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## RECENT CASES

CONSTITUTIONAL LAW — EMERGENCY POWERS — FIFTH CIRCUIT UPHOLDS ABORTION RESTRICTIONS DURING COVID-19 PANDEMIC. — *In re Abbott*, 954 F.3d 772 (5th Cir. 2020).

Although frustration among many conservatives grew after the Supreme Court's 2019 term,<sup>1</sup> some had been voicing discontent with the conservative legal movement even before then.<sup>2</sup> In particular, some scholars have advocated for eschewing the purportedly neutral principles of originalism and textualism in favor of approaches to jurisprudence that are more substantively conservative and oriented toward the common good.<sup>3</sup> The debate sparked by these proposals for a “common-good constitutionalism”<sup>4</sup> coincided with the surge of COVID-19 in the United States.<sup>5</sup> All levels of government responded with measures to fight the virus, a series of constitutional objections arose, and thus emerged a unique opportunity for courts to consider putting common-good constitutionalism into practice. Recently, in *In re Abbott*,<sup>6</sup> the Fifth Circuit upheld GA-09, a Texas executive order that temporarily postponed all nonessential medical procedures, including abortions, in response to the COVID-19 pandemic.<sup>7</sup> To reach this decision, the Fifth Circuit relied on principles central to common-good constitutionalism, potentially indicating that this judicial philosophy is gaining traction.

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<sup>1</sup> See, e.g., Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUB. DISCOURSE (June 16, 2020), <https://www.thepublicdiscourse.com/2020/06/16/65043> [<https://perma.cc/XR7D-FH8S>] (condemning the majority in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)).

<sup>2</sup> See Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, THE ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382> [<https://perma.cc/TVAg-VU3U>] (noting “a disturbance in the originalist force by a few . . . socially conservative scholars and activists”).

<sup>3</sup> See, e.g., Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037> [<https://perma.cc/HTQ8-KKRX>]; cf. Josh Hammer, *Common Good Originalism*, AM. MIND (May 6, 2020), <https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism> [<https://perma.cc/G7FK-24U7>].

<sup>4</sup> Much debate ensued after common-good constitutionalism was proposed, with critiques coming from both the right and the left. See, e.g., Barnett, *supra* note 2; Hammer, *supra* note 3; Lee J. Strang, *Rejecting Vermeule's Right-Wing Dworkinian Vision*, LAW & LIBERTY (Apr. 2, 2020), <https://lawliberty.org/rejecting-vermeules-right-wing-dworkinian-vision> [<https://perma.cc/38Z8-KWKG>]; Eric Levitz, *No, Theocracy and Progressivism Aren't Equally Authoritarian*, N.Y. MAG.: INTELLIGENCER (Apr. 2, 2020), <https://nymag.com/intelligencer/2020/04/vermeule-catholic-integralism-theocracy-progressives-conservatives-constitution.html> [<https://perma.cc/VHL7-K8XL>].

<sup>5</sup> Cf. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (declaring COVID-19 a national health emergency).

<sup>6</sup> 954 F.3d 772 (5th Cir. 2020).

<sup>7</sup> See *id.* at 777–78.

On March 22, 2020, Texas Governor Greg Abbott issued GA-09, an executive order postponing the provision of all “surgeries and procedures that are not immediately medically necessary.”<sup>8</sup> The stated purpose of the order was to conserve needed hospital capacity and personal protective equipment (PPE) in anticipation of a shortage of both stemming from efforts to combat the COVID-19 pandemic.<sup>9</sup> The following day, Texas Attorney General Ken Paxton issued a press release interpreting “surgeries and procedures” to include “any type of abortion that is not medically necessary to preserve the life or health of the mother.”<sup>10</sup> The press release also stated that violations “[would] be met with the full force of the law,” with “penalties of up to \$1,000 or 180 days of jail time.”<sup>11</sup> GA-09 was set to expire at 11:59 p.m. on April 21, 2020, with the possibility of modification at the Governor’s discretion.<sup>12</sup>

