University of St. Thomas Law Journal

Volume 18
Issue 2 *Preparing for the Next Pandemic*

Article 9

April 2022

American Contagions: Unexpected Pasts, Unwieldy Presents, and Contested Futures

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ARTICLE

AMERICAN CONTAGIONS: UNEXPECTED PASTS, UNWIELDY PRESENTS, AND CONTESTED FUTURES

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I. INTRODUCTION

With this article, I aim to trace three different features of the law of pandemics. First, I will describe an unexpected history of epidemics in the United States, one that I think will be surprising to many Americans and that looks different than one might have imagined. Second, I will turn to our unwieldy present, with its cacophony of different points of view and perspectives and account for some of the controversies that have arisen in the law of pandemics in the last year or so. Third, I will do what historians should never do: I will make a couple predictions about our contested future—or at least try to shine a light on some of the directions we might be headed.

II. UNEXPECTED PASTS

For most of United States history—and for the vast majority of human history—the problem of epidemic and infection has been front and center in legal systems and in social organization. As one epidemiologist recently quipped, "The nineteenth century was followed by the twentieth, which was followed by the . . . nineteenth century."[1] We may well be returning to a new era in which infectious disease plays a much larger role in our law and in our society than it did in the second half of the twentieth century, when all too many infectious disease specialists believed we had defeated this scourge once and for all.

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1. ALFRED CROSBY, AMERICA'S FORGOTTEN EPIDEMIC: THE INFLUENZA OF 1918, at xiv (Cambridge Univ. Press 2d ed. 2003).

There are two schools of thought in thinking about the socio-politico-legal history of disease. One is the idea that epidemics make states. I associate this idea with Peter Baldwin's book *Contagion and the State in Europe*, which uses examples from the late nineteenth and early twentieth century to capture how germs smote human social organization, and how they come like asteroids from outer space to our world—and they remake it.[2] As a result, we build our politics around what germs do. We can see this, for example, in early modern medieval Europe, where the Black Death transformed the European state. But there's a counter tradition here that we can refer to as what my colleague Yale historian Frank Snowden describes as "we get the germs that we deserve."[3] And what Professor Snowden means by this is that germs have evolved to match the social structures that we have produced. So in many ways, epidemics are the continuation of the social structures and politics that we have produced.

Here, I will pursue the second hypothesis and see if it can make sense of the American history of epidemics. I think what we will see when we start to pursue this path is that there are two different legal regimes which have existed historically across states in the modern era.

The first one is something we can call "quarantinism." Traditionally this has been associated with the contagious theory of disease, the idea that disease passed among bodies. There is of course a lot of truth in this theory, but we can see that it led authoritarian regimes in the mid-nineteenth century—Prussia, Eastern European states—to establish strict quarantines and *cordon sanitaire* and to control bodies as a way to manage infection risk and disease.[4]

The second kind of legal regime we can call the "sanitationist" regime. Sanitation is a strategy which is rooted in a very different idea of disease, and the strategy originates in the environmentalist theory of disease where diseases come from environments. As a result, the sanitationist regime focuses not on the control of bodies, but on the control of the settings in which human beings and their communities exist. We might associate these policies with liberal states that seek to make better environments to lift up the people who live within them, parroting the mid-nineteenth-century case in the United Kingdom where cholera was dealt with mainly through sanitation and other kinds of things that lift up whole populations in urban settings.

The United States has been both of these regimes. It has been sanitationist for white people and for elites, and it has been quarantinist at the

2. *See* Peter Baldwin, Contagion and the State in Europe, 1830–1930 (Cambridge Univ. Press 1999).

3. Frank M. Snowden, Epidemics and Society: From the Black Death to the Present 7 (2019).

4. John Fabian Witt, American Contagions: Epidemics and the Law from Smallpox to COVID-19 (2020).

borders, and for non-whites and the poor. The story I tell here will pursue this mixed theory in the United States throughout history.

