic.

Jacobson and the related state and federal mandatory vaccination cases are based on the state's police powers. The vaccination laws in these cases, most of which relate specifically to smallpox, are justified by a state's power to protect its residents from epidemic disease. The objective of the laws is to have enough of the state's residents vaccinated, and thus immune to the disease, that when an infected person encounters another person, the probability is that the second person will be immune and will not catch the disease. When all of an infected person's contacts are immune, there will be no further transmission. Likewise, if new cases enter the community, others will not be infected. Thus, the epidemic will be halted.

It is not necessary that everyone in a community be immune to stop the spread of a disease. The percentage of the population that must be immune—vaccinated or recovered from the disease—varies with the disease and the vaccine. This is critical, because some people are not medically fit to be vaccinated, either because the vaccine will injure them or because it will not work on them. But when enough members of a community are immune to stop the spread of the disease, the community has reached "herd immunity." Mandating vaccinations to achieve herd immunity is a clear exercise of police power that balances the risk of individual injury against the good of the community.

While modern vaccines are much safer than smallpox vaccine, many of them, especially the flu vaccine, are less effective than smallpox vaccine. They do not prevent all cases of the flu, although they often reduce the severity of the infection when a vaccinated person catches the flu. The best scientific evidence in June 2020 is that the COVID-19 vaccine will be like flu vaccines and will be only partially effective. The percentage of the population that must be vaccinated to reach herd immunity is thus higher when the vaccine is less effective.

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77. *Id.* at 5-9.

78. Unthank v. United States, 732 F.2d 1517, 1518-19 (10th Cir. 1984); NEUSTADT & FINEBERG, *supra* note 76, at 97-98.

79. *See* NEUSTADT & FINEBERG, *supra* note 76, at 2-3.

People may be less motivated to seek out a less effective vaccine, and anti-vaccination groups may have an easier time eroding public trust when the vaccine cannot guarantee that an inoculated person will not get the disease. Once a vaccine becomes available, mandatory vaccination laws will therefore be essential in getting to herd immunity. But we can expect these new laws to prompt judicial review of the police power standards outlined above.

VIII. PERSONAL PUBLIC HEALTH RESTRICTIONS

The Supreme Court has not ruled on mandatory communicable disease treatment, quarantine, or testing. The authority to carry out these actions is implicit in *Jacobson*, however, and there is a body of state cases upholding individual restrictions.

Because there was no vaccine, test, or effective treatment for the Spanish Influenza of the 1918-1919 pandemic, it did not produce judicial challenges to testing or treatment.

Tuberculosis does provide some useful legal guidance. Tuberculosis is a slow moving, relentless disease. While it is relatively hard to catch, it is difficult to treat today, and it was impossible to treat effectively until the 1950s. It can debilitate those it infects and can linger for years before killing its host. In 1915 there were more than 100,000 tuberculosis deaths per year in the United States, out of a population of only 100,000,000, and it killed year after year. It was called the "white plague." Globally, it is still a major killer.[80] As with COVID-19, a significant number of persons infected with tuberculosis are carriers, that is, they have either no or minor symptoms but can spread the disease to others. A tuberculosis carrier can spread the disease for years, so it is critical to identify carriers.

In *State v. Armstrong*, a Christian Scientist wanted to register as a university student in Washington State.[81] The state university required all students to have a chest x-ray for tuberculosis diagnosis, a common requirement at that time. Armstrong refused the x-ray because it was against her religion. The court held that personal religious beliefs must be subordinated to the protection of the public health, and that requiring tuberculosis testing for school entry was a legitimate use of public health power.[82]

Testing for tuberculosis could have serious practical consequences. If the student in *Armstrong* had tested positive, she would have been excluded from the university. The test result would have been reported to the local health department, which would then have investigated the case. The health department would have made sure that she received treatment for tuberculosis, and she would have been isolated until the treatment rendered her non-infectious. If she had refused treatment, or the health officer had determined that she could self-quarantine, a

80. *See* Thomas M Daniel, *The History of Tuberculosis*, 100 RESPIRATORY MED. 1862 (2006).
81. 239 P.2d 545 (Wash. 1952).
82. *Id.* at 549.

confinement order would have been issued, and she would have been put in isolation in a locked quarantine facility.

