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Pathologies of Liberty

Public Health Sovereignty and the Political Subject in the Covid-19 Crisis

Sheila Jasanoff*

Résumé : Le présent article examine divers litiges portés devant les tribunaux aux États-Unis depuis le début de la pandémie du Covid-19 et la façon dont ils ont mis à l'épreuve la nature et les limites du pouvoir de l'État fédéral dans un système de santé publique qui a longtemps fonctionné comme un État dans l'État. La pandémie a révélé une tension entre deux conceptions des êtres humains, d'un côté en tant que sujets de la biomédecine, plus agis qu'agissants, et, de l'autre, en tant que sujets sociaux et politiques, agissants plutôt qu'agis. En vertu de ce que cet article nomme la « souveraineté sanitaire », les individus sont tenus de subir, au nom du bien commun, des restrictions possiblement sévères à leurs libertés et ils sont gouvernés par les mécanismes disciplinaires du biopouvoir tels que les a décrits Michel Foucault. Toutefois, ils peuvent, comme sujets sociopolitiques, se fonder sur le droit constitutionnel pour affirmer des formes de solidarité et exprimer des appartenances qui mettent au défi la tentative de réduire la vie à une réalité purement biologique. Aux États-Unis, de telles revendications de résistance ont mobilisé le droit de renoncer à un traitement pour des motifs religieux, les droits de réunion et d'association, ou encore le droit d'exiger du gouvernement qu'il justifie les utilisations qu'il fait de l'expertise. L'article rappelle d'abord comment aux États-Unis, la responsabilité de protéger la santé publique est partagée entre le gouvernement fédéral et les États. Il relate brièvement trois épisodes plus anciens durant lesquels la « souveraineté sanitaire » fut brandie contre diverses revendications relevant des libertés individuelles – cas de la vaccination obligatoire, du VIH-SIDA et de la tuberculose. L'article décrit ensuite trois arènes dans lesquelles la pandémie du Covid-19 a, elle aussi, suscité des conflits entre la santé publique et la liberté individuelle : les élections ; la liberté de religion ; l'étendue du pouvoir exécutif. L'analyse menée met en lumière le fait que la liberté individuelle peut être utilisée soit pour promouvoir soit pour limiter l'expression du politique en substituant l'expertise judiciaire, fondée sur le droit, à l'expertise de l'exécutif en matière de santé publique. Finalement, la réflexion sur le droit aux États-Unis doit encore développer des modes de raisonnement permettant de trouver de façon cohérente un équilibre judicieux entre la liberté personnelle et les exigences de santé publique.

Mots-clés : libertés publiques, fédéralisme américain, élections, liberté religieuse, vaccination, expertise en santé publique

Abstract: *This paper discusses the diverse grounds on which litigation during the Covid-19 pandemic tested the nature and limits of power in a public health system that has long functioned like a state within a state. The pandemic revealed a tension between human beings as biomedical subjects, more acted upon than acting, and as social and political subjects, more acting than acted upon. In the regime of what this paper calls public health sovereignty, people are required to observe potentially severe restraints on liberty in the name of the common good and are governed by the disciplinary mechanisms of biopower described by Michel Foucault.*

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As sociopolitical subjects, however, people can use the competing apparatus of constitutional law to assert solidarities and express affiliations that challenge the reduction of life to the purely biological. In the United States, such resisting claims have included the right to forego treatment on religious grounds, the rights of assembly and association, and the right to demand accountability for the government's uses of expertise. This paper first describes the landscape of US health and safety regulation, in which responsibility for public health protection is divided between the federal government and the states. It offers a brief history of three earlier episodes that pitted public health sovereignty against claims of individual liberty: compulsory vaccination, HIV/AIDS, and tuberculosis. The paper then looks at three arenas in which the Covid-19 pandemic has given rise to conflicts between public health and individual liberty: elections, religious freedom, and the scope of executive power. The paper demonstrates that the apparatus of liberty can be used either to promote or to constrain political expression by substituting judicial expertise in law for executive expertise in public health. The paper concludes that American legal thinking has yet to develop modes of reasoning that will consistently strike a judicious balance between claims of personal liberty and the demands of public health.

Keywords: *civil liberties, American federalism, elections, freedom of religion, vaccination, expertise in public health*

On September 16, 2020, William P. Barr, Attorney General of the United States and the nation's highest law enforcement official, launched an extraordinary attack on the public health measures adopted throughout the country to fight the Covid-19 pandemic. His remarks came during a question and answer session following a speech on prosecutorial discretion and the rule of law at Hillsdale College, a small, conservative, liberal arts institution in Michigan. A questioner asked, "What are the constitutional hurdles for forbidding a church from meeting during COVID-19?" Barr replied with a broadside against unchecked bureaucratic power, which in his view was holding many US state governors, and by extension their publics, captive. In words that ricocheted around the internet, he went on to say, "But putting a national lockdown, stay at home orders, is like house arrest. Other than slavery, which was a different kind of restraint, this is the greatest intrusion on civil liberties in American history."[1]

Many found this an astonishing reading of history in a nation that had interned its own citizens of Japanese descent during the Second World War. The comparison between the Covid-19 lockdowns and slavery drew well-merited scorn.[2] Few, however, thought to set Barr's remarks within the longer history of American modernity, in which public health concerns founded on expert predictions came to serve as potent justification for restraints on personal liberty. Barr's comments, more interesting when read in their full context, challenged a version of what may be called *public health sovereignty* that has underwritten most US efforts to regulate citizens' physical and mental well-being since the mid-nineteenth century.

