

A Tale of Two Sovereignties:
Public Health and Fundamental Rights
in COVID-Era Judicial Reasoning

by

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Abstract

The COVID-19 pandemic has brought to the forefront of law important questions about what to do when public health and constitutionally-guaranteed rights—or *public health* and *political sovereignties*—come into conflict. In liberal democracies, courts are usually the authority tasked with resolving clashes of this type. This thesis offers an account of how judges in the United States and other countries have balanced the need for public health protection with the constitutional rights that citizens have been promised. By highlighting the tensions left unresolved by a foundational U.S. case, *Jacobson v. Massachusetts* (1905), I find new angles to analyze the different ways in which U.S. courts have negotiated this balance, which is mainly by using various forms of purely legal reasoning to justify the wholesale embrace of one type of sovereignty over the other. In France, the *Conseil d'État* exerts continuous effort to balance the two sovereignties, holding public health authorities to high standards of reasoning; in Austria, the Constitutional Court nominally upholds public health sovereignty but nonetheless often strikes down measures on grounds rooted in political sovereignty; and in Taiwan, courts have leaned heavily toward ratifying public health sovereignty. These different approaches to balancing the tension between the two sovereignties further point toward underlying divergences in the different social compacts implicated in each jurisdiction, as well as competing visions of the individual as a political and as a biological subject.

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I often like to describe life as a directed random walk. And that's exactly the process that led to my sitting in Professor Sheila Jasanoff's classroom during the idyllic, surreal summer I and 18 other then-Harvard undergraduates spent in Freiburg, Germany, in 2016. I had followed only my long-standing interest in Germany when I decided to spend the summer there. In fact, when I chose her "Sustainability" class, I thought I was signing up for a field course on environmental science in one of Germany's greenest cities. It would dovetail nicely with my engineering coursework back at Harvard, I probably thought.

While I did not get the scientific education I had expected, I got so much more. During the course of the summer, Professor Jasanoff showed me that an entire world existed between the science and engineering I knew and the law that intrigued me—the world of science and technology studies (STS). After a sun- and fun-soaked collective adventure on the edges of the Black Forest, I left with a heart full of memories and a new way of seeing the world, having discovered new ideas and new paths forward.

Perhaps she saw in me something I did not see in myself. I am humbled and honored that she has chosen to take me under her wing. Over the past few years, she has never failed to offer me just the right dose of realist encouragement in my moments of doubt. She has been incredibly supportive of not just my academic development but also my personal growth, always drily amused at my latest plans. It is hard to imagine what my life would be like today without her guidance and mentorship.

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Chapter 1

Introduction

In the final days of 2019, with much of the Western world still sleepy from the Christmas holidays and eagerly anticipating the beginning of a new decade, news emerged from Wuhan, China, of a “mystery pneumonia” that was apparently linked to a local wholesale seafood market.¹ This news was immediately registered by the public health authorities of Hong Kong and Taiwan and prompted panic among their wary publics. Local media made immediate—and prescient—comparisons to the severe acute respiratory syndrome (SARS) epidemic in 2003. Still scarred from this earlier episode, which paralyzed East Asia for months and left 774 dead, of which half were in Hong Kong and Taiwan, both governments were quickly galvanized into action.

During the month of February 2020, what initially seemed to be a regional crisis mushroomed in slow-motion into an impending global catastrophe. On March 11, the

¹ See, e.g., Mandy Zuo et al., “Hong Kong Takes Emergency Measures as Mystery ‘Pneumonia’ Infects Dozens in China’s Wuhan City,” *South China Morning Post*, Dec. 31, 2019, <https://www.scmp.com/news/china/politics/article/3044050/mystery-illness-hits-chinas-wuhan-city-nearly-30-hospitalised> (accessed Mar. 28, 2021).

World Health Organization declared COVID-19 a “pandemic.”² In less than three months, the much of the world was shut down, with severe restrictions on personal movements and commercial activity. In the most devastating sense for both health and economics, the world witnessed the power of the exponential function.

The epicenter of the pandemic made its way around the globe like an unending tide, sparing few countries, rich or poor, and leaving death and trauma in its wake. Over the course of the year, conditions improved and then worsened, as countries, finally catching a breath after having weathered the first peak of infections, had to prepare for a second, then a third, and then a fourth wave of the virus. Especially in North America and Europe, daily life has been disrupted for more than a year, with changing policies and intermittent lockdowns leaving citizens in limbo. Though vaccinations have been steadily rolling out in these regions, new variants of the virus, caused by mutations, are proliferating as well, injecting yet further uncertainty into an already prolonged and fatiguing crisis. Even for countries finally emerging from the pandemic’s shadow, the race against time continues.

This is the state of the world in the spring of 2021: a ship tossed to and fro in an unfriendly sea, seeing the lighthouse in the distance yet facing a strong headwind and not knowing how far exactly it is from shore.

In order to combat the pandemic, governments, democratic and authoritarian, implemented unprecedented and previously unimaginable restrictions on what their citizens could do. Largely because public health experts said so, governments curtailed almost overnight the rights and liberties of their citizens to a degree not seen since World

² See Emma Farge, “World Health Organization Calls Coronavirus Outbreak ‘Pandemic’ for First Time,” *Reuters*, Mar. 11, 2020, <https://www.reuters.com/article/us-health-coronavirus-who/world-health-organization-calls-coronavirus-outbreak-pandemic-for-first-time-idUSKBN20Y2OI> (accessed Mar. 28, 2021).

War II, and in peacetime even longer. In many of the world's established liberal democracies, political leaders and their governments faced intense pushback for these measures. Protests against lockdowns have been staged across Europe.³ Governments were taken to court in country after country and, in the United States, in all 50 states.

Especially during the Trump era, a significant political flashpoint in the United States concerned the proper role of scientific expertise.⁴ Even before the onset of the COVID-19 pandemic, on the pressing issue of climate change, the country had cleaved into a "we-need-to-listen-to-the-experts" or "follow-the-science" camp of left-leaning citizens and a stereotypically science-skeptical camp of their right-leaning counterparts. The urgent and ubiquitous intersection of scientific expertise and law arising from the pandemic all but ensured that acerbic partisan controversy would erupt over measures designed to combat the pandemic, and it has, from mask-wearing early on to vaccinations now.

This thesis examines the way in which courts in different countries have negotiated the balance between public health duties and political rights, focusing on different courts in the United States and using France, Austria, and Taiwan as points of comparison. It builds on science and technology studies (STS) scholar Sheila Jasanoff's article "Pathologies of Liberty," which proposes that a *public health sovereignty*, acting as a "state within a state," exercises power over the citizens of liberal democracies by curtailing their constitutionally-guaranteed rights and liberties when experts deem it appropriate for the sake of protecting public health.⁵ In Chapter 2, I lay out the legal

³ See, e.g., Julie McCarthy, "Protestors Across Europe Clash With Police Over COVID-19 Lockdowns," *NPR*, Mar. 21, 2021, <https://www.npr.org/2021/03/21/979653125/protesters-across-europe-clash-with-police-over-covid-19-lockdowns> (accessed Apr. 3, 2021).

⁴ See Stephen Hilgartner, J. Benjamin Hurlbut, and Sheila Jasanoff, "Was 'Science' on the Ballot?", 371-6532 *Science* 893 (2021), DOI: <https://doi.org/10.1126/science.abf8762>.

⁵ Sheila Jasanoff, "Pathologies of Liberty: Public Health Sovereignty and the Political Subject in the Covid-19 Crisis," 11 *Cahiers Droit, Sciences & Technologies* 125 (2020), DOI: <https://doi.org/10.4000/cdst.2982>.

background for balancing fundamental rights and public health in the four jurisdictions. In Chapter 3, I show that an often-cited foundational case in the United States, *Jacobson v. Massachusetts*, often cited as upholding public health sovereignty, actually leaves unanswered the question of how to strike the balance. Chapter 4 then examines the way in which U.S. courts have attempted to answer this question in the context of the COVID-19 pandemic, on questions of religious liberty, voting access, and the scope of executive power. In Chapter 5, I turn my focus abroad and analyze the ways in which French, Austrian, and Taiwanese courts have reasoned about the same questions. Chapter 6 discusses not only the competition between the two sovereignties but also the different social compacts and conceptions of personhood underlying these clashes. Lastly, Chapter 7 concludes by offering some final observations.

Chapter 2

Background and Legal Foundations

The central objective of this thesis, examining the ways in which courts in different countries have balanced public health and political sovereignty, is premised upon the assumption that the ends of maintaining public health and defending constitutional rights are, in general, at odds. Consider, for example, the following statement, taken from a UN report on HIV / AIDS and human rights: “Public health interests do not conflict with human rights. On the contrary, it has been recognized that when human rights are protected, fewer people become infected.”¹ It may sound palatable upon first hearing, but upon reflection, it is unpersuasive because it attempts to use a platitude to mask over its own logical incoherence.

To understand the stark contradictions of this position, one need only consider the following exceedingly simple thought experiment: Think of all the rights and liberties to which a citizen of the United States is entitled during “normal” times. Can a pandemic

¹ See UNAIDS, *International Guidelines on HIV/AIDS and Human Rights* (2006), <https://www.ohchr.org/documents/publications/hivaidsguidelinesen.pdf> (accessed May 16, 2021).

be quelled without curtailing the rights of *some* individuals to *some* extent? The answer to this question can be yes only if the *full* set of rights of *every* citizen can be maintained to its *fullest* degree.² But the moment “patient zero” enters the country’s borders and is detected to be a disease-carrying agent, that patient, in order to prevent transmission to others, is subject to examinations, interrogations, and quarantines, all of which are *restrictions* on the personal liberty and freedom of movement the individual would have otherwise enjoyed. To preserve patient zero’s political rights to their full extent, these disease control measures would be impossible, meaning the state would have to completely and utterly retreat in the face of the public health threat, something no government in the world has dared to do during the COVID-19 pandemic.

In sum, although there are many cases in which problems can be reframed so that a win-win solution can be found, this is unfortunately—and emphatically—*not* the case here. It is wrong to say that “[p]ublic health interests do not conflict with human rights.” They do. The safeguarding of public health *must* come at the expense of *someone’s* liberties and rights, perhaps just the few initial patients’, and perhaps those of entire national populations. Therefore, it is imperative to understand how courts—often the arbiters of last resort on such questions—have reached the decisions they have reached. In this chapter, I lay the groundwork for the remainder of this thesis by surveying the pertinent legal landscape. Specifically, I focus on the various ways in which fundamental rights are defined in the different jurisdictions I examine, the standards by which courts in these jurisdictions evaluate claims of rights infringement, as well as the different loci of responsibility for public health.

² To draw an economic analogy, is there a *Pareto-efficient* method of suppressing a disease outbreak, in which no one is made “worse off” (i.e., in which no one’s rights are invaded at all)? The answer is no.

2.1 Fundamental Rights in the United States, the European Union, and Taiwan

In the United States, the Bill of Rights was appended as the first ten amendments to the Constitution in order to soften opposition to ratifying an agreement that provided for a centralized government with authority over the thirteen original states.^{3,4} It contains a list of rights that citizens of the new country were entitled to, as well as actions that the new central government was forbidden from taking. For the first century of its existence, however, the Bill of Rights only applied to the federal government and protected Americans only from federal actions, and not to the individual states, which protected their citizens' rights through analogous clauses in their state constitutions. Only through a gradual process called *selective incorporation*, made possible after the ratification of the Fourteenth Amendment in 1868, did the Supreme Court hold, provision by provision, that the protections offered by the Bill of Rights applied to the states as well. More will be discussed in section 3.3.

In the European Union, fundamental rights are first and foremost enumerated in the European Convention of Human Rights (ECHR), which is binding on all member-states. Individual member-states, however, often also have their own constitutional protections of fundamental rights, some dating from pre-EU times. In Austria, for example, fundamental rights are not mentioned in the post-WWII constitution itself but rather dates from the 1867 *Staatsgrundgesetz* (Basic Law) issued by the Austro-Hungarian Kaiser; in France, fundamental rights are enumerated in the only surviving relic of its 1946 Constitution (the current French constitution dates from 1958).

³ See National Archives, "The Bill of Rights: How Did It Happen?" (2018), <https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen> (accessed May 6, 2021).

⁴ See also Carl H. Esbeck, "Differentiating the Free Exercise and Establishment Clauses," 42 *J. Church & St.* 311, 313–315 (2000).

In Taiwan (formally known as the Republic of China, abbreviated “ROC”), fundamental rights are directly enumerated in Chapter 2 of the *Míngúo Xiānfǎ* (民國憲法; “Constitution of the Republic”), organized into about a dozen articles. These rights are largely the same as those protected in the United States and the EU.

But despite this superficial similarity, the way in which these rights are actually enumerated differs greatly across the three jurisdictions. In the U.S. Constitution, rights (such as the freedom of religion, speech, and assembly) are generally defined in an absolute, unconditional manner, whereas in the ECHR, most liberties and rights—with the exception of freedom from torture, slavery, and forced labor, which are absolute—are more vaguely stated, in that EU citizens are only guaranteed to *have* the right, and nothing more. Furthermore, many of the rights are themselves explicitly subsumable to broader societal interests and can be curtailed when a pressing need exists. Taiwan’s constitution enumerates rights in a similar manner to that adopted in the ECHR.

This difference is most effectively illustrated by way of a concrete example. Concerning religious liberty, the U.S. Bill of Rights—more specifically, the First Amendment to the U.S. Constitution—states:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...”⁵

Its analogue in the European Convention of Human Rights, Article 9, states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests

⁵ U.S. Const. amend. I.

of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”⁶

And lastly, Article 13 of Taiwan’s constitution simply states:

“The people shall have freedom of religious belief.”⁷

But Article 23, mirroring the second clause of ECHR Article 9 above, then states:

“All the freedoms and rights enumerated in the preceding Articles shall not be restricted by law except by such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare.”⁸

The above pattern is the same for the freedom of expression⁹ and freedom of association and assembly.¹⁰ The right to privacy is similarly prescribed and circumscribed in the ECHR and Taiwan’s constitution.¹¹ (In the U.S., the right to privacy is not enumerated anywhere in the Constitution or its amendments but was recognized as “inherent” in the Constitution by the Supreme Court by the 1960s and 1970s.) The similarities and differences are stark when compared in this way, and these relationships are reflected in the jurisprudence of each jurisdiction, as will be discussed in the next few chapters.

The question could easily be asked: What exactly does it mean to *have* a right or a freedom? Does having *partial* freedom count as having the freedom? On its face, the U.S. Bill of Rights—with “Congress shall make no law” implying an absolute prohibition on the federal government—offers the strongest protection of the three jurisdictions, and it

⁶ European Convention on Human Rights art. 9.

⁷ *Minguo Xianfa* [Constitution of the Republic] art. 13.

⁸ *Minguo Xianfa* [Constitution of the Republic] art. 23.

⁹ See U.S. Const. amend. I; ECHR art. 10; *Minguo Xianfa* [Constitution of the Republic] art. 11.

¹⁰ See U.S. Const. amend. I; ECHR art. 11; *Minguo Xianfa* [Constitution of the Republic] art. 14.

¹¹ See ECHR art. 8; *Minguo Xianfa* [Constitution of the Republic] art. 12.

is indeed in the United States, as opposed to the EU or Taiwan, that such rights are often perceived as standing above the fray of public health regulation. Conversely, the European and Taiwanese formulations facially guarantee their people rights, but to unspecified degrees or subject to balancing tests and the norms of the rule of law. Moreover, the qualifying portions of the ECHR and Taiwan's constitution can be construed incredibly broadly. Put more simply, the ECHR and the Taiwanese constitution, read literally, only guarantee rights and freedoms insofar as their exercise does not "harm society," and the state is empowered to abridge them when it deems it "necessary" to do so. While the interpretive liberties inherent in this formulation have so far not caused any constitutional crises in the EU or Taiwan, they are enough to alert one to the possibility of abuse, especially in an age of what many see as an authoritarian comeback worldwide. With the U.S. historical context in mind—that is, a fledgling republic emerging from the shadow of tyranny—it is not difficult to understand why the Framers of the Constitution opted for a much more absolute guarantee of the most fundamental rights.