So, where to start? The best place would be with the long history of police power and what mid-nineteenth-century jurists called the "jurisprudence of hygiene." In 1879, U.S. Army Surgeon John Billings wrote a book of that title positing that every member of the community is entitled to good health and that liberty and control of property exists on the condition that they are exercised so as not to harm the rights of others.[5]

This ordinary mid-nineteenth-century liberal idea was powerfully connected to the idea that individual states within the United States had the authority and the power to do what was necessary to regulate for the health of the people. This was captured in the *Ciceronian dictum* "*Salus populi suprema Lex*," or, the health of the people is the supreme law.[6] Organizations like the Massachusetts Sanitary Commission in 1850 powerfully articulated this idea.[7] Chief Justice John Marshall of the U.S. Supreme Court voiced it in one of the most important passages of the constitutional law of the early republic.[8]

The *salus populi* dictum was connected to the robust police power that existed to deal with the problem of infection and epidemic. It is no wonder that nineteenth-century legal authorities relied so heavily on this police power because the nineteenth century was riddled with many horrifying infectious diseases: cholera, smallpox, yellow fever, typhoid, and many more.[9] To get a sense for the police power, we could compare it to the war power: the power to engage in national self-defense. Each offers an awesome and plenary authority, with massive risks of abuse but also indispensability: the power to conscript human beings into national self-defense—the draft—is akin to the power to conscript human beings into the project of protecting human communities against infectious disease.

Nineteenth-century states and localities deployed the police power to advance robust sanitationist regimes. Efforts to combat disease included sweeping and coercive sanitary provisions of kinds that eventually became commonplace all across the United States. They included the kinds of modern urban measures we take for granted today: removal of nuisances, street cleaning, the banning of animal carcasses in the streets, the disposal of waste,[10] and prohibitions on letting pigs roam the streets.[11] All of these

5. John S. Billings, *Jurisprudence of Hygiene*, *in* A TREATISE ON HYGIENE AND PUBLIC HEALTH 34 (1879).

6. *See* LEMUEL SHATTUCK, REPORT OF THE SANITARY COMMISSION OF MASSACHUSETTS, 1850 (1948).

7. *See id.*

8. *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

9. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

10. LOUISE CARROLL WADE, CHICAGO'S PRIDE: THE STOCKYARDS, PACKINGTOWN, AND ENVIRONS IN THE NINETEENTH CENTURY 140–41 (1987).

come out of nineteenth-century sanitation as a project to transform the environments in which Americans lived, and it is the police power that underwrote all of those sweeping powers.

To be clear, by "police power" I don't mean to refer to uniformed law-enforcement officers or "cops on the beat." These are salient contemporary examples of police power. What I mean by the police power is the deep underlying authority of states and localities acting on behalf of states to look after the health of the people. Sanitation rules in the middle of the nineteenth century became tenement reform laws at the end of the century,[12] all of them sitting in the long tradition of sanitationism—and the police power in American history.

But there is a counter tradition of quarantinism that has accompanied the police power—and the sanitationist strand of the police power—from the beginning. The first quarantine order in American history going back to the colonial period seems to have occurred in East Hampton, on Long Island in the 1660s.[13] Crucially, it targeted Native Americans, banning Indians from entering the town unless free of the smallpox.

A tradition of quarantinist policies aimed at marginal communities and non-whites goes back to the very beginnings of the European settlement of North America, and it has continued through our history if we look at places like the border.

Consider Hoffman Island, where European arrivals in New York Harbor were detained and quarantined in the latter part of the nineteenth century and early part of the twentieth century behind wire fences.[14] Similar measures were taken at the southern border, which was a place where harsh regimes of detention and quarantine were adopted. Disturbing imagery from that place and time, for example, shows Mexican contract workers undergoing inspection after being sprayed for pesticides in 1942. Other examples include the targeting of Irish immigrants[15] and the urban poor in the middle of the nineteenth century.[16] In 1924, one of the last significant outbreaks of the Black Plague around Los Angeles produced, essentially, the razing of a Mexican area just outside Los Angeles in an imagined effort to stop the spread of the plague.[17] During the American Civil War and its immediate

11. Hendrik Hartog, *Pigs and Positivism*, 1985 Wis. L. Rev. 899, 922–24 (1985); *see also* Hendrik Hartog, Public Property and Private Power: the Corporation of the City of New York in American Law, 1730–1870, at 150–51 (1983).

12. *See* John Duffy, The Sanitarians: A History of American Public Health 178–208 (1990).

13. Elizabeth C. Tandy, *Local Quarantine and Inoculation for Smallpox in the American Colonies (1620–1775)*, 13 Am. J. of Pub. Health (N.Y.) 203, 203–04 (1923).

14. *See* Kathryn Stephenson, *The Quarantine War: The Burning of the New York Marine Hospital in 1858*, 119 Pub. Health Rep. 79 (Jan.–Feb. 2004).

15. *See* Witt, *supra* note 4, at 39.

16. *See* Naomi Rogers, Dirt and Disease: Polio Before FDR 50 (1992).

