Essays

The United States Supreme Court and the Legacy of the Health Emergency: Partisanship and Conservative Judicial Activism

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Abstract

The article deals with the Supreme Court's jurisprudence during the health emergency to identify the different trends that have characterized the Court's decisions in that peculiar historical period compared to those of continental European courts. The case law reveals some exceptional patterns, still recurring in the most recent rulings: the Court has departed inconstantly from its long tradition of deference during times of crisis; it has accorded heightened protection to Free Exercise, even at the expense of the right to health; it has devalued medical evidence and scientific expertise. Finally, this article concentrates on the legacy of the health emergency, which may be centered around two related concepts: partisanship and conservative judicial activism.

'If judicial decisions greatly overlap with the views of members of an identifiable political party, something is unquestionably amiss'.

CASS. R. SUNSTEIN[1]

I. Introduction

Constitutional and administrative courts have played a crucial role in scrutinizing governmental and legislative measures during the pandemic, acting as important bulwarks against the unprecedented impact of those measures on fundamental rights and liberties.[2] In general, and while being aware of the relevant

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[1] C.R. Sunstein, *Why Extreme Right-Wing Courts Are Wrong for America* (New York: Basic Books, 2005), 19.

[2] P. Popelier et al, 'The Role of Courts in Times of Crisis: A Matter of Trust, Legitimacy and Expertise' *European Court of Human Rights* (2021), available at https://tinyurl.com/bdcu528y(last visited 30 September 2024).

differences in each system, it is possible to identify at least three common trends relating to the work of the courts in continental Europe. First, judicial review has shifted across the different stages of the pandemic: in the initial phase, marked by scientific uncertainty and limited knowledge, it has been deferential, and cases of rejection have prevailed. However, as more scientific data and knowledge became available, courts performed a relatively more stringent review in the subsequent phases.[3] Second, although the right to health, in both individual and collective dimensions, has been accorded a certain priority, courts have largely employed the technique of balancing different and contrasting rights, and in doing so, they have made extensive use of the four-part structure of proportionality.[4] Third, due to the increased relevance of experts and scientific institutions compared to ordinary times, judges gave great consideration to medical and scientific evidence. On the one hand, they have required pandemic mitigation measures to be scientifically grounded; on the other hand, they broadly referred to technical and scientific data to justify the outcome in their reasoning.[5]

Moving away from these common trends in judicial decision-making in continental Europe, the United States Supreme Court has proved once again to bean outlier, confirming the ever-present claim about the *American exceptionalism*.[6]

This article aims to investigate the Supreme Court's jurisprudence on COVID-19 orders and regulations, to identify the different approaches that have characterized the Court's decisions in that peculiar historical period, tracing the reasons (or rather, the reason) for them; and, finally, acknowledging the legacy of the health emergency.

Decisions collected concern challenges to government measures addressing the pandemic and deal with the following topics and legal issues: religious liberty and free exercise; eviction moratorium; federal vaccine mandate; abortion; prison conditions; voting rights and election law; census. Moreover, all the analyzed cases have come to the Court outside the merits docket on an accelerated basis through its shadow docket.[7] This term, coined by Professor William Baude,

> 'captures the obscurity of everything the Supreme Court does besides issuing signed decisions in argued cases – orders granting or denying certiorari; granting or denying applications for emergency relief; and so on'.[8]

[3] P. Iamiceli and F. Cafaggi, 'The Courts and effective judicial protection during the Covid-19 pandemic. A Comparative Analysis' *BioLaw Journal – Rivista di BioDiritto*, 377, 390, 401, 414, 377-416 (2023).

[4] F. Cafaggi and P. Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review: The Court's Perspectives' *European Journal of Risk Regulation*, 1, 11, 20-24 (2021).

[5] ibid 15-17.

[6] The French political scientist and historian Alexis de Tocqueville first used the expression: he described the United States as *exceptional* following his travel there in 1831. A. De Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, 1948), II, 36-37.

[7] W. Baude, 'Foreword: The Supreme Court's Shadow Docket' 9(1) *New York University Journal of Law & Liberty*, 1, 5 (2015).

[8] S.I. Vladeck, 'The Most-Favored Right: COVID, the Supreme Court, and the (New) Free

Cases in the shadow docket do not have the usual briefing and oral argument, nor are they decided with broad and comprehensive explanations.[9]

The case law on the health emergency is of particular interest as it reveals specific patterns and features of the United States Supreme Court, which are still recurring in the most recent jurisprudence.

II. The Dominant Narrative: No More Deference?

The United States has a long tradition of judicial deference to the political branches during crises, including public health crises. With few remarkable exemptions,[10] courts have granted the executive and health officials a wide margin of discretion in managing national emergencies.[11]

The leading case is *Jacobson* v *Massachusetts*,[12] decided by the United States Supreme Court in 1905, which upheld a vaccine mandate during a smallpox epidemic despite constitutional challenges. In delivering the opinion of the court, Justice Harlan underlined the relevance of the state police power and of public health expertise to protect the public from the spread of a communicable disease. He noted that the legislator might delegate, in the first instance, the decision of 'what ought to be done in such an emergency' to a

> 'Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions'.[13]

Otherwise, the Court

> 'would usurp the functions of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case'.[14]

The opinion also recognized that there could be disparate ways to lessen the effects of a health crisis, but it

Exercise Clause' 15 *New York University Journal of Law & Liberty*, 699, 701 (2022).

[9] For an analysis of the Supreme Court's increasing use of the shadow docket, especially from 2017 as a result of the gradual establishment of a conservative majority, see S.I. Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (New York: Basic Books, 2023).

[10] These exceptions are discussed in A.L. Tyler, 'Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic' 109(3) *Virginia Law Review*, 489, 513-524 (2023).

[11] W.E. Parmet, *Constitutional Contagion. COVID, the Courts, and Public Health* (Cambridge: Cambridge University Press, 2023), 20-24, 42-49.

[12] *Jacobson* v *Massachusetts* 197 US 11 (1905).

[13] ibid 27.

[14] ibid 28.

> 'is no part of the function of a court or a jury to determine which one of the two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain'.[15]

Finally, quoting his words in *Mugler* v *Kansas*,[16] Justice Harlan uttered the two-part standard judges should adopt in reviewing the constitutionality of public health regulations. First, courts should intervene when a statute, purporting to have been enacted to protect the public health or the public safety 'has no real or substantial relation to those objects'; second, if that statute is 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law'.[17] These expressions hint at a very deferential standard of review, and employing the language of modern constitutional law, they are ascribable to the rational basis test.[18]

In the early days of the pandemic, the Supreme Court, with Justice Ginsburg on the bench, relied on Jacobson and seemed disinclined to second-guess the exercise of health police powers in emergencies. In *South Bay United Pentecostal Church* v *Newsom (South Bay I)*,[19] by a five-four decision from the shadow docket, the Court refused to block a California order restricting attendance at places of religious worship. There was no opinion of the Court, but Chief Justice Roberts, who voted with the majority, wrote a concurring opinion, emphasizing the need for great deference towards government and state officials. He clearly stated, 'Our Constitution principally entrusts the safety and health of the people to the politically accountable officials of the States'; then, citing *Marshall* v *United States*,[20] he added, 'When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad'. Consequently, 'where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary'.[21] The conservative judges firmly disagreed with this view. Justice Kavanaugh, joined by Justices Thomas and Gorsuch, drafted a dissent, where he pointed out that deference was not due because California had discriminated against religion by imposing stricter limitations on religious services than on some comparable secular activities.