The petitioner in *In re Halko* was confined in a state hospital because he was infected with contagious tuberculosis.[83] He requested habeas corpus review of his confinement.[84] The court found the detention to be a lawful exercise of the public health power, but ruled that the state must periodically review detention orders to make sure that the medical basis for each order is still valid.[85]

While a judicial hearing is not always required prior to detention, habeas corpus review is always available for detainees, at least for those taken into custody and held inside the United States.[86] Many states have amended their public health laws to require pre-detention hearings, and a few state courts have found pre-detention hearings to be required under the state or federal constitution. Once in detention, states are reluctant to force treatment on mentally competent patients, but most persons accept treatment because they will not be released until they become non-infectious. In some cases, treatment fails and the person must remain under restrictions until death.

There appears to be only one modern case dealing with mandatory treatment for a disease other than tuberculosis. *Reynolds v. McNichols* reviewed a Denver municipal regulation requiring that prostitutes who were arrested be held until they were either tested or given antibiotic treatment for gonorrhea, based on their known high risk of infection.[87] Petitioner claimed invasion of privacy and a violation of equal protection based on the requirement that prostitutes be detained, but not their clients.[88] The Tenth Circuit rejected those claims, finding that the city's "hold and treat" orders were a valid exercise of the police power, and that detaining only prostitutes, who were at much higher risk of infection than their clients, was a rational response to the problem of the gonorrhea epidemic.[89]

IX. PUBLIC NUISANCES

One of the most important police powers is the power to abate public nuisances. Environmental threats to health and safety include garbage that harbors vermin, contaminated food, and dangerous buildings. Modern environmental law is rooted in public nuisance law. The orders to close businesses to prevent the spread of COVID-19 are based on the public nuisance power. The orders closing bars, and political opposition to those orders, have a parallel in the controversy over closing the gay bathhouses in the 1970s and 1980s.

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83. *In re* Halko, 246 Cal. App. 2d 533 (Ct. App. 1966).

84. *Id.*

85. *Id.* at 559.

86. *See* Boumediene v. Bush, 553 U.S. 723, 736-746 (2008) (describing the history and effect of the Suspension Clause).

87. 488 F.2d 1378, 1380 (10th Cir. 1973).

88. *Id.* at 1383.

89. *Id.*; *see also* Edward P. Richards & Katharine C. Rathbun, *The Role of the Police Power in 21st Century Public Health*, 26 SEXUALLY TRANSMITTED DISEASES 350, 352-54 (1999) (discussing the Denver program).

In the 1970s, a massive epidemic of sexually transmitted infections (STIs) erupted in gay bathhouses in most large American cities.[90] These included the treatable STIs, including syphilis, gonorrhea, and chlamydia. Public health departments developed STI outreach programs to serve the gay community.[91] These programs found that hepatitis b, a then poorly understood liver disease, was also being transmitted as an STI among gay men.[92] Hepatitis b is a serious liver disease with significant long-term mortality from liver cancer. It remains incurable, but in the 1970s it was untreatable, and it would be several years before a vaccine became available. In addition to screening and treatment for the traditional STIs, outreach programs provided education and information on disease prevention.[93] These efforts did not reduce the STIs.[94]

The government failed gay men and the larger community by not closing the bathhouses in the late 1970s. This came shortly after the failure of the Swine Flu immunization campaign. By this time there were published data linking the high frequency anonymous sexual activity facilitated by the bathhouses to the spread of hepatitis b. Based on what was known at the time, closing the bathhouses would have had two effects. It would have slowed the transmission of STIs, most importantly hepatitis b. It would also have had an important expressive effect of saying that it was dangerous for gay men to engage in the unsafe behaviors facilitated by the bathhouses. While it was not known at the time, this was the period when HIV began to circulate in the United States.[95] HIV has a slow onset, and the symptoms were confused with other diseases, delaying the identification of the first case until 1981.[96] It was not until 1983 that the CDC published guidance on the methods of spread of HIV.[97] Had the bathhouses been closed in the late 1970s, many fewer gay men would have been infected before the HIV epidemic was recognized.