1 Transcript of Attorney General's Remarks as Delivered and Q&A at Hillsdale College, reproduced by Anna Salvatore at Lawfare, September 17, 2020, https://www.lawfareblog.com/transcript-attorney-generals-remarks-delivered-and-qa-hillsdale-college (accessed September 19, 2020).

2 Ruth Marcus, "William Barr has gone too far before, but never this far," *Washington Post*, September 17, 2020, https://www.washingtonpost.com/opinions/william-barr-has-gone-too-far-before-but-never-this-far/2020/09/17/8a0412b8-f920-11ea-a275-1a2c2d36e1f1_story.html (accessed September 20, 2020).

The rise of public health as a basic governmental responsibility corresponds in broad terms to Michael Foucault's expansive notions of biopolitics and biopower, the suites of legitimating practices by which modern ruling institutions protect and increase the life of populations.[3] In his famous lectures on security, territoriality and population at the Collège de France in 1977 and 1978,[4] Foucault elaborated on three sets of mechanisms by which biopower is exercised, most notably in medical settings: the juridico-legal, which defines what counts as illness or wellness and prescribes penalties or sanctions for bad behavior; the disciplinary, which stipulates how a person should behave in order to stay healthy or to regain health; and the preventive, which is administered through a *dispositif*, or apparatus, that calculates statistical averages, predicts probabilities, and allocates the costs and benefits of control in ways acceptable to a given society. These three faces of biopower are not independent of one another but are thoroughly interwoven in practice. To legal scholars, it therefore comes as no surprise that the Covid-19 pandemic of 2020 called all of these mechanisms into operation simultaneously, showing that all three remain fully in force in the present day. Treatment choices made in the early months, and refined thereafter, determined to some extent who would live or die; stringent behavioral rules during lockdowns radically altered patterns of social life and social behavior around the world; and mathematical predictions of incidence, mortality, and cost drove policies on the nature, stringency and duration of measures undertaken to suppress the virus.

Controls on human bodies and movements, however, did not exhaust the trajectory of the novel coronavirus through the force fields of law and policy during 2020. Public health authorities all over the world responded with Foucauldian technologies of security, imposing draconian stay-at-home orders that at one point encompassed half the world's population, but pockets of resistance also sprang up, symbolized most dramatically by Donald Trump's flouting of expert advice during his one-week stint as America's most famous Covid-19 patient in early October 2020.[5] Lesser resisters, who could not command armies to do their bidding, expressed themselves through a variety of legal challenges to the sovereignty of public health in both state and federal courts. The resulting contestations illustrate a tension missing in Foucault's influential account of discipline and security—a tension that arises between human beings as biomedical subjects, more acted upon than acting, and as social and political subjects, more acting

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3 Michel Foucault, *The Will to Knowledge: The History of Sexuality, Volume 1* (trans. R Hurley, 1998) (New York: Pantheon, 1976); originally published as *Histoire de la sexualité* (Paris: Gallimard, 1976). "As soon as power gave itself the function of administering life," Foucault says, "its main role was to ensure, sustain, and multiply life, to put this life in order." *Id.*, p. 138.

4 Michel Foucault, *Security, Territory, Population*, Lectures at the Collège de France 1977-78, eds. Michel Senellart, François Ewald, Alessandro Fontana, trans. Graham Burchell (New York: Palgrave Macmillan, 2007), pp. 19-20.

5 Julie Bosman, Sarah Mervosh, Amy Harmon and Nicholas Bogel-Burroughs, "Most Patients' Covid-19 Care Bears Little Resemblance to Trump's," *New York Times*, October 6, 2020, https://www.nytimes.com/2020/10/06/us/trump-coronavirus-care-treatment.html (accessed October 6, 2020).

than acted upon. As sociopolitical subjects, people may assert solidarities and express affiliations that challenge the reduction of life to the purely biological, and constitutional law serves as part of the apparatus, or *dispositif*, through which such resisting claims can be asserted. Humans, after all, are bound by myriad meaningful social ties, far beyond their involuntary membership in contemporary risk societies.[6] Indeed, at the far extreme, people may wish to affirm that life, as mere existence, is not worth living unless lived in ways that, from a public health standpoint, may appear irrational or unscientific. Such cases demonstrate that, for the human actor, citizenship in a society is not *either* biomedical *or* political, but a form of belonging that demands a constant balancing of individual self-expression with responsibility to others.

The regimes of modern biopolitics reflect a massive turn toward administering life in its bare physical manifestations, turning human populations into objects of the exercise of beneficent power. But nurturing a community's flourishing *as a social and political entity* is an equally salient state obligation. It involves care for a subject population's emotional, intellectual, and spiritual well-being, through instruments of governance whose ostensible purpose is to liberate thought and foster connection. Confrontations between these two discrete frameworks for supporting life—the biological and the sociopolitical—erupted with some frequency during the pandemic in the United States. One can see these conflicts as fundamentally bioconstitutional,[7] in that they crystallized questions about the reciprocal rights and obligations of the state, its component parts, and its citizens in the shared project of maintaining order. In a federal system of divided powers, these encounters took on added complexity as courts decided which institutions of government had jurisdiction, and which were most competent, to decide how much and what kinds of risk a threatened community should be asked to bear.