A few months later, in July 2020, by another five-four decision, again from the shadow docket, without an opinion, with Chief Justice Roberts still joining the more liberal Justices, the Supreme Court in *Calvary Chapel Dayton Valley* v *Sisolak* rejected a petition to enjoin a Nevada order, imposing an occupancy

[15] ibid 30.
[16] *Mugler* v *Kansas* 123 US 623, 661 (1887).
[17] *Jacobson* v *Massachusetts* n 12 above, 31.
[18] E. Chemerinsky and M. Goodwin, 'Civil Liberties in a Pandemic: The Lessons of History' 106 *Cornell Law Review*, 815, 849 (2021).
[19] *South Bay United Pentecostal Church* v *Newsom* 590 US _ (2020).
[20] *Marshall* v *United States* 414 US 417, 427 (1974).
[21] *South Bay United Pentecostal Church* v *Newsom* n 19 above, 2 (Roberts, C.J., concurring).

limit on gatherings for religious worship.[22] Once again, the conservative justices forcefully dissented. According to Justice Alito,

> 'it is a mistake to take language in Jacobson as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic'[23]

because *Jacobson* involved a substantive due process challenge and, consequently, may not be invoked in a First Amendment case. In his dissent, Justice Kavanaugh firstly recognized that, in general, courts should grant officials appreciable levels of deference because 'state and local governments, not the federal courts, have the primary responsibility for addressing COVID-19 matters'.[24] Nevertheless, he admonished soon after, stating that there are

> 'certain constitutional red lines that a State may not cross even in a crisis' and that 'this Court's history is littered with unfortunate examples of overly broad judicial deference'.[25]

However, as the pandemic progressed and after the replacement of Justice Ginsburg with Justice Barrett, whose nomination by President Trump was confirmed by the Senate on October 26, 2020, the Supreme Court changed its approach to constitutional challenges (at least, to those of Free Exercise) to COVID-19 orders.[26] Following the modification in its composition, the majority of the Court embraced the view of those Justices who, until then, were in the minority and became increasingly unwilling to defer to public officials and health authorities.

This new trend was inaugurated in *Roman Catholic Diocese of Brooklyn* v *Cuomo*,[27] where Justice Barrett joined the dissenters from the earlier two cases to establish a new conservative majority. By a five-four vote, in a *per curiam* opinion from the shadow docket, decided on 25 November 2020, the Supreme Court halted New York's order, limiting attendance at religious services in areas classified as *red* or *orange* zones because it violated the Free Exercise Clause. Interestingly, both Justice Gorsuch and Justice Kavanaugh, in their concurring opinions, rejected *Jacobson* and the deference to the government that has been accorded in previous cases. The former noted,

> 'Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical' and therefore 'courts must resume applying the

[22] *Calvary Chapel Dayton Valley* v *Sisolak* 591 US _ (2020).
[23] ibid 9 (Alito, J., dissenting).
[24] ibid 10 (Kavanaugh, J., dissenting).
[25] ibid 10 (Kavanaugh, J., dissenting).
[26] E. Chemerinsky, 'Covid-19 Ruling Reveals Much About the New Supreme Court' *ABA Journal*, available at https://tinyurl.com/35mxeymt(last visited 30 September 2024)
[27] *Roman Catholic Diocese of Brooklyn* v *Cuomo* 592 US _ (2020).

> Free Exercise Clause'.[28]

Furthermore, the latter argued that judicial deference in an emergency

> 'does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised'.[29]

The Court considered the order not neutral regarding religion and subjected it to strict scrutiny. Even though containing the spread of COVID-19 was a compelling state interest, the Court held that the order was not narrowly tailored to achieving that interest. First, because there was no evidence that the applicants had contributed to the diffusion of the disease; second, because there were many other less restrictive measures that could have been adopted to minimize the risk to those attending religious services.

In two subsequent free exercise cases, the Court confirmed that deference would no longer be the prevailing standard. In *South Bay United Pentecostal Church* v *Newsom (South Bay II)*,[30] a six-justice majority, including Chief Justice Roberts with the conservatives, in an unsigned opinion from the shadow docket, halted California's prohibition on indoor worship services, but left in force a capacity limit and a ban on singing and chanting. The Chief Justice's concurring opinion testifies to the shift in the Court's approach: after recalling his words in *South Bay I*, he argued that even during a pandemic, the Constitution 'entrusts the protection of the people's rights to the Judiciary' and, consequently, 'deference, though broad, has its limits'.[31] In addition, in *Tandon* v *Newsom*,[32] by a five-four vote, again in a per curiam opinion and again from the shadow docket, the Court blocked a California order limiting religious gatherings in private homes because it did not satisfy the narrowly-tailored requirement of strict scrutiny.

Roman Catholic Diocese of Brooklyn v *Cuomo* and the other two decisions announced the abandonment of the Court's traditional approach to public health measures: orders issued to curb a pandemic would not continue to receive deference, at least in free exercise cases. Indeed, the Court has taken an increasingly active role in second-guessing orders, which restricted religious worship, and subjected them to strict judicial scrutiny.

III. Inconsistency

After *Roman Catholic Diocese of Brooklyn* v *Cuomo*, one would have predicted

[28] ibid 3 (Gorsuch, J., dissenting).
[29] ibid 3 (Gorsuch, J., dissenting).
[30] *South Bay United Pentecostal Church* v *Newsom* 592 US _ (2021).
[31] ibid 2 (Roberts, C.J., concurring).
[32] *Tandon* v *Newsom* 593 US _ (2021).

that the Supreme Court would uniformly move away from a deferential standard of review of public health powers. At the same time, one would have equally expected the Court to apply ordinary tiers of scrutiny when reviewing challenges to orders that imposed restrictions on fundamental rights.

Both these assumptions, however, have turned out to be wrong.