17. *See* William F. Deverell, Whitewashed Adobe: The Rise of Los Angeles and the Remaking of Its Mexican Past 182–91 (1st ed. 2004).

aftermath, a smallpox epidemic of still little-understood proportions swept through the newly freed populations, the contraband camps, and the like that followed the Union army. It was a smallpox epidemic that essentially no state actor looked after at all, and the Union army essentially took no responsibility for it, and tens of thousands of newly freed people found that freedom essentially meant susceptibility to infection.[18] Over and over again in history, social dislocation comes bundled with infectious disease risk.

Other examples of this quarantinist strand of our public health and police power tradition include the infamous Tuskegee Syphilis Study. Doctors employed by the United States government experimented on African American men suffering from asymptomatic syphilis, lying to them and leaving them untreated for decades to study the etiology of asymptomatic syphilis in the human body.[19] Racial others were not the only marginalized communities that have been similarly terribly treated by the police power tradition. Another example is the HIV/AIDS crisis that began in the early middle of the 1980s, in which government authorities threatened quarantines and then engaged in a contemptuous disregard of the crisis for years, producing untold human suffering.[20]

What has the role of the courts been in managing this police power, which has both salutary applications and also really distressing and terrible ones? The courts have been involved since the earliest parts of United States history, and the Metropolitan Board of Health, established as one of these sanitationist agencies in the middle of the nineteenth century, serves as a good example.

Consider the first annual report of the lawyer for the Metropolitan Board of Health, who had just completed the first year of his duties. The lawyer's name was George Bliss Jr., and to my mind he is one of the hidden heroes of nineteenth-century public health history. He was one of the first figures to tackle the project of managing the legality of the traditional police power in the modern world.[21] New York State had established Bliss's Metropolitan Board right after the Civil War. The Board was equipped with vast authority. But what George Bliss Jr. realized immediately upon starting his work was that the operations of public health agencies in the middle of

18. *See* JIM DOWNS, SICK FROM FREEDOM: AFRICAN-AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION (2012); TERA HUNTER, TO 'JOY MY FREEDOM: SOUTHERN BLACK WOMEN'S LIVES AND LABORS AFTER THE CIVIL WAR 24 (1st ed. 1997).

19. *See* SUSAN M. REVERBY, EXAMINING TUSKEGEE: THE INFAMOUS SYPHILIS STUDY AND ITS LEGACY 67 (2009).

20. SNOWDEN, *supra* note 3, at 437–39; 133 CONG. REC. 38057 (1987).

21. ROSSITER JOHNSON & JOHN HOWARD BROWN, THE TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS 360 (1st. ed. 1904); SECOND CIRCUIT HISTORICAL COMMITTEE & THE FEDERAL BAR COUNCIL, NEW YORK, THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK: THE FIRST 100 YEARS (1789–1889) 80–81, 88–89 (1987).

the nineteenth century would be "cramped and thwarted at every turn."[22] Litigation was instantly a central feature of his experience of doing public health law. In the United States, he encountered state courts issuing injunctions blocking the Metropolitan Board of Health's powers, essentially at every turn.

A court in New York vindicated fat boilers rendering animal carcasses.[23] They obstructed the building of cholera hospitals.[24] They defended the claims of communities who wanted to keep quarantines out of their neighborhoods, and they defeated the Board's efforts to enforce all manner of public health orders.[25]

What Bliss was observing is something that went on in courts throughout the United States. Courts blocked efforts to build smallpox hospitals in Georgia[26] and allowed trespass actions against local officials in North Carolina on narrow and cabined readings of public health provisions.[27] Courts routinely issued damages awards against cities and city officials who were thought to quarantine goods or ships longer than was reasonably necessary.[28]

We have a long tradition of courts neither passing on nor blocking public health authority, but rather channeling it in particular directions. One classic example of this channeling of power came out of California in 1900 where evidence of Bubonic Plague arose in San Francisco.[29] Californians had been concerned about the arrival on American shores of a plague epidemic that had been afflicting Asia. When a case arose in 1900, San Francisco authorities immediately issued a quarantine order and a mandatory inoculation order targeted exclusively on Chinatown, and more specifically on people of Chinese descent within Chinatown.[30]

In a case called *Wong Wai v. Williamson*, the U.S. Court of Appeals for the Ninth Circuit struck down the mandatory inoculation order as a violation of the Equal Protection Clause of the Fourteenth Amendment.[31] The Ninth Circuit did not dispute that San Francisco could mandate the inoculation of its residents—but it did dispute that San Francisco could target exclusively the Chinese population in the city for inoculation.[32] Shortly

22. George Bliss Jr., *Office of the Attorney, Metropolitan Board of Health, November 20, 1866, in* Annual Report of the Metropolitan Board of Health 678 (1866).