Several Texas abortion providers filed suit against the Governor, among other state officials, in the United States District Court for the Western District of Texas.<sup>13</sup> The abortion providers sought a temporary restraining order (TRO), claiming that GA-09 imposed an unconstitutional ban on abortion.<sup>14</sup> The court granted the TRO.<sup>15</sup> First, it found that the providers had a substantial likelihood of succeeding on the merits, since they could likely prove that GA-09 constituted an “outright ban” on abortion, which the court said cannot be justified by any state interest.<sup>16</sup> That “Texas faces it[s] worst public health emergency in over a century” was thus not determinative — Supreme Court precedent prohibiting previability abortion bans does not contain an “except-in-a-national-emergency clause.”<sup>17</sup> Second, the district court found that by

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<sup>8</sup> Tex. Exec. Order No. GA-09 (Mar. 22, 2020), [https://gov.texas.gov/uploads/files/press/EO-GA\\_09\\_COVID-19\\_hospital\\_capacity\\_IMAGE\\_03-22-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf) [<https://perma.cc/54Q7-K9BD>].

<sup>9</sup> *See id.*

<sup>10</sup> Press Release, Ken Paxton, Att’y Gen. of Tex., Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic (Mar. 23, 2020), <https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all> [<https://perma.cc/4LS5-EEQU>].

<sup>11</sup> *Id.* While the press release lacked binding legal force, it indicated how those enforcing GA-09 would interpret the executive order.

<sup>12</sup> Tex. Exec. Order No. GA-09, *supra* note 8. GA-09 has since expired, and subsequent elective surgery bans do not appear to restrict abortion. *See* Emma Platoff, *Texas Bans Elective Surgeries in More Than 100 Counties as Coronavirus Hospitalizations Keep Climbing*, TEX. TRIB. (July 9, 2020), <https://www.texastribune.org/2020/07/09/texas-coronavirus-hospitalizations-elective-surgeries> [<https://perma.cc/4KB3-GRGL>].

<sup>13</sup> *Planned Parenthood Ctr. for Choice v. Abbott*, No. 20-CV-323, 2020 WL 1502102 (W.D. Tex. Mar. 30, 2020).

<sup>14</sup> *Id.* at \*1–2.

<sup>15</sup> *Id.* at \*4.

<sup>16</sup> *Id.* at \*2 (citing *Roe v. Wade*, 410 U.S. 113, 163–65 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 871 (1992) (plurality opinion)).

<sup>17</sup> *Id.* at \*3.

losing the constitutional right to abortion, the patients of the abortion providers would suffer irreparable harm.<sup>18</sup> Third, this irreparable harm would outweigh any damage the TRO would possibly cause to the Texas officials.<sup>19</sup> And fourth, because the TRO would be designed to avoid constitutional deprivations, the public interest would not be disserved.<sup>20</sup>

The Fifth Circuit vacated the TRO by issuing a writ of mandamus.<sup>21</sup> Writing for the panel, Judge Duncan<sup>22</sup> held that this extraordinary remedy was warranted because each of three prongs was satisfied: (1) the petitioner demonstrated no other means to attain relief; (2) the petitioner's right to issuance of the writ was clear and indisputable; and (3) the court, in its discretion, believed that the writ was appropriate.<sup>23</sup> Beginning with the second prong, the court held that the district court "clearly abused its discretion by failing to apply (or even acknowledge) the framework governing emergency exercises of state authority during a public health crisis, established . . . in *Jacobson v. Commonwealth of Massachusetts*."<sup>24</sup> Under this framework, "liberty secured by the Constitution . . . does not import an absolute right in each person to be . . . wholly freed from restraint," but rather "a community has the right to protect itself against an epidemic."<sup>25</sup> Therefore, the Fifth Circuit concluded that "all constitutional rights may be reasonably restricted to combat a public health emergency."<sup>26</sup> Because the Supreme Court never exempted abortion rights from this rule — several Supreme Court abortion cases cite *Jacobson* approvingly<sup>27</sup> — abortion could be restricted.<sup>28</sup>

Having established *Jacobson* as the governing framework, the Fifth Circuit concluded that "the district court was empowered to decide only whether GA-09 lack[ed] a 'real or substantial relation' to the public health crisis or whether it [was] 'beyond all question, a plain, palpable invasion' of the right to abortion."<sup>29</sup> In determining that a "real and substantial relation" existed between the COVID-19 pandemic and GA-09, the court deferred to the findings of the executive branch.<sup>30</sup> And, finding that GA-09 was not, "*beyond question*, in palpable conflict with

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Abbott*, 954 F.3d at 779.

