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Protests During a Pandemic: Constitutional Rights and Public Health

Steven D. Schwinn

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A protester carries an AR style military type rifle at a demonstration outside Indiana Governor Eric Holcomb's mansion to protest the stay-at-home order to combat the spread of COVID-19. The April 18, 2020, protest followed a similar demonstration in Michigan earlier in the week.

Now that we're more than two months into our states' earliest shelter-in-place orders, many of us are getting a little feisty. Some are trying to get out and socialize, even if only at a distance. Some are eating at restaurants and shopping at retail stores, or, more likely, picking up curbside. And some are hitting the parks and beaches or other public places to enjoy a little recreation. In short, many of us are doing whatever we can to return to some form of normalcy in these very un-normal times.

Still, we're antsy, and growing weary of shelter-in-place orders, and deeply worried about our household finances and our local economies. So some have taken to protest. We've seen a spate of small but very vocal protests against state shelter-in-place and business-closure

orders across the country. Protestors have rallied at state capitols to challenge lawmakers and governors to rescind or relax orders and reopen the states.

Most recently, protestors were bolstered by the handful of states that have moved to relax shelter-in-place orders. (After all, if Georgia can reopen, why can't Michigan?) They've also been bolstered by the lack of a uniform and mandatory national policy. And they've been bolstered by President Trump himself, who has expressed support for the protestors (and against some states' shelter-in-place orders), even as his administration has recommended only a phased reopening under conditions that no state has yet met. The patchwork of state policies, the lack of a uniform, mandatory national policy, and the apparent mixed messaging from the administration have all fueled protestors' anger and discontent with their own state's shelter-in-place and business-closure orders—especially when those orders seem arbitrary or unnecessarily strict.

Some of the protestors themselves violate shelter-in-place and social distancing orders. Reports from protests around the country show that protestors often gather in close proximity to one another, without protective masks. A protest in Michigan went even further. Hundreds of protestors massed closely outside the state capitol, and dozens infiltrated the building and packed together in the atrium, many without protective masks. Some attempted to enter a legislative chamber, but were rebuffed in close quarters by police. Some totted flags or banners bearing a Nazi swastika, Confederate flag, or a noose, and some openly carried assault rifles.

In normal times, a close-crowded protest, without protective masks, is, well, just a protest. In normal times, we protect, and even celebrate, this kind of activity. We even protect the very ugly messages conveyed by some of the protestors in Michigan and other states, however much we might disagree with those messages, on the theory that government has no business regulating the content or viewpoint of our speech. (Some of the behavior, however, quite clearly smashed all bounds of lawful protest. You can't storm a legislative chamber armed with assault rifles, whatever the merits of your protest.) In normal times, protests against the government are highly valued forms of political speech, essential to our democracy, and well protected by the First Amendment.

But of course these are not normal times. So when anti-shelter-in-place protestors claim the protection of the First Amendment against shelter-in-place, isolation, and social-distancing orders, we might wonder: Does the First Amendment still protect these protests?

Let's unpack this question, starting with our history of addressing public health crises.

Our History and Tradition of Addressing Public Health Crises

We have a long, well-established history in the United States of using government-mandated quarantine, isolation, and cordon sanitaire to address public health crises. Going all the way back to colonial days, local governments have ordered the quarantine of individuals who have come into contact with a disease, the isolation of those infected with a disease, and cordon sanitaire to restrict travel in and out of places with widespread infection. The courts have generally upheld these policies against various constitutional challenges, recognizing that in an organized society individual rights must sometimes yield to the common good. (This is just an extension of the old adage: My right to swing my fist ends at your nose.) As a result, the courts have generally declined to overturn state policies designed to address public health matters, so long as the policies aren't wholly arbitrary, unduly oppressive, or unreasonable—that is, where they don't well match the public health emergency that they are designed to meet.

The Supreme Court addressed a state's authority to deal with a public health issue in a very different way, through compulsory vaccination, in *Jacobson v. Commonwealth of Massachusetts*, in 1905. While *Jacobson* doesn't deal directly with quarantine, isolation, or cordon sanitaire, it speaks to a state's authority to intrude upon individual liberties in the broader interest of public health. In that way, it provides a framework for sorting out when a state's public-health policies (like shelter-in-place and social isolation) violate individual rights (like free speech).