The US public health system—decentralized and fragmented like most governance structures within the framework of American federalism—serves as a key site for performances of American bioconstitutionalism, the tacit rules and organized practices that define and continually redefine the state's responsibility to safeguard the lives and health of its citizens. Those practices include, in the realm of health protection, the assumption of emergency powers by the executive branch, the delegation of substantial policymaking authority to expert bodies,[8] and the written and unwritten rules, or civic epistemologies,[9] by which a polity tests and evaluates expert knowledge and public

6 This particular form of solidarity, formed through the sense of being united by virtue of being at risk, whether from natural or human-made hazards, derives from the work of Ulrich Beck; see particularly *Risk Society: Towards a New Modernity* (Newbury Park, CA: Sage Publications, 1992 [1986]).

7 Sheila Jasanoff, ed., *Reframing Rights: Bioconstitutionalism in the Genetic Age* (Cambridge, MA: MIT Press, 2011). See also Jasanoff and Ingrid Metzler, "The Borderlands of Life: IVF Embryos and the Law in the United States, United Kingdom, and Germany," *Science, Technology, & Human Values* 45(6):1001-1037 (2020), https://doi.org/10.1177/0162243917753990.

8 Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (Cambridge, MA: Harvard University Press, 1990).

9 Sheila Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton: Princeton University Press, 2005); see also *Science and Public Reason* (London: Routledge-Earthscan, 2012).

reason. The production and reception of knowledge play especially important roles in public health policy, whose legitimacy rests most securely on technical expertise and on its acceptance by publics willing to put up with substantial physical impositions in order to avoid harm to health. Yet, powerful though it is, the sovereignty of the public health enterprise, founded on expertise, is by no means absolute and has been forced to yield in the face of compelling counterclaims expressed in terms of civil liberties.

Within the United States, constitutional rights have been invoked in numerous contexts to supersede expert biomedical judgments. Possibly the most notorious is the case of forced sterilization of persons deemed medically unfit to procreate. Following a period of Progressive—era eugenic enthusiasm that resulted in tens of thousands of cases of forced sterilization,[10] the US Supreme Court ultimately held in *Skinner v. Oklahoma* that the state was barred from depriving the defendant of the fundamental right to have children under the Constitution's equal protection clause.[11] To take another well-known example, the state interest in saving life cannot force a competent adult to undergo medical treatment antithetical to that person's religious beliefs, even when the condition is deemed to be life-threatening.[12] Manifest in these cases is the dual status of the individual as both a political and a biomedical subject, navigating between legal regimes whose purposes do not coincide. As a biomedical subject, even the most confirmed libertarian may be forced to bow to measures such as testing, compulsory vaccination, quarantines, and even long-term confinement in order to maintain not just individual health but the health of the whole community. As an autonomous political subject, however, a person may be entitled to make decisions that run counter to the life-saving ethos of the medical profession and the state's broad interest in preserving life. Further, when the restraints on liberty are severe enough to resemble incarceration, such as long-term commitment to psychiatric hospitals or other mental health institutions, the patient may be entitled to due process protections that guard against arbitrary or excessive actions by the state.[13]

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10 Alex Wellerstein, "States of Eugenics: Institutions and Practices of Compulsory Sterilization in California," in Sheila Jasanoff, ed., *Reframing Rights: Bioconstitutionalism in the Genetic Age* (Cambridge, MA: MIT Press, 2011), pp. 29-58.

11 *Skinner v. Oklahoma*, 316 US 535 (1942) overturned a state compulsory sterilization law on the ground that it drew an impermissible distinction between larceny (theft of chickens in that case) and embezzlement (theft of money) and hence denied the defendant equal protection under the 14th Amendment of the US Constitution. Framed as a matter of equal protection at the time, the decision has resonated more powerfully since as an affirmation of the right to reproduce.

12 Cases asserting the right to refuse treatment have arisen largely under state law in the United States. One type of claim concerns the right of Jehovah's Witnesses to refuse blood transfusions on religious grounds. See *Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218 (N.Y. 1990); *Stamford Hospital v.Vega*, 236 Conn. 646 (Conn. 1996).

13 These protections resulted importantly from challenges by mental health patients against involuntary hospitalization. See Ronald Bayer and Laurence Dupuis, "Tuberculosis, Public Health, and Civil Liberties," *Annual Review of Public Health* 16:307-326 (1995, , https://doi.org/10.1146/annurev.pu.16.050195.001515).

A further complication of the US public health system lodges in the fact that, under the Constitution, much of the responsibility for protecting the rights of the political community and the autonomy of individual sociopolitical subjects rests with the federal government, whereas maintaining citizens' physical health and safety is the primary preserve of states and localities. The former on the whole is designed to enable and nurture citizens' civil liberties, especially in matters of speech, association and belief, whereas the latter disciplines the bodily self.[14] In practice, as we will see, the constitutional apparatus of liberty carries its own disciplining potential: in adjudicating liberty claims, courts are guided by interpretations of their institutional authority that may lead in some cases to withholding the sought-after relief. More specifically, where state and federal governance regimes come into conflict, one finds competing theories of jurisdiction and deference in play. Does the nation-state's prerogative to support and uphold political freedoms take precedence, or is it sooner the state and local power to maintain the community's biological health in accordance with local assessments of relevant expert knowledge? Should the federal government ensure that, in a national crisis, all states act in accordance with the universal claims of science, or should the courts defer to state judgments, even when legislatures appear to be neglecting their protective functions? Attorney General Barr's controversial comments in Michigan stoked these jurisdictional tensions, which also figured in an array of lawsuits challenging state public health mandates during the early months of the Covid-19 crisis in the United States.