<sup>22</sup> Judge Duncan was joined by Judge Elrod.

<sup>23</sup> *See Abbott*, 954 F.3d at 778, 781.

<sup>24</sup> *Id.* at 783 (citing 197 U.S. 11 (1905)).

<sup>25</sup> *Id.* (quoting *Jacobson*, 197 U.S. at 26–27) (first omission in original).

<sup>26</sup> *Id.* at 786.

<sup>27</sup> *See id.* at 785–86.

<sup>28</sup> *Id.* at 786.

<sup>29</sup> *Id.* (quoting *Jacobson*, 197 U.S. at 31).

<sup>30</sup> *See id.* at 787. The court relied on claims made within GA-09 itself and on statements made by the Texas infectious disease expert that non-medically necessary surgeries and procedures would hinder the fight against COVID-19. *See id.*

the Constitution,<sup>31</sup> the court stated that the district court incorrectly characterized GA-09 as an “outright ban” on abortion, when instead it was merely a temporary postponement of some abortions, with broad health exceptions built in.<sup>32</sup> Upon making these findings, the court continued its analysis of the mandamus prongs, determining that because “time is of the essence when it comes to preventing the spread of COVID-19,”<sup>33</sup> restraining the Texas government would provide no other adequate means for the Texas officials to obtain the relief they sought.<sup>34</sup> And finally, citing the gravity of COVID-19, the uncertainty surrounding how long the pandemic may last, and the district court’s extraordinary error in ignoring *Jacobson*, the Fifth Circuit stated that it was persuaded to exercise its discretion to issue the writ.<sup>35</sup>

Judge Dennis “respectfully but emphatically dissent[ed].”<sup>36</sup> He argued that the district court did not clearly abuse its discretion, nor was its result patently erroneous.<sup>37</sup> For one, whereas *Jacobson* dealt with vaccines, which directly curb a disease’s spread, GA-09’s threat to combatting COVID-19 was “more attenuated,” requiring an additional link showing that “PPE resources denied to abortion providers are indeed conserved, are significant in amount, and can realistically be reallocated to healthcare workers fighting COVID-19.”<sup>38</sup> Further, the dissent argued that GA-09 exceeded even the broad power allowed by *Jacobson*, noting that *Jacobson* “clearly anticipated that courts would exercise judicial oversight over a state’s decision to restrict personal liberties during emergencies.”<sup>39</sup> Judge Dennis also challenged the factual justifications for GA-09, arguing that abortions do not require significant uses of hospital capacity or PPE; if anything, they require fewer resources than patients who need prenatal care due to a lack of abortion access.<sup>40</sup> Finally, the dissent noted that depending on how far along a woman is in her pregnancy, even a temporary lack of access to abortion may turn into an “outright ban” on her ability to terminate the pregnancy.<sup>41</sup>

A number of developments followed *In re Abbott*. First, the district court vacated the TRO and issued a new one that prevented GA-09 from applying to “three categories of abortion: (1) medication abortions;

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<sup>31</sup> *Id.* at 787–88 (quoting *Jacobson*, 197 U.S. at 31 (emphasis added)).

<sup>32</sup> *Id.* at 788–89.

<sup>33</sup> *Id.* at 794.

<sup>34</sup> *Id.* at 795. Restraining the government “would be ‘truly irremediable’ through ordinary appeal.” *Id.* at 794 (quoting *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019)).

<sup>35</sup> *Id.* at 795–96.

<sup>36</sup> *Id.* at 804 (Dennis, J., dissenting).

<sup>37</sup> *See id.* at 800.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 801.

<sup>40</sup> *See id.* at 802.

<sup>41</sup> *Id.* at 803.

(2) abortions for women who would be more than 18 weeks LMP (‘last menstrual period’) by April 22 and unable to reach an ambulatory surgical center; and (3) abortions for women who would be past Texas’s legal limit — 22 weeks LMP — for abortion by April 22.<sup>42</sup> Then, in the course of two decisions, the Fifth Circuit granted a temporary stay of the TRO except as to medication abortions and procedural abortions for patients who would be past the legal limit of twenty-two weeks LMP.<sup>43</sup> In so doing, the court criticized the district court’s failure to carefully parse evidence on the validity of GA-09 and its failure to support capacious public authority in times of emergency.<sup>44</sup>

By upholding regulations on abortion — what some view to be liberalism’s holiest sacrament<sup>45</sup> — *In re Abbott* delivered a win for social conservatives.<sup>46</sup> But the way it achieved this result is particularly noteworthy. *In re Abbott* relied on foundational principles of common-good constitutionalism,<sup>47</sup> interpreting *Jacobson* to emphasize a preference for the common good over individual rights and a deferential standard of judicial review. And at the same time, it eschewed other interpretations of *Jacobson* and principles of other judicial philosophies.