2.2 Standards of Review for Safeguarding Fundamental Rights

The modern U.S. Supreme Court uses a multi-tiered approach to its jurisprudence on liberties and rights. Accordingly, in U.S. constitutional law, not all rights are deemed to be created equal, and some rights are seen as more inviolable than others. The most suspect classifications and most sacrosanct rights—for example race and religion—are protected by a stringent standard of review known as strict scrutiny. Government actions involving fundamental rights "must be justified by a compelling governmental interest

and must be narrowly tailored to advance that interest”¹²—famously described by constitutional law scholar Gerald Gunther as “‘strict’ in theory and fatal in fact.”^{13, 14} In the context of the Court’s interpretation of this requirement, “narrowly tailored” often allows only the minimally invasive means necessary. Some others, like gender, are subject to intermediate scrutiny, a more permissive standard. Most rights—those that the Supreme Court has not deemed to be “fundamental,” among which are economic rights—are subject only to rational basis review, which means only looking to see whether the government has a reasonable basis for its actions. It is an extraordinarily deferential standard—laws that restrict these rights need only be “rationally related” to a “legitimate governmental interest.”¹⁵ As long as some legitimate justification exists, the true motives behind the government action are deemed irrelevant, and laws are upheld if there exists “*any conceivable state of facts* that could provide a rational basis for the classification” (emphasis added),¹⁶ even one “based on rational speculation unsupported by evidence or empirical data.”¹⁷

Of the three standards, rational basis review emerged first, out of a backdrop of “substantive due process” review that dominated the Court’s jurisprudence during the early 1900s. Between the 1930s and 1960s, this general reasonableness standard pervaded the Court’s jurisprudence, but strict scrutiny emerged to provide stronger vigilance against government action in response to the Civil Rights Movement. Intermediate scrutiny appeared later as an interpretive principle. In practice, the Court sometimes invents new criteria that either tighten or dilute these standards for specific rights. For

¹² See, e.g., *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-532 (1993).

¹³ Gerald Gunther, “The Supreme Court—1971 Term,” 86 *Harvard Law Review* 1 (1972), at 8.

¹⁴ For a history of the development of strict scrutiny, see Richard H. Fallon, Jr., “Strict Judicial Scrutiny,” 54 *UCLA Law Review* 1267 (2007).

¹⁵ Richard H. Fallon, Jr., “Strict Judicial Scrutiny,” 54 *UCLA Law Review* 1267 (2007), at 1273.

¹⁶ *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

¹⁷ *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

example, abortion had been protected by strict scrutiny under *Roe v. Wade* (1973)¹⁸ but was downgraded to an “undue burden” standard under *Planned Parenthood v. Casey* (1992).¹⁹

In the EU, by contrast, the concept of *proportionality* (*proportionnalité* in French, *Verhältnismäßigkeit* in German), reigns supreme, regarding both EU actions and member-state actions.²⁰ Under this doctrine, when government actions burden individual rights, courts employ a balancing test that assesses whether the measure was “suitable” and “necessary” to achieve the government’s objective as well as whether the burden placed on the right was “excessive” in relation to the objective.²¹ Courts operating under the proportionality principle thus assign weights to the competing interests at play and essentially perform their own calculus of the public benefits and private burdens involved.²²

In Taiwan, a hybrid of the European and American systems has emerged. While largely rooted in European (specifically German) notions of proportionality (“*xiāng chèn*,” or “相稱” in Chinese), the Taiwanese judiciary has in recent years increasingly borrowed from the multi-tiered method of American jurisprudence, and strict scrutiny is currently applied in certain cases.²³

Public health is nowhere mentioned in the U.S. Constitution or any of its amendments, but the Supreme Court has ruled that public health is a matter primarily

¹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²⁰ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 7th ed. (Oxford: Oxford University Press, 2020), at 583, 589.

²¹ *Ibid.*, at 583.

²² *Ibid.*

²³ Chung-Lin Chen, “In Search of a New Approach of Information Privacy Judicial Review: Interpreting No. 603 of Taiwan’s Constitutional Court as a Guide,” 20 *Ind. Int’l. & Comp. L. Rev.* 19, 25–27 (2010).

for the states “to guard and protect.”²⁴ By contrast, according to the French constitution, “*la Nation*”—“the nation”—guarantees the protection of the health of its people—as “*la protection de la santé*”²⁵—and the Austrian and ROC constitutions designate the national government as the legislator and executor of matters concerning public health—as “*Gesundheitswesen*”²⁶ and “公共衛生” (“*gōng gòng wèi shēng*”)²⁷ respectively. This difference between the United States and the other countries in this study has proved important and will be further discussed in Chapter 6.

²⁴ *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

²⁵ *Constitution du 27 octobre 1946* [Constitution of October 27, 1946], *Préambule* [Preamble]. While the 1958 constitution replaced the 1946 one, the preamble of the 1946 constitution still retains legal force.

²⁶ *Bundes-Verfassungsgesetz* [Federal Constitution], art. 10, § 12.

²⁷ *Minguo Xianfa* [Constitution of the Republic], art. 108, § 18. See also translation at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000001>.

Chapter 3

Jacobson in the Eyes of the Beholder

In the midst of the COVID-19 pandemic, one case has been cited over and over again by courts ruling on different areas of the law and reaching very different conclusions: *Jacobson v. Massachusetts* (1905). In *South Bay United Pentecostal Church v. Newsom* (2020), Chief Justice John Roberts relied on *Jacobson* in declining to rule against California’s reopening measures that subjected churches to different capacity limits from those faced by many secular businesses, on the ground that the Constitution primarily leaves matters of public health to the states.¹ In two separate Court of Appeals cases, the Fifth Circuit upheld Texas’s ban on abortions as elective medical procedures during the pandemic, while the Eleventh Circuit struck down a similar ban as an invasion of rights, both relying on *Jacobson*,² and a federal district court even went so far as to say that *Jacobson* meant that “the traditional tiers of constitutional scrutiny do not apply” during pandemics and that courts needed to give way to executive action.³

¹ *South Bay United Pentecostal Church v. Newsom*, 590 U.S. ___, ___ (2020) (Roberts, C.J., concurring).

² Wendy E. Parmet, “Rediscovering *Jacobson* in the Era of COVID-19,” 100 *Bos. Univ. L. Rev. Online* 117, 118.

³ Parmet, at 130.

In this chapter, I argue that *Jacobson* is hardly the broad, sweeping judgment that many scholars and courts have taken it to be. In effect, what it prescribed was a general deference to the state's police power but left the door open to judicial action when state measures are thought to violate individuals' rights to a sufficiently invasive degree.⁴ In view of the fact that *Jacobson* predates by many decades the Supreme Court's modern system of constitutional protections, its holding should not be excessively extrapolated to cover judicial responses during the present pandemic; judges today are effectively operating in uncharted territory.

3.1 Case Background

In 1902, in response to a growing smallpox outbreak in Cambridge, Massachusetts, the city's Board of Health mandated that all residents over age 21 be vaccinated against smallpox, free of charge, or face a \$5 fine.⁵ Pastor Henning Jacobson, a healthy, able-bodied adult, refused to be vaccinated and was prosecuted and tried for his violation.⁶ He pleaded not guilty, offering to prove that he had suffered serious harm from an earlier vaccination, which indicated that he could suffer an adverse reaction to the vaccine, but the trial court declined these offers as "immaterial."⁷ Jacobson then asked the trial court to instruct the jury that the Massachusetts law providing for compulsory universal vaccination contravened "the spirit of the Constitution" and violated the Fourteenth Amendment's Due Process Clause.⁸ The court denied his request, and the jury returned a guilty verdict, which the Supreme Judicial Court of Massachusetts upheld on appeal.⁹

⁴ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁵ *Jacobson*, at 12–13.

⁶ *Jacobson*, at 13.

⁷ *Jacobson*, at 13.

⁸ *Jacobson*, at 13–14.

⁹ *Jacobson*, at 13–14.

The U.S. Supreme Court likewise gave him the cold shoulder, ruling that the law did not violate his rights under the Constitution, that individual liberty was not absolute but rather must be balanced against the collective wellbeing, and since the law pertained to public health and did not infringe on any federally protected rights, it was wholly within the state's police power to promulgate and enforce.¹⁰

3.2 *Jacobson, Interpreted*

On this basis, and perhaps partly due to the lack of subsequent developments to the case law, *Jacobson* case has come to mean, in effect, all things to all people. On health law scholar Wendy Parmet's recounting, *Jacobson* was quickly seized upon as a recognition of the breadth of the states' police power by the dissent in *Lochner v. New York* (1905), in which the Supreme Court struck down a New York law capping the number of hours that bakers could work as a violation of the freedom of contract.¹¹ It was then cited in *Zucht v. King* (1922) to uphold a San Antonio ordinance that denied unvaccinated children access to public schools,¹² and then used to uphold forced sterilization in the now-infamous *Buck v. Bell* (1927),¹³ both on the basis of deference to states' police power, exactly as the dissent had argued in *Lochner*. In *Buck*, the Court simply wrote, "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."¹⁴ For Parmet, this ruling, diametrically opposed to the majority in *Lochner* and taking *Jacobson* to the extreme, signaled "almost total deference to the police power."¹⁵

¹⁰ *Jacobson*.

¹¹ *Lochner v. New York*, 198 U.S. 45, 70 (1905) (Harlan, White, and Day, JJ., dissenting).

¹² *Zucht v. King*, 260 U.S. 174, 176 (1922).

¹³ *Buck v. Bell*, 274 U.S. 200 (1927).

¹⁴ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

¹⁵ Parmet, 127.

The Court eventually read *Jacobson* into its cases on privacy and abortion as well, though justices have focused on other aspects of the case in this effort. Justice William O. Douglas’s concurrence in *Roe v. Wade* (1973) latches onto the *Jacobson* Court’s comment about the “sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government” in order to justify the right to privacy,¹⁶ even though the comment in its original context actually meant that *while* such a sphere existed, the problem in question, vaccination, was beyond this sphere.¹⁷ Douglas turned the qualifying statement into an affirmative grant of its own. Meanwhile, the majority opinion cited *Jacobson* as well—but to the opposite effect: “[I]t is not clear to us that the claim ... that one has an unlimited right to do with one’s body as one pleases bears a close relationship to the right of privacy previously articulated in the Court’s decisions. The Court has refused to recognize an unlimited right of this kind in the past. [Citing *Jacobson* and *Buck*] ... We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”¹⁸ It seems that while Douglas saw *Jacobson* as a glass half-full, the majority (of which Douglas was also a part) saw it as a glass half-empty.

And now, in the midst of the COVID-19 pandemic, the Supreme Court has held that *Jacobson* calls for general deference to state public health measures, citing *Jacobson*’s statement that public health and safety are primarily for the states “to guard and protect.”¹⁹ This argument was first put forth by Chief Justice Roberts in *South Bay United*

¹⁶ *Roe v. Wade*, 410 U.S. 113, 213–214 (1973) (Douglas, J., concurring) (quoting *Jacobson*, at 29).

¹⁷ *Jacobson*, at 29.

¹⁸ *Roe*, at 154.

¹⁹ *Jacobson*, at 38.

Pentecostal Church v. Newsom (2020)²⁰ and was subsequently echoed by the liberals on the bench.²¹ But in 2021, Roberts backtracked to an extent, writing that while he continued to adhere to his earlier view, “[d]eference, though broad, has its limits.”²² (More will be discussed on these cases in section 4.1.) In *Andino v. Middleton* (2020), Justice Kavanaugh expressed his view that *Jacobson’s* call for deference meant that the judiciary should refrain from intervening in state legislatures’ decisions on voting measures during COVID.²³ In the spirit of the Court’s own emergent ambivalence, some lower courts have read *Jacobson* as compelling outright deference to state actions taken in the name of public health, as mentioned earlier in the case of the Fifth Circuit’s 2–1 abortion rights decision, made along ideological lines, in *In re Abbott*. Others have thought of *Jacobson* as upholding a balancing test, as the Eleventh Circuit did in the analogous case. The Kentucky Supreme Court used *Jacobson* to assert that “[c]ourts have long recognized the broad health care powers of the government will frequently affect and impinge on business and individual interests.”²⁴

The sheer diversity of ways in which different courts have invoked *Jacobson* is reminiscent of the parable of the blind men and the elephant—different things to different people, with everyone able to see in *Jacobson* what he or she wants to see and find a piece of *Jacobson* to his or her liking—or perhaps a Rorschach inkblot test offering similar interpretive latitude. In Parmet’s words, some courts even treat *Jacobson* as “an idol to which they must bow but can then cast aside.”²⁵ This, too, comes as little surprise, since

²⁰ *South Bay United Pentecostal Church v. Newsom*, 590 U.S. ___, ___ (2020), at *2 (Roberts, C.J., concurring).

²¹ See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, ___ (2020), at *5 (Breyer, J., dissenting); *South Bay United Pentecostal Church v. Newsom*, 592 U.S. ___, ___ (2021), at *5 (Kagan, J., dissenting).

²² *South Bay United Pentecostal Church v. Newsom*, 592 U.S. ___, ___ (2021), at *2 (Roberts, C.J., concurring).

²³ *Andino v. Middleton*, 592 U.S. ___, ___ (2020), at *2 (Kavanaugh, J., concurring).

²⁴ *Beshear v. Acree*, No. 2020-SC-0313-OA, 2020 WL 6736090 (Ky. Nov. 12, 2020), at *88.

²⁵ Parmet, at 132.

the *Jacobson* opinion articulates broad strokes that do not come together cleanly and makes little attempt to reconcile these differences.

By the tally of public health law scholar Lawrence O. Gostin, in the century between 1905 and 2004, *Jacobson* was cited in 69 Supreme Court opinions, of which 58 were majority opinions.²⁶ There were two main buckets in which *Jacobson* was invoked, and these two mark the same tension that persists to this day: public health deference and individual rights. Among the claims that Gostin has observed that are supposedly grounded in *Jacobson* are that “[l]iberty interests can be limited by the state” but are also “safeguarded by the Constitution”; that the “[f]ederal government lacks the police power”; that states’ exercise of the police power variously could not be “unreasonable or arbitrary,” “must have real and substantial relationship to state interest,” must be in line with a “compelling state interest,” or must be evaluated by “balancing state interest against implicated individual interest”; that states “can delegate police power to agencies”; and even that “[q]uestions of policy and science are for the legislature, not the courts.”²⁷ There was even a third bucket, statutory construction—specifically that “[c]ourts should avoid absurd results in interpreting statutes”²⁸—which would make much of the Court’s last-minute aside that while there may be individuals for whom forced vaccination would be “cruel and inhuman in the last degree,” courts should not read the universal vaccination requirement as covering such circumstance because it would not be a “sensible construction” (internal quotation marks omitted) of the statute.²⁹

²⁶ Lawrence O. Gostin, “*Jacobson v Massachusetts* at 100 Years: Police Power and Civil Liberties in Tension,” 95 *Am. J. Public Health* 576, 578 (2005).

²⁷ Gostin, at 578.

²⁸ Gostin, at 578.

²⁹ *Jacobson*, at 38–39.

In line with the interpretive buffet enjoyed by their colleagues on the bench, legal scholars too have read *Jacobson* in a diversity of ways as well. Gostin interprets *Jacobson* as setting out four criteria for courts to evaluate the validity of states' public health measures: "necessity, reasonable means, proportionality, and harm avoidance."³⁰ Yet, as I have just discussed, the courts have not echoed this view but have rather chosen to interpret *Jacobson* in a far more flexible manner. To read *Jacobson* as pertaining primarily to public health regulations is in itself a choice with which the courts evidently have not agreed.

According to Parmet, *Jacobson* does not actually give courts "easy tests or easy ways to adjudicate the limits of public health powers."³¹ Rather, partly because of its hailing from a rather different time in judicial history, it only "helps to set the table" by providing judicial context.³² By offering a "mélange of criteria" (which in her account are different from Gostin's)³³ and "avoid[ing] simplistic answers," the decision recognizes that "our liberty depends in part on the government's capacity to protect the public's health but also that public health powers can be abused."³⁴ It requires that courts be simultaneously "deferential" and "vigilant."³⁵ The ambiguity of *Jacobson* seems, in Parmet's view, to reflect the real-life complexity of such an undertaking.

Lindsay F. Wiley and Stephen I. Vladeck believe that far from the "'suspension' model" that it has been thought to prescribe,³⁶ *Jacobson* actually articulates a "quintessential balancing test"³⁷ so that courts can vigilantly review the "greater

³⁰ Gostin, at 576.

³¹ Parmet, at 132.

³² Parmet, at 132–133.

³³ Parmet, 131.

³⁴ Parmet, 132.

³⁵ Parmet, 132.

³⁶ Lindsay F. Wiley and Stephen I. Vladeck, "Coronavirus, Civil Liberties, and the Courts: The Case Against 'Suspending' Judicial Review," 133 *Harvard L. Rev. Forum* 179, 182 (2020).