This paper discusses the diverse ways in which litigation initiated during the pandemic tested the nature and limits of the powers exercised by a public health system that functions, for all practical purposes, like a state within a state. It begins by sketching the landscape of US health and safety regulation, which divides powers between the federal government and the states in ways that have proved highly relevant to the law and politics of pandemic control. The next section provides a thumbnail history of earlier episodes that pitted the power of public health authorities against claims of individual liberty, focusing particularly on the histories of compulsory vaccination, HIV/AIDS, and tuberculosis. The subsequent section looks at three arenas in which the Covid-19 pandemic has generated case law that questions the limits of state regulation in the name of public health: elections, religious freedom, and the scope of executive power in this particular crisis. In conclusion, I revisit the fundamental tensions around federalism, expertise, and the rights of human subjects made visible by these lawsuits, and the implications for citizenship in a system of shared and divided powers during an unprecedented public health emergency.

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14 The word discipline is used here in the classic sense proposed by Michel Foucault to describe the role of modern statelike institutions in regulating the conduct of individuals and populations. Foucault, *Discipline and Punish The Birth of the Prison* (New York: Vintage Books, 1979).

I. Public Health in a Federal State

Descriptions of public health regulation in the United States stress its structural and procedural complexity. For example, a 1988 report of the (former) Institute of Medicine[15] stated, "The United States is notable among the countries of the world for complicated policy relationships among national, state, and local levels of government and for its interweaving of private and public sector activity."[16] One can conceptualize the system as a web of rules radiating out from a local core invested with the police power to control personal freedom for the sake of the common good through a variety of restrictive health measures. Local sovereignty is enshrined in the Tenth Amendment to the US Constitution, which declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."This grant includes, without explicit mention, the power to make and enforce rules directed toward preserving and enhancing the health of city and state residents.

Local directives aimed at public health protection, especially through coercive quarantines for ships coming from infected regions, date back almost to the beginnings of colonial settlement in the Americas. Smallpox, typhus and yellow fever carried through maritime trade from the West Indies proved deadly not only to indigenous populations but also to the colonists, and for a long time the only way to exclude transmission was by quarantining vessels, with their cargo and occupants, far away from centers of human habitation. By the 1720s, additional preventive measures were introduced, following practices then being tested in Britain, such as inoculation against smallpox. In an early confrontation between rival forms of expert authority, Puritan minsters in Boston, led by Cotton Mather, better remembered for his support of the Salem witchcraft trials, strongly advocated for inoculation, countering the prevailing views of local physicians. Opinion on this experimental treatment was so divided and so inflamed that, foreshadowing today's hydroxychloroquine controversies, "[t]here was not only a war of pamphlets but actual riots in which the lives of Cotton Mather and Dr. Boylston were threatened."[17]

Originally enforced through ad hoc orders by governors and city councils, public health took on a more organized aspect by the end of eighteenth century and those efforts ramped up through the first half of the nineteenth. Older cities, led by Baltimore and Boston among others, began forming boards of health and health departments

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15 This body has since been renamed the National Academy of Medicine and is, as before, part of a parent body now known as the National Academies of Science, Engineering and Medicine (NASEM).

16 Institute of Medicine Committee for the Study of the Future of Public Health, *The Future of Public Health* (Washington, DC: National Academies Press, 1988), available from: https://www.ncbi.nlm.nih.gov/books/NBK218220/ (accessed September 20, 2020).

17 Susan Wade Peabody, "Historical Study of Legislation regarding Public Health in the States of New York and Massachusetts," *The Journal of Infectious Diseases*, Volume 6, Supplement 4 (Feb. 1909), pp. 1-158, at p. 48.

staffed by professionals. In Boston, Paul Revere, a silversmith and metalworker who became a hero by carrying the news of the impending British invasion to the colonial militia, was appointed the city's first health officer in 1799. Changes in social and scientific understanding of disease causation developed hand in hand with organizational reforms that created the modern knowledge infrastructures for public health protection. The historian Charles Rosenberg describes how efforts to control successive cholera epidemics in New York accompanied a transition from moral to secular explanations of what causes cholera, the spread of the germ theory of disease, and eventually the state legislature's creation of New York City's Metropolitan Board of Health in 1866.[18] Cities and states laid the groundwork for public health protection but local jurisdiction was neither absolute nor supreme. Federal involvement in public health extends back to the turn of the nineteenth century, when the precursor to the Public Health Service was formed to serve diseased seamen. Today, the system in its entirety opertates at every point through an interpenetration of technical expertise and regulatory power, or knowledge and norms, functioning as a massive engine of co-production.[19] It involves the simultaneous making of a healthy population and the technical and normative criteria by which that population's health and welfare are defined, understood, and managed.

The convergence of national interests with public health protection begins all the way up the chain of knowledge-making in the domain of biomedical research and development, where funding has long served as a national and even international instrument of health policy. The National Institutes of Health (NIH), with an annual budget of more than $40 billion, dwarfs most other funding agencies around the world and exercises commensurate clout. NIH can flex its economic muscle to build international alliances around biomedical issues and create new forms of partnership between public and private research entities, with implications for the direction, speed and control of research.[20] It was granted a lead role in implementing Trump's Operation Warp Speed, a plan to bring a Covid-19 vaccine to market by January 2021, with a mandate to launch a clinical trials network consisting of thousands of volunteers[21]—in effect, a conscription project similar to raising an army in wartime. Indeed, the novel speeded-up vaccine trials are sites of co-production in which biomedical subjects see themselves as the vanguard of a political project of nation-rebuilding, a post-pandemic nation liberated from the invasive scourge of the coronavirus. As if evidencing the force of such subject formation, one female volunteer declared in an op-ed in the *New York Times* that

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18 Charles E. Rosenberg, *The Cholera Years: The United States in 1832, 1849, and 1866* (Chicago: University of Chicago Press, 1962).