Common-good constitutionalism — premised on the idea that “originalism has now outlived its utility” — seeks to reorient legal methodology toward a “substantively conservative approach to constitutional law and interpretation.”<sup>48</sup> It proposes a revival of the classical legal tradition, which, rather than being a departure from American jurisprudence, has “a much longer and more impressive pedigree within our law than does originalism itself.”<sup>49</sup> Justice Harlan’s opinion in *Mugler v.*

<sup>42</sup> *In re Abbott*, 809 F. App’x 200, 201 (5th Cir. 2020).

<sup>43</sup> *Id.* at 203; *In re Abbott*, 800 F. App’x 293, 296 (5th Cir. 2020).

<sup>44</sup> *See Abbott*, 809 F. App’x at 202. The Fifth Circuit stated that “the TRO persists in ‘usurp[ing] the state’s authority to craft emergency health measures’ by ‘substitut[ing] [the district court’s] own view of the efficacy of applying GA-09 to abortion.’” *Id.* (quoting *Abbott*, 954 F.3d at 778) (first two alterations in original). The district court’s view was that “[b]ecause individuals with ongoing pregnancies require more in-person healthcare . . . than individuals who have previability abortions, delaying access to abortion will not conserve PPE.” *Planned Parenthood Ctr. for Choice v. Abbott*, No. 20-CV-323, 2020 WL 1815587, at \*4 (W.D. Tex. Apr. 9, 2020).

<sup>45</sup> *See, e.g.*, ANN COULTER, *GODLESS: THE CHURCH OF LIBERALISM* 89 (2006) (“Abortion is the sacrament and *Roe v. Wade* is Holy Writ.”).

<sup>46</sup> Although *In re Abbott* arguably represented only a narrow restriction on abortions, many in the pro-life movement celebrate such incrementalist victories. *See* MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 58–91 (2015).

<sup>47</sup> *See* Adrian Vermeule, *The Guardian of Life*, MIRROR JUST. (Apr. 7, 2020), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2020/04/the-guardian-of-life.html> [<https://perma.cc/GNE9-EPEX>] (providing a side-by-side comparison of excerpts from Vermeule, *supra* note 3, and *Abbott*, 954 F.3d 772).

<sup>48</sup> Vermeule, *supra* note 3.

<sup>49</sup> Adrian Vermeule, *Common-Good Constitutionalism: A Model Opinion*, IUS & IUSTITIUM (June 17, 2020), <https://iusetiustitium.com/common-good-constitutionalism-a-model-opinion> [<https://perma.cc/V2AQ-S335>]. *Jacobson* itself arguably demonstrates this point. *See id.*

*Kansas*,<sup>50</sup> as Professor Adrian Vermeule notes, summarized the main elements of “the common-good framework”: “(1) the public authority may act for the common good; (2) by making reasonable determinations about the means to promote its stated public purposes; and (3) when it does, judges must defer.”<sup>51</sup> In addition to this framework, legal outcomes should accord with “principles of objective natural morality,” or a socially conservative understanding of natural law.<sup>52</sup> As such, existing “jurisprudence on free speech, abortion, sexual liberties, and related matters will prove vulnerable” under common-good constitutionalism.<sup>53</sup>

*In re Abbott* seems to employ these common-good constitutionalist principles. First, *In re Abbott* interpreted *Jacobson* as emphasizing the state’s authority to promote the common good and “to protect the public’s health and well-being . . . even when doing so requires overriding the selfish claims of individuals to private ‘rights.’”<sup>54</sup> Second, *In re Abbott* adopted a deferential approach to judicial review, in line with Justice Harlan’s “common-good framework.”<sup>55</sup> And finally, *In re Abbott*’s outcome of restricting abortion accords with a socially conservative understanding of natural law, namely one that emphasizes the importance of protecting prenatal life.<sup>56</sup>