In *Jacobson*, the Court upheld a Massachusetts compulsory vaccination law against an individual-rights challenge. A Cambridge resident, who was convicted for refusing to get a smallpox vaccination, argued that the law violated his rights under the Fourteenth Amendment. In rejecting that claim, the Court first noted that the state had authority to adopt "such reasonable regulations established directly by legislative enactments as will protect the public health and the public safety." But at the same time, the Court held that those regulations are subject to protections in the U.S. Constitution. In balancing out the state's power to regulate with the individual's rights, the Court noted that individual rights are not absolute and that in an "organized society," individual rights sometimes give to "the common good." The Court also noted that this is largely a question for the legislature. The Court wrote,

> If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain,

> palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

The Court held that the compulsory vaccination law was, indeed, tailored to the public health situation. For example, the Court noted that the state legislature determined that compulsory vaccination was "as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population," as demonstrated by the experiences in other countries and many states. Moreover, the Court noted that the state only required vaccination when, in the opinion of the board of health, it was necessary for the public health or safety. The Court noted that the vaccine was one that "any medical practitioner of good standing would regard as proper to be used." Finally, the Court noted that the defendant in the case was a "fit subject of vaccination," and that he demonstrated no reason not to be vaccinated.

Jacobson teaches us that individual rights must sometimes yield to state policies designed to meet public-health concerns. And its language, quoted above, suggests that the courts should defer to state government policies designed to address those concerns, even when they run up against individual rights. (*Jacobson* raises an interesting and disputed question whether the courts should apply *looser standards* to individual rights in a public health emergency, or whether they should apply ordinary standards with the recognition that a public health emergency is an *extraordinary situation*. That question is well beyond the scope of this piece. But it might not matter: Courts may get to the same result either way, as we'll discuss.)

At the same time, however, *Jacobson* recognizes that there is a backstop to states' authority to address public-health emergencies. In particular, the case recognizes that individual rights might prevail over a state policy when that policy is not properly tailored to meet a public health emergency, or when it plainly violates individual rights. A good example comes from a pair of cases addressing local public-health measures to address bubonic plague in the late nineteenth century. In *Wong Wai v. Williamson* (1900), a federal court struck down the San Francisco Board of Health's order that all Chinese residents receive an inoculation against the bubonic plague and restricted their right to leave the city. The court held that the requirements were "not based on any established distinction in the conditions that are supposed to attend the plague, or the persons exposed to its contagions." The same court later invalidated the quarantine because it was "unreasonable, unjust and oppressive" and constituted discrimination in violation of the Fourteenth Amendment with *Jew Ho v. Williamson* (1900). In other words, the Board's attempts to address a widespread public-health issue by directing its policies toward residents of a single race was both ill-tailored to the public-health concern and racially discriminatory.

Subject to these authorities and constraints, states today have broad authority to address public-health concerns. In particular, they have broad authority to issue quarantine and isolation orders to address an emergency like the COVID-19 pandemic. Every state has a quarantine or isolation law; many of these date back 40 to 100 years. (The National Conference of State Legislatures collects those laws here, **www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx**.) The federal government, too, through the Centers for Disease Control, has statutory authority to issue quarantine and isolation orders, although the responsibility falls mainly on the states. Strictly speaking, these statutory authorities permit the states and federal government to impose conventional quarantine and isolation orders on individuals who may become sick, or who are already sick, respectively.

In addition, state governors have statutory authority to take extraordinary measures to address an emergency, like a public health crisis. Governors who have issued shelter-in-place, social isolation, and business-closure orders to address the novel coronavirus have acted pursuant to this statutory emergency authority.

But state governors' orders must also comport with the principles previously outlined, in *Jacobson*, *Wong Wai*, and *Jew Ho*. As applied to the protestors, those orders must not plainly violate the First Amendment. But what does the First Amendment provide? Let's take a look at that question next.

The First Amendment and Free Speech in the Public Forum

Like all rights in our Constitution, First Amendment rights are not absolute. This means that the government may intrude on First Amendment rights when it can justify that intrusion, usually under an exacting and rigorous test. For example, as a general matter, the government cannot restrict speech based on its content unless the government can prove that its restriction is *necessary* to achieve a *compelling government interest*. This test, called "strict scrutiny," is the most stringent test known to constitutional law, and it leaves the government very little room to regulate.