23. *See* Witt, *supra* note 4, at 65–66.

24. *See* Witt, *supra* note 4, at 66.

25. *See* Bliss Jr., *supra* note 22, at 678–79.

26. *See* Markham v. Brown, 37 Ga. 277 (1867).

27. *See* Comm'rs of Salisbury v. Powe, 51 N.C. (6 Jones) 134, 136–37 (1858).

28. *See* Sumner v. Philadelphia, 23 F. Cas. 392 (C.C.E.D. Pa. 1873) (No. 13,611).

29. Nayan Shah, Contagious Divides: Epidemics and Race in San Francisco's Chinatown 120–56 (2021).

30. Witt, *supra* note 4, at 43, 73.

31. Wong Wai v. Williamson, 103 F. 1 (C.C.N.D. Cal. 1900).

32. *See id.*

thereafter, the same court struck down the mandatory quarantine order that also targeted the Chinese population exclusively.[33]

Courts like the Ninth Circuit channeled public health authority, but they emphatically did not block it. Judges were loath to hinder public health authorities from exercising the police power. They well understood the risk that infectious disease and epidemics posed to the basic existence of American communities.

The deeper tradition, captured in a case called *Jacobson v. Massachusetts* and decided in February of 1905,[34] was a general recognition that states have the basic authority to issue what Chief Justice Marshall had called "health laws of every description."[35] In *Jacobson*, the Supreme Court upheld a mandatory smallpox vaccine law in Massachusetts. Justice John Marshall Harlan summed up a century and more of police power jurisprudence when he said that liberty did not "import an absolute right in each person to be freed . . . of restraint."[36] People are subject to restraint, Harlan wrote, because if people are allowed to engage in forms of conduct or exercise forms of autonomy that cause harm to others, "real liberty" would cease to exist.[37] Harlan's view was that real liberty requires the police power of the state, notwithstanding that it is dangerous, notwithstanding that it can be misused. We rely on it necessarily in episodes of infectious disease risk.

At the center of *Jacobson* is what the public health scholar Wendy Parmet calls the "tragic view of public health."[38] To Parmet, public health powers and civil liberties are, in some sense, deeply and unavoidably at odds with one another. What public health law must do, in this tragic view, is take human beings and limit their liberties and autonomy in the service of advancing the interests of the community. In *Jacobson,* Justice Harlan observes that this necessity of public health law may aid individuals over time since individuals can benefit from public health restraints, but at least in the near term, it will involve, tragically, a compromise between individual freedoms and public health values.[39]

One of the extraordinary features of the twentieth century is the infectious disease revolution: the apparent vanquishing of so many of the scourges of nineteenth-century life. In the law of public health, the apparent victory over infectious diseases helped to produce a new if uneasy synthesis between civil liberties and public health. Leading experts on the law of

33. *See* Jew Ho v. Williamson, 103 F. 10 (C.C.N.D. Cal. 1900).

34. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

35. Gibbons v. Ogden, 22 U.S. 1, 78 (1824).

36. *Jacobson*, 197 U.S. at 26.

37. *Id.*

38. Wendy E. Parmet, *Public Health Law: Power, Duty, Restraint, by Lawrence O. Gostin*, 24 J. PUB. HEALTH POL'Y 460, 465 (2003) (book review).

39. *Jacobson*, 197 U.S. at 25.

public health in the late twentieth and early twenty-first century began to take the position that health and liberty, properly understood, were aligned. In this view, protecting the rights of at-risk populations could induce crucial kinds of cooperation with public health policies. Authorities would be best able to protect public health precisely by respecting the rights of the public.[40]

Call this the new sanitationist synthesis. The paradigm case here was HIV/AIDS. Managing the spread of HIV seemed to require the cooperation and good will of the populations most badly affected. And so, public health authorities around the HIV/AIDS crisis forged a new synthesis between health and human rights.[41] Figures like the late Jonathan Mann and a whole generation of public health students began to redescribe the relationship between public health law and civil liberties. And we can see this not only in HIV/AIDS, but also in the way in which the Ebola crisis of just a few years ago produced a striking reversal of the traditional *Jacobson* politics and public health. In the Ebola crisis, public health law experts allied themselves with organizations such as the ACLU to defend the rights of people who might have been exposed to Ebola in order to make sure that those people would come forward and identify themselves.[42] In the Ebola crisis, the quarantine advocates were populist politicians and the public health experts were civil libertarians, showing a reversal of that old "tragic" view.