³⁷ Wiley and Vladeck, at 190.

incursions into civil liberties in times of greater communal need.”³⁸ They observe that it was never held to apply to *all* constitutional rights “to the exclusion of subsequently articulated doctrinal standards.”³⁹ In their view, *Jacobson* called for proportionality,⁴⁰ “broadly deferential judicial review of government responses to public health emergencies is neither normatively defensible nor compelled by precedent.”⁴¹ Therefore, “the Supreme Court’s subsequent civil liberties jurisprudence can be reconciled with *Jacobson*’s broad language.”⁴² Furthermore, they point out that *Jacobson* “predated the entire modern canonization of constitutional scrutiny,”⁴³ a point that I elaborate below.

Given such divergent interpretations, the possible meanings of *Jacobson* can only be elucidated by returning to the original text of the case itself.

3.3 Returning to *Jacobson*’s Text

So what does *Jacobson* actually say? The Court’s opinion expounds at length on a variety of important legal issues, but these issues all relate to two interrelated threads: deference to the state police power and the limited nature of constitutional liberties. Of these, the first alone constitutes the central holding of the case. Indeed, the two threads can even contradict each other: Constitutional liberties are limited and subsumable to the collective good, but courts reserve the right to intervene when constitutional liberties are invaded in a “plain, palpable” manner.⁴⁴ As mentioned previously, *Jacobson* makes many claims without reconciling them, and delineating the boundaries between these overlapping claims is no trivial task.

³⁸ Wiley and Vladeck, at 183.

³⁹ Wiley and Vladeck, at 194.

⁴⁰ Wiley and Vladeck, at 188.

⁴¹ Wiley and Vladeck, at 194.

⁴² Wiley and Vladeck, at 182.

⁴³ Wiley and Vladeck, at 193.

⁴⁴ *Jacobson*, at 31.

Fundamentally, the first thread of deference constitutes the central holding of the case. *Jacobson's* ruling is that federal courts owe deference to states when states are exercising their police power completely within their borders—the “authority of a State” to enact “all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States.”⁴⁵ This deference extends to “health laws of every description” (internal quotation marks omitted)⁴⁶—“the safety and the health of the people” of a state are for the state itself “to guard and protect.”⁴⁷ Yet, despite its broad statements, the *Jacobson* Court does not completely cede jurisdiction to the states on matters relating to the police power; rather, it leaves a caveat without offering a clear or convincing resolution. Declining to set out affirmative sufficient conditions for judicial intervention against the legislative action, the Court merely stated that “[i]f there is any ... power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it *can only be*” when the challenged statute bears “no real or substantial relation” to the legislature’s professed objective or is “beyond all question, a plain, palpable invasion of rights secured by the fundamental law” (emphasis added).⁴⁸

Second, the Court declared that individual liberties are not absolute but can be subsumed to the collective good of society. In response to *Jacobson's* claim that compulsory vaccination violates his right to bodily integrity and constitutes “nothing short of an assault upon his person,”⁴⁹ the Court writes:

“[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all

⁴⁵ *Jacobson*, at 25.

⁴⁶ *Jacobson*, at 25.

⁴⁷ *Jacobson*, at 38.

⁴⁸ *Jacobson*, at 31.

⁴⁹ *Jacobson*, at 26.

circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a rule unto himself would soon be confronted with disorder and anarchy.”⁵⁰

The Court then expounds on this philosophy for another three pages and further mentions how unreasonable it would be, if individual liberties were absolute, that “one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State.”⁵¹ As Gostin observes, the Court here offers a textbook endorsement of the social compact theory.⁵² Such a formulation of individual liberties—attempting to reconcile the tension between individual freedom and collective good and balance the rights of the individual against the obligations of the individual to society—is decidedly akin to that in the European Convention of Human Rights.⁵³ In this view, liberty exists not “outside of law” but “only *within* the social compact” (emphasis added).⁵⁴ However, this philosophical approach fell out of fashion decades ago, when the Court, under then-Chief Justice Earl Warren, “transformed constitutional law” over the course of the Civil Rights Movement when it developed the modern tiers of scrutiny, thereby “plac[ing] a constitutional premium on the protection of liberty interests.”⁵⁵

Jacobson concludes by shying away from its earlier sweeping statements, “in order to prevent misapprehension as to [its] views.”⁵⁶ Qualifying the breadth of the police

⁵⁰ *Jacobson*, at 26.

⁵¹ *Jacobson*, at 38.

⁵² Gostin, at 578.

⁵³ See discussion in Chapter 2.

⁵⁴ Parmet, at 124.

⁵⁵ Gostin, at 580.

⁵⁶ *Jacobson*, at 38.

power that it had just proclaimed, the Court writes that the police power “may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can readily be suggested.”⁵⁷ Coming at the very end of the opinion, this retreat seems almost an afterthought, insurance of a sort bought against criticism or future abuse that ultimately fails to alter the strong impression left by its earlier words. In a way, the Court almost seems to realize that its earlier comments had been too strongly worded and seeks a last-minute dilution of their power and the strength of the precedent they might set, by undermining itself and leaving the door open to future compromises.

3.4 The Limits of *Jacobson*

Beyond the interpretational differences, *Jacobson* is arguably a relic of a bygone era of the Supreme Court’s jurisprudence. It presents further challenges for modern courts because even though its general legal and philosophical themes—namely, federalism and the separation of powers, as well as the tension between individual liberty and societal wellbeing—remain relevant today, its surrounding legal context and landscape have been transformed beyond recognition since its time.

Modern Supreme Court jurisprudence departs from *Jacobson*’s universe in two crucial ways.⁵⁸ First, as mentioned in Chapter 2, the Supreme Court began the process of *selective incorporation*—applying the federal Bill of Rights to states, clause by clause—during the 1920s. Previously, the Bill of Rights of the U.S. Constitution protected citizens only from actions of the *federal* government and not state governments, as the Supreme

⁵⁷ *Jacobson*, at 38.

⁵⁸ Parmet, at 131.

Court ruled in *Barron v. Baltimore* (1833).⁵⁹ Under this earlier constitutional regime, for example, the clause “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”⁶⁰ meant only that the U.S. Congress could not; what states chose to do within their own borders was of no concern to the federal government, though in practice, most if not all states also protected the freedom of religion in their own constitutions. The Fourteenth Amendment’s Due Process Clause paved the way for things to change, but the process unfolded slowly over decades. Before the 1920s, the Supreme Court only once held that a Bill of Rights provision applied to the states—specifically the Fifth Amendment’s guarantee against public deprivation of private property “without just compensation.”^{61, 62} Only in the years after *Gitlow v. New York* (1925), in which the Court ruled that the First Amendment’s freedom of speech and freedom of the press guarantees bound the federal government and states alike,⁶³ did the Court begin incorporating the Bill of Rights against the states in earnest, and this process did not mature until the 1940s onwards. The important point here is that *Jacobson*, decided in 1905, hails from a time before even the infancy of this process. It offers no affirmative prescriptions for how federal courts should decide when a state’s exercise of the police power to protect public health infringes upon the free exercise of religion, for example, or the right to abortion. Rather, it offers only broad philosophical guardrails within which modern courts must interpolate. Strictly speaking, based on the precedents up until 1905 and using the Court’s own reasoning in the case, there would have been no violation of rights at the federal level at all in *Jacobson*. The matter, as a question of the scope of the

⁵⁹ *Barron v. Baltimore*, 32 U.S. 243 (1833).

⁶⁰ U.S. Const. amend. I.

⁶¹ U.S. Const. amend. V.

⁶² *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

⁶³ *Gitlow v. New York*, 268 U.S. 652 (1925).

police power and whether the individual's rights conflicted with the social, compact would have been left for the state courts to resolve.

Second, in 1905, the Supreme Court had not yet designed the modern tiers of scrutiny that now control how the Court decides cases in which constitutional rights are allegedly restricted. At this time, the Court did recognize the Due Process Clause of the Fourteenth Amendment as "imposing a general reasonableness limit on the police power,"⁶⁴ but as Parmet indicates, "the police power did not, strictly speaking, limit individual rights ... because individuals had *no rights* in contravention of the public's health, safety, or welfare" (emphasis added).⁶⁵ By now, in 2021, this legal philosophy may be as foreign to Americans as the legal system of another country altogether. As mentioned in the previous section, it was during the 1960s that the Supreme Court began recognizing certain rights as so sacrosanct, and certain bases for government classification (for example, race) as so inherently constitutionally suspect, as requiring that any pertinent law be "narrowly tailored" to a "compelling governmental interest"—where "narrowly tailored" has been held to mean that the method must have no alternative and use the minimal means necessary to achieve the government's objective.⁶⁶

Gostin argues that even under the present tiered constitutional regime, the Court would still reach the same decision in *Jacobson*, specifically concerning the way that it affirmed compulsory vaccination laws over objections concerning personal bodily integrity.⁶⁷ But the ruling on vaccination would not necessarily translate over to areas of more vigilant constitutional protection—a point validated by Gostin himself, who

⁶⁴ Parmet, at 124.

⁶⁵ Parmet, at 123–124.

⁶⁶ See Chapter 2 for a fuller discussion about this standard of review. A strict enforcement of this interpretation of "narrowly tailored" strikes me as in conflict with decision-making processes under high uncertainty during fast-evolving crises, when it is often impossible to determine whether an alternative exists.

⁶⁷ Gostin, at 580.

remarks that bodily integrity has only been recognized by the Court insofar as abortion rights are concerned.⁶⁸

Thus, as Wiley and Vladeck put it, “*Jacobson* never quite said what it’s been said to have said.”⁶⁹ Though many see it as calling for courts to defer to states’ public health measures when they come into conflict with individual rights, it is not at all clear that this is its unambiguous implication. During the COVID-19 pandemic, questions of executive overreach in the name of protecting public health have been thrust into the public sphere, as well as before courts across the country. With precious little set in stone, courts have more or less had to improvise as they navigate the crucial questions left unanswered by *Jacobson*.

⁶⁸ Gostin, at 580.

⁶⁹ Wiley and Vladeck, at 190.

Chapter 4

“Public Health v. Political Sovereignty” in the United States

In this chapter, I offer an account of the ways in which U.S. courts have negotiated the tension between public health sovereignty and political sovereignty along three different areas of contestation: religious liberty, voting access, and executive power. For the first two, I focus on Supreme Court decisions, whereas the third is based on a set of three state supreme court cases.

4.1 Religious Liberty

Judicial disputes involving religious liberty have been among the highest-profile COVID-related cases in the United States. As of May 2021, the U.S. Supreme Court has ruled on at least five major religious liberty cases: *South Bay United Pentecostal Church v. Newsom* (2020) (“*South Bay I*”), *Calvary Chapel Dayton Valley v. Sisolak* (2020), *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020), *South Bay United Pentecostal Church v. Newsom* (2021) (“*South Bay II*”), and finally, *Tandon v. Newsom* (2021). At issue in each case except the last are a Democratic state governor’s COVID-19 measures that imposed greater

burdens on religious institutions than on certain secular businesses. While the plaintiffs cried foul, the states responded that the measures were justified by public health expertise, though the alignment of certain exemptions with powerful business interests—casinos in Nevada and the entertainment industry in California—at times cast doubt on the states’ arguments.

As mentioned in Chapter 2, the First Amendment to the U.S. Constitution states: “Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof . . .*”¹ (emphasis added). The latter half is known as the Free Exercise Clause, and the Court’s current jurisprudence regarding it is twofold: Laws that are facially neutral toward religion and of general applicability are subject to rational basis review,² while those that are not are subject to strict scrutiny.³ Though each case was brought as a Free Exercise Clause challenge, the core argument presented by plaintiffs centers not on whether their ability to “free[ly] exercise” their religion has been curtailed *per se*, but rather on whether they have been subject to religious *discrimination* by the state, specifically by the alleged differential treatment afforded to them *vis-à-vis* certain secular establishments.

These five cases together provide fertile ground for analysis and have proven to be the arena where the competing philosophies regarding public health and fundamental rights—as well as expertise and common sense—most observably duel. In this standoff, battle lines have been drawn on what exactly should be compared to what (i.e., whether the alleged discrimination in fact existed), whether to take expert testimony at face value, as well as the proper role of the federal courts and the Constitution in the midst of a public

¹ U.S. Const. amend. I.

² *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

³ *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993).

health emergency. The opposing points of view on the Court largely align with the way in which the dispute has been mapped onto the American liberal–conservative political divide, as well as the epistemological dichotomy between expertise and common sense, and the Supreme Court justices have generally espoused views consistent with their widely-perceived ideological predilections.⁴

So far, while political sovereignty suffered early defeats, it prevails over public health sovereignty, at least in this area of the law, no doubt as a result of the death of the late Justice Ruth Bader Ginsburg in September 2020 and her subsequent replacement by a conservative successor, Justice Amy Coney Barrett. The case law is still evolving, and it would hardly be surprising if further challenges were presented to the Court in during the still-ongoing pandemic. The fifth case, *Tandon v. Newsom*, seems to represent a break from the first four and point in a rather different direction, confounding the logic that had run rather consistently up until then. Thus, I analyze the first four cases separately and present the fifth as a new starting point. It is not clear where the latter will lead, or how far the justices in the *Tandon* majority are prepared to go.

⁴ It is difficult to find terms that precisely describe the coalitions on the Court in these cases. Whereas a simple “majority” and “dissent” would have sufficed for most Supreme Court cases, these cases here deal with emergency requests for action, and while there is a majority *vote* in each case, there is often no majority *opinion*. Not all justices voting one way or the other always joined an opinion, as would be the case for “normal” Supreme Court cases, and there are often multiple opinions on the same side of the Court. The alternative is to use “conservative” and “liberal,” but even here, the division is not a clear-cut one. Chief Justice John Roberts, normally considered a conservative justice, has voted with the liberal justices in most of these cases, but for completely different reasons. Thus, I use the terms “conservative” and “liberal” rather flexibly, and they may best be thought of as describing *points of view* rather than justices.

For the sake of clarity, the sitting Supreme Court justices commonly regarded as conservative are, in order of seniority, Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Chief Justice John Roberts has long been considered conservative as well, but since the retirement of former Justice Anthony Kennedy and subsequent replacement by the more-conservative Brett Kavanaugh, he has taken a more centrist tack as the swing justice, and especially so over the past year or two, as is evident from the cases discussed in this section. The sitting Supreme Court justices common regarded as liberal are, again in order of seniority, Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Of course, the late Justice Ruth Bader Ginsburg was on the liberal wing as well.

4.1.1 *Expert and Common-Sense Notions of Religious Worship*

The analytical starting point for determining whether measures curtailing religious worship are constitutional are the precedents set in *Smith* and *Lukumi*, specifically whether the contested measures are neutral and generally applicable—that is, whether they treat religion the same as its “comparable” secular counterparts. Based on the answer to this question, the Court would then apply either rational basis review or strict scrutiny. But even here, the Court is already polarized—at issue is the beguiling question: *Neutral with respect to what?* What “religion” should be compared to—and what aspect of religion to even use as a basis for comparison—has divided the Court.

One position, propounded by the experts and endorsed by the liberal wing of the Court, focuses on religious *gatherings* and holds that the measures are neutral because they do not treat religious gatherings less favorably than “comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.”⁵ Other activities and businesses, including supermarkets, restaurants, florists, hair salons, pet grooming shops, and cannabis dispensaries in *South Bay I*⁶ and bike shops and acupuncturists in *Roman Catholic Diocese*,⁷ are “dissimilar” because “people neither congregate in large groups nor remain in close proximity for extended periods.”⁸ This standard of comparison is made on the basis of medical experts’ assessment of COVID transmission risk.⁹ Under this standard, the states’ measures are

⁵ *South Bay United Pentecostal Church v. Newsom*, 590 U.S. ___, ___ (2020), at *2 (Roberts, C.J., concurring).

⁶ *South Bay I*, at *1 (Kavanaugh, J., dissenting).

⁷ *Roman Catholic Diocese v. Cuomo*, 592 U.S. ___, ___ (2020), at *2 (Gorsuch, J., concurring).

⁸ *South Bay I*, at *2 (Roberts, C.J., concurring).

⁹ *South Bay United Pentecostal Church v. Newsom*, 592 U.S. ___, ___ (2021), at *1 (Kagan, J., dissenting).

neutral because things like hair salons should not even be compared with churches, and they need only pass rational basis review.

