

FROM DEFERENCE TO SKEPTICISM: THE CHANGING LANDSCAPE OF PUBLIC HEALTH LAW

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OVERVIEW



BUT FIRST, AN INTRODUCTION TO LAW

Source	Jurisdiction (state/federal)
Statutes	Legislature
Regulations	Executive (administrative agencies)
Court Opinions	Judiciary
Constitutions	Interpreted by judiciary

- Focus today will be on Court Opinions. They shape what statutes & regulations can be passed and how they will be interpreted.
- Some of the cases today will focus on the federal Constitution, which is the supreme law of the land.



HOW PAST CASES AFFECT FUTURE CASES

- Concept of Stare Decisis: “Let it Stand”
- Principle that lower courts in the same jurisdiction must follow the decisions of higher courts
- The higher court will also follow its own decision unless there are circumstances requiring it to *overrule* itself
 - Example: *Bowers v. Hardwick* (1986) (5-4 decision upheld a Georgia law criminalizing homosexual sex) overruled by *Lawrence v. Texas* (2003) (6-3 decision struck down Texas law criminalizing homosexual sex)
- Stare decisis applies only to “*binding*” or “*mandatory*” authority



FACTORS IN DETERMINING THE RELEVANCE OF PRECEDENT CASES

- Similarity of legal issues
- Similarity of facts
- How recent the precedent is
- Expertise of court issuing precedent—remember, sometimes “binding”
- Reasoning of the precedent



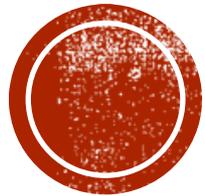
PAST CASES ARE SOMETIMES ONLY PERSUASIVE—WE STILL CALL THIS “PRECEDENT”

- Precedent cases may be a “binding” decision by a prior court of higher jurisdiction
- Precedent cases may be merely persuasive—e.g., court in N.C. may look to decision in California for precedent cases



SESAME STREET OF LEGAL (AND ETHICAL) REASONING





PHASE 1: GREAT DEFERENCE TO PUBLIC HEALTH AUTHORITIES IN ERA OF WIDESPREAD DISEASE

Pre-civil rights movement

JACOBSON V. MASSACHUSETTS, 197 US 11 (1905)

- Between 1901 and 1903, there were 1,596 smallpox cases and 270 smallpox deaths in Boston
- Boston and Cambridge undertook large scale campaign to vaccinate population
 - Boston “virus squads”
 - Cambridge undertook a formal vaccination order in 1902
- Many people vaccinated under duress, particularly in working class neighborhoods
- Anti-vaccination movement was vocal in its opposition.