III. An Unwieldy Present

So far, I have tried to offer a thumbnail sketch of 200 years of American history, from the police power—its values and its abuses—to the *Jacobson* case, which is the culmination and upholding of that powerful police power tradition, to the new synthesis of the late twentieth century. But what about our unwieldy present?

History can illuminate this unwieldy present. So far, we have heard the story about the traditional public health police power and the *Jacobson* case's tragic view that individual liberties and the public good are ineluctably opposed. We have also seen Justice Harlan's effort to breathe life into a more collective conception of freedom—"real liberty," he called it—to resolve this tension. And I have tried to sketch the new sanitationist synthesis of the late twentieth and early twenty-first centuries.

Today the new sanitationism is under assault. In legal responses to COVID-19, a whole array of new quarantinisms have arisen, quarantinisms

40. See the review of this position in Witt, *supra* note 4, at 85–98.

41. Health and Human Rights: A Reader (Jonathan M. Mann, Sofia Gruskin, Michael A. Grodin & George J. Annas eds., 1999).

42. American Civil Liberties Union & Yale Global Health Justice Partnership, Fear, Politics, and Ebola: How Quarantines Hurt the Fight Against Ebola and Violate the Constitution (2015), https://www.aclu.org/sites/default/files/field_document/aclu-ebolareport.pdf.

that challenge substantial parts of that new synthesis between civil liberties and public health. Front and center are a set of new surveillance technologies that may render the cooperation of affected populations no longer as necessary as it had seemed to be in fighting HIV/AIDS. The South Korean Center for Disease Control and Prevention, for example, has used an extraordinary mix of surveillance camera footage, mobile GPS data, cell phone records, as well as a "right to know" policy that uses electronic alerts for neighbors, informing them of the age, gender, and location of COVID-19-infected people.[43] South Korean officials use highly specific information—including rooms that people have entered, whether they have visited the toilet, if they have worn a mask—that essentially highlights the extent to which older privacy rights rested on the incapacity of states to even obtain the kind of information that people might have imagined was private.[44] In the case of Hong Kong, we find electric wristbands being used to quarantine all arrivals except essential workers.[45] We have cameras and thermal sensors used to identify people with infections. Any number of mechanisms are now being used, which both promise and threaten new technological capacities to control bodies and to produce a new quarantinism in our time.

This is not the only new quarantinism on the horizon, and we can see another version developing in the United States prison system. As of June 2021, about three in ten incarcerated people had been infected with COVID-19—a likely undercount according to many experts[46]—as compared to an infection rate of approximately nine in one hundred in the general population.[47] If we look at Latinx, Black, and Native American communities, we find similarly disparate impacts in the COVID-19 pandemic.[48] Crude percentages of COVID-19 deaths measured by race and

43. Brian J. Kim, *Lessons for America: How South Korean Authorities Used Law to Fight the Coronavirus*, LAWFARE (Mar. 16, 2020), https://www.lawfareblog.com/lessons-america-how-south-korean-authorities-used-law-fight-coronavirus; Jongeun You, *Lessons from South Korea's Covid-19 Policy Response*, 50 AM. REV. PUB. ADMIN. 801, 803 (2020).

44. John Fabian Witt, *Scrambling the New Sanitationist Synthesis: Civil Liberties and Public Health in the Age of COVID-19*, 2021 U. CHI. LEGAL F. (2021).

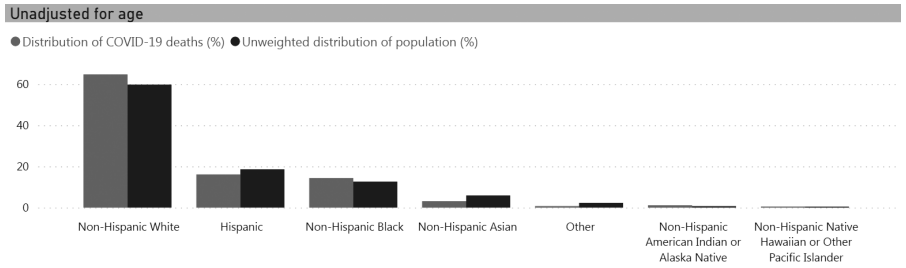
45. Xiaofeng Liu & Mia M. Bennett, *Viral Borders: COVID-19's Effects on Securitization, Surveillance, and Identity in Mainland China and Hong Kong*, 10 DIALOGUES IN HUM. GEOGRAPHY 158, 159–60 (2020).

