

Regulation of Public Health, Part 2

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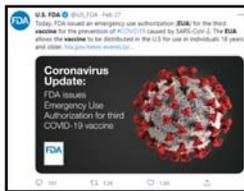
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Grand Princess Oakland, CA

3500+ onboard
45+ cases

Coronavirus-Stricken Grand Princess Arrives At Port Of Oakland; Passenger Says 'It Looks Like A War Zone'

March 9, 2020 at 11:19 am Filed Under: California, Coronavirus, COVID-19, Cruise Ship, Emergency declaration, Gov. Gavin Newsom, Grand Princess, Oakland, State of emergency



From a public health standpoint, does containing people on a cruise ship make sense?

Whose quarantine authority is likely strongest in this case: CDC, State of California, or City of Oakland?



Jacobson v. Massachusetts (1905)

Background and Holding

- When necessary for the public health and safety, can a state enforce a mandatory vaccination of all inhabitants in the state?
- "... an affirmative answer to these questions (that the statute violates Constitutional liberties) would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease."
- Disease in question: Smallpox



South Dakota v. Dole (1987)

Background and Holding

- Can Congress hedge its provision of federal funding to the state of South Dakota on the condition that they increase their drinking age from 19 to 21?
- "Indeed, the condition imposed by Congress is directly to one of the main purposes for which highway funds are expended – safe interstate travel."



Harris v. McRae (1980)

Background and Holding

- Does Title XIX require a State participating in Medicaid to fund the cost of medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment?
- No. "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."



NFIB v. Sebelius (2012)

Background and Holding (Medicaid expansion)

- Can the federal government hedge all of a State's Medicaid funds on the expansion of Medicaid coverage?
- "In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' – it is a gun to the head."



NFIB v. Sebelius (2012)

Dissent (Medicaid expansion)



Rust v. Sullivan (1991)

Background and Holding

- Can the grant of federal funds for Title IX projects be conditioned on forbidding counseling of abortion as a method of family planning?
- “The Secretary’s regulations are a permissible construction of Title X and do not violate either the First or Fifth Amendments to the Constitution.”



Policy after *Rust*

- President Reagan instituted the “Mexico City Policy” on August 1984
- President Clinton revoked the Mexico City Policy on January 22, 1993 and ordered HHS to revoke 1988 regulations and reinstate prior regulations
- President George W. Bush reinstated the Mexico City Policy January 22, 2001
- President Obama revoked Mexico City Policy January 23, 2009
- President Trump reinstated January 23, 2017
- President Biden revoked January 28, 2021



USAID v. Alliance for Open Society International (2013)

Background and Holding

- Can the federal government condition billions of dollars in funding on a requirement that funding not be “used to promote or advocate the legalization or practice of prostitution or sex trafficking,” or the requirement of an explicit policy opposing prostitution or sex trafficking?
- Conditioning federal funding is allowed (see *Rust*), but mandating explicit policy violates the First Amendment as compelled speech



Federalism, Public Health, and COVID-19



SCOTUS and COVID-19

- May 29, 2020: *South Bay United Pentecostal Church v. Newsom*
 - 5-4 vote to uphold California’s limit on attendance at places of worship
 - C.J. Roberts concurs, quotes *Jacobson*; J. Kavanaugh argues religious discrimination
- July 24, 2020: *Calvary Chapel Dayton Valley v. Sisolak*
 - 5-4 vote to uphold COVID-19 restrictions on worship
 - J. Alito, J. Gorsuch, J. Kavanaugh all argue religious discrimination; J. Alito frames as 1st amendment issue, questions *Jacobson*’s relevance
- September 18, 2020: Passing of Supreme Court Justice Ruth Bader Ginsburg
- October 26, 2020: Confirmation of Supreme Court Justice Amy Coney Barrett



SCOTUS and COVID-19

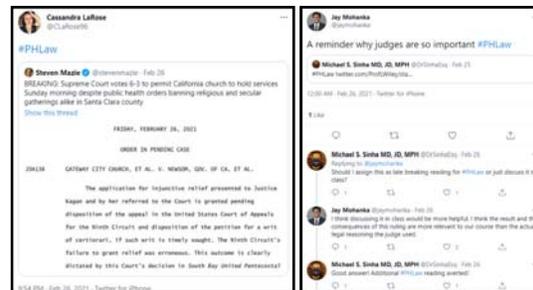
- November 25, 2020: *Roman Catholic Diocese of Brooklyn v. Cuomo*
 - Limits on in-person worship during COVID-19 (10 people in red zones, 25 people in orange zones) – no such limits for grocery shopping, education
 - Majority (unsigned) argued that New York orders “single out houses of worship” and must be held to a “strict scrutiny” standard
 - J. Gorsuch concurrence criticized C.J. Roberts’ *South Bay* opinion for relying on *Jacobson*, adding that “things never go well” when the Court tries to “stay out of the way in times of crisis”
 - J. Sotomayor dissented, noting that “Justices of this Court play a deadly game in second guessing the expert judgment of health officials”

SCOTUS and COVID-19

- February 5, 2021: *South Bay United Pentecostal Church v. Newsom*
 - Application for injunctive relief
 - C.J. Roberts: “federal courts owe significant deference to politically accountable officials with the ‘background, competence, and expertise to assess public health’ ... [the] Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the states.”
 - J. Barrett and J. Kavanaugh: singing ban should be enjoined, favors certain sectors (houses of worship) over others (Hollywood studio)
 - J. Gorsuch, J. Thomas, and J. Alito: the State “so obviously targets religion for differential treatment,” in violation of the First Amendment unless the State can show they are the least restrictive means of achieving a compelling government interest.” Cite to dissent in *Sisolak*

SCOTUS and COVID-19

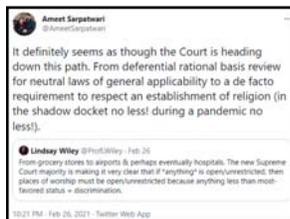
- February 5, 2021: *South Bay United Pentecostal Church v. Newsom*
 - J. Kagan, J. Breyer, and J. Sotomayor dissent: “Justices of this Court are not scientists. Nor do we know much about public health policy ... In the worst public health crisis in a century, this foray into armchair epidemiology cannot end well.”
- February 26, 2021: *Gateway City Church v. Newsom*
 - “The Ninth Circuit’s failure to grant relief was erroneous. This outcome is clearly dictated by this Court’s decision in *South Bay United Pentecostal Church v. Newsom* (2021).”
 - J. Kagan, J. Breyer, and J. Sotomayor: “I dissent for the reasons set out in *South Bay United Pentecostal Church v. Newsom* (2021).”



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Where do you see this Supreme Court jurisprudence going?