There were no efforts to close the bathhouses until 1984. While the CDC was actively investigating the epidemiology and virology of HIV during this period,

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90. *See* RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC (1987).

91. Hernando I. Merino & Jeff B. Richards, *An Innovative Program of Venereal Disease Casefinding, Treatment and Education for a Population of Gay Men*, 4 SEXUALLY TRANSMITTED DISEASES 50-52 (1977).

92. FRANKLYN N. JUDSON, SEXUALLY TRANSMITTED DISEASE IN GAY MEN (1977).

93. David G. Ostrow & Dale M. Shaskey, *The Experience of the Howard Brown Memorial Clinic of Chicago with Sexually Transmitted Diseases*, 4 SEXUALLY TRANSMITTED DISEASES 53–55 (1977).

94. Frederick C. Wolf & Franklyn N. Judson, *Intensive Screening for Gonorrhea, Syphilis, and Hepatitis B in a Gay Bathhouse Does Not Lower the Prevalence of Infection*, 7 SEXUALLY TRANSMITTED DISEASES 49-52 (1980).

95. M. Thomas P. Gilbert et al., *The Emergence of HIV/AIDS in the Americas and Beyond*, 104 PROC. NATL. ACAD. SCI. U.S.A. (Nov. 20, 2007).

96. *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY AND MORTALITY WEEKLY REPORT 250–52 (1981).

97. *Acquired Immunodeficiency Syndrome (AIDS): Precautions for Health-Care Workers and Allied Professionals*, MORBIDITY AND MORTALITY WEEKLY REPORT 450-51 (1983).

the Reagan administration was otherwise ignoring the HIV epidemic. The National Academy of Sciences "identified as a major concern a lack of cohesiveness and strategic planning throughout the national effort."[98] The push to close the bathhouses did not come from the CDC, but from city health deparments. The New York City Health Department sought a permanent injunction to close the bathhouses in New York City.[99] The injunction in *City of New York v. New St. Mark's Baths* was based on a New York statute that made a person guilty of a criminal nuisance when:

1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or
2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.[100]

Bathhouse owners attempted to present expert testimony to contest the rationale for closing the bathhouses. Their argument was that it was better to use bathhouses as places to do public health education than to close them.[101] Citing *Williams v. Mayor of Baltimore*, which was based on the analysis in *Jacobson*, the court in *New St. Mark's Baths* held that as long as the state's actions had a rational relationship to the state's objectives, the regulated parties could not use the courts to attack the agency's policy decisions and expert analysis unless the agency had acted in an arbitrary and capricious manner.[102]

CONCLUSION

The states exercised broad powers over public health and safety—the police powers—during the colonial period. They retained those powers under the Articles of Confederation and the Constitution. The federal courts, under guidance from the Supreme Court, have largely left those state police powers intact when they are used for legitimate public health purposes. The Civil Rights Acts and Supreme Court precedent have made it clear that the states cannot use those powers in a discriminatory manner, however.

While the courts have put few limitations on public health powers, public officials have always been subject to political limitations. When fear is great, the public supports intrusive public health actions. When the fear wanes, either because the disease has been controlled or because the public has normalized the

98. Comm. on a Nat'l Strategy for AIDS, *Confronting AIDS: Directions for Public Health, Health Care, and Research* 32 (1986).

99. City of New York v. New St. Mark's Baths, 497 N.Y.S. 2d 979 (N.Y. Sup. Ct. 1986) (permanent injunction proceeding), *aff'd*, 562 N.Y.S. 2d 642 (N.Y. App. Div. 1990).

100. *Id.* at 982.

101. *Id.* at 983.

102. *Id.*

toll of the disease, support wanes and officials hesitate to employ the police powers.[103]

During the COVID-19 pandemic we have seen the usual reluctance among some citizens to accept public health restrictions. What is unusual is that some courts have also been willing to ignore the lessons of *Jacobson* and other classic police power cases and substitute their own judgment for that of public officials. When the pandemic is over and the appeals are done, it will be interesting to see what has survived of the traditional police powers.

103. Milton J. Rosenau, *The Uses of Fear in Preventive Medicine*, 162 BOSTON MED. & SURG. J. 305 (1910).