19 The term refers to the simultaneous production of natural and social orders. See Sheila Jasanoff, ed., *States of Knowledge: The Co-Production of Science and Social Order* (London: Routledge 2004).

20 NIH News Release, "NIH to launch public-private partnership to speed COVID-19 vaccine and treatment options," April 17, 2020, https://www.nih.gov/news-events/news-releases/nih-launch-public-private-partnership-speed-covid-19-vaccine-treatment-options (accessed September 26, 2020).

21 NIH News Release, "NIH launches clinical trials network to test COVID-19 vaccines and other prevention tools," July 8, 2020, https://www.nih.gov/news-events/news-releases/nih-launches-clinical-trials-network-test-covid-19-vaccines-other-prevention-tools (accessed September 26, 2020).

she felt herself to be a "middle-aged Joan of Arc," ready to stick her arm out "for science" in order to bring back the normal faster.[22] Unknowingly, she echoed a script for compulsory national biomedical service articulated some ten years before by, among others, Ezekiel Emanuel, bioethicist and health policy adviser to President Barack Obama. Their theory was that biomedical knowledge is a public good and hence there is a duty of citizenship to participate in research that produces it.[23] Every political subject, in Emanuel's view, has an obligation also to serve as a research subject. Such a mandate would represent in the fullest sense an assertion of public health sovereignty and its totalizing hold on the human body.

A second crucially important player in the federal apparatus of public health protection is the Food and Drug Administration (FDA), the oldest US regulatory agency and historically one of the most well respected for its technical expertise. Its authority encompasses the premarket evaluation of pharmaceutical drugs for safety and efficacy. FDA gained enormous respect following the thalidomide controversy of the 1950s and 1960s, when Dr. Frances Kelsey, a vigilant FDA pharmacologist, resisted corporate pressure and kept the anti-morning sickness drug from being approved in the United States.[24] Already approved in Europe, thalidomide caused upwards of ten thousand birth defects around the world, but US citizens were largely spared and Kelsey came to be revered as a model regulator and public servant. By the 1980s, however, the agency was routinely under fire for perpetuating the "drug lag" through an approval process that critics charged was too slow and cumbersome to deliver needed medicines to ailing patients in real time. These criticisms kicked into higher gear following the introduction of genetic tests and the development of "direct to consumer" (DTC) testing by companies such as 23andMe. Bypassing the apparent bottlenecks of clinical trials and restrictive bioethics rules, DTC testing offered a precedent for privatization and deregulation of biomedical products and services that foreshadowed current calls for rapid, unrestricted, experimental development of anti-covid drugs.[25] In the course of these developments, FDA shifted from being a trusted doorkeeper protecting vulnerable

22 Molly Jong-Fast, "I Am Not a Brave Person. I Am Also Patient 1133," *New York Times*, September 17, 2020, https://www.nytimes.com/2020/09/17/opinion/coronavirus-vaccine-trials.html (accessed September 26, 2020).

23 G. Owen Schaefer, Ezekiel J. Emanuel, and Alan Wertheimer, "The obligation to participate in biomedical research," *Journal of the American Medical Association* 302(1):67-72 (2009), https://doi.org/10.1001/jama.2009.931.

24 Daniel P. Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton, NJ: Princeton University Press, 2010).

25 The United States proved to be especially permissive toward DTC testing, consistent with a bioconstitutional regime in which patients are treated as consumers and the government's chief obligation is to increase access to accurate data so that citizens can make informed treatment choices for themselves. See J. Benjamin Hurlbut, Ingrid Metzler, Luca Marelli, and Sheila Jasanoff, "Bioconstitutional Imaginaries and the Comparative Politics of Genetic Self-knowledge," *Science, Technology, & Human Values* (2020), https://doi.org/10.1177/0162243920921246. See also Kaushik Sunder Rajan, "Two Tales of Genomics: Capital, Epistemology, and Global Constitutions of the Biomedical Subject," in Jasanoff, ed., *Reframing Rights*, pp. 193-216.

patients against unsafe and ineffective drugs to a facilitator of market transactions between manufacturers and consumers willing to try new therapies without the benefit of rigorous testing mandated by the FDA.

Sovereignty confers rights to protect a nation's territorial and political integrity, and this provides a further basis for federal involvement in managing public health. The US government has constitutional responsibility to provide for the nation's defense and to prevent interstate conflicts within its borders. These grants of authority allow the federal government to regulate movements of persons and goods across state lines, as well as travel into or out of the United States. Today there is no question that the nation's power to act in self-defense can be activated to confront public health emergencies such as epidemics. The federal government also has power to control possible sources of economic controversy, within or outside its borders, under the Commerce Clause, Article 1, Section 8, which authorizes it "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."[26]