On 12 January 2021, in *Food and Drug Administration* v *American College of Obstetricians and Gynecologists*,[33] the Supreme Court refused to block an order adopted by the Food and Drug Administration, which set specific conditions for obtaining a medication abortion. The order required patients to go in person to a hospital, clinic or medical office to pick up the mifepristone, while the in-person requirement was not demanded for any other medical treatment. At the time, the right to abortion was still constitutionally protected at the federal level by *Roe*[34] and *Casey*;[35] consequently, under the new non-deferential approach, one would have expected the Court to apply the most stringent form of review to the limitation on abortion and to conclude that such restriction no longer survived strict scrutiny. However, the conservative majority of the Justices, without explanation and again with a decision from the shadow docket, held that the restriction for patients seeking to obtain a medicine to terminate early pregnancy was constitutional. Quite surprisingly, Chief Justice Roberts delivered a concurring opinion, highlighting the need for judicial deference to the elected branches and the health officials to whom they delegate power. He clearly stated that in

> 'contexts concerning government responses to the pandemic, my view is that courts owe significant deference to the politically accountable entities with the 'background, competence, and expertise to assess public health'".[36]

This language and the outcome of the case undoubtedly show that the Court was not uniform in departing from the tradition of deference.

Another striking demonstration of the Court's inconsistency is offered by comparing Justice Kavanaugh's dissent in *Calvary Chapel Dayton Valley* v *Sisolak* and Justice Kavanaugh's concurring opinion in *Andino* v *Middleton*.[37] In the former, as noted previously, he warned that there are certain *constitutional red lines* that public health powers may not pass over and he cautioned that the Court's history is characterized by *unfortunate examples* of exceedingly broad judicial deference. The latter deals with the state's power to manage elections during a health emergency and, specifically, concerns South Carolina's witness requirement for absentee ballots. On 10 October 10 2020, the Supreme Court, with a decision from the shadow

[33] *Food and Drug Administration* v *American College of Obstetricians and Gynecologists* 592 US _ (2021).

[34] *Roe* v *Wade* 410 US 113 (1973).

[35] *Planned Parenthood* v *Casey* 505 US 833 (1992).

[36] *Food and Drug Administration* v *American College of Obstetricians and Gynecologists*, n 33 above, 1-2 (Roberts, C. J., concurring).

[37] *Andino* v *Middleton* 592 US _ (2020).

docket, declined to halt that requirement. Justice Kavanaugh, voting with the conservative Justices, wrote a concurring opinion, stressing the need to accord public health officials a high degree of deference. Quoting Chief Justice Roberts' concurring opinion in *South Bay I*, firstly he stated that 'the Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States'. Then, he argued

> 'that a State legislature's decision either to keep or to make changes to election rules to address COVID-19 ordinarily 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'.[38]

However, under the Court's new approach, a more accurate scrutiny would have been appropriate because, as Justice Ginsburg recalled in her dissent in *Shelby County* v *Holder*, the right to vote is 'the most fundamental right in our democratic system'.[39]

These examples prove that abortion and election law[40] are two areas, where the Court has not moved away from the deferential review, which traditionally marked its approach during national crises.

In general, as Professor Amanda Tyler pointed out, the Court 'has not been consistent'[41] in second-guessing public health powers during the pandemic: it has 'exercised rigorous scrutiny of government actions'[42] over some claims, while, concerning other matters, it 'has fallen back on well-worn arguments about deference to those who are better suited to manage a public health crisis'.[43]

The first group, apart from the religious cases after *Roman Catholic Diocese of Brooklyn* v *Cuomo*, include decisions involving property rights and federal vaccine mandate. In these fields, the Court was distinctly active and orders issued to stem the spread of the pandemic have been struck down. On August 26, 2021, the Supreme Court decided *Alabama Association of Realtors* v *Department of Health*

[38] ibid 1-2 (Kavanaugh, J., concurring).

[39] *Shelby County* v *Holder* 570 US 529, 566 (2013).

[40] Besides *Andino* v *Middleton* and still on the subject of voting rights, the Supreme Court, on 6 April 2020, decided *Republican National Committee* v *Democratic National Committee*. With a *per curiam* opinion from the shadow docket, the Court granted the application for stay with reference to a District Court's order requiring that absentee ballots, mailed and postmarked after election day (7 April 7 2020), still be counted so long as they were received by 13 April 2020. See *Republican National Committee* v *Democratic National Committee* 589 US _ (2020).

[41] A.L. Tyler, n 10 above, 525.

[42] ibid 554.

[43] ibid 582. See also E.P.N. Meyer et al 'Courts and COVID-19: an Assessment of Countries Dealing with Democratic Erosion' 5 *Jus Cogens*, 85, 105 (2023): the authors observed that the 'US Supreme Court seems to adopt deferential or restrictive judicial behavior episodically and without following a fixed pattern'.

and Human Services:[44] by a six-three vote from the shadow docket, with a *per curiam* opinion, the Court blocked a nationwide moratorium on evictions, imposed by the Centers for Disease Control and Prevention. In particular, to justify its decision, the majority relied on the major questions doctrine, which holds that Congress has 'to speak clearly when authorizing an agency to exercise powers of "vast economic and political significance" '.[45] On 13 January2022, in *National Federation of Independent Business* v *Occupational Safety and Health Administration*,[46] by a six-three vote, in an unsigned opinion from the shadow docket, the Court referred to the same doctrine to halt an emergency rule, issued by the Occupational Safety and Health Administration (OSHA), which required employers with at least 100 employees to enforce the mandate vaccination programs for employees or, as an alternative, weekly testing and masking. Relying on a troublesome distinction between 'workplace safety standards', which OSHA is authorized to impose, and 'broad public health measures',[47] which it is not, the Court concluded the Congress 'has not given that agency the power to regulate public health more broadly'.[48]

Conversely, there are two other areas, besides the right to terminate pregnancy and voting rights, where the Court continued to defer to state officials: rights of prisoners and census. On the one hand, the Court refused to interfere with decisions concerning prison conditions and managing the pandemic inside penal institutions. On 16 November 2020, in *Valentine* v *Collier*,[49] another case from the shadow docket, the Court declined to reinstate a District Court order requiring a Texas prison to take specific steps to protect inmates against a COVID-19 outbreak. This despite - as Justice Sotomayor reported in her dissent - the 'rampant failures by the prison to protect its inmates from COVID-19'[50] and the fact that people incarcerated in that facility were 'some of our most vulnerable citizens' and faced 'severe risks of serious illness and death'.[51] On the other hand, the Court provides broad discretion to officials on how to conduct the 2020 census. In *Ross* v *National Urban League*,[52]

[44] *Alabama Association of Realtors* v *Department of Health and Human Services* 594 US _ (2021). Previously, on 12 August 12 2021, in *Chrysafis* v *Marks*, the Supreme Court granted a request from a group of New York landlords to lift part of the State moratorium on residential evictions put in place at the beginning of the COVID-19 pandemic. Specifically, the provision allowed New York tenants to avoid eviction by declaring that they had suffered financial hardship as a consequence of the pandemic. See *Chrysafis* v *Marks* 594 US _ (2021).

[45] ibid 6 (per curiam).