The other position, taken up by the conservative wing, conceives of religious institutions as whole, self-embodied entities, putting “church” on the same comparative footing as bike shops, acupuncturists, and hair salons. Accordingly, the conservative justices are indignant that something as important as religious worship has been relegated to a status below that of such pedestrian, even arguably frivolous, activities as acupuncture and pet grooming, and indeed, they are entirely distrustful of the governors’ motives. In *Roman Catholic Diocese*, Justice Gorsuch sarcastically writes: “[A]ccording to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?”¹⁰ In this view, by subjecting religious institutions to more stringent restrictions than “comparable secular activities,” the state measures discriminate against religion and thus need to pass strict scrutiny.¹¹

The conservative justices’ suspicions are seemingly vindicated when one takes into account the carveouts that Nevada granted to casinos in *Calvary Chapel* and that California granted to Hollywood studios in *South Bay II*, all while subjecting religious institutions to stringent measures—including allowing singing on set film studios but prohibiting singing and chanting inside churches.¹² Justice Gorsuch accuses California, like Nevada, of “playing favorites during a pandemic, expending considerable effort to protect lucrative industries ... while denying similar largesse to its faithful.”¹³ Justice

¹⁰ *Roman Catholic Diocese*, at *2 (Gorsuch, J., concurring).

¹¹ *Roman Catholic Diocese*, at *1 (Gorsuch, J., concurring).

¹² *South Bay II*, at *1 (Roberts, C.J., concurring).

¹³ *South Bay II*, at *5 (statement of Gorsuch, J.).

Barrett agrees: “Of course, if a chorister can sing in a Hollywood studio but not in her church, California’s regulations cannot be viewed as neutral.”^{14, 15} But astonishingly, Justice Kagan defends even this aspect of California’s measures—the differential treatment of Hollywood and churches—as a considered public health judgment, a show of considerable judicial deference. Since film production studios are required to test their employees for COVID-19 up to three times a week, something that the state’s expert has testified is not feasible for churches, she concludes that “California’s choices make good sense.”¹⁶ Instead, the conservative justices are in the wrong because they insist upon treating religious gatherings like “secular activities that pose a much lesser danger.”¹⁷

This position has run up against limited buy-in from the public. For example, a Los Angeles chef, who was forced to shutter his restaurant even for outdoor dining during a strict lockdown in December 2020, while Hollywood studios continued operating as “critical infrastructure” thanks to an exemption from California Governor Gavin Newsom, said that the incident “underscores the fact [that] our officials [*sic*] policy revolves around supporting their campaign donors at the expense of small business. It’s not about science or data.”¹⁸ The entertainment industry was also granted an exemption from a strict curfew between 10 pm and 5 am, and a COVID testing site was temporarily closed to accommodate on-site filming featuring a TikTok star, resulting in the cancellation of some 500 appointments.¹⁹ Upon lobbying from the industry, Newsom had earlier reclassified film production as “essential,” provided social-distancing guidelines

¹⁴ *South Bay II*, at *1 (Barrett, J., concurring).

¹⁵ Of course, the “of course” here is the controvertible part, since it makes her statement seem self-evident and obvious while it is anything but, and masks the room for reasonable disagreement.

¹⁶ *South Bay II*, at *4 (Kagan, J., dissenting).

¹⁷ *South Bay II*, at *1 (Kagan, J., dissenting).

¹⁸ Lee Fang, “Hollywood Deployed Lobbyists to Win Exemptions to Strict California Lockdown,” *The Intercept*, Dec. 11, 2020, <https://theintercept.com/2020/12/11/hollywood-covid-filming-california-lockdown/> (accessed May 7, 2021).

¹⁹ Fang, “Hollywood Deployed Lobbyists.”

were followed.²⁰ It seems that basing reopening decisions, at least ostensibly, on COVID transmission risk and purported expert advice alone has not proved wholly convincing among the public. For one, COVID transmission risk is a highly technical criterion that is relatively opaque and black-boxed to most members of the public, who tend to lean more on informed common sense to make similar judgments. Furthermore, the public's sense of fairness may be offended when widely held notions of what is "essential" and "nonessential" are defied, causing them to distrust the decision-making rationale altogether: Is expertise the motivation behind the measure, or is it merely a fig leaf used to whitewash an unsavory measure with a veneer of legitimacy? Unfortunately, this important context was left entirely unaddressed by one side of the Court in its reasoning, and this is a feature, not a bug, of rational basis review, which the liberal justices use to evaluate these claims and which, as discussed in Chapter 2, compels judges to read no further than the superficial reasoning provided by the government as long as that reasoning is rational.

Regardless of possible shady interests and under-the-table dealings, however, implicit at the heart of the debate between the two sides of the Court is whether the person and the person's religious belief are to be treated by the state as an integrated self or whether religion is like any other good or service. The conservative view recognizes worship as a central activity in the lives of the religious, on a par with other essentials of living like food, sleep, and work, and in this view, under no circumstances can businesses like florists, hair salons, and casinos be prioritized over religious establishments for reopening.²¹ By contrast, the expert's gaze (and liberal viewpoint) reduces religious

²⁰ Fang, "Hollywood Deployed Lobbyists."

²¹ In *Calvary Chapel*, Justice Gorsuch writes: "[T]here is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel." *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. ___, ___, at *1 (Gorsuch, J., dissenting).

worship to just another type of sessile activity in which people sit neatly and closely packed in rows. It takes a purely material view of religious worship in that it takes only the external physical appearance of religious worship and inscribes it as a handful of numeric parameters, all supposedly risk factors for COVID transmission: the number of people present, whether people from different households mix, how long people stay, the proximity of people during the event, and whether people sing.^{22, 23} By dissociating the event from its social and spiritual significance, the state focuses on the “life-sustaining” (internal quotation marks omitted) but ignores the “soul-sustaining,” as the Sixth Circuit pointed out.²⁴ Moreover, the expert’s position evinces a reductionist view of the person as a biological subject, susceptible only to medical malaise, placed in some volume of space that has some density and flow rate of other humans, rather than as a whole person with social and spiritual needs or a political subject entitled to certain liberties and rights.²⁵ Lastly, this view neglects the real-life continuity between the different settings that it seeks to regulate—as the Sixth Circuit also observed, the people in these different settings are often the same people, and by treating each setting as an isolated entity, it “assume[s] the worst when people go to worship but assume[s] the best when people go to work or go about the rest of their daily lives in permitted social settings.”²⁶ This last point has much to do with whether to take expert judgments completely at face value and how much to zoom out and see their real-world contexts, which I now discuss.

²² *Roman Catholic Diocese*, at *2–*3 (Sotomayor, J., dissenting); *South Bay II*, at *2 (statement of Gorsuch, J.).

²³ It is interesting, too, that this view almost invariably contemplates worship as having large numbers of people present. This point will be addressed in section 4.1.2.

²⁴ *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020).

²⁵ For a more extended discussion on regulating the biological subject versus the political subject, see S. Jasanoff, “Pathologies of Liberty” (Ch. 1, note 5).

²⁶ *Roberts v. Neace*, at 414.

4.1.2 *Expert vs. Common-Sense Evaluations of Public Health Risk*

The liberal justices base their understanding of public health risk—specifically, how relatively hazardous different activities are—entirely on what the states’ experts attest. In *Roman Catholic Diocese*, Justices Breyer and Sotomayor separately write about what “members of the scientific and medical communities *tell us*,”²⁷ or what “medical experts *tell us*,”²⁸ namely that the virus is transmitted when “a person or group of people talk, sing, cough, or breathe near each other” (emphasis added).²⁹ Thus, “according to experts,”³⁰ religious gatherings pose a high risk of COVID transmission, the court ought to accept that assessment, and that is the end of the story.

The conservative view, on the other hand, seems to hold that these expert risk assessments are made in a vacuum and are detached from the reality of lived lives. One way in which it does so is by simply subjecting expert claims to very normal common-sense skepticism. For example, the Court in *Roman Catholic Diocese* writes: “It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows,” among which were “acupuncture facilities, campgrounds, garages,” and others.³¹ Kavanaugh goes further in *Calvary Chapel*: “Nevada’s COVID-19-based health distinction between (i) bars, casinos, and gyms on the one hand, and (ii) religious services on the other hand, *defies common sense*. ... [T]he State cannot plausibly maintain that those large secular businesses are categorically safer than religious services” (emphasis added).³² He ultimately concludes that “the State has not yet supplied a sufficient

²⁷ *Roman Catholic Diocese*, at *4 (Breyer, J., dissenting).

²⁸ *Roman Catholic Diocese*, at *2 (Sotomayor, J., dissenting).

²⁹ *Roman Catholic Diocese*, at *4 (Breyer, J., dissenting). See also *Roman Catholic Diocese*, at *2 (Sotomayor, J., dissenting).

³⁰ *Roman Catholic Diocese*, at *4 (Breyer, J., dissenting).

³¹ *Roman Catholic Diocese*, at *3 (*per curiam*).

³² *Calvary Chapel*, at *11 (Kavanaugh, J., dissenting).

justification for its counterintuitive distinction.”³³ Even Chief Justice John Roberts, who had voted with the liberal justices in *South Bay I*, *Calvary Chapel*, and *Roman Catholic Diocese*, writes in *South Bay II*: “[T]he State’s present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake” (emphasis added).^{34, 35}

The other way these justices have challenged expertise is by contextualizing the expert assessments in reality, thereby highlighting the contradictions and shortcomings within the states’ expert-supported plans when they are implemented in the real world. While Justice Sotomayor accused Justice Gorsuch of “not even try[ing] to square his examples” with expert assessments, the conservative justices essentially accused their liberal counterparts and the states of not even attempting to square their reasoning with the actual situation on the ground. For example, Justice Gorsuch points out in *South Bay II* that “[t]he State presumes that worship inherently involves a large number of people. Never mind that scores might pack into train stations or wait in long checkout lines in the businesses the State allows to remain open. Never mind, too, that some worshippers may seek only to pray in solitude, go to confession, or study in small groups. ... [N]o one is barred from lingering in shopping malls, salons, or bus terminals.”³⁶ California is concerned with physical proximity among worshippers but “is not as concerned with the close physical proximity of hairstylists or manicurists to their customers, whom they touch and remain near for extended periods. ... And California allows people to sit in

³³ *Calvary Chapel*, at *12 (Kavanaugh, J., dissenting).

³⁴ *South Bay II*, at *2 (Roberts, C.J., concurring).

³⁵ Roberts subsequently implies a need for the Court to *balance* the competing public health and liberty interests at stake, and Breyer made a passing reference to the same effect in *Roman Catholic Diocese*. More will be discussed in section 4.1.3.

³⁶ *South Bay II*, at *3–*4 (statement of Gorsuch, J.).

relatively close proximity inside buses too.”³⁷ In *Calvary Chapel*, Kavanaugh writes: “I continue to think that the restaurants and supermarkets at issue in *South Bay* (and especially the restaurants) pose similar health risks to socially distanced religious services in terms of proximity to others and duration of visit. *I suspect that many who have frequented all three kinds of establishments in recent weeks and months would agree.*”³⁸ While the casualness with which he dismisses expert opinion might strike some as troubling, his account only confirmed what many Americans knew all along. This is a point that the plaintiffs in *Calvary Chapel* emphasize, attaching a photo of a large crowd of unmasked Las Vegas casino-goers in June 2020 to illustrate its point.³⁹ Yes, casinos were allowed to reopen with social-distancing and mask requirements, according to Nevada, but reality, as it so often happens, evidently fell far shy of the presumed ideal. Questions surrounding enforcement and compliance (or nonenforcement and noncompliance, as it were) were ignored by the liberal justices, who only accused their colleagues of recklessly discarding expertise. The implications of voluntary hand-tying whenever matters of expertise are involved are troublesome with respect to the legitimacy of the judiciary and would render the Court powerless to defend constitutional rights whenever policies are cloaked by the imprimatur of scientific rationalization, opening the door to potential abuse or unnecessary invasions of these rights. By refusing to cede power entirely to experts where expertise is involved, the conservative justices propose a different vision and understanding of the proper role of the Court in relation to expertise in times of crisis.

It should be noted that the jurisprudential difference is no doubt partly because one side (the conservative) uses strict scrutiny while the other side (the liberal) does not.

³⁷ *South Bay II*, at *3 (statement of Gorsuch, J.).

³⁸ *Calvary Chapel*, at *11 (Kavanaugh, J., dissenting).

³⁹ *Calvary Chapel*, at *1 (Brief of Applicant).

The practical impact of this difference is that the conservative justices would require that any measure be the minimum necessary means, while the liberal justices would simply require that measures have at least one rational and relevant possible justification, which they find them to have.

4.1.3 *Deferential vs. Gatekeeping Role of the Federal Courts and the Constitution during Times of Crisis*

On April 27, 2020, then-Attorney General William P. Barr wrote the following in a memorandum to his Department of Justice (emphasis added):

“Many policies that would be unthinkable in regular times have become commonplace in recent weeks, and we do not want to unduly interfere with the important efforts of state and local officials to protect the public. *But the Constitution is not suspended in times of crisis.* We must therefore be vigilant to ensure its protections are preserved, at the same time that the public is protected.”⁴⁰

His deputy minced no words when he wrote to California Governor Gavin Newsom that “there is no pandemic exception to the U.S. Constitution and its Bill of Rights.”⁴¹ The language employed by these two senior members of the Trump administration’s DOJ are a full-throated endorsement of political sovereignty over public health sovereignty, asserting the supremacy of the Constitution in all circumstances and, importantly, envisioning any exception made in order to account for the public health situation as extraconstitutional, beyond the scope of the Constitution, and a violation of it, rather than something that the Constitution can implicitly accommodate or tolerate.

⁴⁰ William P. Barr, “Balancing Public Safety with the Preservation of Civil Rights” (official memorandum, Washington, D.C.: Department of Justice, 2020), <https://www.justice.gov/opa/page/file/1271456/download>.

⁴¹ Eric Dreiband to Gavin Newsom, May 19, 2020, available at <https://www.justice.gov/crt/page/file/1279096/download> (accessed Dec. 28, 2020).

This mode of thinking is reflected in the conservative wing of the Supreme Court, whose justices have written that “even in a pandemic, the Constitution cannot be put away and forgotten”⁴² and that “[e]ven if the Constitution has taken a *holiday* during this pandemic, it cannot become a *sabbatical*” (emphasis added).⁴³ The specter of *Korematsu*⁴⁴ apparently looms large over Justice Kavanaugh when he comments that the Supreme Court’s history is “littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles. The court of history has rejected those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake.”⁴⁵

But this all is not to say that the conservative view is that the Constitution can never accommodate the exigencies of a public health emergency. In the words of Justice Alito, “[U]nprecedented restrictions on personal liberty, including the free exercise of religion,” are “understandable” as an “initial response” because public health officials must “respond quickly and decisively to evolving and uncertain situations” and therefore “may not be able to craft precisely tailored rules.”⁴⁶ For this reason, “at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules,” but “a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists.”⁴⁷ In

⁴² *Roman Catholic Diocese*, at *5 (*per curiam*).

⁴³ *Roman Catholic Diocese*, at *3 (Gorsuch, J., concurring).

⁴⁴ *Korematsu v. U.S.*, 323 U.S. 214 (1944), in which the Supreme Court upheld the Japanese internment during WWII.

⁴⁵ *Calvary Chapel*, at *10 (Kavanaugh, J., dissenting).

⁴⁶ *Calvary Chapel*, at *3 (Alito, J., dissenting).

⁴⁷ *Calvary Chapel*, at *3 (Alito, J., dissenting).

other words, there should be some flexibility, but the flexibility cannot go on forever, even though the pandemic has proven to be a long-lasting *and* ever-changing crisis.

Still, the liberal justices all but accuse their conservative colleagues of judicial obstinacy. They often invoke statistics in their opinions, attesting to the severity of the COVID-19 pandemic. The connection is never explicitly made, but the implication is that the demands of the Constitution should be “given some slack” in light of these extenuating circumstances, and that by insisting on adherence to the Constitution *even under such conditions*, their ideologically conservative colleagues are jeopardizing public health. More accurately, their position appears to be that no matter how sacrosanct a right may be, the welfare of the nation demands that they yield in such dire circumstances—in other words, “desperate times call for desperate measures.” The foundation for this position rests on *Jacobson*, in particular its implications for federalism.

In *South Bay I*, Chief Justice John Roberts cited *Jacobson* in writing that “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’ When those officials ‘undertake[] to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad’” (citations omitted).⁴⁸ The liberal justices echoed this argument in *Roman Catholic Diocese* and *South Bay II*, and just how far they were prepared to extend this logic became evident in the latter, as mentioned previously.

