

Jacobson v. Massachusetts: Alternate Perspectives in 2005

Introduction

Richard A. Goodman, MD, JD, MPH

Professor Hodge will move to the microphone and begin the second principal presentation. It should be apparent to you that an immense amount of work has been put into these presentations. Are you ready to go on?

Defendant – Commonwealth of Massachusetts: State Perspectives in 2005

James G. Hodge, Jr., JD, LL.M.

Thank you, Rick. Thank you, Professor Scott for the compelling overview. In the face of the sort of horrific examples of governmental action in the name of public health, human subjects and research, and national security that Professor Scott so nicely lays out, perhaps it seems daunting to counter with the state's perspective. That is, I think, until we remember importantly that the facts of *Jacobson* do not reflect these particular horrors themselves nor do the vast array of public health powers and practices over the last century. *Jacobson* to me is worthy of celebrating because public health is worthy of celebration. *Jacobson* reminds us that what we do in public health practice is essential, it is indispensable, it is valuable, and it can even be noble. I think the case stands for the furtherance of the mission of public health consistent with the respect for individual rights, a finding quite consistent with what we heard from Professor Scott, but it sustains even more the essential role, almost obligation-based duty of the state to do what no single individual in this room or anyone else can do – that is, to protect the community's health.

What I would like to very briefly do today, and I will be brief for the purposes of allowing our panel the full opportunity of their comments and guidance, is lay out a different perspective on this case that examines the role and function of the state in the pursuit of this obligation. To do so, I want to take a very brief glimpse at the Commonwealth's case in 1905. This case is far more complex than the single question that often dominates one's focus, "were there individual liberty interests that were violated in the implementation of this vaccination requirement?" I will also touch on government's reliance on *Jacobson* over the century although there is considerable additional opportunity for the panel to focus on this theme as well as the state's protection of the individual rights and the public's health.

When you read their legal briefs, the Commonwealth of Massachusetts really saw this case as a must win. It was not an option to lose this case. The Commonwealth positioned its arguments in its brief and argued before the court in reaction to what Jacobson argued. Three points dominate the counsels' observations: (1) The Commonwealth unquestionably has the power and duty to protect the welfare of its citizens; (2) The legislature has broad discretion to assess and authorize activities that protect the public's health; and (3) The legislature has reasonably determined that timely smallpox vaccinations for citizens in affected communities furthers the public's health. "Case closed" concludes the Commonwealth. Yet, the Commonwealth also recognizes that there is another side to this case that the court will hear.

Despite its basic predicates, the Commonwealth recognized the nature and the force of Jacobson's objections. The antivaccination movement during this period of time was very vocal and strong in some minority positions. The Cambridge Board of Health regulation is patently weak. It did not state clearly what the counsel for the Commonwealth had to largely spell out for the court's benefit. *Jacobson's* claims in the lower courts were summarily dismissed despite judicially-recognized limits to police powers.

The Commonwealth presented the strongest arguments it could muster to defeat these particular claims. For example, the Commonwealth made very clear that courts cannot contravene legislative judgment unless that judgment is utterly arbitrary and unreasonable. The Cambridge Board of Health, as argued by the Commonwealth, enforced its regulation in a fair and nondiscriminatory manner. Jacobson's evidence, said the Commonwealth, was properly excluded because nothing he would have proffered during the course of the delivery of that evidence would constitute a defense to the state's overwhelming use of its police power. State police powers, though limited, are still encompassing.

For many, *Jacobson* is defined today by the court's quintessential inquiry: "does the City of Cambridge's mass vaccination requirement violate constitutional protections of individual liberty rights? This view navigates towards a Fourteenth Amendment analysis as if this will solely answer this question. I think the case is considerably more complex and valuable because of the multifarious additional constitutional issues explored. Jacobson argued that the Preamble and the spirit of the Constitution has been violated, due process rights infringed, privileges and immunities violated, and equal protection breached. In response, the Commonwealth rebuffs these essential points ~ building a systematic argument to defeat these claims resolving around individual norms through the sophisticated development of structural constitutional limits on what the court can particularly do. The Commonwealth's claims were ground in structural principles like separation of powers, federalism, and Massachusetts' state constitutional social contract theory. These constitutional principles, individual constitutional rights, separation of powers, federalism, social contract theory, co-exist, reminds the Commonwealth. Concerning separation of powers, the Commonwealth notes that courts should not question the rational judgments of a legislative body. It is about separating court function and legislative function. In *Jacobson*, the Supreme Court acknowledges the need to separate judicial and legislative functions "[The] court would usurp the functions of another branch of government if it adjudged, as a 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." Furthermore, the Court says, "no court, much less the jury," (I might even add, 'much less *Jacobson*,') "is justified in disregarding the action of a legislature simply because in its or their opinion a particular method was ~ perhaps possibly ~ not the best" approach. This is the legislative prerogative pursuant to the police powers. If the legislature has spoken, the court must defer according to the Commonwealth.