[46] *National Federation of Independent Business* v *Occupational Safety and Health Administration* 595 US _ (2022).

On the same day, in *Biden* v *Missouri*, the Supreme Court upheld a Centers for Medicare and Medicaid Services rule, which demanded facilities that participate in Medicare and Medicaid to ensure that their staff were vaccinated against OVID-19 (subject to medical and religious exemptions). See *Biden* v *Missouri* 595 US _ (2022).

[47] ibid 6 (per curiam).

[48] ibid 9 (per curiam).

[49] *Valentine* v *Collier* 592 US _ (2020).

[50] ibid 2 (Sotomayor, J., dissenting).

[51] ibid 11 (Sotomayor, J., dissenting).

[52] *Ross* v *National Urban League* 592 US _ (2020).

in a one-paragraph unsigned decision from the shadow docket, the Court temporarily stayed an order by a District Courtin California requiring the 2020 census count to continue through 31 October 2020, in light of the COVID-19 pandemic. Justice Sotomayor wrote a powerful dissent, where she emphasized that the previous deadline for counting votes (30 September 2020) resulted in a discriminatory effect because of the higher percentage of non-responses 'among marginalized populations and in hard-to-count areas, such as rural and tribal lands'.[53]

It has been observed that the continental European courts were more likely to defer in the early stages of the pandemic due to a framework of uncertainty, while, with the evolution of scientific knowledge, in successive phases, judicial review of COVID-19 measures became progressively more stringent. It can also be observed that the United States Supreme Court has followed a different pattern. As the caselaw demonstrates, the Court has inconsistently shifted its approach, deferential or rigorous, depending on the areas and matters of the constitutional challenges, without following the progression between different stages of the health emergency.

IV. The Most Favored Nation Status of the Free Exercise Clause

On 12 November 2020, as part of a speech to the Federalist Society, Justice Alito warned: 'It pains me to say this, but in certain quarters, religious liberty is fast becoming a disfavored right'.[54]

A couple of weeks later, Justice Alito's concern proved unfounded with the decision in *Roman Catholic Diocese of Brooklyn* v *Cuomo* and subsequent cases on religious liberty. Indeed, one of the most apparent consequences of Justice Ginsburg's replacement with Justice Barrett was an expansion in the safeguard of the First Amendment's Free Exercise Clause: the new conservative majority, consisting of Justices Thomas, Alito, Gorsuch, Kavanaugh, Barrett plus the Chief Justice Roberts, seemed willing to afford larger protection to religion.[55]

[53] ibid 6 (Sotomayor, J., dissenting).

[54] 'Supreme Court Justice Samuel Alito Speech Transcript to Federalist Society' *Rev.com*, available at https://tinyurl.com/ycyfzv6n (last visited 30 September 2024).

[55] In general, it has been observed that the Roberts Court has been more inclined to grant greater protection to religious freedom. Professor Lee Epstein and Professor Eric A. Posner reported that across 'the Warren, Burger, and Rehnquist courts the religious side prevailed about half the time, with gradually increasing success. In the Roberts Court, the win rate jumps to 81%'. See L. Epstein and E.A. Posner, 'The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait' *Supreme Court Review*,315, 324 (2021). This trend is likely to become more pronounced with Justice Barrett's confirmation.

At the same time, an analysis related to state and federal judicial decisions, issued between 1 March 2020, and 1 July 2022, has revealed that Free Exercise Challenges to COVID-19 orders, limiting religious worship, have had a higher success rate. Indeed, 'although most decisions rejected such claims, plaintiffs were more successful in these claims than in many other types of individual rights claims, as courts ruled partially or fully for plaintiffs in 37 of the 143 decisions in our compilation in which plaintiffs challenged gathering restrictions based on religious liberty claims'. See W.E. Parmet and F. Khalik, 'Judicial Review of Public Health Powers Since the Start of the COVID-19

In order to perceive this change, labeled as 'dramatic',[56] it is necessary, once again, to refer to COVID-19 cases involving free exercise claims and, specifically, to *South Bay I*, decided before Justice Barrett's confirmation, *Roman Catholic Diocese of Brooklyn* v *Cuomo* and *Tandon* v *Newsom*. As noted above, these decisions concerned challenges to orders, which imposed numerical restrictions on places of worship, at-home religious gatherings, and many secular services. At the same time, a few different secular entities were exempted and subjected to less stringent limitations. The constitutional question with which the Justices grappled was whether these mitigation measures discriminated against religion by imposing preferential treatments on secular gatherings while declining them for religious gatherings. Specifically, in addressing the argument of discrimination, they dealt with the matter of comparability: whether the secular activities that were disciplined less rigorously were comparable to the religious practices that were treated more strictly.[57]

The Court resolved these issues in different manners, following the modification in its composition.

In *South Bay I*, the Court declined to halt the pandemic order on free exercise grounds. In his concurring opinion, Chief Justice Roberts explained that limitations of places of worship did not discriminate against religion, because

> 'similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances'.[58]

In his view, the apt comparators were these gatherings, given that 'large groups of people gather in close proximity for extended periods of time', and not the exempted secular activities, such as operating grocery stores, banks and laundromats, where people 'neither congregate in large groups nor remain in close proximity for extended periods'.[59] Therefore, in the majority of the Court's view, religious gatherings should be compared to secular activities that exhibit analogous characteristics and, therefore, are similar in their likelihood of spreading the disease.

The Court's approach, however, changed drastically after Justice Barrett's confirmation.

In *Roman Catholic Diocese of Brooklyn* v *Cuomo*, the Court held that the order violated the neutrality and the general applicability requirements set in *Employment*

Pandemic: Trends and Implications' 113(3) *American Journal of Public Health*, 280, 282 (2023).

[56] E. Chemerinsky, *The Supreme Court in Transition: October Term 2020* (Chicago: American Bar Association, 2021), 55.

[57] In this regard, it has been noted that 'The issue of comparator is an increasingly significant theme of United States jurisprudence, in particular from the Supreme Court'. See B. Bennett et al, *COVID-19, Law & Regulation. Rights, Freedoms, and Obligations in a Pandemic* (Oxford: Oxford University Press, 2023), 217.

[58] *South Bay United Pentecostal Church* v *Newsom* n 19 above, 2 (Roberts, C.J., concurring).

[59] ibid 2 (Roberts, C.J., concurring).

Division v *Smith*[60] (although the *per curiam* opinion did not cite this decision) and in *Church of Lukumi Babalu Aye* v *City of Hialeah*,[61] and consequently discriminated against religion.[62] In particular, the conservative majority argued that the regulations were not a neutral rule of general applicability because 'they single out houses of worship for especially harsh treatment'.[63] Hence, the Court explained that the State has placed less onerous restrictions on businesses, categorized as essential, such as acupuncture facilities, campgrounds, garages and transportation facilities, compared to constraints imposed on houses of worship. According to the Court, New York had regulated religious activities more rigorously than comparable secular activities. However, on the one hand, the Court omitted to justify why it believed those secular entities were the appropriate comparators; on the other hand, the Court clearly overlooked the relevant differences between the businesses in question and religious worship. Nevertheless, the order was subject to strict scrutiny: although stemming the diffusion of the virus was considered a valid compelling interest, the narrowly tailored condition was not satisfied.