Border protection encompasses the practices of keeping out infective agents—be they ideas, persons, or non-human organisms—when they are seen as threatening the body politic. In these cases, national regulation, resting on expert knowledge provided by the Centers for Disease Control and Prevention (CDC), can take precedence over state by state determinations. On January 31, 2020, Donald Trump used this authority to ban travel into the United States by any person resident in China during the 14 days preceding entry.[27] The travel ban—undertaken to protect "the security of our transportation system and infrastructure and the national security" against "the potential for widespread transmission of the virus by infected individuals seeking to enter the United States"—was justified on grounds of public health. The presidential proclamation cited Chinese infection and death statistics, the uncertainties surrounding the virus, the first finding of human-to-human transmission by the CDC, and the World Health Organization's January 30 declaration of the Covid-19 outbreak as "a public health emergency of international concern." Health considerations triggered the action, but the authority to act derived from the executive branch's broad power to secure the nation and to determine whose entry might be detrimental to the national interest, not on a primary responsibility to halt the spread of disease. In fact, the ban on travel from China included many exemptions, such as for returning citizens, that would later be cited to show that it was never the purely safety-driven or comprehensive public health measure touted by the White House. According to data collected in both countries, nearly 40,000 people arrived in the United States from China in the two months after

26 While environmental regulation is beyond the scope of this paper, it should be noted that early federal involvement in areas such as water pollution was justified on grounds of keeping peace between states. See *Missouri v Illinois & Sanitary District of Chicago*, 180 U.S. 208 (1901) and *Missouri v Illinois*, 200 U.S. 496 (1906).

27 White House, Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus, January 31, 2020, https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/ (accessed September 26, 2020).

the ban was declared.[28] As a partial and incomplete sealing off of the nation's borders, it proved ineffective in stopping the spread of infection throughout the country.[29]

Despite ups and downs in the reputation and record of the agencies comprising the federal public health system, this elaborate framework, now more than a century old, establishes certain core principles of biomedical citizenship in the United States. Citizens can rely on the federal government to be at the forefront of medical research, through the well-funded but politically accountable NIH. Regardless where in the country US citizens live, they are entitled to expect that drugs and devices prescribed to them will meet the same standards of quality and efficacy. In principle, they can also count on federal expertise and enforcement authority to detect health threats from abroad and take appropriate preventive measures. Yet, none of these entitlements is failsafe and, as the unfolding Covid-19 crisis illustrates, each may entail inter-jurisdictional conflicts in a federal system with fifty separate states that share responsibility for collecting information and ensuring public health and safety. Lawsuits triggered by the pandemic revealed the fissures in public health sovereignty, as well as the force of the intersecting and competing apparatus of civil liberties.

II. Civil Liberties and Public Health Sovereignty: A Brief History

As efforts to develop an anti-coronavirus vaccine heat up, fear has arisen that poorly tested and potentially dangerous drugs may be introduced by politicians hungry for a decisive victory against the disease and by companies eager to profit from the pandemic.[30] The extraordinary spectacle of a president infected with Covid-19 during the heat of a national election campaign and being treated with untested experimental drugs underlined the chaotic conditions under which medical innovation advanced throughout 2020. Concerns that politics was overwhelming science, fueled by the spread of conspiracy theories on social media and diminishing trust in expertise, recalled the anti-vaccine hysteria of an earlier era when states first adopted compulsory vaccination as a public health measure. Yet, compared with today's shifting legal and political sands, the situation back then appeared significantly tamer and easier to control, with few questioning the supremacy of the public health regime.

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28 Steve Eder, Henry Fountain, Michael H. Keller, Muyi Xiao and Alexandra Stevenson, "430,000 People Have Traveled From China to U.S. Since Coronavirus Surfaced," *New York Times*, April 4, 2020, https://www.nytimes.com/2020/04/04/us/coronavirus-china-travel-restrictions.html (accessed October 10, 2020).

29 The spread of Covid-19 in the severely affected New York City area was traced primarily to introductions from Europe and elsewhere in the United States, and not directly from China. See Ana S. Gonzalez-Reiche, Matthew M. Hernandez, Mitchell J. Sullivan, and Brianne Ciferri, "Introductions and early spread of SARS-CoV-2 in the New York City area," *Science* 369 (6501):297-301(2020), https://doi.org10.1126/science.abc1917.

30 Jan Hoffman, "Mistrust of a Coronavirus Vaccine Could Imperil Widespread Immunity," *New York Times*, July 18, 2020 (updated September 1, 2020), https://www.nytimes.com/2020/07/18/health/coronavirus-anti-vaccine.html (accessed October 3, 2020).

During the Covid-19 pandemic, the Commonwealth of Massachusetts emerged as one of the most respectful toward the idea of public health sovereignty. For example, in a large interview-based survey of mask-wearing habits conducted for the *New York Times* in July 2020, Massachusetts patterned among states and regions having the highest odds that "if you encountered five people in a given area, all of them would be wearing masks."[31] In 1902, however, the Swedish immigrant and minister Henning Jacobson, residing in Cambridge, adopted a decidedly more confrontational stance toward local health authorities. Jacobson resisted his city's vaccination mandate in a case that resulted in a landmark decision in the US Supreme Court.[32] A smallpox epidemic in Boston in 1901 had led to 1596 cases and 270 deaths, and the City of Cambridge Board of Health decided under a state law permitting compulsory vaccination that anyone who had not been vaccinated since 1897 should be vaccinated or revaccinated. Jacobson refused, recalling his sufferings from childhood vaccination in Sweden decades before, and also refused to pay the $5 dollar fine required by law from vaccine refusers. His argument rested on a claim of liberty: "[A] compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best."[33]