Principles of federalism suggest that there is some sort of line between the federal and state government as to the distribution of powers. In reality, federalism is like a pendulum swinging back and forth over the last 100 years between state sovereignty and federal supremacy. Principles of federalism have undulated over this time like ripples in a wave. Modern cases led to the 1941 *Darby* decision where the Court stated, "Congress' power may actually be attended by the same incidences as the exercise of the police power of the states." Later, in 1995, perhaps swinging back towards state sovereignty, the Court claimed that the Constitution withholds from Congress a

plenary police power in *United States v. Lopez*. Recently in 2005, *Gonzales v. Raich* addressed federal sanctions concerning the medicinal use of marijuana in California. The Court found that Congress can regulate purely local activities that are part of an economic class of activities that substantially affect interstate commerce.

This pendulum may swing back and forth, but in 1905 it was firmly pointed in the direction of state sovereignty. Says the Court, “The safety and health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government.” Furthermore, “[w]hile this court (which refers to the U.S. Supreme Court) should guard with firmness every right appertaining to life, liberty, or property, . . . , it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so. . . .” Indubitably the Court was motivated by a strong sense of federalism that saw states’ rights as a pinnacle of public health protections.

Social contract theory refers to individuals’ responsibilities as members of collective society. Citizens do not exist as islands in society. They are responsible to each other and to their communities for a host of activities. The Court picks up on this theme derived from the Massachusetts’ state constitutional argument as espoused by the counsel for the Commonwealth. The Massachusetts constitution sets forth “as a fundamental principle of the social compact” that the whole people covenants with each other and that all should be governed by certain laws for the common good. Furthermore, “constitutional principles of liberty do not import an absolute right in each person to be wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good” because of social contract theory grounded in the need to do what is necessary to protect the public’s health.

These factors (separation of powers, federalism, and social compact theory) can be weaved together to reach ultimate conclusions that shed light on why *Jacobson* was decided as it was. Sovereign states are instituted to, among other things, protect the public’s health for the benefit of their citizens. The Commonwealth used its broad police powers in the pursuit of protecting the public’s health. The judicial branch must respect that exercise, and the federal government must avoid interfering with this exercise under separation of powers and federalism respectively. There is nothing about the Commonwealth’s action therefore that clearly violates individual constitutional rights.

Government’s reliance on *Jacobson* over the century has been prolific. As public health sciences, practice, and policies have matured, *Jacobson*’s themes have been consistently relied on by government. As my colleague, Professor Larry Gostin at Georgetown discusses, *Jacobson* has been cited and used responsibly to authorize government to regulate persons in the interest of public health and safety, to limit individual liberty interests when necessary to protect the communal health, and support an array of public health measures like school vaccination requirements, isolation, quarantine, medical treatment, fluoridation, and traffic safety provisions.

In many ways what *Jacobson* began (which we did not know at that time but we do now) was a revolution in governmental public health practice. Through the court’s recitation of the federal constitutional limits of state public health powers, it provided legal structure for public health reforms. Despite some exceptions, states embraced this structure over time through changes in legislative, regulatory, and judicial or other laws. Public health as a whole increasingly reflects the

ethic of voluntarism and other qualities that are built into the Court's Opinion. In many ways, *Jacobson* supports the state's role, perhaps even duty, to protect communal health while cautioning that its actions must bear real and substantial relation to the accomplishments of these objectives.

As government chooses to pull from the vast well of its extensive police powers some exercise in public health, it simultaneously acknowledges that the exercise can be limited. A legacy of *Jacobson* is its historical and modern guidance on when and how to balance the states' use of public health powers with individual rights and interests. *Jacobson* remains good law today because public health practitioners and citizens truly do understand and appreciate its core message: Protecting the public's health is synergistic with respective individual liberties. Ladies and gentleman, thank you.

Richard A. Goodman, MD, JD, MPH

James, thank you very much. Thanks to both of you again.