

Introduction

Abbe R. Gluck

In addition to being the great public health challenge of a generation, COVID-19 also will be remembered as one of the most significant governance challenges of our time. The pandemic exposed both the strengths and weaknesses of our fragmented, federalist system of health care at the same time that it showcased the underappreciated capacity of the Affordable Care Act – the centerpiece of our national health care law – as a highly effective national safety net. The pandemic also revealed the dire costs of ignoring large parts of our public health infrastructure and failing to address the stark inequities in our health care system. And it took far too long for regulators to focus on the risks taken by the hundreds of thousands of essential and frontline workers who kept the nation going in the most uncertain of times. At the same time, the reactions of governments in response to the crisis propelled to the center of legal discourse a century-old landmark Supreme Court decision, *Jacobson v. Massachusetts*,¹ which embodies deference to science-based government decisions in the name of public health.

Jacobson came back to the fore to justify government action in the name of an unprecedented public health crisis at the same moment that some legal experts, including members of the Supreme Court, were mid-battle to shrink the administrative state and unwind decades of doctrine supporting administrative delegations. The chapters in Part III take up these varied and complex questions of the separation of powers, federalism, and regulation.

In Chapter 10, “Federalism, Leadership, and COVID-19: Evolving Lessons for the Public’s Health,” Nicole Huberfeld complicates earlier critiques of health care federalism, including her own. The failure of the national government under the Trump Administration to act quickly to trigger emergency authorities and use other available regulatory tools created a void that many state governments stepped in to fill. In that sense, 2020 evinced the strengths of a state–federal health care system, like ours, that is decentralized and built on redundancies and overlapping authorities. On the other hand, as the pandemic wore on, those same authorities

¹ 197 U.S. 11 (1905).

served as obstacles in many states to the more direct national control that the Biden Administration tried to exert over the pandemic to achieve a more effective and equitable response. By 2021, some states and localities were fiercely resisting federal regulatory moves relating to protective measures such as mask-wearing and vaccination. Huberfeld argues that the US tradition of health policy heterogeneity across the states – not only with respect to pandemic-related safety measures but also in the system’s structure, such as in Medicaid and emergency authorities – ultimately produced more inequalities and a more uncoordinated response than a fully centralized national system would have done.

Chapter 11, “Coronavirus Reveals the Fiscal Determinants of Health,” by Matthew Lawrence, and Chapter 12, “Legislating a More Responsive Safety Net,” by Ariel Jurow Kleinman, Gabriel Scheffler, and Andrew Hammond, are somewhat less sanguine about federal action, with both chapters delving into fiscal preparedness and the safety net. Whereas Huberfeld aptly highlights the pandemic responses of Congress, including major relief bills and making vaccines cost-free, Lawrence criticizes Congress for its earlier inattention to public health. He also describes structural features of our national fiscal system, such as the requirement that legislation be “scored” for its impact on the budget, that discourage long-term investments in areas such as pandemic preparedness, and highlights the risks associated with a public health system that largely relies on annual appropriations rather than permanent funding.

Kleinman, Scheffler, and Hammond focus on a different aspect of the fiscal response: the variety of federal safety-net programs – in areas ranging from tax credits to food support, unemployment insurance, and health care – that did step up with significant support in 2020–21 but that the authors contend should have done more. Refuting the common description of the pandemic as the “great equalizer,” they highlight how the pandemic both exacerbated preexisting inequalities and argue for “automatic stabilizers” in critical safety-net programs to bring help more quickly, equitably, and sufficiently in the future.

In Chapter 13, “Eradicating Pandemic Health Inequities: Health Justice in Emergency Preparedness,” Ruqaiyah Yearby takes on another aspect of health justice: the failure of both the federal and state governments to focus on essential workers early or completely enough. Arguing through a lens of health (in)justice, Yearby argues that the governments should have designed better workplace protections and ensured other benefits, such as sick leave, for those who became infected. She proposes a new model with more robust community engagement, especially from essential workers themselves, to revise emergency preparedness plans before the next emergency.

These analyses of legislative and executive actions would not be complete without including the third branch of government: the courts. From the beginning of the pandemic, the courts were thrust into disputes on topics ranging from the lockdowns of gun shops, to limits on access to “elective” medical procedures – including abortion – to prohibitions on religious gatherings. At the center of all these cases

was a debate about how deferential courts should be to government decisions made in the name of public health, a question until that point controlled by the century-old Supreme Court decision *Jacobson*. In Chapter 14, “The *Jacobson* Question: Individual Rights, Expertise, and Public Health Necessity,” Lindsey Wiley details how courts have struggled to reconcile *Jacobson*’s emphasis on the common good and deference to scientific regulatory judgment with the revolution in individual rights which occurred over the intervening century. She argues that courts were wrong to “suspend” ordinary judicial review in the name of the public health crisis. At the same time, she argues that *Jacobson*’s principles of public health necessity, proportionality, and deference to scientific judgment nevertheless remain relevant factors that courts must reintegrate into modern standards of review in order to balance individual rights against government actions like those taken during the pandemic.

The proper role of government has always been one of the dominant questions of health policy and indisputably remains a key question three years into the COVID-19 pandemic. Congress, the executive, the states, and the courts each have unique roles to play, and their varied choices have significant impacts on access to pandemic-related protections, redressing inequalities, and protecting the interests of both individuals and the community. The history continues to be written. As this book goes to press, Congress is fighting over whether to accord additional COVID-19 relief requested by President Biden; proposals abound to close the Medicaid gap that remains in ten states; and more than a year ago, the Supreme Court struck down the Occupational Safety and Health Administration’s emergency temporary standard for workplace protection. Like so many other areas covered in this book, the governance challenges highlighted by this set of chapters existed before the pandemic, but COVID-19 has shined a bright light on them which demands attention.

