AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Personal Freedom and Public Morality

*Herbert H. Slatery III***, Opinion on the Constitutionality of Mask Mandate (2020)[[1]](#footnote-1)**

*In the spring of 2020, the novel coronavirus, later designated COVID-19, jumped from animals to humans. A global pandemic began in China and quickly swept through much of the rest of the world. COVID-19 had various unusual and significant features, including that humans had no natural immunity to it, many infectious carriers were asymptomatic, and many of those who would become symptomatic were infectious for up to two weeks before their symptoms became apparent. The virus was relatively easy to transmit and was fatal in a relatively high number of cases, particularly among the elderly. There was no immediate vaccine or effective treatment, and tests to detect the virus had to be newly developed, manufactured and distributed. Public health experts recommended that the most effective means of slowing transmission were frequent hand washing, the use of masks that covered the nose and mouth, and maintaining a physical distance of six feet or more between individuals.*

*Governors across the country declared public health emergencies and made use of preexisting statutory authority to slow the spread of infection. Because of prevalence of infectious asymptomatic carriers and limiting testing capacity, the infectious could not be easily identified and quarantined as in traditional epidemics. As a result, many governors took the unprecedented step of issuing wide-ranging “lockdown” orders that imposed generalized restrictions on ordinary life of most of the general public.*

*On March 12, Tennessee Governor Bill Lee declared a state of emergency. On May 22, he issued Executive Order 38, which strongly urged residents to wear face coverings in public. It further authorized several counties to adopt additional restrictions as needed. A district attorney in city of Knoxville requested an opinion from the state attorney general on the constitutionality of a general mask mandate. Attorney General Herbert H. Slatery III concluded that the state had sufficient constitutional authority to issue such a mandate. A mask mandate neither deprived individuals of their protected liberty nor interfered with their protected freedom of expression.*

 Is a governmental mandate that requires the general population to wear face coverings in public during a state of emergency caused by COVID-19 constitutionally permissible?

 As a general proposition, a governmental mandate that requires the general population to wear face coverings in public due to the health emergency caused by COVID-19 would be constitutionally defensible. The constitutionality of any particular governmental mandate, though, would depend on its specific terms and the underlying authority of the governmental entity issuing it.

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For more than a century, the United States Supreme Court has recognized that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Jacobson v. Massachusetts* (1905).Moreover, during an epidemic, the traditional tiers of judicial scrutiny do not apply. *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer* (6th Cir. 2020). In these narrow circumstances, courts are to overturn only those orders that (1) have no “real or substantial relation” to protecting public health or (2) are “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”

A governmental mandate that requires the general population to wear face coverings in public due to the health emergency caused by COVID-19 satisfies this two-prong *Jacobson* test. *First*, a governmental mandate to wear face coverings in public has a “real or substantial relation” to the COVID-19 health crisis*.* In considering whether a governmental measure has a “real or substantial relation” to a public health crisis, the inquiry is whether the measure is arbitrary or unreasonable. The governmental decision as to how best to protect the public is afforded great deference. Unless the measure adopted by the government is arbitrary or unreasonable, a court’s interference is not justified.

The United States Supreme Court recently emphasized *Jacobson’s* teachings regarding the limited role of courts when officials are responding to a public health crisis, especially when those “officials are actively shaping their response to changing facts on the ground.” *South Bay United Pentecostal Church v. Newsom* (2020). . . .

Under these precepts, a measure requiring the general population to wear face coverings in public would have a “real or substantial relation” to the COVID-19 health crisis. Health professionals have advised that COVID-19 is “spread mainly through close contact from person to person,” primarily “[t]hrough respiratory droplets produced when an infected person coughs, sneezes, or talks.” Face coverings reduce the chances that respiratory droplets containing the virus will infect others. Even though some may be unconvinced that wearing face coverings is an effective way to thwart the spread of COVID-19, courts may not second-guess governmental officials when the measures they enact in response to a public health emergency are not arbitrary or unreasonable.

*Second,* a governmental mandate to wear face coverings in public does not amount to a “plain, palpable invasion of rights secured by the fundamental law.” Under the minimal scrutiny required by *Jacobson*, a governmental mandate to wear face coverings in public during the current COVID-19 health crisis does not amount to a “plain, palpable” invasion of clearly protected rights. . . . Requiring a person to wear a face covering during a comparable public health crisis is no more invasive—indeed is arguably less invasive—than requiring a person to be vaccinated.

Even if traditional constitutional scrutiny applied, the governmental mandate would not impermissibly infringe on a person’s constitutional right to liberty or freedom of speech.

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The liberties secured by the Constitution do “not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.” . . . It is a “fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.” . . .

. . . . The liberty safeguard by the Constitution is “liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.” *West Coast Hotel Co. v. Parish* (1937). Thus, liberty is subject to regulation that is reasonable in relation to its subject and is adopted in the interests of the community.

Tennessee courts have regularly embraced the principles espoused in *Jacobson* and *West Coast Hotel* when considering governmental regulations concerning the health, safety, and welfare of the public. *Mascari v. International Brotherhood of Teamsters* (TN 1948); *Moyers v. City of Memphis* (TN 1916).

For instance, challenges to Tennessee’s mandatory safety belt law have been rejected. Requiring seat belts to be used did not violate the constitutional prohibition against taking liberty without due process. *State v. Crandall* (TN 2012).

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It follows that a challenge to a governmental face-cover mandate as violating the constitutional right to liberty is almost certain to be rejected by the courts. The face-cover mandate is likely to be held to be a reasonable regulation to mitigate the transmission of COVID-19 and would not constitute an unconstitutional infringement on liberty interests.

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Even assuming that refusing to wear a face covering constituted conduct sufficient to implicate constitutional principles of free speech, a governmental mandate to wear a face covering in public during the COVID-19 pandemic would not violate the First Amendment.

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When the face-cover mandate is analyzed under the four-part *United States v.* *O’Brien* (1968*)* test, it survives a First Amendment challenge. First, the mandate is clearly within the State’s power to protect the safety of its citizens against an epidemic. Second, the mandate serves the important governmental interest of protecting the safety of the public by mitigating the spread of COVID-19. Third, the State’s interest in protecting the safety of its citizens is unrelated to the suppression of free speech. The mandate’s purpose is not to suppress expression; its purpose is to mitigate the spread of COVID-19. Fourth, the incidental restriction on freedom of expression imposed on those who do not wish to wear a face covering during the COVID-19 pandemic is no greater than necessary to further the State’s interest. “[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O’Brien*, so long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.” *United States v. Albertini* (1985). Here, the State’s interest in protecting the safety of the public would indeed be less effectively achieved without a mandate that requires the wearing of a face covering in public during the COVID-19 pandemic.

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1. Excerpt taken from State of Tennessee Office of Attorney General, Opinion No. 20-14, “Constitutionality of Governmental Mandate to Wear Face Coverings” (July 24, 2020). [↑](#footnote-ref-1)