But sometimes the Court applies a less rigorous test. For example, the Court has relaxed the standard just a bit when the government regulates speech in a "public forum." (A public forum is a place that has traditionally been reserved, open, and available for free speech, like a park, or sidewalk, or public street.) Thus, the government may impose reasonable restrictions on the time, place, or manner of speech in a "public forum." Time, place, and manner restrictions must be content neutral, that is, they cannot be justified based on the content of the speech. And

they must be narrowly tailored to serve a significant government interest and leave open "ample alternative channels for communication of the information." (*Clark v. Community for Creative Non-Violence*, 1984).

Public-forum analysis is most relevant here, because protests against state government coronavirus policies occur in public forums (state capitol grounds and surrounding public areas). Moreover, Supreme Court cases applying the doctrine largely arose in the context of public protest, and so examining some of those cases can provide some guidance in determining whether coronavirus policies today intrude on protestors' First Amendment rights.

For example, in *Frisby v. Schultz* (1988), the Court upheld a municipal ordinance that prohibited picketing "before or about the residence or dwelling of any individual," in order to protect the privacy, well-being, and tranquility of the community and the privacy of the home. The case arose when anti-abortion protestors sought to picket on a public street outside the home of a doctor who performed abortions at clinics in neighboring towns. In response, the town enacted the ordinance to ban residential picketing. The protestors challenged the ordinance, arguing that it violated the First Amendment.

The Court rejected the challenge and upheld the ordinance. The Court deferred to the lower court's ruling that the ordinance was content-neutral. It held that the ordinance left open ample alternative channels for communication, because it only banned picketing in front of particular residential houses, and allowed other protests, like marching through a neighborhood in front of an entire block of houses, or distributing literature and proselytizing door to door. And the Court held that the complete ban on residential picketing was narrowly tailored to achieve the significant government interest in protecting residential privacy.

Similarly, in *Clark*, cited above, the Court upheld a National Park Service regulation that prohibited camping, including sleeping, on certain national park lands. The plaintiffs in that case challenged the regulation after the Park Service denied permission to sleep in temporary structures in Lafayette Park and on the National Mall in Washington, D.C., as part of a demonstration to call attention to homelessness. The Court ruled that the camping ban was a content-neutral time, place, or manner regulation on speech, because it applied without regard to the message conveyed. The Court held that the regulation was narrowly tailored to meet the government's substantial interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." And it ruled that the regulation left the plaintiffs with plenty of other ways to convey their message, including allowing the plaintiffs to maintain the demonstration, a "symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil."

More recently, the Court in *Hill v. Colorado* (2000), upheld Colorado's restriction on speech within 100 feet of health-care facilities. In *Hill*, the case concerned plaintiffs who sought to engage in "sidewalk counseling" of patients on the public ways and sidewalks around abortion clinics. They challenged a state law that prohibited any person from approaching within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." The Court rejected the challenge. The Court ruled that the restriction was a content-neutral time, place, and manner regulation on speech, because it applied equally to all

speech, whether by "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries." Importantly, the Court held that it was content- and viewpoint-neutral, even though it would almost certainly apply only to speakers who wished to convey an anti-abortion position, because it was facially neutral and justified without reference to the content or viewpoint of the speech. The Court affirmed this approach more recently, in *McCullen v. Coakley* (2014). In *McCullen*, protestors challenged a state law that banned anyone from "enter[ing] or remain[ing]" in a public area within 35 feet of a reproductive health facility. The Court ruled that the statute was content-neutral, because it was justified based on the location of the speech, not its content, even though it would apply disproportionately to abortion-related speech. The Court nevertheless ruled the law unconstitutional, however, because the government might have achieved its interests with a better-tailored restriction.

Do Government Shelter-in-Place and Social-Distancing Orders Violate Free Speech?

Applying the *Jacobson* framework and the public-forum doctrine to the protests against state government coronavirus policies, those policies probably do not violate the protestors' free speech rights. But there are some caveats.