*In re Abbott*’s interpretation of *Jacobson* evinces a preference for the common good over inviolable individual rights. In upholding a mandatory vaccination law enacted amidst a smallpox epidemic, the *Jacobson* Court noted that “[t]here are manifold restraints to which every person is necessarily subject for the common good.”<sup>57</sup> And *In re Abbott* seems to accord with this principle, even while others emphasize *Jacobson*’s language about ensuring that emergency measures are closely related to the actual emergency.<sup>58</sup> In upholding restraints on abortion for the sake of the common good, the Fifth Circuit understood *Jacobson*’s century-old framework as superseding *Casey*’s far more recent undue burden

<sup>50</sup> 123 U.S. 623 (1887).

<sup>51</sup> Vermeule, *supra* note 49.

<sup>52</sup> Vermeule, *supra* note 3; see also Susannah Black, *Common Good Constitutionalism Considered*, MERE ORTHODOXY (Apr. 1, 2020), <https://mereorthodoxy.com/common-good-constitutionalism> [<https://perma.cc/FSU2-UF6J>] (calling common-good constitutionalism and natural law jurisprudence “complementary ideas, not alternatives or competitors”).

<sup>53</sup> Vermeule, *supra* note 3.

<sup>54</sup> *Id.*

<sup>55</sup> See Vermeule, *supra* note 49; cf. Vermeule, *supra* note 3 (“[C]ommon-good constitutionalism will favor a powerful presidency ruling over a powerful bureaucracy . . .”).

<sup>56</sup> See Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2475 (1997) (“From the pro-life point of view, any regime of law . . . that deprives unborn human beings of their right to legal protection against homicide is gravely unjust.”).

<sup>57</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

<sup>58</sup> See Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 130 (2020) (“[*Jacobson*] emphasized that the police power was limited and offered a *mélange* of criteria for when courts should intervene . . .”).

test.<sup>59</sup> Doing so allowed the court to acknowledge that “under the pressure of great dangers,” individual liberties may “be subjected to such restraint . . . as the safety of the general public may demand.”<sup>60</sup> Thus, the Fifth Circuit demonstrated a preference for the common good over even constitutionally protected individual liberties like abortion.<sup>61</sup>

*In re Abbott* also interpreted *Jacobson* to require a deferential approach to judicial review. This deferential view can be contrasted with Judge Dennis’s dissent, which favored a civil libertarian approach.<sup>62</sup> Whereas Judge Dennis challenged the idea that GA-09 would preserve hospital capacity and PPE,<sup>63</sup> the majority broadly deferred on this question.<sup>64</sup> The majority declined to investigate whether a temporary postponement of abortions would indeed preserve hospital capacity and PPE, noting instead that under *Jacobson*, “courts may not second-guess the wisdom or efficacy of [a state’s emergency] measures.”<sup>65</sup> This decision, when coupled with the “‘drastic and extraordinary’ remedy of mandamus,”<sup>66</sup> evinces broad deference to the Texas executive branch.

Importantly, not everyone interprets *Jacobson* as the Fifth Circuit did, with some viewing the reading in *In re Abbott* as “especially unconvincing.”<sup>67</sup> For example, in one view, the Fifth Circuit should not have relied so heavily on *Jacobson* in the first place because it “rested on a police power jurisprudence that applied to all public health laws, not simply those issued during an emergency.”<sup>68</sup> Further, “in 1905, the Court had not yet recognized the specific rights at issue in most of the COVID-19 cases,” so *Jacobson* “could not have affirmed the suspension of heightened standards of review for specific constitutional claims.”<sup>69</sup> Other observers argue that the Fifth Circuit correctly identified *Jacobson* as the controlling precedent, but claim that a more literal reading of *Jacobson*

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<sup>59</sup> While the Fifth Circuit did rely on *Casey* to some extent, it was primarily used within the context of the *Jacobson* framework. See *Abbott*, 954 F.3d at 778.

<sup>60</sup> *Id.* at 783 (quoting *Jacobson*, 197 U.S. at 29).

<sup>61</sup> Whether the Constitution’s liberty guarantees indeed protect, or even allow, abortion has been the subject of debate. See, e.g., Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL’Y 539, 539 (2017).