46. Katie Park, Keri Blakinger & Claudia Lauer, *A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?*, MARSHALL PROJECT (June 30, 2021), https://www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison-are-officials-ready-for-the-next-pandemic.

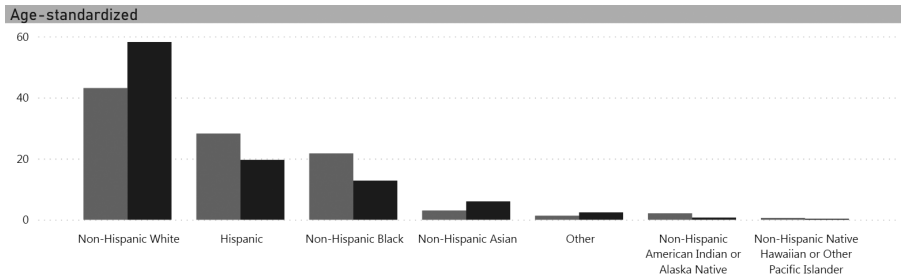
47. Eddie Burkhalter, Izzy Colon, Brendon Derr, Lazaro Gamio, Rebecca Griesbach, Ann Hinga Klein, Danya Issawi, K.B. Mensah, Derek M. Norman, Savannah Redl, Chloe Reynolds, Emily Schwing, Libby Seline, Rachel Sherman, Maura Turcotte & Timothy Williams, *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html.

48. *Disparities in Deaths from COVID-19*, CDC (Dec. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-deaths.html.

Hispanic origin suggest that population and death rates more or less matched up with one another in the first year of the pandemic.[49]



But if we adjust for age, we can see that the distribution of COVID-19 deaths by race and Hispanic origin has been a discriminatory scourge, with a terribly disparate impact on Black and Latinx communities in the United States.[50]



Non-Hispanic whites' death rates are more or less half what you would expect by population, and Latinx and Black populations' death rates are more or less double what you would expect from age-adjusted populations. The result has been disparate impact by the pandemic in the United States, affected by both the inequality crisis and what my colleague the political scientist Jacob Hacker calls the "great risk shift": the shifting of risks to the private marketplace and to individuals,[51] something we see in the dreadful wave of violence against Asian Americans during the course of the pandemic in the United States. [52] In all these ways, ranging from new technologies' disparate impacts to new forms of racial discrimination and racial violence, we see new quarantinism surging to the fore in our grappling with this pandemic.

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49. *Id.*

50. *Id.*

51. JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM (2d ed. 2019).

52. *The Rise in Anti-Asian Attacks During the COVID-19 Pandemic*, NPR (Mar. 10, 2021), https://www.npr.org/2021/03/10/975722882/the-rise-of-anti-asian-attacks-during-the-covid-19-pandemic.

At the same time, we also have the new appearance of a set of individual rights claims which have had unprecedented success at the U.S. Supreme Court. In November 2020, the U.S. Supreme Court decided a stunning new case in the history of the law of epidemics: *Roman Catholic Diocese of Brooklyn v. Cuomo*.[53] In *Roman Catholic Diocese*, the Court enjoined the enforcement of religious gathering limits on churches, mosques, and synagogues on the grounds that those limits violated the free exercise rights of would-be worshippers by treating secular activities—for example, shopping—more favorably than religious ones.[54] In February 2021, the Court decided another case, *South Bay United Pentecostal Church v. Newsom*, doing for California what the earlier case had done for New York: enjoining the enforcement of indoor religious gathering prohibitions in the state.[55] A couple months later, in *Tandon v. Newsom*, the Court extended the *South Bay* holding to enjoin the enforcement of at-home, religious gathering limits in the state of California.[56]

New individual rights as against public health measures are showing up in state supreme courts, too. In 2020, the Wisconsin Supreme Court denied the state governor's authority to engage in a variety of public health measures that the governor thought were indispensable to managing the public health risks brought by the pandemic.[57] The Michigan Supreme Court adopted a nondelegation rationale to strike down as unconstitutional under the state constitution a seventy-five-year-old emergency statute enacted by the Michigan Legislature, which delegated powers to the governor to deal with emergencies such as pandemics.[58] Stories about individual rights as against state authority animated the Wisconsin and Michigan decisions.