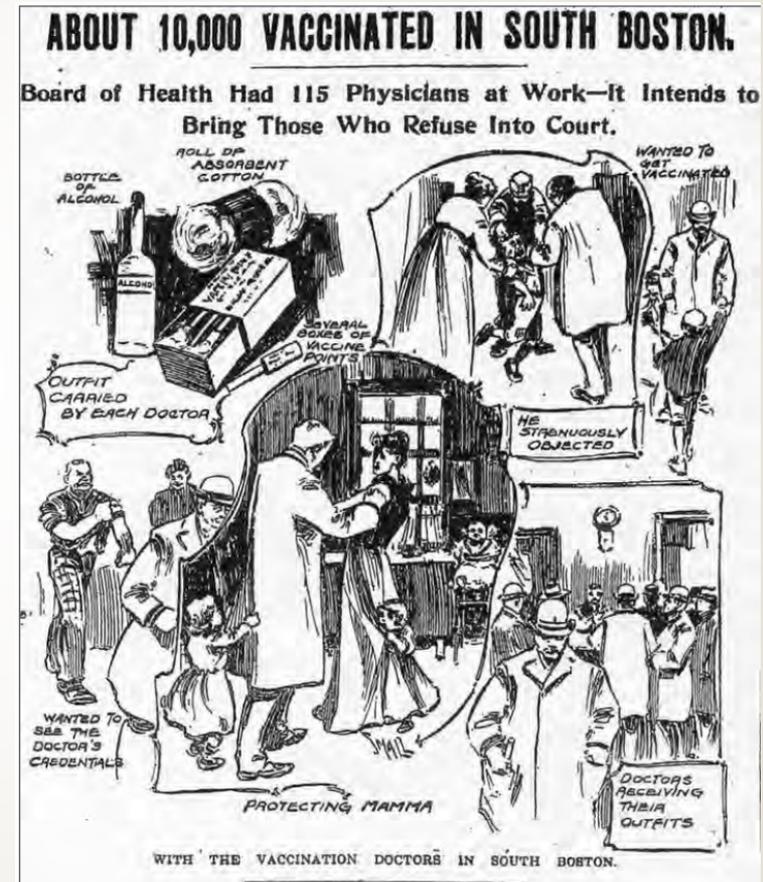


Illustration of House-to-house vaccination from the *Boston Globe*, January 28, 1902.



JACOBSON V. MASSACHUSETTS, 197 US 11 (1905)

- The Rev. Henning Jacobson was a Lutheran minister in Cambridge.
- Jacobson had suffered side effects from childhood vaccinations and saw his son suffer side effects from a vaccine.
- Before Jacobson v. Massachusetts, Jacobson pushed for (and received) a school vaccine exemption for his daughter.
- Jacobson was charged in a **criminal case** for refusing mandatory smallpox vaccination and found guilty. He was sentenced to paying a **fine of \$5**.
- His case made its way to the United States Supreme Court – Jacobson argued that mandatory vaccination was unconstitutional.
- Jacobson argued that compulsory vaccination law was “unreasonable, arbitrary, and oppressive.”



The Reverend Henning Jacobson



ON WHAT BASIS DID JACOBSON ARGUE THAT THE VACCINE MANDATE WAS UNCONSTITUTIONAL?

SUBSTANTIVE DUE PROCESS under the 14th Amendment of the Constitution

14th Amendment (ratified in 1868): Section 1.

- “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.”
- Procedural vs. “substantive due process”
- (5th Amendment similar—constrains the federal government)



BASIC IDEA OF SUBSTANTIVE DUE PROCESS—A VERY IMPORTANT CONCEPT

- Idea that the Fifth and Fourteenth Amendments to the U.S. Constitution safeguard substantive rights that the government cannot restrict *without a highly compelling reason*.
 - Examples include:
 - Criminalizing contraception (*Griswold v. Connecticut*, 381 U.S. 479 (1965))
 - Intimate relationships between adults (*Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015)).
- At the time Jacobson made his argument, the Supreme Court was not yet open to such claims with respect to individual liberties.
 - But note: *Lochner v. New York*, 198 U.S. 45 (1905): Supreme Court uses substantive due process to strike down workplace regulations as a violation of “freedom of contract” (“economic substantive due process”—later abandoned).



**JACOBSON V.
MASSACHUSETTS,
197 US 11 (1905)**

- The Court held that **Cambridge's mandatory vaccination was constitutional:**
 - Reasonable exercise of the state's **police power**, which allows states to protect the health and welfare of its citizens
 - Court rejected exemption based on personal choice

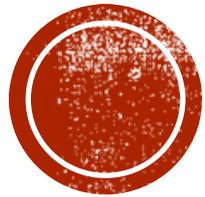


JACOBSON V.
MASSACHUSETTS,
197 US 11 (1905)

SOME TAKE-
AWAYS

- Public health decisions must be given **deference**, and this deference is appropriate if those powers are not exercised in **arbitrary, unreasonable manner.**
- **Opinion demonstrates *major* deference on scientific grounds:** The trial court that first heard Jacobson's case refused to allow Jacobson to submit scientific evidence challenging the Cambridge smallpox regulations.
 - Validity of the science on which Cambridge regulations were based was *assumed* as common knowledge: **"knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox."**





PHASE 2: RISE OF INDIVIDUAL RIGHTS AND ANTI-DISCRIMINATION LAWS

The civil rights movement of the 1960s and 1970s through the 1990s.

MAJOR FEDERAL ANTI-DISCRIMINATION LAWS RELATING TO DISABILITY

Rehabilitation Act of 1973

- Section 504 prohibits discrimination against “handicapped individuals” in
 - Programs conducted by federal agencies
 - Programs receiving federal financial assistance
 - Federal employment

Americans with Disabilities Act (1990)

- **Broader** than Rehabilitation Act, but there is **overlap**
- Bars discrimination against individuals with disabilities in:
 - Employment
 - Services and programs of state and local governments (public education, health care)
 - Public transit
 - Businesses open to public
 - Telecommunications companies.