The courts proved uniformly hostile to Jacobson's claims, as also to his offers of evidence from his own clinical history to support his contentions. Only medical expert testimony, the Massachusetts supreme court ruled, would have been admissible, and even then it would have had to be weighed against the fact that, for nearly a hundred years, medical professionals, legislatures, and people at large had all agreed that regular vaccination was a good preventive against smallpox and that the risk of injury to any person was "too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive."[34] Justice John Marshall Harlan writing for a 7-2 majority of the US Supreme Court issued a ringing defense of the state's police power to enact laws pertaining to health protection. The liberty that the US constitution grants to citizens, Harlan wrote,

> does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.[35]

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31 Josh Katz, Margot-Sanger-Katz and Kevin Quealey, "A Detailed Map of Who Is Wearing Masks in the U.S.," *New York Times*, July 17, 2020, , https://www.nytimes.com/interactive/2020/07/17/upshot/coronavirus-face-mask-map.html (accessed October 6, 2020).

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

33 *Jacobson* at p. 26.

34 *Jacobson*, p. 24.

35 *Jacobson*, p. 26.

In this case, each citizen of Massachusetts was bound by the state's own constitution to a "social compact" for the "common good," and the state legislature's right to demand vaccination during a smallpox epidemic, in the Court's view, clearly fell within its constitutional authority to secure the welfare of the people of the Commonwealth.[36] More specifically, the challenged law met the four standards that were later held to justify state intrusions: "necessity, reasonable means, proportionality, and harm avoidance."[37] These principles became so firmly rooted that a hundred-year retrospective on the case concluded, "Despite all the discordance in public opinion, *Jacobson* endures as a reasoned formulation of the boundaries between individual and collective interests in public health."[38]

The fixation on the physical body alone as the focus of public health sovereignty eroded in the United States with the HIV/AIDS epidemic that began in the 1980s. As the sociologist Steven Epstein has written in his account of knowledge production to combat this lethal disease,[39] a social movement comprising highly educated, creative, and resourceful activists succeeded in getting the NIH to reimagine its clinical trial procedures to better serve the suffering community. Their work made experimental new drugs available on something more closely approximating patients' terms than terms set exclusively by clinical researchers. In Epstein's view, activists provoked a "sustained lay invasion of the domain of scientific fact-making,"[40] bringing home to scientists such as Dr. Anthony Fauci, first director of the Office of AIDS research, that populations of research subjects are fully sentient and capable human beings. The movement thereby succeeded in "yoking together moral (or political) arguments and methodological (or epistemological)

36 This argument carries weight right down to the present day in the minds of philosophers who are unprepared to question the epistemologies of biopower that underwrite conceptions of the common good during a disease outbreak. If one unquestioningly accepts expert reasoning and rules, then of course it follows that public health sovereignty is a benign form of government and individual rights *should* be curtailed in the name of the greater good that such sovereignty ordains. See for instance Michael Tomasky, "There's a Word for Why We Wear Masks, and Liberals Should Say It," *New York Times*, October 17, 2020, https://www.nytimes.com/2020/10/17/opinion/covid-masks-freedom-democrats.html (accessed October 17, 2020) [quoting John Stuart Mill's "On Liberty" for the proposition that liberty means "doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, *as long as what we do does not harm them*" (emphasis added)].

37 Lawrence O. Gostin, "*Jacobson v Massachusetts* at 100 Years: Police Power and Civil Liberties in Tension," *American Journal of Public Health* 95:576-581 (2005), https://doi.org/10.2105/AJPH.2004.055152, at p. 579.

38 Gostin, "*Jacobson*," p. 580.

39 Steven Epstein, *Impure Science: AIDS, Activism, and the Politics of Knowledge* (Berkeley: University of California Press, 1996).

40 Epstein, *Impure Science*, p. 330. Advocates of patient activism might argue that a similar breaching of clinical hegemony was undertaken, albeit alone and on the strength of pure political power, by Donald Trump in refusing to follow medical guidance during his struggle with Covid-19. See Michael Cooper, "Trump's 'Don't be afraid of Covid' exhortation is denounced by Democrats and disease experts," *New York Times*, October 5, 2020, https://www.nytimes.com/2020/10/05/us/elections/trump-covid-tweet-democrats.html (accessed October 10, 2020).

arguments."[41] This exercise in self-conscious co-production, emphasizing the research subject's agency as a moral and political actor alongside being a disease-carrying body, ran counter to the Foucauldian conception of the passive population that had dominated clinical thinking and is still reflected in Emanuel's call for a nationwide conscription of biomedical research subjects.

A 1986 report issued by the (then) Institute of Medicine (IOM) also illustrates the more holistic appreciation of what infectious disease means to patient populations that gained ground during the HIV/AIDS epidemic.[42] The authoring committee included a health care and public health panel with some members drawn from bioethics and the social sciences.[43] Not surprisingly, the resulting IOM report included a section on scientifically unjustified discrimination against people with AIDS or suspected of having the disease. It recommended public education programs to combat false assumptions about transmission that promoted discrimination, and it investigated how best to achieve a balance between public and individual interests in formulating policies to confront the disease. On balance, the committee recommended the adoption of "the least-restrictive measures commensurate with the goal of controlling the spread of infection."[44] It also cautioned against undue coercion of "closed populations" (e.g., prisoners, psychiatric patients, and the institutionalized mentally retarded) and recommended the free admission of HIV-infected children to school classrooms because the risk of transmission from such children had been found to be negligible.