What do we make of this new generation of cases that is now just about a year old? Consider two possible views. In the first view, these cases are not a novel departure at all. These cases are of the kind that George Bliss Jr. saw in 1866 with the Metropolitan Board of Health in New York. They are consistent with a long tradition of courts staying involved and channeling the police power of the *salus populi* dictum: the police power to look after the health of the people. These cases, in this view, are like *Wong Wai*[59] or the *Jew Ho v. Williamson*[60] case from San Francisco in 1900,

53. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

54. *Id.*

55. South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021).

56. Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

57. *See* Wis. Leg. v. Palm, 942 N.W.2d 900 (Wis. 2020); Todd Richmond, *Wisconsin High Court Tosses Out Governor's Stay-Home Order*, AP NEWS (May 13, 2020), https://apnews.com/article/virus-outbreak-us-news-ap-top-news-wisconsin-courts-69eeec35356f6c25cf63b855886237c3.

58. *In re* Certified Questions from U.S. Dist. Ct., W.D. Mich., S. Div., 958 N.W.2d 1, 31 (Mich. 2020).

59. Wong Wai v. Williamson, 103 F. 1 (C.C.N.D. Cal. 1900).

60. Jew Ho v. Williamson, 103 F. 10 (C.C.N.D. Cal. 1900).

except that now religion, not race, is the relevant discrimination. There is considerable support for these ideas. In *South Bay Pentecostal*, Justice Gorsuch suggests that sufficiently tailored rules for religious gatherings would pass constitutional muster.[61] He observes that the difficulty with California's approach is that it has categorical prohibitions and limits that take no account of nuanced questions about the specific risks of particular religious gatherings.[62] The idea here is that states, when they exercise their police power, cannot discriminate.

A second view is that these cases are in fact a new departure, a change from channeling to a version of blocking. In this second conception, the new cases embody a novel resistance to the *salus populi* power, one that arises out of and is energized by an increasingly powerful partisan resistance to the administrative state's authority to manage and control infectious disease risks to American communities. The second view sees the recent cases as adopting a new resistance to the "real liberty" that Justice Harlan sketched in the *Jacobson* case in 1905.[63] And there is support for this second view in the cases, too. Justice Gorsuch's concurring opinion in *Roman Catholic Diocese v. Cuomo* from November goes out of its way to issue a broadside attack on the *Jacobson* case and the authority that it provides to state governments.[64]

Which of these two views is the better view? The future holds the answer. My own sense is that the cases are a new departure. There is something different nowadays from what George Bliss Jr. saw when he was having trouble getting animal carcasses off the streets in the 1860s.

Why do I think that these cases are a new obstruction to the pursuit of the common good, and the health of people? All rules, all classifications, and all efforts to engage in public health rulemaking will have edge cases, and all edge cases can make rules come to look arbitrary. The kinds of strict scrutiny that the U.S. Supreme Court applies in religious freedom cases like these is famously strict in theory. But it is virtually impossible to tailor the rules sufficiently narrowly, if a court wants to insist that there be no unnecessary overbreadth in a public health regulation.

Another reason to think that the second view is correct is the disinclination in the recent cases to take public health dilemmas seriously. The new majority on the Court in the New York and California cases has insisted on obviously inapt comparisons to things like bike shops or other commercial spaces, which pose substantially different challenges to public health regulators. Churches are different regulatory spaces than commercial buildings, with different uses, traditions, and rituals. The Occupational Safety and

61. *South Bay United Pentecostal Church*, 141 S. Ct. at 718 (statement of Gorsuch, J.).

62. *Id.* at 719.

63. Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

64. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69–72 (2020) (Gorsuch, J., concurring).

Hazards Act (OSHA), to take only one example, applies differently in churches.[65] The question of what counts as an appropriate comparator for religious gatherings is one the majority of the Court seems not to have taken seriously. Religious gatherings during a pandemic pose distinctive challenges. It might be worth observing that the influenza episode of 1918–1919 in the United States did not produce anything like a set of challenges to religious gathering limits like the ones we are seeing now, notwithstanding that state and local officials across the United States imposed parallel or analogous religious gathering limits on worshipers in 1918–1919.[66]