<sup>62</sup> See *Abbott*, 954 F.3d at 796–804 (Dennis, J., dissenting). For a discussion of the approaches to judicial review, see generally ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* (2007). The civil libertarian view suggests that “constitutional rules should not be relaxed during an emergency,” *id.* at 16, whereas the deferential view suggests that “judicial review of governmental action . . . should be relaxed or suspended during an emergency,” *id.* at 15.

<sup>63</sup> *Abbott*, 954 F.3d at 802–03 (Dennis, J., dissenting).

<sup>64</sup> See *id.* at 793 (majority opinion).

<sup>65</sup> *Id.* at 785 (citing *Jacobson*, 197 U.S. at 28, 30). Even when the Fifth Circuit upheld some restrictions on Texas’s ability to regulate abortions, the court still seemed to endorse a deferential approach to judicial review. See *supra* note 44.

<sup>66</sup> *Abbott*, 954 F.3d at 778 (quoting *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019)).

<sup>67</sup> Parmet, *supra* note 58, at 130.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 131.

encourages, rather than discourages, meaningful judicial review.<sup>70</sup> Because *Jacobson* “eschewed any form of the suspension principle,” instead adopting “a quintessential balancing test,” these observers argue that it should not “be read to establish as weak a standard of review as some contemporary courts have concluded.”<sup>71</sup>

Even other conservative jurists approach *Jacobson* differently. For example, in dissent in *Calvary Chapel Dayton Valley v. Sisolak*,<sup>72</sup> Justices Alito, Thomas, and Kavanaugh argued against extending *Jacobson* to a First Amendment challenge of Nevada’s restrictions on religious congregations.<sup>73</sup> And an originalist lower court could have approached *Jacobson* similarly. Under originalism, a lower court judge may “decline to *extend* a constitutional rule to brand new circumstances, if the binding precedent is completely unmoored from the Constitution’s original public meaning.”<sup>74</sup> And *Jacobson* made no reference to any original public meaning, relying instead on legal principles that have developed over time.<sup>75</sup> So, the Fifth Circuit could have declined to extend to the abortion context a case that “primarily involved a substantive due process challenge to a local ordinance requiring residents to be vaccinated for small pox.”<sup>76</sup>

Based on *In re Abbott*’s consistency with common-good constitutionalist principles, and its simultaneous inconsistency with these other methodologies and interpretations of *Jacobson*, *In re Abbott* is best understood as a common-good constitutionalist case. This understanding, when considered in light of other cases using similar reasoning,<sup>77</sup> potentially foreshadows that changes may be coming to the conservative legal movement. And, if this is the case, then social conservatives may have cause for celebration. But at the same time, the need to develop principled limits on state authority so as to prevent potential abuse becomes all the more important.<sup>78</sup>

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<sup>70</sup> See Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. F. 179, 190–91 (2020).

<sup>71</sup> *Id.*

<sup>72</sup> 140 S. Ct. 2603 (2020) (mem.).

<sup>73</sup> See *id.* at 2608 (Alito, J., dissenting). By contrast, the Fifth Circuit insisted that “*Jacobson* governs a state’s emergency restriction of *any* individual right,” and that “[t]he same analysis would apply . . . to an emergency restriction on gathering in large groups for public worship during an epidemic.” *Abbott*, 954 F.3d at 778 n.1 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (“The right to practice religion freely does not include liberty to expose the community . . . to communicable disease . . .”).

<sup>74</sup> Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44, 46 (2019).

<sup>75</sup> See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

<sup>76</sup> *Calvary Chapel*, 140 S. Ct. at 2608 (Alito, J., dissenting).

<sup>77</sup> See, e.g., *In re Rutledge*, 956 F.3d 1018, 1025 (8th Cir. 2020) (citing *Abbott* to uphold restrictions on abortion); *Geller v. de Blasio*, No. 20cv3566, 2020 WL 2520711, at \*5 (S.D.N.Y. May 18, 2020) (relying on *Jacobson* to uphold a public-protest ban despite First Amendment challenges).

<sup>78</sup> For example, *Buck v. Bell*, 274 U.S. 200 (1927), which upheld the forced sterilization of “mental defectives,” *id.* at 205, deferred to an authority that overrode individual rights, *id.* at 207.