In the absence of intermediate focal points in the case law, the two sides retreat, respectively, to their diametrically opposed fortresses of *Jacobson* and an absolutist reading of the Constitution. Crucially, both sides take for granted that the relationship between the public health and constitutional sovereignties is dichotomous and mutually

⁴⁸ *South Bay I*, at *2 (Roberts, C.J., concurring).

exclusive. The pandemic—and public health and scientific expertise in general—is treated as an aberration from the constitutional order, which apparently exists on a different ontological plane from the rest of the empirical world. Even despite their disagreements, both sides seem to agree on treating the pandemic as a constitutional “other.” Extending from this disagreement on the role of the Constitution during the pandemic is yet another disagreement on the role of federal courts in this epistemological imbroglio.

The conservative faction of the Court consistently takes the position that the courts are gatekeepers of scientific expertise—that they reserve the right, and even have the obligation, to review expert claims when they come into conflict with constitutional protections. Gorsuch, joined directly and indirectly by four of his five conservative colleagues,⁴⁹ writes in *South Bay II*: “[W]e are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. The whole point of strict scrutiny is to test the government’s assertions ... Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution” (emphasis in original).⁵⁰ By implication, the experts speaking truths to executive power are to be similarly held accountable.

On the other hand, the liberal faction of the Court takes as controlling the position that “the experts said so,” reasoning that members of the federal judiciary are unelected and lack expertise and should therefore defer to the judgments of states’ public health experts when expertise and constitutional rights clash. This position is first articulated by Chief Justice Roberts in his concurrence in *South Bay I*: State officials acting in an

⁴⁹ Justices Alito and Thomas join his statement. Justices Barrett and Kavanaugh write in a separate concurrence that they “agree with Justice Gorsuch’s statement.”

⁵⁰ *South Bay II*, at *2 (statement of Gorsuch, J.).

emergency like the COVID-19 pandemic “*should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people,*” especially where there are “changing facts on the ground” (citations omitted; emphasis added).⁵¹ The liberal faction endorses this position in *Roman Catholic Diocese* as well as *South Bay II*.⁵² Viewing her conservative colleagues’ position as an irresponsible and reckless disregarding of expert opinion and scientific evidence, Justice Kagan accuses her conservative colleagues of “armchair epidemiology.”⁵³ “Is it that the Court does not believe the science, or does it think even the best science must give way?” she asks.⁵⁴ The conservative justices “play a deadly game in second guessing the expert judgment of health officials,” admonishes Sotomayor.⁵⁵

Yet the conservative justices do acknowledge the limits of their own expertise, as when they admitted that “[m]embers of this Court are not public health experts.”⁵⁶ They simply do not think that expertise alone should carry the day; and even the *amicus* brief submitted by experts from the American Medical Association and the Medical Society of the State of New York in *Roman Catholic Diocese* agreed as much when they “recognize[d] that this case cannot be decided by science alone.”⁵⁷ In short, the conservative justices might answer Kagan’s rhetorical question by saying that even the best science must give way in the face of the Constitution.

Interestingly, by *South Bay II*, Chief Justice Roberts himself shied away from the position he had taken on the first three cases. As earlier discussed, though he reaffirms

⁵¹ *South Bay I*, at *2–*3 (Roberts, C.J., concurring).

⁵² See *Roman Catholic Diocese*, at *5 (Breyer, J., dissenting); *South Bay II*, at *5 (Kagan, J., dissenting).

⁵³ *South Bay II*, at *6 (Kagan, J., dissenting).

⁵⁴ *South Bay II*, at *4 (Kagan, J., dissenting).

⁵⁵ *Roman Catholic Diocese*, at *3 (Sotomayor, J., dissenting).

⁵⁶ *Roman Catholic Diocese*, at *5 (*per curiam*).

⁵⁷ *Roman Catholic Diocese*, at *10 (Brief for the AMA and the MSSNY as *Amicus Curiae*).

his belief that the Court should continue deferring to experts on matters of public health, he concludes California’s across-the-board ban on indoor worship “appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake. ... Deference, though broad, has its limits.” For the first time in this line of cases, the role of expertise is subjected to a more nuanced gaze—not simply that it must give way, as the other conservative justices argue, or that it must prevail, as the liberal justices argue. For Roberts, though courts should not wade into the science itself, they still reserve the authority to decide when enough is enough. This position is somewhat more aligned, as we will see, with that taken by European constitutional courts. It remains to be seen whether his position will gain any traction—there appears to be little room for it within the current tiers of review, seeing that it is ostensibly a more demanding form of rational basis review.

In April 2021, the Court decided *Tandon v. Newsom*, in which the conservative majority struck down California’s ban on gatherings of more than three households in private settings, including for religious purposes, as an unconstitutional burden on religion.⁵⁸ In its opinion, the Court seemed to reverse or stretch to the breaking point the logic that had guided its earlier decisions. It chose to compare at-home religious gatherings to visiting secular businesses because “hair salons, retail stores, personal care services, movie theaters, private suites and sporting events and concerts, and indoor restaurants” were all allowed to “bring together more than three households at a time.”⁵⁹ Astoundingly, the basis for this comparison is that “[c]omparability is concerned with the risks various activities pose, not the reasons why people gather”⁶⁰—the exact logic that

⁵⁸ *Tandon v. Newsom*, 593 U.S. ____ (2021).

⁵⁹ *Tandon v. Newsom*, at *3 (*per curiam*).

⁶⁰ *Tandon v. Newsom*, at *2 (*per curiam*).

the liberal justices had used, and that the conservative majority had rejected, in the previous cases.

4.2 Voting Access

The 2020 general election turned out to be one of the most bitterly fought elections in U.S. history, in no small part because the COVID-19 pandemic introduced a Pandora's box of problems into a strong economy that normally would have ensured the incumbent's victory at the top of the ballot. The battle over mail-in voting in the face of the pandemic became a major flashpoint for the deeply polarized country, with Democrats broadly in favor and Republicans against, and the similarly divided Supreme Court was presented with several high-profile cases arising from changes to voting procedures in different states. Here, I focus on two cases that particularly highlight the clash between the two camps of the Supreme Court, both arising in Wisconsin: *Republican National Committee v. Democratic National Committee* (2020) and *Democratic National Committee v. Wisconsin State Legislature* (2020). A small handful of other cases further illuminates my analysis.

The U.S. Constitution states that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations ...”⁶¹ Furthermore, for the presidential election, the electors representing each state are to be appointed “in such Manner as the Legislature thereof may direct.”⁶² In these cases, most of which unfolded in states with divided government, and specifically Republican-controlled legislatures, Democratic-controlled state

⁶¹ U.S. Const. art. I, § 4, cl. 1.

⁶² U.S. Const. art. II, § 1, cl. 2.

institutions—including state committees and supreme courts—sought to override the Republican legislatures’ decision not to extend ballot receipt deadlines.

While the impact of these cases ultimately translated into the number of ballots that would be counted or not counted in each state, the arguments advanced by the Court do not fall neatly on the two sides of this divide. Rather, while the liberal justices, firmly committed to public health sovereignty, focus on possible disenfranchisement of at-risk voters, the conservative justices, adhering to norms of regular political sovereignty, argue against special arrangements on the basis of the constitutional separation of powers. In a sense, the critical question underlying the Court’s decisions on whether to allow ballot receipt deadline extensions to stand was whether the COVID-19 pandemic was extraordinary enough to merit a temporary suspension of constitutional understandings of sovereignty and provisions for the separation of powers, at least as far as elections are concerned. The impact on the number of ballots cast was an indirect effect.

This tension has been evident from the outset of the pandemic. In *Republican National Committee v. Democratic National Committee* (2020), the conservative majority on the Supreme Court stayed a U.S. district court order that, in view of a surge in absentee-ballot requests, instructed election officials in Wisconsin to accept mail-in ballots for the Wisconsin primaries postmarked after the day of the election, April 7.⁶³ It asserted that the question before the Court was a “narrow, technical question about the absentee ballot process,” namely, whether absentee ballots had to be mailed and postmarked by April 7, as required by state law, or whether they could be postmarked after the day of the election as long as they were received by the extended ballot receipt deadline of April 13.⁶⁴

⁶³ *Republican National Committee v. Democratic National Committee*, 589 U.S. ____ (2020) (*per curiam*).

⁶⁴ *Republican National Committee*, at *1 (*per curiam*).

Because this relief had not been requested by the plaintiffs in their written petition⁶⁵ but was rather “unilaterally” handed-down by the district court, and because the Court had previously held that “lower federal courts should ordinarily not alter the election rules on the eve of an election,” the district court’s action, which would have “fundamentally alter[ed] the nature of the election,” needed to be overturned.⁶⁶ To conclude, the majority reiterated that the question was a “narrow” one and that the decision said nothing about “whether other reforms or modifications in election procedures in light of COVID–19 are appropriate.”⁶⁷

The liberal dissenters reject outright the majority’s premise that the question was a “narrow, technical one.” Rather, “[t]he question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic.”⁶⁸ The majority’s decision would cause “massive disenfranchisement.”⁶⁹ At stake, they argued, were “the constitutional rights of Wisconsin’s citizens, the integrity of the State’s election process, and ... the health of the Nation.”⁷⁰ As for the fact that the district court indeed altered the rules of an election only days before the election, the dissent believed that the district court was justified in its action because it was “reacting to a grave, rapidly developing public health crisis.”⁷¹

A similar scene replayed itself in even sharper relief for the general election. At issue in *Democratic National Committee v. Wisconsin State Legislature* (2020) was a district court’s intervention against Wisconsin’s law requiring that mail-in ballots for the general

⁶⁵ The dissent notes that while the plaintiffs did not request this relief in writing, they requested it verbally at the preliminary injunction hearing. See *Republican National Committee*, at *5 (Ginsburg, J., dissenting).

⁶⁶ *Republican National Committee*, at *2 (*per curiam*).

⁶⁷ *Republican National Committee*, at *4 (*per curiam*).

⁶⁸ *Republican National Committee*, at *6 (Ginsburg, J., dissenting).

⁶⁹ *Republican National Committee*, at *3 (Ginsburg, J., dissenting).

⁷⁰ *Republican National Committee*, at *6 (Ginsburg, J., dissenting).

⁷¹ *Republican National Committee*, at *5 (Ginsburg, J., dissenting).

election be received by Election Day.^{72,73} The conservative majority affirmed the Seventh Circuit’s stay on the district court’s injunction, arguing that the judicial branch should not intervene in a matter expressly delegated to the state legislative branch by the Constitution,⁷⁴ much less the federal judiciary in a matter reserved primarily for the states to administer.⁷⁵ The dissent again faulted the majority for “disenfranchis[ing] large numbers of responsible voters in the midst of hazardous pandemic conditions.”⁷⁶

Again, the two sides of the Court took opposite positions on whether the exigencies of the public health crisis or the supremacy of the written Constitution’s allocation of power should carry the day—specifically, whether state executive action should prevail over state legislative decision, and whether the federal judiciary should intervene in a state matter. For Justice Kagan and her liberal colleagues, “[o]n the scales of both constitutional justice and electoral accuracy, protecting the right to vote in a health crisis outweighs conforming to a deadline created in safer days.”⁷⁷ Training her fire on Justice Kavanaugh’s solo concurrence, she specifically criticizes his opinion for “how much it reasons from normal, pre-pandemic conditions.”⁷⁸ Because of the special circumstances arising from the pandemic, holding onto the ordinary deadline “disenfranchise[s] citizens by depriving them of their constitutionally guaranteed right to vote”⁷⁹ and forces voters to choose between “brav[ing] the polls ... and los[ing] their right to vote” (quoting Justice Ginsburg’s dissent in *Republican National Committee*;

⁷² *Democratic National Committee v. Wisconsin State Legislature*, 592 U.S. ____ (2020), at *1 (Roberts, C.J., concurring).

⁷³ *Democratic National Committee*, at *1 (Gorsuch, J., concurring).

⁷⁴ In art. I, § 4, cl. 1. and art. II, § 1, cl. 2., as mentioned in notes 61 and 62.

⁷⁵ *Democratic National Committee*.

⁷⁶ *Democratic National Committee*, at *3 (Kagan, J., dissenting).

⁷⁷ *Democratic National Committee*, at *5–*6 (Kagan, J., dissenting).

⁷⁸ *Democratic National Committee*, at *10 (Kagan, J., dissenting).

⁷⁹ *Democratic National Committee*, at *11 (Kagan, J., dissenting).

internal quotations omitted).⁸⁰ In this view, protecting voter access while respecting the voter’s health and safety is paramount, and the constitutionally prescribed separation of powers is rendered as a secondary consideration, merely a matter of relaxing one deadline. The voters’ right to vote is inseparable from the public health measures that would keep voters safe.

Justice Gorsuch, on the other hand, fixates on the jurisprudential anomaly of the district court’s ruling: “Nothing in [the Constitution] contemplates the kind of judicial intervention that took place here, nor is there precedent for it in 230 years of this Court’s decisions.”⁸¹ “Why did the district court seek to scuttle such a long-settled tradition in this area?” he asks.⁸² “COVID. Because of the current pandemic, the court suggested, it was free to substitute its own election deadline for the State’s.”⁸³ He acknowledges the “serious challenges” of holding a national election in the thick of a pandemic but states nevertheless that judges cannot “*improvise* with their own election rules in places of those the people’s representatives have adopted”—“[o]ur oath to uphold the Constitution is tested by hard times, not easy ones” (emphasis added).⁸⁴ The last statement in particular is a clearest endorsement of the principles of political sovereignty over those of the public health sovereignty. In fact, it goes so far as to be a *reversal* of the way in which this tension is conventionally considered: Not only should the Constitution hold fast despite the pandemic, the Constitution should hold fast *because of* the pandemic. Which is more powerful, COVID or the Constitution? Gorsuch seems to answer without the slightest hesitation: the Constitution, before which COVID is but a blip. The individual, with the

⁸⁰ *Democratic National Committee*, at *12 (Kagan, J., dissenting).

⁸¹ *Democratic National Committee*, at *3 (Gorsuch, J., concurring).

⁸² *Democratic National Committee*, at *1 (Gorsuch, J., concurring).

⁸³ *Democratic National Committee*, at *1 (Gorsuch, J., concurring).

⁸⁴ *Democratic National Committee*, at *4 (Gorsuch, J., concurring).

risks that he or she may have to bear and the rights that he or she may lose, is relegated to the background in this struggle; the procedural integrity of making election rules in the constitutionally authorized manner is foremost.

The separation of powers argument advanced by the conservative justices also appears in other related cases and merits further examination. As mentioned earlier, the text of the U.S. Constitution indeed leaves the administration of federal elections to the legislative branch, and primarily to the legislatures of each state. And while the pandemic was justification enough for the liberal justices in allowing a federal district court to override state legislative action, this is not the case with the conservatives. For Justice Gorsuch, federal courts can be arbitrary—why extend the deadline by 6 days, as the district court did here, and not “3 or 7 or 10,” and why not “tinker[] with in-person voting rules too?”⁸⁵ The bulwark against a potential “Babel of decrees,” he argues, is precisely the Constitution’s delegation of election-administering authority to state legislatures, which, unlike courts, are accountable to the people, can “bring to bear the collective wisdom of the whole people” when making policy, can afford to do extensive research and factfinding and thereby make more informed decisions, and are consensus-driven rather than adversarial.⁸⁶ The slow-moving nature of legislative action is a “feature” rather than a “fault in the constitutional design” and guarantees that decisions are made only after deliberative consideration and with broad consensus, not upon the sole discretion of a judge.⁸⁷ Therefore, according to Justice Kavanaugh, Wisconsin’s non-action regarding whether to alter the election deadline is a decision in itself driven by “weighty reasons that warrant judicial respect.”⁸⁸

⁸⁵ *Democratic National Committee*, at *2 (Gorsuch, J., concurring).

⁸⁶ *Democratic National Committee*, at *2–*3 (Gorsuch, J., concurring).

⁸⁷ *Democratic National Committee*, at *3 (Gorsuch, J., concurring).

⁸⁸ *Democratic National Committee*, at *7 (Kavanaugh, J., concurring).