As an initial matter, under *Jacobson*, government shelter-in-place and social-distancing rules must have a "real or substantial relation" to the protection of public health. These almost certainly do. Most or all shelter-in-place and social-distancing rules are designed and narrowly tailored to protect against the transmission of COVID-19, at least so far as our scientific understanding currently extends. This is especially true in close-quartered protests, where some or many of the protestors decline to wear protective masks—and thus make the transmission of novel coronavirus all the more likely. Moreover, at least so far states appear to enforce shelter-in-place and social-distancing rules in a nondiscriminatory way. Enforcement does not appear to raise the problems in *Wong Wai* and *Jew Ho*.

Next, under the public-forum doctrine and cases, government shelter-in-place and social-distancing rules must be content-neutral, narrowly tailored to achieve a significant government interest, and leave open ample alternatives for communication. Again, these rules almost certainly do. The rules apply to everybody, whatever they wish to say, and are justified on the basis of preventing transmission of novel coronavirus, not on the basis of speech. (Unlike *Hill* and *McCullen*, there is no evidence or suggestion that the rules would apply to a particular content or viewpoint of speech. But under those cases, even if they did apply this way, the courts would rule them content-neutral, because they are justified on the basis of preventing transmission, not speech.) The rules follow best practices and expert advice to prevent the transmission of the disease, a significant government interest. And they allow protestors to convey their message in many other ways. (For example, protestors could simply comply with social-distancing rules and wear masks.) In all, government shelter-in-place and social-distancing rules almost certainly do not violate the free speech rights of protestors.

Now the caveats. If the government adopted or applied shelter-in-place and social-distancing rules in a way that discriminated against certain protestors (but not others) or certain messages (but not others), or if the government continued shelter-in-place and social-distancing rules even if they do not protect public health, then the rules may violate *Jacobson* or the public-forum doctrine. Indeed, some lower courts have already held that government shelter-in-place orders and medical-procedure restrictions violated other individual rights (like the right to worship and the right to abortion), because they were not sufficiently tailored to meet the current crisis. If we come to that point with shelter-in-place and social-isolation orders, these, too, may run afoul of protestors' free speech rights.

Are There Other Constitutional Problems?

Maybe. Government shelter-in-place and social-distancing rules may raise a couple of other constitutional problems as applied to protestors. But even so, the courts are likely to uphold the rules, for reasons much like those previously discussed.

For one, government shelter-in-place and social-distancing rules may implicate the free assembly rights of the protestors. Under the First Amendment, we have a right "peaceably to assemble, and to petition the Government for a redress of grievances." Government restrictions on free assembly must satisfy the strict scrutiny test. But for largely the reasons discussed, shelter-in-place and social-distancing rules probably do. That's because they follow best practices and current expert medical advice on how to reduce the transmission of novel coronavirus. That is, they're narrowly tailored. And reducing the transmission is almost certainly a compelling government interest.

For another, these rules may implicate the over breadth and vagueness doctrines. The over breadth doctrine says that the government may not regulate substantially more speech than is permissible. The vagueness doctrine says that a government rule must tell a reasonable person what is legal and what is not, so as to put us all on notice as to the legality of our behavior. But if the shelter-in-place and social-distancing orders meet the public-forum and strict scrutiny tests, it's hard to see how they are overbroad.

And if they tell us what's permissible and not, it's hard to see how they are unconstitutionally vague.

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Recent protests against government shelter-in-place and social-isolation orders draw on a rich history and tradition of protest in the United States. We protect and celebrate protest, especially protests against government action, and preserve the right to protest in our cherished First Amendment.

But at the same time, we have a long history and tradition of using quarantine, isolation, and other restrictive and intrusive means (like compulsory vaccinations) to address public-health concerns. The courts have upheld government policies that restrict or intrude upon individual liberties, like free speech, so long as they are well tailored to meet a public-health concern and don't plainly violate a constitutional right. That's because the courts have recognized that in an organized society, individual liberties must sometimes yield to the common good.

Under these principles, recent protestors are probably not protected by the First Amendment against government shelter-in-place and social-distancing rules. But that doesn't mean that they don't have a right to convey their message. They just must do it in a way that comports with the extraordinary government rules in these extraordinary times.

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Steven D. Schwinn *is Professor of Law at The University of Illinois Chicago John Marshall Law School, and may be reached at* schwinn@uic.edu. *He also hosts a YouTube channel with short videos discussing many of these issues, available under Steven D. Schwinn at* https://bit.ly/SchwinnYouTube.