SCHOOL BD. OF NASSAU COUNTY V. ARLINE, 480 U.S. 273 (1987)

- *Arline* answers the question: **are contagious diseases like tuberculosis considered a disability under anti-discrimination laws?**
- Gene Arline was an elementary school teacher whose tuberculosis became **active** in 1977 after 20 years of remission.
- In 1979, the Nassau County, Florida School Board discharged her – not because of any wrongdoing, **but because of the continued reoccurrence of active tuberculosis.**
- Arline sued under Section 504 of the Rehabilitation Act.



Gene Arline



SCHOOL BD. OF NASSAU COUNTY V. ARLINE, 480 U.S. 273 (1987)

- This landmark case held that **an individual with tuberculosis is a “handicapped individual” under Section 504 of the Rehabilitation Act.**

- Definition of a “handicapped individual”:

Someone with a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

- The school district argued that Arline was not entitled to protection of the Rehabilitation Act because they did not dismiss her because of her diminished physical capabilities. They dismissed her because of the threat of her TB relapses posed to the health of others.
- The Court rejected the school’s argument. It noted that the level of public fear that contagious diseases give rise to, which leave tuberculosis patients vulnerable to discrimination, which is what the Act is designed to protect against.



SCHOOL BD. OF NASSAU COUNTY V. ARLINE, 480 U.S. 273 (1987)

- Court then considered whether Arline was “otherwise qualified”
 - **Individualized inquiry:** based on the facts of the **specific case**, courts must ensure that the Rehab Act (and later, the ADA) **protects individuals from discrimination.**
 - When making this inquiry, courts may give **deference** to legitimate state concerns such as “avoiding exposing others to significant health and safety risks”
 - Here, lower court made “no findings as to the duration and severity of Arline's condition, nor as to the probability that she would transmit the disease,” so case sent back to district court to answer these questions.



THE CASE OF NANCY CRUZAN—THE RIGHT TO REFUSE MEDICAL TREATMENT



- In re Cruzan, Supreme Court 1990
- Nancy Cruzan was determined to be in permanent vegetative state; after some years, her parents sought to remove her artificial nutrition & hydration but was opposed by the State of Missouri
- Court indicated: individuals have a constitutional right to refuse unwanted life-sustaining medical treatment, including artificial nutrition & hydration.



PROCEDURAL DUE PROCESS



- “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319 (1976)
- Baseline: **Notice and opportunity to be heard**



CITY OF NEWARK V. J.S., 279 N.J. SUPER. 178 (1993)

- J.S. was a 40-year-old man with tuberculosis and HIV. He sought to leave the hospital against medical advice.
 - Prior history of disappearances, followed by returns to emergency room
 - Active TB
 - Allegedly failed to follow proper infection control guidelines or complete treatment regimen; deemed “non-compliant” (a lot packed into a term like that)
 - Previously dropped off at a shelter
- City of Newark asked court to use authority under New Jersey law to commit J.S. to hospital until State Commissioner of Health was satisfied that his TB does not threaten the community.
 - NJ TB Control Statute from 1912: Allows a court to commit person to hospital if they are “suffering from” TB and “is an actual menace to the community”—provided little procedural due process & no standards



CITY OF NEWARK V. J.S., 279 N.J. SUPER. 178, 652 A. 2D 265 (1993)

- Instead of declaring statute unconstitutional, court reads ADA and procedural due process requirements into New Jersey statute
 - “Many of the rights we now recognize were unheard of in 1912...Declaring the statute unconstitutional and leaving citizens of New Jersey with no shield against the rare person with TB who poses a true significant risk to others would be the true frustration of legislative intent.”
- The court construes the TB statute to include certain process requirements—namely those found in New Jersey’s statutes regarding civil commitments of the mentally ill
 - the provision of counsel,
 - an expeditious hearing,
 - adequate notice of the hearing,
 - discovery before the hearing,
 - an independent medical examination
 - the right to be present at the hearing,
 - to cross-examine witnesses, and to present testimony
 - a hearing on the record with evidence provided under oath
 - periodic court reviews,
 - and all proofs by clear and convincing evidence).

