

MEMORANDUM

To: Cheryl Sbarra, MAHB
From: Mike Hugo
Date: May 22, 2020
Re: Rights of poll workers to a safe working place vs. rights of citizens to disobey health regulations and emergency regulations requiring the use of facial coverings

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Question: If a person enters a polling location to vote, can that person be refused a ballot if s/he refuses to comply with the order for all persons to wear a face covering, in the absence of a legally permissible exception such as an underlying health condition?

Answer: Yes

Rationale: Under the Constitution of the United States, “the Congress shall have the power to ... provide for the ... general welfare of the United States.” Art. I Section 8. So, at least on a federal level, the government can make laws that provide for the general welfare of people in this country.

But since this is a state action, which does not seem to be outlawed in the U.S. Constitution, we will look to our own state constitution, which says at Article IV,

“the full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth....”

There is only one case involving boards of health and the Commerce Clause under Article 1 Section 8 of the U.S. Constitution. That case, *Morgan's Steamship Co. v. Louisiana Board of Health* (1886), held that “quarantine laws belong to a class which typically only the states may establish until Congress acts in the matter to preempt state action by covering the same ground or forbidding state laws.” So we will proceed with this memorandum on the presumption that the question depends upon interpretation of state law.

So with these Constitutional questions behind us, we will look at whether the state can impose limitations upon individual liberties in the name of public welfare. The purpose of the Governor’s emergency order which mandates the wearing of facial coverings is grounded in public health policy. The Order is aimed at reducing the risk of exposure and spread of an

extremely contagious coronavirus. As has been said many times, the reason for wearing masks is not so much to protect the person wearing it, as it is to protect people who come within a six-foot area of the mask-wearer. It is widely believed that the exchange of particulates and airmasses is diminished sharply at the six foot margin.

Poll workers across the Commonwealth of Massachusetts are generally of an older age cohort and are generally retired people who look forward to their rare public service opportunities and who dedicate themselves to this task religiously. Because of their relative age, generally speaking when we talk about poll workers we're talking about people who are most vulnerable to the COVID-19 virus. For this reason, it is important that those who choose to exercise their right to vote in person rather than by absentee ballot or other measures which are currently under consideration in our state legislature, must respect the rights and the health of the poll workers, with whom they must come within 6 feet of as part of the voting process.

U.S. Supreme Court Rulings

As it would turn out, the seminal case which gives us precedent to require that facial coverings be worn in the name of public health, comes from a United States Supreme court case emanating from Massachusetts involving vaccination rights.

Jacobson v. Massachusetts, 197 U.S. 11 (1905), was one of a handful of cases to ever be considered by the United States Supreme Court which has a bearing upon issues of public health as they would affect the public welfare. At issue in the *Jacobson* case was whether an individual's freedom could be subordinated to the police power of the state for a matter of common welfare. In *Jacobson*, a pastor was trying to refuse a mandatory smallpox vaccination which was mandated under G.L. c. 75, § 173. Similar to the issues before us at this time, the pastor was disturbed by the vaccination process, and asserted that mandating vaccines or imposing a fine for those refused them was quote an invasion of his Liberty” and infringed upon his 14th Amendment rights under the constitution. The provision he invoked from the constitution was the Equal Protection Clause.¹

The underlying vaccination statute, G.L. c. 75, § 137, stated,

“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 five dollars.”

On Feb. 27, 1902, the Cambridge Board of Health passed a regulation stating:

¹ The Equal Protection Clause says, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States called; Nor shall any state deprive any person of life, Liberty, or property, without due process of law; Nor deny any person within its jurisdiction the equal protection of the laws.”

“Whereas, smallpox has been prevalent to some extent in the city of Cambridge and still continues to increase; and whereas it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated, and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated.”

In a 7-2 decision delivered by Justice Harlan, the Court rejected the Jacobson’s claims that the 14th Amendment gave him a right to refuse the smallpox vaccination and found the law to be constitutional. In so doing, the Supreme Court upheld the state’s right to enforce a fine against a citizen who refused to comply with a public health regulation.

In its decision, the Supreme Court looked to see whether the public health regulation, “had a real and substantial relation to the protection of the public health and safety” and held that a state’s police power may overcome an individual’s liberties in certain situations if the exercise of those liberties could otherwise expose “great dangers” to the safety of the “general public.” While the then-current smallpox epidemic justified the alleged infringement on individual liberties there, a person refusing to wear a mask to a polling location today would likewise fail in a claim that his/her civil rights were unlawfully impinged upon. This is especially true where the exercise of the police power by requiring facial coverings is considered a direct measure for eradicating the epidemic. Under such a reasoning, no court (maybe other than in Wisconsin) would find a regulation or law that is aimed squarely at eliminating a pandemic risk, to be arbitrary.

Most constitutional scholars have concluded that the *Jacobson* Court established a two prong test. Others have surmised that it established a four-prong test, but either way, the rights of the poll workers will outweigh those of the person refusing to comply.

The two-prong test is defined as asking: (1) Is there a compelling state interest in an effort to protect public health and safety? (2) Is the State’s police power necessary and being exercised in a reasonable and not an arbitrary manner?

Those who have broken this test into four elements, look to the regulation’s: (1) necessity, (2) reasonable means, (3) proportionality, and (4) harm avoidance. Under either scenario, the facial covering regulation outweighs a person’s right to flaunt the wearing of facial protection. In *Jacobson*, which involved whether the measure was arbitrary or a direct measure to combat the epidemic, the Supreme Court had little difficulty reaching its decision to uphold the Massachusetts law.

The issue seems well settled as to the power of the state to enforce a health regulation where there is a compelling state interest in an effort to protect public health and safety, and the State’s police power is necessary and being exercised in a reasonable and not an arbitrary manner. But what about 1st Amendment grounds?

First Amendment Arguments:

Assuming that the 1st Amendment argument is based upon religious freedom, we must look at under what circumstances does the government interest in protecting public welfare outweigh an individual's right to freely exercise his/her religion? This question is always looked at by the Supreme Court on a case-by-case basis.

The best string of cases to look at for this started in 1963, with the balancing test applied in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* involved an employee who refused to work on the Sabbath and who was fired and barred from receiving unemployment benefits. The underlying unemployment claim was denied after the state found that her termination for religious reasons was, in fact, good cause. When the Supreme Court looked at this, it found that her termination was an unconstitutional invasion of her right to freely exercise religion. The Court found that the government had to demonstrate that there was a compelling public interest and that the law in question was narrowly tailored to achieve that interest.

In 1990, the Supreme Court then decided another case on that standard in the case of, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 US 872, (1990). That case related to claims for wrongful termination by members of the Native American Church following their ingestion of peyote, a hallucinogen, for sacramental purposes as a church related ceremony. The court found that the Free Exercise Clause in the First Amendment permits the state to prohibit ingestion of peyote, even for religious purposes. In that case the court ruled that "the Free Exercise Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids the performance of an act that his religious belief requires, if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for non-religious reasons."

A third case in this string, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), was one in which the Supreme Court again faced the topic of the interaction between state police power and the Free Exercise Clause of the First Amendment. In *Yoder*, Three Amish families asserting their religious rights against public education beyond the 8th grade challenged a Wisconsin law compelling school attendance by children up to age 16. In that case, the Supreme Court ruled in favor of asserting First Amendment rights, finding that the state infringed on such rights. The court also ruled that the state did not provide adequate proof of the benefits of the extra few years of school, enough to justify any infringement on religion.

Conclusion:

It seems clear that the balancing tests looked to by the Supreme Court, would favor the poll workers asking the police officer assigned to the polling place to eject persons entering the polling locations without facial coverings.