Roman Catholic Diocese of Brooklyn v *Cuomo* case makes evident that when the Court referred to a secular comparator, it did no longer intend 'an activity or venue of comparable risk, size or kind';[64] instead, it meant any secular business that was more leniently regulated compared to religious entities. This view is expressly revealed by Justice Kavanaugh's concurring opinion, where he argued that

> 'once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class'.[65]

This approach has been confirmed and further developed in *Tandon* v *Newsom*. The *per curiam* opinion expressly stated that government regulations violated the Free Exercise Clause 'whenever they treat any comparable secular activity more favorably than religious exercise'.[66] Then, even though all secular at-home gatherings were limited in the same way as in-home religious meetings, the Court found California treated some comparable secular activities more

[60] *Employment Division* v *Smith* 494 US 872 (1990). For an in-depth discussion of the neutrality and general applicability requirement, C. Mala Corbin, 'Religious Liberty in a Pandemic' 70(1) *Duke Law Journal Online*, 1, 9-26 (2020).

[61] *Church of Lukumi Babalu Aye* v *City of Hialeah* 508 US 520, 532-546 (1993).

[62] Professor Cass Sunstein described *Roman Catholic Diocese of Brooklyn* v *Cuomo* as a 'kind of anti-*Korematsu* – as a strong signal of judicial solicitude for constitutional rights and of judicial willingness to protect against discrimination, even under emergency circumstances in which life is on the line'. See C.R. Sunstein, 'Our Anti-Korematsu' 1 *American Journal of Law and Equality*, 221, 222 (2021).

[63] *Roman Catholic Diocese of Brooklyn* v *Cuomo* n 27 above, 3 (*per curiam*).

[64] M. Karbon, 'Free Exercise in the COVID era: The New Court's Kantian Approach to Religion' 15(2) *Washington University Jurisprudence Review*, 383, 406 (2023).

[65] *Roman Catholic Diocese of Brooklyn* v *Cuomo* n 27 above, 3 (Kavanaugh, J., concurring).

[66] *Tandon* v *Newsom* n 32 above, 1 (*per curiam*).

favorably than at-home religious practice. In reaching that conclusion, without any justification, the Court compared private religious in-home gatherings with significantly different services, like 'hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants',[67] which were less stringently restricted. Ironically, but effectively, Justice Kagan, in her dissent, observed that 'the law does not require that the State equally treat apples and watermelons'.[68] Again, the order was subject to strict scrutiny and did not survive judicial control.

Tandon signals what, from the perspective of the new conservative majority, represents illegitimate discrimination towards religion: the decision to restrict worship while subjecting some secular activities to a more favorable treatment violates the First Amendment's Free Exercise Clause. In other words, the government is not allowed to regulate secular businesses less stringently than worship, regardless of any substantial difference between them. Indeed, 'any line-drawing that results in a better outcome for some secular spaces over religious spaces must be seen as a subordination of religion'.[69] Consequently, religious activities must always be treated in the same way as the most favored secular entities.

The Free Exercise challenges to pandemic mitigation measures reveal some astonishing features of the Supreme Court's approach during the health emergency.

First, the conservative justices have assigned religious liberty enhanced value, superior to the other fundamental rights that previously enjoyed equal consideration, and also to the right to health, despite the dramatic context of the pandemic.

Free exercise of religion has been provided greater protection to the extent that some commentators have observed that it has been afforded a kind of 'Most Favored Nation status'.[70] This expression, borrowed from economics and originally referred to international agreements, 'refers to any system which mandates that all privileges bestowed upon one entity must also be awarded to another, regardless of circumstances'.[71] It also perfectly aligns with the Court's view about religion. As noted above, according to the Court's conservative wing, religious liberty has to be treated the same as the most leniently regulated secular activity. Hence, 'if a statute provides any exemptions to the regulation at issue for secular reasons, then religious activity must be accorded an exemption as well'.[72]

[67] ibid 3 (*per curiam*).

[68] ibid 1 (J. Kagan, dissenting).

[69] Z. Rothschild, 'Free Exercise Partisanship' 107 *Cornell Law Review*, 1067, 1119 (2022).

[70] D. Laycock, 'The Remnants of Free Exercise' *Supreme Court Review*, 1, 49-50 (1990).

[71] M. Karbon, n 64 above, 402.

[72] M. Strasser, 'COVID-19, Free Exercise, and Most Favored Nation Status' 27(1) *Lewis &Clark Law Review*, 1, 2 (2023). The enforcement of the Most Favored Nation (MFN) principle may be quite problematic and may result in undesirable consequences, as the following example demonstrates. 'Assume a court upholds a city ordinance requiring private parades traveling through city streets to obey traffic rules and stop at stop signs and red traffic lights. Assume also that the court has recognized that ambulances driving patients to the hospital are not subject to these limitations. Certainly the Free Speech Clause would not require that a caravan of car protestors receive the same

The second feature pertains to the intensity of review: the mere existence of a secular exemption in public health measures has triggered strict scrutiny. Once strict scrutiny was applied to public health orders, infringing on religious liberty, the conservative majority of the Justices concluded that those orders could not survive judicial review, because they failed the narrowly tailored requirement.

In 2015, Professor Elizabeth Sepper introduced the phenomenon of Free Exercise Lochnerism in the scholarship debate, noting that courts have increasingly incorporated 'the central premises of Lochner into religious liberty doctrine'.[73] The fact that the Court has placed the right to free exercise above all others and the aggressive protection it has granted to this right enable to refer this concept also to the jurisprudence during the health emergency. Free Exercise Lochnerism alludes to the rigor and severity of the judicial control of public health regulations, infringing on religious liberty. Indeed, echoing Professor Gerald Gunther's renowned expression, the Court has exercised an excessive stringent form of scrutiny, which was 'strict in theory', but 'fatal in fact'.[74]

Finally, Free Exercise cases reveal that religion has been treated as a 'trump' card[75] and not as a 'shield':[76] plaintiffs who have challenged public health orders on religious grounds have always succeeded after the Supreme Court's composition change. Indeed, the conservative majority has been reluctant to balance religious liberty with other fundamental rights, nor has it accorded a certain degree of priority to the right to health. The difference between the balancing technique and the quadripartite structure of proportionality, employed by courts in continental Europe, is quite apparent.