However, the problem here, as Justice Kagan points out, is that Wisconsin’s legislature did not actually meet to deliberate whether COVID-induced changes to election rules might be appropriate; in fact, it did not meet at all between April 2020 and the time of this case, in late October.⁸⁹ While she agreed with the conservatives’ *Jacobson*-consistent argument for deference to state legislatures on issues of COVID response, she warned that in election law, “deference to legislators should not shade into acquiescence” because legislators may often have the incentive to suppress votes if they believe it would benefit them.⁹⁰ In *Moore v. Circosta*, concerning a similar set of circumstances in North Carolina, where the General Assembly *did* meet to make a raft of COVID-related rule changes for the general election but left the ballot receipt deadline in place, only to be overridden by the state’s Board of Elections, Kagan apparently declined to intervene.⁹¹

Either way, for the conservative justices, the consequences of leniency are grave for the established political order, more so than for the individual voter. They believe that federal courts, and courts in general, commit judicial overreach when they intervene in state legislatures’ decisions on election procedure and thereby “offend” the Elections Clause, “do damage to faith in the written Constitution as law,” and undermine the “authority of legislatures.”⁹² The relevant constitutional provisions “would be *meaningless* if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election” (emphasis added).⁹³

⁸⁹ *Democratic National Committee*, at *7 (Kagan, J., dissenting).

⁹⁰ *Democratic National Committee*, at *6–*7 (Kagan, J., dissenting).

⁹¹ *Moore v. Circosta*, 592 U.S. ___, at *1 (2020) (Gorsuch, J., dissenting).

⁹² See *Moore v. Circosta*, at *4 (Gorsuch, J., dissenting); *Democratic National Committee*, *4 (Gorsuch, J., concurring).

⁹³ *Republican Party of Pennsylvania v. Boockvar*, 592 U.S. ___, at *3 (2020) (statement of Alito, J.).

And what about the dissent’s points concerning disenfranchisement? The conservative justices do not appear to believe that disenfranchisement is at issue. Justice Kavanaugh dismisses the liberal dissent’s points about disenfranchisement as merely “rhetoric,”⁹⁴ and Justice Gorsuch states simply: “Elections must end sometime, ... and requiring ballots be in by election day puts all voters on the same footing.”⁹⁵ In both the Wisconsin and North Carolina general election cases, the conservative justices focus on how much each state has *already* done to facilitate voting, including, in Wisconsin, mailing all registered voters an absentee ballot application during the summer, accepting mail-in ballots starting in September, offering a two-week early voting period as well as an array of alternatives to mailing the absentee ballot.⁹⁶ In light of these “considerable efforts” to accommodate pandemic voting conditions, Gorsuch asks: “The district court’s only possible complaint is that the State hasn’t done *enough*. But how much is enough?” (Emphasis in original.)⁹⁷

As is by now evident, the cases discussed here put the Court in the position of having to choose between defending the separation of powers as provided by the Constitution and potentially disenfranchising up to hundreds of thousands of voters. By upholding one end of the social contract—that is, by preserving limited government with constitutionally defined powers and roles, the Court does detriment to other elements of the contract—that of protecting the public’s health and the right to vote. Yet public health is not part of the social contract between Americans and the federal government—that matter is up to the states.⁹⁸ Before the date of the 2020 election, the Court had left the door

⁹⁴ *Democratic National Committee*, at *15 (Kavanaugh, J., concurring).

⁹⁵ *Democratic National Committee*, at *1 (Gorsuch, J., concurring).

⁹⁶ *Democratic National Committee*, at *1–*2 (Gorsuch, J., concurring).

⁹⁷ *Democratic National Committee*, at *2 (Gorsuch, J., concurring).

⁹⁸ See, e.g., *Jacobson*, at 38: “The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. *They are matters that do not ordinarily concern the National Government*” (emphasis added). Also cited in *South Bay I*, at *2 (Roberts, C.J., concurring).

open to resolving this question in *Republican Party of Pennsylvania v. Boockvar*. However, in February 2021, the Court declined to grant review in this case, leaving these important constitutional questions unanswered.⁹⁹

4.3 Executive Power

In this final section, I examine three state supreme court cases—in Wisconsin, Michigan, and Kentucky—that unfolded along different lines of legal contestation and ended with three very different resolutions, exhibiting an intoxicating mix of partisan politics along the way. In Michigan, an emergency law more than seven decades old was invalidated, and with it went the governor’s COVID-related executive orders, which had been issued on the basis of the law.¹⁰⁰ In Wisconsin, the emergency law itself survived, though it was substantially defanged; unlike the broad strokes of the Michigan lawsuit, this case instead turned on an issue of statutory construction concerning whether the Secretary-Designee of Health’s executive order was a rule or an order and ultimately resulted in the lifting of all of the secretary’s edicts.¹⁰¹ In Kentucky, by contrast, the governor’s executive orders were upheld almost in their entirety, and unanimously, too, by a supreme court of split political ideology.¹⁰² Arguments similar to those raised in the cases in Wisconsin and Michigan were dismissed.¹⁰³

The first unifying thread through the three cases is the extent to which attempts to persuade the courts to place limits on what has been perceived as unfettered executive power manifested themselves as highly technical, sometimes arcane, legal arguments

⁹⁹ *Republican Party of Pennsylvania v. Degraffenreid*, 592 U.S. ____ (2021).

¹⁰⁰ *In re Certified Questions from the United States District Court*, ____ Mich. ____, ____ N.W. 2d ____, 2020 WL 5877599, Docket No. 161492 (Oct. 2, 2020).

¹⁰¹ *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

¹⁰² *Beshear v. Acree*, No. 2020-SC-0313-OA, 2020 WL 6736090 (Ky. Nov. 12, 2020).

¹⁰³ *Beshear*.

that sidestep the fact that what is really being challenged is the scope of public health sovereignty. One such arena of contention is statutory construction, with creative and even outlandish interpretations proffered by plaintiffs.

A case-in-point is *Wisconsin Legislature v. Palm*, which was brought largely on the grounds that Emergency Order 28, issued by Andrea Palm, then the Secretary-Designee of Wisconsin's Department of Health Services, was a "rule" rather than an "order" within the meaning of Wis. Stat. § 227.01(13) and was thus illegal because Palm had issued it without following emergency rulemaking procedures,¹⁰⁴ even though a separate statute, Wis. Stat. § 252.02(6), authorized the department to "implement all emergency measures necessary to control communicable diseases."¹⁰⁵ The emergency order itself was issued not on the Wisconsin governor's authority but on account of the emergency powers accorded to the secretary under her interpretation of these two statutes. It contained sweeping provisions, including mandating that all individuals stay at home with limited exception or face possible imprisonment of up to 30 days, prohibiting all nonessential travel, and closing a wide array of businesses and establishments.¹⁰⁶ In relevant part, Wis. Stat. § 227.01(13) defines a "rule" as a "*general order of general application that has the force of law and that is issued by an agency*" for legislative purposes (emphasis added).¹⁰⁷ And so, the entire case—and many of Wisconsin's COVID measures along with it—turned on the construction of this phrase. Because the order applied to "every person physically present in Wisconsin, whether they were present when the order was issued or entered Wisconsin subsequently," the legislature argued that it constituted a "general order of

¹⁰⁴ *Wisconsin Legislature*, at ¶¶ 7, 9.

¹⁰⁵ Wis. Stat. § 252.02(6).

¹⁰⁶ *Wisconsin Legislature*, at ¶ 7.

¹⁰⁷ Wis. Stat. § 227.01(13).

general application.”¹⁰⁸ Palm, on the other hand, argued that because the emergency order applied only to the present situation arising from COVID-19, it did not have “general application” and thus should not be governed by the statute in question.¹⁰⁹ The majority on the Wisconsin Supreme Court sided with the legislature’s reading of “general application,” citing precedent that defined “general application” as applying to a class of persons that can be “described in general terms” and admit new members to the class, rather as applying to many different situations as opposed to one specific one.¹¹⁰ Two dissenting justices accused the majority of “torturing the plain language”¹¹¹ of Wis. Stat. § 252.02(6) by way of “analytical gymnastics”¹¹² and disregarding the fact that broad emergency powers in the name of public health had been in place as early as 1876.¹¹³ They argued that the delegation of power to the secretary should not have been bound by the rule-or-order question at all because of it was intended to be an incredibly broad delegation.¹¹⁴

Even more curious are the arguments brought forth in the Michigan and Kentucky cases. In Michigan, the plaintiffs asked the court to declare that Governor Gretchen Whitmer acted beyond her powers prescribed by the Emergency Powers of the Governor Act (EPGA) of 1945 when she issued her COVID-19 executive orders. To that end, they contended that “a genuine emergency must necessarily be short-lived” and that COVID was no longer an emergency because it had already gone on for six months by the time of the case; that the law’s reference to public emergencies “within the state” means that the law cannot cover statewide emergencies because “a statewide emergency is not

¹⁰⁸ *Wisconsin Legislature*, at ¶ 17.

¹⁰⁹ *Wisconsin Legislature*, at ¶ 18.

¹¹⁰ *Wisconsin Legislature*, at ¶ 23.

¹¹¹ *Wisconsin Legislature*, at ¶ 132 (Dallet, J., dissenting).

¹¹² *Wisconsin Legislature*, at ¶ 134 (Dallet, J., dissenting).

¹¹³ *Wisconsin Legislature*, at ¶ 135 (Dallet, J., dissenting).

¹¹⁴ *Wisconsin Legislature*, at ¶ 145 (Dallet, J., dissenting).

‘within’ the state; and that the law’s references to “area involved” and “affected area” means that it was not intended to cover the entire state.¹¹⁵ The majority rejected all of these arguments as not a “reasonable understanding.”¹¹⁶ Another justice on the Michigan Supreme Court even wrote a lengthy disquisition arguing that “public health is not within the scope of ‘public safety.’”¹¹⁷ Rejecting this argument as well, the court affirmed the intended breadth of the EPGA.¹¹⁸ In a twist, however, it then proceeded to find the EPGA itself an unconstitutional delegation of power from the legislative branch to the executive branch precisely because of its breadth.¹¹⁹ This had the effect sought by the petitioners by voiding the statutory basis for the governor’s orders. In Kentucky, one line of contestation was the meaning of the clause “and which a local emergency response agency determines is beyond its capabilities” in the definition of “emergency” in the Kentucky Revised Statutes.¹²⁰ The attorney general argued that the clause meant that the governor was obligated to confer with local officials in all 120 counties in Kentucky before declaring a statewide emergency.¹²¹ The Kentucky Supreme Court unanimously rejected this construction in part because it would produce an “absurd result” in the context of rapidly unfolding crises.¹²²

Another argument has been that of the nondelegation doctrine, which holds that for the integrity of the separation of powers to be maintained, no branch of government can exercise powers that have been constitutionally assigned to another branch. By making rules during an emergency, the executive illicitly exercises legislative power, so

¹¹⁵ *In re Certified Questions*, at *14–*15.

¹¹⁶ *In re Certified Questions*, at *14–*15.

¹¹⁷ *In re Certified Questions*, at *9 (Viviano, J., concurring in part and dissenting in part).

¹¹⁸ *In re Certified Questions*, at *21.

¹¹⁹ *In re Certified Questions*, at *21.

¹²⁰ *Beshear*, at *34.

¹²¹ *Beshear*, at *34.

¹²² *Beshear*, at *37.

the argument goes. But in practice, the U.S. Supreme Court has recognized the legislative branch's ability to delegate broad authority to the executive branch (for example in the way Congress sets general policy goals and leaves the federal agencies to delineate the details) since 1928, as long as the delegation is limited by an "intelligible principle" for the executive branch to follow.¹²³ Yet in Michigan and Kentucky, the nondelegation doctrine was invoked by the plaintiffs, who sought, among other things, the wholesale invalidation of the emergency statutes because they allegedly breached the separation of powers by vesting the executive branch with overbroad authority during emergencies.¹²⁴ A majority of the Michigan Supreme Court accepted this argument, while the Kentucky Supreme Court unanimously rejected it.¹²⁵

A third line of argument has been whether the executive orders are "arbitrary and capricious." This point was raised in both Wisconsin and Kentucky, but the Wisconsin Supreme Court declined to hear the issue.¹²⁶ In Kentucky, the court simply dissected measures provision by provision using rational basis review¹²⁷ and concluded that all but one of the them were reasonable and therefore "not arbitrary."¹²⁸

In evaluating these arguments, however esoteric, even contrived, they may seem, the courts have consistently relied on arguments pitting political sovereignty against public health sovereignty. Recurring themes in the opinions hostile to the executive orders include separation of powers, liberty and limited government, and even the ideals of the Enlightenment, directly reaching back to the founding ethos of the United States. For example, Michigan's majority opinion actually quotes Montesquieu in saying that

¹²³ *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹²⁴ See *In re Certified Questions*, at *5, *21–*36; *Beshear*, at *3–*4, *40–*56.

¹²⁵ See *In re Certified Questions*, at *5, *21–*36; *Beshear*, at *3–*4, *40–*56.

¹²⁶ *Wisconsin Legislature*, at ¶ 4 n.7.

¹²⁷ *Beshear*, at *68–*69.

¹²⁸ *Beshear*, at *60.

“[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty” (internal quotation marks omitted).¹²⁹

A concurring opinion in the Wisconsin case even draws upon Thomas Paine’s *Common Sense*, one of the seminal documents of the American Revolution: “In America THE LAW IS KING! For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other” (internal quotation marks omitted).¹³⁰

The opinion continues, quoting from two U.S. Supreme Court cases, *Skinner v. Railway Labor Executives Ass’n* (1989) and *Ex parte Milligan* (1866):

“In Wisconsin, as in the rest of America, the Constitution is our king—not the governor, not the legislature, not the judiciary, and *not a cabinet secretary*. We can never ‘allow fundamental freedoms to be sacrificed in the name of real or perceived exigency’ nor risk subjecting the rights of the people to ‘the mercy of wicked rulers, or the clamor of an excited people.’ *Fear never overrides the Constitution. Not even in times of public emergencies, not even in a pandemic*” (emphasis added; citations omitted in original).

Notable in this formulation, of course, is the equivalence drawn between the “Constitution” and the liberties and rights afforded to the people of Wisconsin during “normal” times. Public health sovereignty, “even in a pandemic,” is thus conceived of as not just in opposition to political sovereignty but rather as entirely extraconstitutional. For liberties to be curtailed to meet the demands of a public health crisis or other public emergency means to this court that the constitution itself must be unlawfully suspended, which it refuses to allow. Constitutional rights, as understood by the court, are taken to be defined as absolute. This position, of course, is also exactly that taken by the Trump DOJ and the conservative justices of the Supreme Court on the issue of religious liberty (see section 4.1.3).

¹²⁹ *In re Certified Questions*, at *22.

¹³⁰ *Wisconsin Legislature*, at ¶ 85.

Turning to less extreme examples, one finds that similar (though less belligerent) uneasiness about the scope of power exercised by a single official during times of crisis undergirds the courts' reasoning in all the cases discussed here. In reaching its decision, the Wisconsin majority reasoned that if it had adopted Palm's definition of a "rule," thus allowing her executive order to stand, then "*one person, Palm, an unelected official, could create law applicable to all people during the course of COVID-19 and subject people to imprisonment when they disobeyed her order*" (emphasis added).¹³¹ "Rulemaking," according to the court, "*exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin*" (emphasis added).¹³² While the statute defining the powers of Wisconsin's Department of Health Services, from which Palm claims to derive her authority to issue the executive order in question, plainly reads: "The department may authorize and implement *all* emergency measures necessary to control communicable diseases" (emphasis added),¹³³ the majority nonetheless believed that it would be "constitutionally suspect" to interpret this authority as coming "even at the expense of fundamental liberties, without rulemaking," adding that the statute was not "an 'open-ended grant' of police powers to an unconfirmed cabinet secretary" (emphasis added).¹³⁴ In Michigan, the majority focused on a similar concern and made much of the fact that the EPGA concentrated substantial power in the hands of the governor, arguing that it allowed her to, "in effect, suspend[] normal civil government" (internal quotation marks omitted).¹³⁵ While recognizing COVID-19 as an emergency that may require a "singular assertion[] of governmental authority," it held

¹³¹ *Wisconsin Legislature*, at ¶ 24.

¹³² *Wisconsin Legislature*, at ¶ 28.

¹³³ Wis. Stat. § 252.02(6).

¹³⁴ *Wisconsin Legislature*, at ¶ 31.