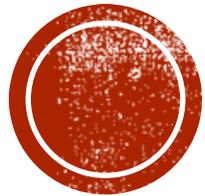
With respect to the standards that must be met before commitment is ordered, the court states that the ADA requires that judicial decisions be based upon (a) the nature of the risk, (b) the duration of the risk, (c) the severity of the risk, and (d) the probabilities of harm to others.



AS APPLIED IN THE CASE

- Court granted order committing J.S. to the hospital but limited some hospital action based on the **right to refuse treatment**.
 - Based on **individualized assessment**
 - The court found that confining J.S. did not violate due process: Requiring confinement until 3 negative tests is limited and reasonable.
 - The court declined to force J.S. to provide sputum sampler and take his prescribed medication – **“J.S. has the right to refuse treatment, even if medically unwise.”**
 - BUT refusing treatment could delay him meeting conditions of release from confinement, justifying his commitment for public health purposes.
 - **Commitment is a last resort:** public health officials should begin with incentives and enablers instead—**must use the least restrictive means**





PHASE 3: CRITICAL APPRAISAL OF PUBLIC HEALTH AUTHORITIES AND EMPHASIS ON INDIVIDUAL CHOICE

21st Century/anti-vax movement/COVID and post-COVID era

RELIGIOUS EXEMPTIONS AND THE FREE EXERCISE CLAUSE

- The Free Exercise Clause of the First Amendment: “Congress shall make no law respecting an establishment of religion, or **prohibiting the free exercise thereof...**” US Const., Amt. 1
- **Employment Division. v. Smith, 494 U.S. 872 (1990):**
 - Alfred Smith and Galen Black were fired from their jobs after using the drug peyote for sacramental purposes at a ceremony of the Native American Church. Ineligible for unemployment compensation because discharged for “misconduct” of taking illegal drugs.
 - SCOTUS holds that denying benefits for peyote use was permissible
 - **Free exercise standard:** “right of free exercise does not relieve an individual of obligation to comply with valid and neutral law of general applicability on that ground that law proscribes conduct that his religion prescribes”



RELIGIOUS EXEMPTIONS AND THE FREE EXERCISE CLAUSE

- Supreme Court cases from the COVID-19 pandemic imply that the **Court could be less deferential to public health in Free Exercise Clause cases.**
 - Court exempted religious gatherings from California’s COVID-19 public health restrictions on gatherings(*Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021)).
 - “Most favored nation” approach—cannot treat comparable secular activity more favorably than religious activity (which the Cal. regs did—some businesses exempt)
 - Though the Supreme Court declined to review a case in New York on religious exemptions for the COVID-19 vaccine, three dissenting justices indicated support for such exemptions. (*Dr. A. v. Hochul*, 567 F. Supp. 3d 362, 375 (N.D.N.Y. 2021), rev’d in part, vacated in part sub nom. *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021), cert. denied sub nom. *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022))
- It is unclear what the future holds with respect to when and to what extent religious exemptions will be required for public health measures





Mississippi historically had highest rate of childhood vaccination in the country and had no religious exemption.



This changed in April 2023 when a federal district judge in Mississippi ordered the state to allow religious exemptions from childhood vaccines



Today, Mississippi no longer has the highest rate of childhood vaccines

CASE STUDY: MISSISSIPPI —READING TEA LEAVES



WHERE ARE WE TODAY?

- The COVID-19 pandemic demonstrated widespread public distrust of public health institutions.
- The pandemic highlighted the need to clearly articulate the rationale for quarantine policies to bolster trust in public health interventions.
- Political Questions vs. Judicial Questions: Much of the conflict about COVID restrictions was resolved politically.
- Leaving open questions: How would Jacobson be decided today? How much deference would public health authorities be given if challenged in court? Does it depend on the severity of the next nationwide public health challenge?
- Balancing and re-balancing of the government interest in protecting public health and individual rights.



SOME TAKE-AWAYS

- When thinking about public health actions or regulations at the state level, there is a backdrop of caselaw and federal law that suggests:
 - There is a need for a clear **scientific rationale and explanation** for public health measures (unlikely to see deference of the past)
 - Public health measures should interfere with individual liberty in the **least restrictive means** possible and still achieve needed goals
 - **Procedural due process** must be built in
 - Attention must be paid to **anti-discrimination laws**



THANK YOU!