V. Disregard for Science

The third feature, which distances the Supreme Court from continental European courts, pertains to the role of science in judicial-decision making: if the latter has accorded great weight to technical and scientific expertise, the former,

favored traffic-law treatment provided to ambulances. Yet under a MFN approach, if the caravan consisted of religious worshippers – say, on the way to a funeral – would we conclude that unless the hearse and other mourners were allowed to speed through red lights that their religious liberty would be constitutionally disrespected and impermissibly demeaned on account of the relatively superior treatment of emergency medical vehicles?'. See, V.D. Amar and A.E. Brownstein, 'Exploring the Meaning of and Problems With the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach to Protecting Religious Liberty Under the Free Exercise Clause' *Verdict*, available at https://tinyurl.com/24b69kz9 (last visited 30 September 2024).

[73] E. Sepper, 'Free Exercise Lochnerism' 115 *Columbia Law Review*, 1453, 1455 (2015).

For an historical analysis of the Free Exercise Lochnerism phenomenon, also J.K. Kessler, 'The Early Years of First Amendment Lochnerism' 116(8) *Columbia Law Review*, 1915 (2016).

[74] G. Gunther, 'The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection' 86(1) *Harvard Law Review*, 1, 8 (1972).

[75] R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 193.

[76] F. Schauer, 'A Comment on the Structure of Rights' 27 *Georgia Law Review*, 415, 429-430 (1993).

especially after the change in its composition in November 2020, has been indifferent, if not hostile, towards public health evidence.[77] On the one hand, judges required governments to take evidence-based, or at least evidence-informed, decisions, acknowledging the growing relevance of science in 'providing guidance'[78] to decisions related to pandemic mitigation measures; on the other hand, scientific and medical expertise received little, if any, consideration by the conservative majority of the Justices.[79]

It is pertinent, once again, to first refer to Free Exercise challenges to COVID-19 orders. As noted, the key issue was comparability: whether religious gatherings have been regulated more strictly than comparable secular activities. The scientific consensus suggested that places of worship and at-home religious services, where people congregate in large groups, talk, chant and remain in close proximity for extended periods, often have turned into 'super-spreader events'.[80] Consequently, one would have expected the comparison to be made with other secular activities, which, according to the scientific community and based on the evolving knowledge about the pandemic, present similar and elevated risks of spreading the virus.[81] However, the conservative Justices have surprisingly followed a different pattern: they regularly overlooked the factual findings[82] of the lower courts, nor did they consider the relevant expertise in making the comparability evaluation. Instead, the majority appeared to rely 'on its own intuition to determine which activities were comparable to the religious services that were restricted'.[83]

This approach was explicitly foreshadowed in Justice Kavanaugh's dissent in *Calvary Chapel Dayton Valley* v *Sisolak*. Substituting a scientifically grounded assessment with his own personal judgement, he affirmed: 'I continue to think that the restaurants and supermarkets … pose similar health risks to socially distanced religious services'.[84]

The trend was confirmed once the conservative Justices became the majority.

[77] W.E. Parmet, n 11 above, 87.

[78] F. Cafaggi and P. Iamiceli, n 4 above, 33.

[79] H. Hershkoff and A.R. Miller, 'Courts and Civil Justice in the Time of Covid: Emerging Trends and Questions to Ask' 23 *Legislation and Public Policy*, 321, 332, 396, 399, 405 (2021).

[80] L.M. Marsh, 'Confusion in the Time of COVID: The Supreme Court's Lack of Clarification in Balancing a Public Health Emergency and the Constitutional Right to Free Exercise' 86 *Missouri Law Review*, 647 (2021): a super-spreader event is 'where the number of cases transmitted will be disproportionately high compared to general transmission' (fn 3). See also, A. Woodward 'Trump declared houses of worship essential. Mounting evidence shows they're super-spreader hotspots' *Business Insider* available at https://tinyurl.com/4r54vc9a (last visited 30 September 2024).

[81] C. Mala Corbin, n 60 above, 5.

[82] M. Strasser, n 72 above, 30. The author first recalls that 'district court is the finder of fact', then argues that 'it is difficult to understand why the trier of fact's findings would be ignored, especially if there were various reasons that the practices at the religious institutions would be more likely to cause virus transmission'.

[83] W.E. Parmet, 'From the Shadows: The Public Health Implications of the Supreme Court's COVID-Free Exercise Cases' 49 *The Journal of Law, Medicine & Ethics*, 564, 569 (2021).

[84] *Calvary Chapel Dayton Valley* v *Sisolak* n 22 above, 11 (J. Kavanaugh, dissenting).

In *Roman Catholic Diocese of Brooklyn* v *Cuomo*, the Court held that some secular businesses, classified as essential, were the apt comparators to religious services. In reaching that conclusion, it ignored the factual findings of the District Court: indeed, as Justice Breyer highlighted in his dissent,

> 'After receiving evidence and hearing witness testimony, the District Court in the Diocese's case found that New York's regulations "were crafted based on science and for epidemiological purposes"'.[85]

Hence, according to the District Court, the appropriate comparators should have been 'public lectures, concerts or theatrical performances',[86] treated even more rigorously than religious services. At the same time, the Court did not explain the reasons why it believed that essential businesses were comparable to religious ones, nor did it consider medical and scientific expertise, related to the heightened likelihood of infection in these latter services, thus playing, in Justice Sotomayor's words,

> 'a deadly game in second-guessing the expert judgement of health officials about the environments in which contagious virus, now infecting a million Americans each week, spreads most easily'.[87]

In *Tandon* v *Newsom*, the Court also added that 'comparability is concerned with the risks various activities pose';[88] however, surprisingly, the majority did not take into account any evidence regarding the different risks of contamination, that in-home religious gatherings posed compared to secular businesses more leniently regulated; nor did it provide any explanation about how the Court has determined the relevant comparable activities. Once again, the minority dissented: Justice Kagan sharply criticized the majority for neglecting the District Court's findings, 'based on the uncontested testimony of California's public-health experts', and for avoiding any discussion of the health evidence. Hence, she bitterly concluded, the Court

> 'once more commands California "to ignore its experts' scientific findings," thus impairing "the State's effort to address a public health emergency"'.[89]

Another area where the Court's tendency towards science is evident concerns constitutional challenges to federal vaccine mandates. In general, vaccination is a matter where the evidentiary basis of decision-making was largely discussed: indeed, in continental Europe, courts focused essentially on the efficacy and the safety of the COVID-19 vaccines, as well as on the adequacy of the mandates to

[85] *Roman Catholic Diocese of Brooklyn* v *Cuomo* n 27 above, 2 (J. Breyer, dissenting).
[86] ibid 2 (J. Breyer, dissenting).
[87] ibid 3 (J. Sotomayor, dissenting).
[88] *Tandon* v *Newsom* n 32 above, 2 (per curiam).
[89] ibid 2 (J. Kagan, dissenting).