¹³⁵ *In re Certified Questions*, at *28.

that “the sheer magnitude of the authority in dispute, as well as its concentration in a single individual, simply cannot be sustained within our constitutional system of separated powers.”¹³⁶

On the other side, public health sovereignty has been consistently asserted as well. The clearest example comes from Kentucky, where the politically bipartisan supreme court unanimously upheld the legality of the governor’s COVID-19 executive orders. In its opinion, the court emphasized that economic rights are always subject to such “reasonable” restrictions as benefit society as a whole and that public health is “an imperative obligation of the state” (quoting *Nourse v. City of Russellville* (Ky. 1935)), thereby affirming the breadth of the police power of the state, especially when concerning public health.¹³⁷ This assertion also repudiates the view expressed in the Wisconsin concurrence and espoused by the plaintiffs in this present case—namely, that the constitutional rights in question are supreme and supersede any extenuating considerations. Addressing the plaintiffs’ contention that it would be in the public’s best interest to invalidate the governor’s executive orders, because doing so would ameliorate the economic damage caused by the orders and restore Kentuckians’ constitutional rights, the court responded that public health was a “greater public interest” than both: “[T]he interests of the vast majority take precedence over the individual business interests of any one person or entity. While we recognize and appreciate that the Plaintiffs allege injuries to entire industries in the state, ... the interests of these industries simply cannot outweigh the public health interests of the state as a whole.”¹³⁸ The reasoning here is almost an exact echo of *Jacobson*, where the U.S. Supreme Court cautioned that the rights

¹³⁶ *In re Certified Questions*, at *48.

¹³⁷ *Beshear*, at *63–*64.

¹³⁸ *Beshear*, at *91.

of a small minority could not override the overall wellbeing of a great majority.¹³⁹ Likewise, dissents in the Wisconsin and Michigan cases for the most part recognize public health sovereignty, though they view the broadness of the question before their respective courts differently. One dissent in Wisconsin criticizes the majority's statutory interpretation for handicapping what it saw as the deliberately broad conferral of emergency powers on the Department of Health Services,¹⁴⁰ concluding that "it will be Wisconsinites who pay the price" for the majority's interpretive antics¹⁴¹—again focusing on the public health impact of seemingly insulated legal arguments. Interestingly, also in Wisconsin, one dissent in particular wrote that the case before the court was a narrow question of statutory construction and had "nothing whatsoever"¹⁴² to do with questions about "constitutional limits on executive power" or "government's potential infringement of certain constitutional protections."¹⁴³ "We are a court of law," it said.¹⁴⁴ "We are not here to do freewheeling constitutional theory."¹⁴⁵ It would later go on to expound upon the separation of powers and "the state's inherent power 'to promote the general welfare'": "If [it] sounds incredibly broad and far-reaching, that's because it is."¹⁴⁶

Through these three areas of case law, one observes the stunning variety with which courts have argued either in favor of public health or political sovereignty. Of course, the competing claims are always advanced under the cover of formal legal arguments, but the logic of the two sovereignties in competition undergirds judicial

¹³⁹ *Jacobson*, at 38.

¹⁴⁰ *Wisconsin Legislature*, at ¶ 138 (Hagedorn, J., dissenting).

¹⁴¹ *Wisconsin Legislature*, at ¶ 132 (Dallet, J., dissenting).

¹⁴² *Wisconsin Legislature*, at ¶ 166 (Hagedorn, J., dissenting).

¹⁴³ *Wisconsin Legislature*, at ¶ 167 (Hagedorn, J., dissenting).

¹⁴⁴ *Wisconsin Legislature*, at ¶ 168 (Hagedorn, J., dissenting).

¹⁴⁵ *Wisconsin Legislature*, at ¶ 168 (Hagedorn, J., dissenting).

¹⁴⁶ *Wisconsin Legislature*, at ¶ 177 (Hagedorn, J., dissenting).

reasoning in U.S. state and federal courts alike, from the court of first review to the court of final review.

Chapter 5

Alternative Answers Abroad

Having surveyed the landscape of COVID-related litigation in the United States, I now turn my focus abroad, specifically to France, Austria, and Taiwan. All three jurisdictions here use the principle of proportionality as well as some form of due process and equality to adjudicate disputes concerning civil liberties restrictions. Nonetheless, the ways in which courts have responded to these challenges during the COVID-19 pandemic exhibit a substantial amount of variation, and examples from each country illustrate a different spin. The jurisprudence of France's *Conseil d'État*, its top administrative court, most closely parallels the way in which litigation has unfolded in the U.S. in that it has waded wholeheartedly into the tension between public health and political sovereignty, oscillating between rulings that favor one or the other based on the balance of interests and rights at stake. In Austria, the *Verfassungsgerichtshof* (VfGH), or Constitutional Court, has shown itself to be quite tolerant of the Austrian federal government's COVID policies on constitutional grounds but has invalidated a number of ordinances on much narrower grounds, particularly "*Unzureichende Dokumentation*," or

insufficient documentation on the part of the government.¹ In Taiwan, little litigation has occurred, no doubt because of the near-invisibility of COVID-19 in daily life, but judicial interpretations from its Constitutional Court in the years between the SARS epidemic in 2003 and COVID-19 reveal a society that places a premium on restricting the rights of the infected few at the early stages of an epidemic in order to prevent the sort of mushrooming public health crisis that would even raise the question of broader restrictions on civil liberties.

5.1 France

In France, the *Conseil d'État* adjudicated a number of notable cases concerning COVID-related restrictions on religious liberty, freedom of assembly, economic activity, and abortion, as well as in areas like data privacy and asylum conditions.² The first four allow for direct comparison to U.S. jurisprudence, since the decisions have been decidedly rather conventional in the sense that the *Conseil d'État* straightforwardly balanced the public health claims and the rights infringement claims in each case, getting into such technical details as case counts, matters normally left to experts in other jurisdictions. In this aspect, the French court is rather epistemologically activist in its involvement in evaluating the public health issues at stake.

A triptych of religious liberty cases offers a representative panorama of the *Conseil d'État's* jurisprudence. First, on May 18, 2020, the court struck down a decree from the

¹ Österreichisches Parlament [Austrian Parliament], "COVID-19: Entscheidungen des Verfassungsgerichtshofes" [COVID-19: Decisions of the Constitutional Court], Feb. 9, 2021, <https://fachinfos.parlament.gv.at/politikfelder/arbeit-soziales/covid-19-entscheidungen-des-verfassungsgerichtshofes/> (accessed May 17, 2021).

² Conseil d'État [Council of State], "Dernières décisions (référé) en lien avec l'épidémie de Covid-19" ["Final Decisions (Judgments) Related to the COVID-19 Epidemic"], Nov. 20, 2020, <https://www.conseil-etat.fr/actualites/actualites/dernieres-decisions-referes-en-lien-avec-l-epidemie-de-covid-19> (accessed May 3, 2021).

Ministry for Solidarity and Health (*Ministère des Solidarités et de la Santé*) that in relevant part allowed religious establishments to continue staff operations but prohibited members of the public anywhere in France from meeting or gathering inside, the only exception being funerals, at which at most 20 people were permitted.³ The petitioners had acknowledged that churches needed to contribute to the fight against the virus's spread but nonetheless argued that a blanket entry ban was disproportionate.⁴ The Minister of the Interior, representing the government, responded that the blanket prohibition was necessary in light of a thousand-person worship service in the Alsatian town of Mulhouse that had seeded the virus across the administrative region of Grand Est.⁵ The judge of the *Conseil d'État* rejected this justification as unrepresentative of worship services generally, since this particular instance had brought together several factors conducive to the spread of COVID-19; furthermore, it reasoned that while worship services did pose a heightened risk of COVID-19 transmission, this risk was mitigable, and because far less restrictive measures were feasible (public gatherings were limited to a maximum of 10 people at the time), the provision at issue was not proportionate and thus "seriously and manifestly illegally" ("*grave et manifestement illégale*") infringed on freedoms.⁶

By October, France was in the midst of a dangerous second wave of COVID-19 infections, and the government issued a new decree on October 29 that again prohibited meetings and gatherings of the public inside religious establishments, with exceptions carved out for weddings and funerals, which were limited to six and 30 people respectively.⁷ The decree was challenged on the grounds that there was a lack of evidence

³ CE [Council of State], May 18, 2020, 440366, <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000041897157>.

⁴ 440366.

⁵ 440366.

⁶ 440366.

⁷ CE [Council of State], Nov. 7, 2020, 445825, <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042532335>.

of COVID-19 clusters arising from churches and that other enclosed venues faced more lenient restrictions and were allowed to admit patrons.⁸ This time, in its November 7 decision, the *Conseil d'État* rejected the applicants' claims regarding the freedom of worship and freedom of assembly, among other things, and ruled that the measures were justified and proportionate, citing the dire and worsening outbreak in metropolitan France—including specific case count and ICU occupancy figures—and the sometimes-lax enforcement of COVID-19 sanitary protocols in churches.⁹

Within a month, in view of the improving COVID-19 situation in France, the government loosened restrictions and revised the October 29 decree to allow up to 30 people to gather inside religious establishments while capping capacity in sales outlets, shopping centers, and covered markets to one patron for every 8 m² of retail surface area.¹⁰ Once again, the decree was challenged, with the petitioners arguing that the measures were disproportionate to the goal of maintaining public health and discriminated against religious establishments by imposing a flat cap on religious establishments regardless of size while allowing for size-based flexibility for every other authorized activity, including public transit, retail, and professional gatherings.¹¹ In the decision of November 29, the presiding judge of the *Conseil d'État*, like the judges in the other cases, acknowledged the heightened COVID transmission risk that religious gatherings pose, but here, the judge, taking into account falling case counts and ICU occupation rates, ultimately decided that the across-the-board 30-person capacity limit

⁸ 445825.

⁹ 445825.

¹⁰ CE [Council of State], Nov. 29, 2020, 446930, <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042606085>.

¹¹ 446930.

was not justified by these risks and disproportionately burdened the right to religious freedom.¹²

5.2 Austria

Austria's *Verfassungsgerichtshof* (VfGH) operates on largely similar principles as the *Conseil d'État*, but it has taken what has proved to be an interesting variant on the proportionality jurisprudence. Exercising substantial judicial restraint, the VfGH has abstained from overturning COVID ordinances on the grounds that fundamental rights have been infringed, although cases are generally brought on these grounds. Still, the VfGH has overturned a number of ordinances during the COVID-19 pandemic, though for much narrower and more technical reasons.

One notable example is the case V 363/2020, decided July 14, 2020, concerning an ordinance issued by the Federal Minister of Social Affairs, Health, Care and Consumer Protection (BMGSPK¹³) that prohibited entry into all public places as well as the use of public transit, with only certain exceptions.¹⁴ A university researcher staying with his mother about 100 kilometers outside Vienna and who did not own a car was therefore prevented from accessing the apartment he was renting in the city center of Vienna and the law library at his university.¹⁵ He alleged that the ordinance violated his freedom of movement, as well as his personal freedom, freedom of property, and more.¹⁶ The court reasoned that the freedom of movement is not guaranteed “without limits,” and that the BMGSPK's ordinance, under its standard analysis, had a legitimate purpose and

¹² 446930.

¹³ Short for *Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz*.

¹⁴ VfGH [Constitutional Court], Jul. 14, 2020, V 363/2020, at ¶ 2.

¹⁵ V 363/2020, at ¶ 7.

¹⁶ V 363/2020, at ¶ 37.

restricted freedoms in a proportionate manner in achieving that purpose.¹⁷ However, it still ultimately sided with the petitioner because it found that the ordinance's provisions were not consistent with the Austrian Parliament's COVID-19 Measures Act (*COVID-19-Maßnahmengesetz*), upon which the BMSGPK's ordinance was based, which only allowed for restrictions on entry into "*bestimmte Orte*"—specific places—and thus did not cover what the court construed as a "general" entry ban with specific exceptions.¹⁸ Thus, the court was deferential and permissive on constitutional grounds but simply held that the ordinance was inconsistent with the governing law. In effect, once the legislature amended the law, the ordinance would be on perfectly solid legal grounds. The court left the door open to more restrictive measures, acknowledging that there may be circumstances in which it would be necessary, though a more concrete legal basis would be required.¹⁹

Another illustrative example is the case V 411 /2020, also decided July 14, 2020, in which another ordinance from the BMSGPK was challenged, this time one that in relevant part placed an entry ban on all businesses, though it carved out a long list of 23 exceptions, among which were pharmacies, banks, and public transit but also hardware and garden stores.²⁰ It also exempted all businesses with under 400 m² of retail surface area.^{21, 22} A retailer operating outlets across Austria and affected by these measures alleged that the area threshold violated its freedom of acquisition of property, bore no logical relationship to the state's objective of preventing the spread of COVID-19, and was disproportionate to this objective in any case, and that the exemption for hardware and garden stores in

¹⁷ V 363/2020, at ¶¶ 61–62.

¹⁸ V 363/2020, at ¶¶ 64–67.

¹⁹ V 363/2020, at ¶ 68.

²⁰ VfGH [Constitutional Court], Jul. 14, 2020, V 411/2020, at ¶ 2.

²¹ V 411/2020, at ¶ 2.

²² The exact German term used is "*Kundenbereich*"—literally, "customer area."

particular was a violation of the principle of equality because it did not draw a logical or relevant factual distinction to merit the differential treatment.²³ The BMSGPK countered that retail area was indeed a relevant distinguishing factor so as to limit customer traffic when coupled with the requirement that each customer be allotted at least 20 m² of retail area, and that hardware and garden stores were exempt because they offered critical supplies for daily living, and to restrict their operations would be to induce a rush of panicked customers to these stores.²⁴ The VfGH rejected the BMSGPK's distinction as "*unsachlich*"²⁵—"unobjective"—and without factual basis.²⁶ Above all, however, it faulted the BMSGPK for insufficiently documenting its decision-making process and the facts and circumstances it used to craft its ordinance, holding that *that* alone was enough to render the contested provisions of the ordinance unlawful, i.e., inconsistent with the *COVID-19-Maßnahmengesetz*'s stipulation that administrative measures be "*erforderlich*" ("necessary") to preventing the spread of COVID-19.²⁷ A crisis may require the authorities to make decisions without knowing the full picture.²⁸ However, to the extent possible under crisis situations, and in light of the broad constitutional discretion given to administrative authorities in issuing ordinances, the VfGH ruled that the ordinance-issuing authority had an obligation to make the decision-making process readily comprehensible so that the legality of the ordinances could be properly assessed, the VfGH ruled.²⁹ Whether the applicant's economic rights were violated was not addressed.

After this case, the VfGH invalidated nearly a dozen COVID-related ordinances on the basis of insufficient documentation. The list that would make even those most

²³ V 411/2020, at ¶¶ 54–55, 57.

²⁴ V 411/2020, at ¶¶ 63, 65–66.

²⁵ V 411/2020, at ¶ 95.

²⁶ V 411/2020, at ¶ 93.

²⁷ V 411/2020, at ¶¶ 89–90.

²⁸ V 411/2020, at ¶¶ 71–72.

²⁹ V 411/2020, at ¶¶ 78, 80.

skeptical of public health sovereignty in the United States envious: Bans on events with more than 10 attendees and entry bans on hospitality establishments, among others, were all overruled on these grounds, many citing V 411/2020.³⁰³¹ In such cases, public health sovereignty is never directly questioned, but political sovereignty is in the process *de facto* upheld because the VfGH holds the government and its public health officials to a high standard of transparency in decision-making. While recognizing and letting stand the broad discretion statutorily granted to the administrative authorities by the legislature in times of crisis, the VfGH simultaneously imposes demanding standards on the rationality of the administrators' actions.

5.3 Taiwan (Republic of China)

Perhaps unsurprisingly, there has been little in the way of COVID-related litigation in Taiwan, no doubt because of its earlier resounding success in holding off COVID-19. Daily life there had been largely normal, and even over a year into the pandemic, it had tallied only just over 1,000 confirmed cases and fewer than a dozen deaths.³² So prepared was Taiwan in the wake of its SARS experience that its existing laws were sufficient to meet the COVID-19 challenge, and no emergency was ever declared.³³

³⁰ *Österreichisches Parlament* [Austrian Parliament], "COVID-19: Entscheidungen des Verfassungsgerichtshofes" [COVID-19: Decisions of the Constitutional Court].

³¹ See, e.g., V 428/2020.

³² See, e.g., Amy Qin and Amy Chang Chien, "Covid? What Covid? Taiwan Thrives as a Bubble of Normality," *New York Times*, Mar. 13, 2021, <https://www.nytimes.com/2021/03/13/world/asia/taiwan-covid.html> (accessed May 1, 2021).

³³ Tsung-Ling Lee, "Legal Preparedness as Part of COVID-19 Response: The First 100 Days in Taiwan," *BMJ Global Health* (May 6, 2020), DOI: <https://www.doi.org/10.1136/bmjgh-2020-002608>.