A final reason why we might view the recent cases as a novel departure from the tradition of channeling rather than blocking public health authority is political. It has long been said that the Supreme Court follows the election returns. As we are able to see more effectively now, it follows partisan formations and partisan mobilizations. And at this moment, we are in the midst of a partisan mobilization in which the two major parties in the United States have split over the police power and have split over the use of the administrative state and its value and its dangers. And that partisan split is showing up quite obviously in this latest round of cases. One thing to observe about this partisan split is that it is much more radical than the split over the police power in the era of *Jacobson*. *Jacobson* was decided in February 1905 just days before the Court held argument in the famous *Lochner v. New York* case, in which the Court struck down a maximum hours law for bakeries in the state of New York.[67] *Lochner* famously (or infamously) arrogated to the Court the power to decide that a maximum hours law was an unconstitutional use of the police power interfering with the freedom of autonomy of bake shop owners and bake shop employees.[68]

Already the contrast should be apparent. The Court that struck down the regulation in *Lochner* was the same one that upheld the mandatory vaccination law in *Jacobson*. The *Lochner* Court has long been the Court best known for conceiving of the justices' role as defending individual liberty against state regulation. But even that maximally liberty-oriented Court did not interfere with the use of the police power for public health purposes. Not so for today's Court. Today, the Court restrains democratically accountable state officials' use of the police power in a pandemic. In its 230 years, the Supreme Court had never done such a thing until now.

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65. *See* 29 C.F.R. § 1975.4(c)(1) (2021) ("As a matter of enforcement policy, the performance of, or participation in, religious services . . . will be regarded as not constituting employment under the Act.").

66. Miles Ott, Shelly F. Shaw, Richard N. Danila & Ruth Lynfield, *Lessons Learned from the 1918–1919 Influenza Pandemic in Minneapolis and St. Paul, Minnesota*, 122 PUB. HEALTH REPS. 803–10 (2007).

67. Lochner v. New York, 198 U.S. 45 (1905).

68. *Id.*

IV. Contested Futures?

I have tried to describe a world of the nineteenth-century police power in which that authority was both dangerous and indispensable: a power that accomplished many virtuous things while also pursuing and advancing very destructive discriminations and dangerous authorities. In the latter part of the twentieth century, that tragic authority of the state began to be dissolved in the idea that protecting individual rights might actually be a better way to advance public health. I have tried to describe to you a moment we are in today in which that new synthesis is being scrambled in all sorts of new directions. New forms of state authority have been identified in brave new technologies of pandemic control. New forms of discrimination have become visible. New and unprecedented individual rights have been articulated and upheld by the courts, with worrisome implications for public health.

One more way in which our moment is scrambling the *status quo ante* is the way in which the pandemic has called on the state to engage in a massive and unprecedented experiment in public provision of basic social goods. Just think of the way in which health care rights,[69] housing rights,[70] and employment rights[71] have been up in the air in the course of the last year, and have been the beneficiaries of new legislation at the federal and the state levels. Pandemic-era policies have done more than any policy in decades to lift poor Americans out of poverty.[72] A new child tax credit for families of up to $300 per child each month aims to extend at least part of this program of family support years into the future.[73] In short, social rights to the public provision of crucial social goods are on the agenda in the United States in a way they have not been in a half century or more. This is not to say that such social rights will continue to expand. But we are engaged in a new public policy contest, one with a substantial partisan dimension, over whether social rights and new systems of social provision will continue and how they might continue to do so.

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69. *Civil Rights and COVID-19*, HHS Office for C.R. (July 26, 2021), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/index.html.

70. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020), https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19; Temporary Halt in Residential Evictions in Communities with Substantial or High Levels of Community Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244 (Aug. 6, 2021), https://www.cdc.gov/coronavirus/2019-ncov/communication/Signed-CDC-Eviction-Order.pdf.

71. Dep't of Lab., Families First Coronavirus Response Act: Emp. Paid Leave Rights (2020), https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave.

72. Yacob Reyes, *Report: Pandemic Aid Programs Reduce Poverty at Record Level*, Axios (July 29, 2021), https://www.axios.com/pandemic-aid-programs-reduce-poverty-031f0325-ea04-457d-8aa0-2da602bb7dba.html.

73. Jason DeParle, *Monthly Payments to Families With Children to Begin*, N.Y. Times (July 12, 2021), https://www.nytimes.com/2021/07/12/us/politics/child-tax-credit-payments.html.

Recall that we opened this article with the iconic hypothesis that societies and states shape the course of epidemics. The thesis seems to have been vindicated. Public health law is indeed substantially shaped by existing legal and political institutions. The law has structured the story by which epidemics have taken place and been managed. Epidemics have not radically remade the American state. Instead, the American state has channeled and managed epidemics, for better and for worse.