mitigate the spread of the pandemic. On the contrary, the United States Supreme Court has resolved these disputes on a different ground. Both *Biden* v *Missouri* and *National Federation of Independent Business* v *Occupational Safety and Health Administration (NFIB* v *OSHA)*, albeit with different outcomes, are centered on who has the power to introduce compulsory vaccination. Specifically, the Court has hinged the issue on the principle of horizontal separation of powers, ultimately investigating how much authority Congress has delegated to the executive branch.[90] Justice Gorsuch's concurring opinion in *NFIB* v *OSHA* is truly illustrative in this regard. He began by affirming that 'the central question we face today is: Who decides?'; then, he specified,

> 'the only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people'.[91]

Nevertheless, the Court's seemingly science-neutral approach tends to devalue medical and scientific evidence. In *NFIB* v *OSHA*, the conservative majority concluded that the Occupational Safety and Health Administration did not have the authority to impose a vaccine mandate, neither testing nor masking as alternatives. From a substantive standpoint, however, the Court ended up displacing a rule by a federal agency, which, as Justices Breyer, Sotomayor and Kagan in their dissent observed, was based

> 'on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID-19 in most workplaces'.[92]

Therefore, compared to Justice Gorsuch's concurring opinion, the question seems better posed in the dissent:

> 'Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?'.[93]

The majority felt it was entitled to the final word, granting itself the power to second-guess the experts and replacing scientific assessments with judgements,

[90] For some justices, the preliminary problem of vertical separation of powers also arises, ie could Congress delegate this power or was it the responsibility of the state level.

[91] *National Federation of Independent Business* v *Occupational Safety and Health Administration* n 46 above, 1 (J. Gorsuch, concurring).

[92] ibid 5 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[93] ibid 12 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

unsupported by any medical competence.[94]

In 2000, Justice Breyer wrote that science should expect to find a 'warm welcome, perhaps a permanent home, in our courtrooms'.[95] Although he acknowledged that a 'judge is not a scientist and a courtroom is not a scientific laboratory', he famously stated that the 'law must seek decisions that fall within the boundaries of scientifically sound knowledge'.[96] In Justice Breyer's view, judicial decisions should reflect an appropriate scientific and technical awareness to cope with the needs of society. In an emergency, in which there was a compelling need for health protection, the attitude of the current majority of the Court toward science raises more than a few concerns. Far from fulfilling Justice Breyer's wish, the cases analyzed[97] expose the majority's indifference to health evidence and its unwillingness to accord any relevance to medical expertise.

VI. The Legacy of the Health Emergency: Partisanship and Conservative Judicial Activism with Distinctive Features

The Supreme Court's case law on COVID-19 orders reveals some *exceptional* patterns: the Court has departed inconstantly from its long tradition of deference during times of emergency; it has accorded heightened protection to Free Exercise, even at the expense of the right to health; it has devalued health evidence and scientific expertise.

The origins of this peculiar approach lie essentially in the composition of the Court, especially after the replacement of Justice Ginsburg by Justice Barrett, and in the Justices' inclination to mirror the preferences of the appointing Presidents. The actual majority consists of Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, Kavanaugh and Barrett. All of them are Republican appointees (the last three by President Trump), ideologically conservative and more pro-religion than average.[98] With the exception of Chief Justice Roberts, who, at least on some occasions,[99] settled on a more moderate position, the others have regularly voted

[94] President Biden harshly lambasted the decision in *NFIB* v *OSHA*, noting that 'I am disappointed that the Supreme Court has chosen to block common-sense life-saving requirements for employees at large businesses that were grounded squarely in both science and the law'. See 'Statement by President Joe Biden on the U.S. Supreme Court's Decision on Vaccine Requirements' available at https://tinyurl.com/5y29457x (last visited 30 September 2024).

[95] S. Breyer, 'Science in the Courtroom' 16(4) *Issues in Science and Technology*, 52 (2000).

[96] ibid 53.

[97] In this regard, the following previously mentioned cases might also be included: *Alabama Association of Realtors* v *Department of Health and Human Services*; *Valentine* v *Collier*; *Republican National Committee* v *Democratic National Committee*. In all, the Court gave no consideration to what the science said, nor it was concerned about the negative consequences of its decisions on the public health.

[98] L. Epstein and E.A. Posner, n 55 above, 327.

[99] See *Roman Catholic Diocese of Brooklyn* v *Cuomo*, where the Chief Justice Roberts dissented with the conservative majority, because he considered that the case has become moot.

in line with the views of the Republican Party.

In a country marked by profound polarization, Republican politicians have been more skeptical of the pandemic mitigation measures than Democrats; they are also known for their attitude towards religious rights, as well as for their aversion to abortion. On the one hand, this may justify the abandonment of the deferential approach in favor of more rigorous judicial control, with many challenges won, mostly with the casting votes from Justices appointed by Republican Presidents.[100] The trend is particularly evident in Free Exercise challenges to COVID-19 orders, where the conservative Justices have almost always ruled in favor of religious liberty, and in particular, those appointed by Trump, while the liberals have always sided with the government.[101] On the other hand, the Republicans' view on abortion (entirely endorsed by President Trump) may help to explain the inconsistency of the Court: the inclination of conservative Justices to exercise a stringent review during the pandemic, when fundamental rights were implicated, and to rule against public health orders has been overcome by their hostility to the right to terminate the pregnancy. An opposite shift has characterized the liberal minority, with Justices Breyer, Sotomayor and Kagan voting for abortion and against the government.[102] As noted, the result has been a deferential review, which, anticipating the decision in *Dobbs* v *Jackson Women's Health Organization*,[103] has essentially allowed anti-abortion governors 'to use the pandemic as a proxy for denying or infringing on reproductive rights through anti-abortion measures'.[104]

Free Exercise and abortion challenges are illustrative[105] of the fact that the

[100] W.E. Parmet, n 11 above, 75.

[101] This conclusion is consistent with the results of a research conducted on a sample of 123 federal courts decisions, pertaining to free exercise challenges to COVID-19 orders, occurred between the outbreak of the pandemic and 31 December 31 2020. In COVID-19-related free exercise cases, 'Democratic-appointed judges sided with the government 100% of the time, while Republican-appointed judges sided with the government 34% of the time and with religious plaintiffs 66% of the time (a 66% differential). Trump-appointed judges, meanwhile, sided with the government 18% of the time and with religious plaintiffs 82% of the time (an 82% differential with Democratic-appointed judges)', see Z. Rothschild, n 69 above, 1083.