One case in particular proves illustrative. In *Xingtí* No. 1 of *Míngúo* Year 110 (i.e., 2021),³⁴ a case before the District Court of Taipei, a COVID-19 patient who had already been held at the Taipei City Hospital for 30 days for treatment and compulsory quarantine was ordered to undergo another 30 days of quarantine, under Taiwan’s own health regulations, because the patient was still testing positive for COVID-19 although the patient’s symptoms had evidently subsided.³⁵ The patient applied for this new order to be overturned because it infringed on the patient’s personal freedom, because Taiwan’s regulations were, in the applicant’s view, excessive in comparison to WHO, U.S., and Singaporean regulations, which only required 10–21-day quarantines as well as no manifestation of symptoms, and because medical evidence showed that a positive COVID test did not mean that the patient was still infectious.³⁶ The court rebuffed all of the applicant’s claims and upheld the Department of Health’s order as “obviously” legal.³⁷

This case is in line with the Taiwanese judiciary’s longstanding willingness to uphold stringent limits on the liberties of individual patients. For further evidence of this inclination, one need look no further than J.Y. Interpretation No. 690.³⁸ In 2011, a divided Constitutional Court controversially upheld Art. 37, par. 1 of the Communicable Diseases Control Act³⁹, which stated: “Any person who has physical contacts with patients of contagious diseases, or is *suspected* of being infected, *shall* be detained and checked by the

³⁴ “Minguo” years are calculated from the establishment of the Republic of China on January 1, 1912. Hence, 2021 is the 110th “Year of the Republic.”

³⁵ *Taipei Difang Fayuan* [District Court of Taipei], 110 *Nian Du Xing Ti* No. 1 [Xingtí No. 1 of Year 110], at ¶¶ 1, 3.

³⁶ 110 *Nian Du Xing Ti* No. 1 [Xingtí No. 1 of Year 110], at ¶¶ 1, 3.

³⁷ 110 *Nian Du Xing Ti* No. 1 [Xingtí No. 1 of Year 110], at ¶ 3.

³⁸ The Judicial Yuan is one of the five *Yuans*—literally, “councils”—one of the five branches of government of the Republic of China, as originally proposed by Sun Yat-Sen. The other four branches are the Legislative, Executive, Examination (in charge of the civil service), and Control (provides oversight over the other four).

³⁹ 傳染病防治法 (*Chúanrǎnbìng Fángzhìfǎ*).

competent authority, and if necessary, shall be ordered to move into designated places for further examinations, or to take other *necessary* measures, including immunization, etc.” (emphasis added)⁴⁰—with compulsory quarantine specifically listed among the “necessary measures.”⁴¹ A few points are particularly noteworthy about this provision. For one, it envisions “person[s]” purely as a biomedical subject (a view echoed by the Constitutional Court, as will be discussed shortly). For another, the language of obligation on the part of public health authorities rather than discretion—“*shall* be detained,” for example—makes this statute even stronger as a manifestation of public health sovereignty. Furthermore, the inclusion of not only persons who actually are infected but also anyone suspected thereof, subjecting them to obligatory public health scrutiny, widens the scope of the statute considerably and seems antithetical to the cherished, though not entirely analogical, principle of “innocent until proven guilty.”

And so, the constitutionally guaranteed right to personal freedom was at stake before the Constitutional Court, along with due process. Brushing aside concerns that these measures essentially allowed “innocent” citizens to be detained without trial in the name of public health on suspicion alone, the Constitutional Court argued that because the purpose of compulsory quarantine was different from that of detention as a means of criminal punishment and involved discretion based on medical expertise, it merited a more lenient standard of review.⁴² Unlike imprisonment, compulsory quarantine would serve to “protect the life and health” of the detained—a rather paternalistic view and one that seems to recognize only the biological dimension of personhood. Public health

⁴⁰ Original text: “曾與傳染病病人接觸或疑似被傳染者，得由該管主管機關予以留驗；必要時，得令遷入指定之處所檢查，或施行預防接種等必要之處置。” Now Art. 48 in the most recent version of the statute.

⁴¹ J.Y. Interpretation No. 690 (Const. Ct. Sept. 30, 2011), translated at <https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=690>.

⁴² J.Y. Interpretation No. 690.

officials would need broad authority in order to quell epidemics, and decisions about whether a person should be forcibly quarantined would rest on medical expertise, it said.⁴³ In the majority’s view, compulsory quarantine would be “reasonable and necessary”—proportional and would not violate due process.

Four justices (out of 15) on the Constitutional Court objected to the majority’s allowing persons to be detained without judicial scrutiny. According to some scholars, the decision effectively created a new, laxer constitutional standard for restricting personal freedoms in the name of public health.⁴⁴ But ironically, these somewhat draconian measures reflect an epidemiological approach focused on preventing any epidemic from gaining a firm foothold in Taiwan to begin with, and its success meant that Taiwan had been spared from having to grapple with the more difficult and broader-reaching tensions afflicting many other democracies—things like whether hair salons should be allowed to open when churches have to remain closed if a public health official signs off on such a measure, for example. The overwhelming force of public health sovereignty on individual persons in the early stages of an epidemic allowed Taiwanese society at large to continue living under relatively normal conditions, without a lockdown. The short-term liberty rights of the few were bartered to secure the longer-term economic and social rights of the many, as Taiwan’s packed restaurants and subway trains have attested.

In mid-May 2021, however, Taiwan suddenly saw an enormous spike in COVID-19 cases, totaling in just eight days the case count it had accumulated over the preceding

⁴³ J.Y. Interpretation No. 690.

⁴⁴ Mong-Hwa Chin, Background Note on J.Y. Interpretation No. 690, translated at <https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=690> (accessed May 17, 2021).

16 months.⁴⁵ The government has taken measures to shut down businesses in an effort to contain the outbreak,⁴⁶ and it remains to be seen, now that its “Plan A” has failed, which direction Taiwan will now take.

The three different jurisdictions discussed in this chapter offer in effect three distinct answers to the question of balancing public health and political rights, even though they are all rooted in proportionality. As will next be discussed, they, along with U.S. courts, exhibit different understandings of personhood as well as the social compacts that tie citizens to the state.

⁴⁵ See, e.g., Lawrence Chung, “Taiwan Reports 240 New Covid-19 Cases, in Talks with US for Share of Donated Vaccine Doses,” *South China Morning Post*, May 18, 2021, <https://www.scmp.com/news/china/diplomacy/article/3133869/taiwan-talks-us-share-joe-bidens-pledged-80-million-covid-19> (accessed May 18, 2021).

⁴⁶ See, e.g., “Taiwan Urges No Panic Buying as New COVID-19 Rules Kick Off,” *Reuters*, May 16, 2021, <https://www.reuters.com/world/asia-pacific/taiwan-urges-no-panic-buying-new-covid-19-rules-kick-off-2021-05-16/> (accessed May 18, 2021).

Chapter 6

Discussion:

Sovereignties, Social Compacts, Subjects

This section highlights four common themes underlying the jurisprudences of the different courts discussed in this thesis. First, I categorize the courts' different approaches to balancing public health demands and the continuity of constitutional protections into three general models. I then discuss the divergent social compacts, notions of personhood, as well as constitutional allocations of power undergirding the differences among the courts.

6.1 Three Models for Balancing the Two Sovereignties

As is by now clear, the way in which courts have navigated the balance between public health sovereignty and political sovereignty varies from country to country, court to court, and often even within courts. Put together, the cases discussed reveal three general models that courts have employed to deal with this complex question.

The first model broadly defers to public health sovereignty, dictating that political sovereignty should yield in a time of crisis or emergency. Courts retreat into the

background and cede gatekeeping authority to experts and public health authorities. Wiley and Vladeck would term this the “suspension” model.¹ This is the model implicitly used by the liberal wing of the U.S. Supreme Court as well as justices on lower U.S. courts that have generally favored maintaining orders issued in the name of fighting COVID-19. Needless to say, Taiwan’s preferred approach aligns with this model as well.

The second model places the two sovereignties as equals in a dynamic equilibrium. Courts function as a true arbiter that balances and evaluates asserted interests and countervailing factors on a case-by-case basis, considering the unique set of facts that surround each instance to strike the right balance. This is the model used in France’s *Conseil d’État* and that which, at least in theory, is also prescribed when proportionality tests are used elsewhere.

The third model prioritizes political sovereignty entirely. Because of its relative inflexibility, there is a limited degree of ability to accommodate exigent public health emergencies, but it provides the strongest protection against invasions of rights in the name of public health. It imagines fundamental rights as absolute even in the deepest of crises. The judiciary functions here as a gatekeeper of scientific expertise, thanks to a standard of review—strict scrutiny—designed to be nearly fatal to proposed state encroachments. This is the model espoused by the conservative wing of the U.S. Supreme Court and lower U.S. courts. It appears not to have gained much currency abroad.

The jurisprudence of the Austrian VfGH defies simple categorization in this context. Even though it has found COVID ordinances unlawful, it rarely does so in a way that entangles itself with the facts or the appropriateness of the measures but rather focuses on procedural missteps from the government. Unlike the French *Conseil d’État*,

¹ Wiley and Vladeck.

the VfGH declined to rule on constitutional claims, instead basing its rulings largely on matters of procedural decorum or consistency with the legislature's written statutes. It never challenges public health sovereignty on its face and is generally permissive of abridgments of fundamental rights in accordance with public health necessities, but the effect of its rulings has often been to favor political sovereignty by insisting on proper legal justifications for the government's measures.

The range within which American courts must maneuver appears to be limited by the set of analytical tools at their disposal, since precedents compel an "almost always uphold" standard (rational basis review) in most cases. When fundamental rights are implicated, the standard of review escalates to "almost always strike down" (strict scrutiny), although the U.S. Supreme Court has opted to fashion different standards of review for different bodies of case law. By contrast, the proportionality doctrine, at least as practiced by the French *Conseil d'État*, seems to allow courts a greater degree of flexibility in meeting the dual challenges of safeguarding public health and maintaining citizens' constitutional rights. In requiring a careful balancing test in each instance, the French model enables a more individualized, case-by-case approach that avoids the extremes of excessively burdening citizens' rights and excessively hampering public health authorities' efforts to fight contagious disease.

6.2 Social Compacts, Simple and Complex

The social compact is one of the fundamental philosophies underpinning the institution of government. As discussed in Chapter 3, it was also one of the motivations for the U.S. Supreme Court's decision in *Jacobson v. Massachusetts*—specifically, a recognition of the obligations the individual owes to society (here, to be compulsorily vaccinated against infectious disease) by choosing to be a part of society and thereby

enjoy its benefits. The different sets of cases presented in this thesis—and the appeals to public health and political sovereignty judges have used to decide them—are inextricably embedded in the different social compacts at play in each society, and it is illuminating to examine them in this light.

In the United States, the federal structure of government laid out in the Constitution has meant that cases—especially in religious liberty, voting access, and abortion—pitted state authority against federal authority, with further implications for federal review of separation of powers issues within state legal systems. Public health, except when concerning crossings of national borders or state boundaries,² is a responsibility borne primarily by the governments of each of the 50 states. However, fundamental rights like religious liberty, the right to vote, and the right to abortion are guaranteed in the Federal Constitution and enforced by the federal government. Thus, disputes concerning state emergency measures that curtail religious liberty, for example, are not just a matter of whether states are primarily responsible for public health (they are), but rather whether federal authority wins out over state authority in protecting rights guaranteed under federal law.

One can understand these complicated relationships as three overlapping social compacts: one between the individual and the state government, one between the individual and the federal government, and one between the state government and the federal government. The individual, as a citizen of a state, agrees to follow state laws and take actions against his or her own will in the interest of society; in return, the state takes measures to safeguard public health and thereby protect the individual from such hazards as the threat of infectious disease. The individual, as an American citizen, has

² See U.S. Const. art. I, § 8, cl. 3, known as the Commerce Clause.

similar obligations to the federal government and his or her co-nationals, and in return, the federal government guarantees citizens a minimum standard of fundamental rights that they are entitled to simply by virtue of being an American subject: the right to practice religion free from state interference, the right to vote in elections, the right to speak and associate freely, and so forth. The state surrenders part of its sovereignty by submitting to a higher authority, the federal government, but in return, the federal government promises not to infringe upon matters within the state's jurisdiction.

The cases discussed in Chapter 4 are particularly complicated precisely because they implicate government at both levels and place them in conflict. Thus, in many cases, there is a question of not only horizontal but also vertical separations of power, involving the contradicting commitments that individuals have been promised from different governments as well as contradicting mandates accorded to different branches of government.

By contrast, in France, Austria, and Taiwan, the responsibility for public health is expressly vested in the national government in their respective constitutions. At the same time, fundamental rights are also guaranteed by the same national government. This unified locus of authority means that, at least as far as the present body of case law is concerned, individuals are only party to a single social compact—that with the national government. By obeying the laws of each country, individuals are entitled to protection of both their political rights and public health, and the same locus of power is able to strike this balance integrally, without the complexities introduced by competing social compacts.

6.3 The Political and Biological Subjects

Also implicated in public health sovereignty and political sovereignty are two competing imaginations of the individual in society, as discussed in section 4.1.1. By imposing restrictions on individual rights in the name of protecting the individual as well as society at large, public health sovereignty regulates people as biological subjects. Human interactions and activities are inscribed as a series of numbers predicting transmission, infection, and mortality risks, and in the extreme case, humans are viewed not as people but rather solely as vectors of disease transmission. The individual and his or her rights are not included in this view; indeed, they are dismissed as hardly relevant. The jurisprudence of the Taiwanese courts, as discussed in section 5.3, reflects this position in almost pure form.

By contrast, political sovereignty prizes the political self over the biological self. The suite of fundamental rights that individuals are entitled to are not interrupted or frozen on account of whether an individual has become a link in the chain of COVID transmission. Yet this view, by disregarding a critical scientific component of the individual's vulnerability as well as disease spread, arguably cannot hope to effectively control epidemics. Thus, the balance between regulating the political subject and the biological subject is one that must be negotiated as carefully as that between political and public health sovereignty itself.

Chapter 7

Conclusion

In *Ex parte Milligan* (1866), the U.S. Supreme Court commented that “a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.”¹ While these comments concerned President Abraham Lincoln’s suspension of *habeas corpus* during the American Civil War more than a century and a half ago, they continue to be invoked today.² And while the appropriateness of these words as applied to the present context is a matter of debate, the fundamental question it gets at is one that governments and societies worldwide that are bound by the rule of law must consider.

The courts and countries discussed in this thesis have offered various possible “solutions” to the question of how public health and fundamental rights are to be balanced during a rapidly unfolding pandemic. There is no one correct solution—there is only a solution “most” suitable to each country’s peculiar circumstances. The close entanglement between this question and each country’s constitutional system and

¹ *Ex parte Milligan*, 71 U.S. 2, 126 (1866).

² See *South Bay I*, at *2 (Brief for Applicants).

political order cannot be understated. Also at play are culture, economics, history, and much more.

Democratic societies face the ever-present threat of backsliding, for democracy is a form of government that requires constant tending to retain its strength. In many ways, COVID-19 represented a stress test for democracy itself. The deeper question for some may be how exceptions for pressing crises can be accommodated without giving future would-be authoritarians pretext for declaring similar crises in order to consolidate power. My hope in this thesis has been at least to provide illumination for those seeking to grapple and come to terms with the legal complexities of our present moment.

The Court also wrote in *Ex parte Milligan*: “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.”³ Do the Court’s words still hold true in 2021?

Unfortunately, current American jurisprudence largely leaves courts with only two blunt analytical tools—strict scrutiny and rational basis review—to address a matter requiring great delicacy and nuance. Over the course of the pandemic, much as the American body politic was deeply polarized, American courts retrenched into two

³ *Ex parte Milligan*, at 120–121.

diametrically opposed positions and forwent the opportunity to create the environment for a much more flexible compromise akin to a proportionality test, something that Chief Justice John Roberts alluded to but that currently has no place in American jurisprudence. The U.S. Supreme Court and state supreme courts could have taken the opportunity to craft new standards of review for such rare widespread emergencies that would have amounted to neither judicial acquiescence nor obduracy. But amidst the country's greatest test in nearly 80 years, America's judiciary showed the country one important truth—that judges are people too, for even the supposedly dispassionate arbiters of law could not escape the political forces pulling the country into tribal partisan corners. When—not if—the strength of the entire nation is again put to the test, all future Americans will be worse off for the judiciary's inability to adequately meet the challenges of the current pandemic. One can only hope that at that time, we will not repeat the mistakes of our present moment.

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