[102] K. Mok and E.A. Posner 'Constitutional Challenges to Public Health Orders in Federal Courts during the COVID-19 Pandemic' 102 *Boston University Law Review*, 1729, 1747-1748 (2022). The authors focused on all civil liberties challenges other than those based on the First Amendment's Free Exercise Clause; they collected cases decided at all levels of the federal judiciary, between 1 March 2020 and 29 June 29 2021. They found that 'the abortion cases present a special twist. Here, the inclination of Democratic-appointed judges to side with the state during the public health crisis conflicted with the commitment to abortion rights. The Republican-appointed judges faced the same tension in the opposite direction: the suspicion of public health orders conflicted with hostility to abortion rights. The groups switched sides, possibly indicating attitudes toward abortion trumped attitudes toward government public health action'.

[103] *Dobbs* v *Jackson Women's Health Organization* 597 US _ (2022).

[104] E. Chemerinsky and M. Goodwin, n 18 above, 817.

[105] In this regard, however, the decisions on evictions moratorium and prison conditions are also worth mentioning. Both mirrored the Republicans' attitude respectively on property rights and prisoners' right not to be subjected to cruel and unusual punishments: in the former, the Court

Court has split along partisan lines. In those cases, party affiliations and political ideologies align with votes by Democratic and Republican-appointed Justices.

However, increased judicial partisanship is not the only legacy of the health emergency. Closely related to the latter, the case law also reports a tendency toward judicial activism: a conservative judicial activism with some peculiar traits.

As has been observed, judicial activism is 'not a monolithic concept'; instead, it can 'represent a number of distinct jurisprudential ideas'[106] and may take on different meanings.

In the specific context of the health emergency, first of all, judicial activism, as Professor Cass Sunstein observed years ago, refers to the Supreme Court's tendency to frequently strike down the actions of other parts of government[107] in cases where those actions were not plainly unconstitutional.[108] As noted, the Court has departed, at least in some areas, from a long tradition of deference to political elected branches and officials during national emergencies, exercising a more rigorous review and invalidating public health measures which were not plainly unconstitutional (or rather, which were not unconstitutional at all).

Secondly, the Court has overturned a long-established approach to how courts should control public health orders and has affirmed relevant principles in constitutional law by relying entirely on its shadow docket. Professor William Baude affirmed that the non-merits docket is 'opaque'.[109] Even during the pandemic, its use confirmed the transparency concern: the Court has offered little, and in some cases, no explanations to justify the outcomes, thereby significantly reducing the quality of the reasoning.

Judicial activism also usually correlates with a low regard for precedents and stare decisis. In this regard, however, the pandemic context reveals a distinguishing feature. Traditionally, the Court has held that decisions from the shadow docket lack precedential value.[110] However, Professor Stephen Vladeck argued that the Supreme Court, at least in Free Exercise cases, has given precedential effect also to its decisions from the non-merits docket: in the Court's view, he noted, all of the Court's shadow docket orders 'were to be treated as precedent by lower courts, even the unsigned and unexplained ones'.[111] The recognition of precedential

ruled in favor of property owners and against tenants; in the latter, it ruled against inmates' right to have safe prison conditions.

[106] K.D. Kmiec, 'The Origin and Current Meanings of "Judicial Activism"' 92 *California Law Review*, 1441, 1476 (2004).

[107] C.R. Sunstein, n 1 above, 41.

[108] C.R. Sunstein, 'Opinion. Taking Over the Courts' *The New York Times*, available at https://tinyurl.com/kh9yhhhw (last visited 30 September 2024).

[109] W. Baude, n 7 above, 4. See also S.I. Vladeck, 'The Supreme Court Needs to Show Its Work' *The Atlantic* available at https://tinyurl.com/yrx938kj (last visited 30 September 2024); I. Somin, 'Major Question of Power: The Vaccine Mandate Cases and Limits of Executive Authority' *Cato Supreme Court Review*, 69, 70, 93-95 (2021-2022).

[110] S.I. Vladeck, n 8 above, 724.

[111] ibid 734. See also S.I. Vladeck, 'The Supreme Court's Most Partisan Decisions Are Flying Under the Radar' *Slate* available at https://tinyurl.com/yc39c3sn (last visited 30 September 2024).

value to emergency decisions may be ascribed to judicial activism.

Another expression of judicial activism lies in the Court's willingness to second-guess scientific expertise, albeit amid a health emergency. Professors Helen Hershkoff and Arthur Miller pointed out that, during the pandemic, President Trump 'undermined the public's trust in medical guidelines, routinely disparaging health professionals'.[112] In this respect, the majority of the Court was also aligned with the President's attitude, replacing scientifically-based considerations with personal judgements not grounded in medical evidence.[113]

Lastly, judicial activism within the emergency context means 'result-oriented judging'.[114] On the one hand, the inconsistent approach of the conservative majority, sometimes inclined to exercise a rigorous review of the pandemic mitigation measures, other times deferential, seems 'driven by the particular merits of the cases'.[115] On the other hand, but closely related, the Court, in the manner of a 'judicial arm of the Republican party',[116] seemed much more inclined to realize a Republican agenda than to safeguard public health at a time, however, when there was a pressing need for it.

Two final remarks.

First, it has been argued that, even during a pandemic, ordinary tiers of review, and specifically strict scrutiny, should be applied instead of deferential judicial control.[117] If this view is to be embraced in theory, the Supreme Court's case law on COVID-19 measures caution about calling for expansive judicial monitoring under emergency circumstances. What seems troubling is the Court's tendency to dismiss scientific evidence and the fact it appeared to have no regard for the consequences of its decisions on public health and safety.

Second. Justice Breyer, before his retirement, wrote that the Supreme Court's authority 'depends on trust, a trust that the Court is guided by legal principles, not politics'.[118] If this is true, and such is believed to be the case, judicial partisanship seems to erode the Court's authority and, before that, the public's confidence in the Court and in its power to act as a constitutional check on the other branches and as a guardian of fundamental rights.

[112] H. Hershkoff and A.R. Miller, n 79 above, 353.

[113] Not surprisingly, on *Nature*, has been published an essay, with the impressive title 'The Supreme Court's War on Science', where the author, discussing the trio of landmark decisions issued by the Supreme Court in late June 2022, noted that the ultraconservative, six-member supermajority, is 'often sceptical of – if not outright hostile towards – science'. See J. Tollefson, 'The Supreme Court's War on Science' 609 *Nature*, 460, 461 (2022).

[114] K.D. Kmiec, n 106 above, 1475.

[115] A.L. Tyler, n 10 above, 496, 588-593.

[116] 'The Supreme Court Isn't Listening, and It's No Secret Why' *New York Times*, available athttps://tinyurl.com/5c2yprrj (last visited 30 September 2024).

[117] L.F. Wiley and S.I. Vladeck, 'Coronavirus, Civil Liberties, and the Courts: the Case Against "Suspending" Judicial Review' 133(9) *Harvard Law Review Forum*, 179 (2020); E. Chemerinsky and M. Goodwin, n 18 above, 820, 849.

[118] S. Breyer, *The Authority of the Court and the Peril of Politics* (Cambridge, Massachusetts: Harvard University Press, 2021), 100.