Public health legislation of the period provides an additional powerful signal that, in the struggle between individual liberty and population health, the former had made great strides. Within a decade of the onset of the epidemic in the United States, half the states enacted or revised their public health laws to cover conditions under which HIV patients could be quarantined and recalcitrant patients—those engaging in unsafe sexual conduct even after being a seropositive diagnosis—could be restrained. Although a number of states criminalized recalcitrant behavior putting unknowing partners at risk, those where the disease was most prevalent went the opposite way. According to a study published in 1993, "It is worth noting that neither California nor New York, states that together account for close to 40% of AIDS cases in the United States, enacted criminal laws or revised public health statutes to cover the sexual transmission of HIV."[45] In these states, the view that informed "self-protection was the ultimate protection against

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41 Epstein, *Impure Science*, p. 336.

42 Institute of Medicine, *Confronting AIDS: Directions for Public Health, Health Care, and Research* (Washington, DC: National Academy Press, 1986).

43 They included Dorothy Nelkin, a Cornell University professor and leading representative of the field of science and technology studies (STS), and LeRoy Walters, a prominent bioethicist from the Kennedy School of Ethics at Georgetown University.

44 IOM, *Confronting AIDS*, p. 16.

45 Ronald Bayer and Amy Fairchild-Carrino, "AIDS and the Limits of Control: Public Health Orders, Quarantine, and Recalcitrant Behavior," *American Journal of Public Health* 83(10):1471-1476 (1993), https://doi.org/ 10.2105/ajph.83.10.1471, at p. 1472.

HIV infection" clearly won the day over opponents' argument that the state, through its police powers, was responsible for protecting vulnerable or otherwise defenseless persons against disease transmission.[46] As the study authors noted, the less restrictive states were also the ones "that are typically more populous, more cosmopolitan, more politically liberal, and with better organized gay communities."[47] Through the efforts of patient activists, a previously impermeable barrier between political and biological citizenship became more porous: civil liberties penetrated deeper into the domain of public health sovereignty.

A resurgence of tuberculosis in America in the 1990s, coinciding with and caused in part by the AIDS epidemic, further refined the obligations of public health agencies to respect individual rights and liberties. Until the discovery of antibiotic treatments in the mid-twentieth century, TB was a leading cause of disease and death throughout the world, afflicting young and old, rich and poor, the gifted and the unsung. Public health measures could at best provide for ways to isolate patients, to remove them from conditions where they might infect others, and sanitariums flourished to care for those who could afford such comforts. Diagnosed at 19 and dead at 21, TB patient Ruth Reed wrote poignantly from the shelter of such a place during her second confinement, "This time I am not bitter, not impatient, not rebellious. Suddenly I am serene."[48] There was little choice but to cultivate serenity when suffering from a terminal illness, but with the possibility of treatment came the potential for state coercion and associated legal, ethical, and constitutional concerns.

TB can be treated, but it has not been banished from the world or even from the United States. According to figures from the World Health Organization, an estimated 10 million people worldwide contracted TB in 2018 and 1.5 million people died of the disease.[49] Statistics from the CDC show a steady decline in US TB cases over the last 30 years, from a high of about 25,000 in 1993 to under 10,000 in 2018.[50] Recognizing the continued prevalence of a potentially lethal infectious disease, states adopted a variety of coercive measures against TB, including compulsory quarantine, forced medication, and treatment under observation for noncompliant patients. The rise of patient activism, however, forced a rethinking of such coercion, and by the first decade of this century a change was detectable in the relations between TB patients and the health care system, according much greater respect to patient autonomy. One expression is the World Care

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46 Bayer and Fairchild-Carrino, "AIDS and the Limits of Control," p. 1471.

47 Bayer and Fairchild-Carrino, "AIDS and the Limits of Control," p. 1475. Conversely, Indiana, ranking 23rd in the country in recorded cases, stood out for invoking the power to quarantine more frequently than any other state, a fact with special resonance during the Covid-19 crisis when a former governor of that state, Michael Pence, is the US vice president.

48 Ruth Reed, "I Like Tuberculosis," *The Atlantic* 149 (4):436-440 (April 1, 1932), at p. 440.

49 World Health Organization, Tuberculosis, March 24, 2020, https://www.who.int/news-room/fact-sheets/detail/tuberculosis (accessed October 10, 2020).

50 Centers for Disease Control and Prevention, Trends in Tuberculosis, 2018, https://www.cdc.gov/tb/publications/factsheets/statistics/tbtrends.htm (accessed October 10, 2020).

Council's Patient's Charter for TB Care,[51] which characterizes patients as partners in treatment. The WHO guidelines on the treatment of tuberculosis build on this more active conception of the patient in spelling out a number of specific rights: "They have the right to care, dignity, information, privacy, food supplements and/or other types of support and incentives, if needed. They also have the right to participate in TB programme development, implementation and evaluation."[52] In return, patients are expected to show solidarity by sharing information with relevant caregivers and community members.

Some analysts have argued that states need to go further than enumerating individual rights. The most basic step would be to provide for treatment not only during the infectious phase of the disease but "treatment until cure," because that is the only way to ensure that sick bodies will safely reenter society. Moreover, asking patients to adhere to treatment standards implies that they are able to comply with relevant requirements. Since TB today disproportionately afflicts those without such resources—the homeless for instance—the demand for adherence requires, for example, "that homeless individuals not be discharged from hospitals to the streets or to chaotic and often dangerous mass shelters after treatment for their acute infectious tuberculosis."[53] For our purposes, such analyses chiefly underscore the point that, in the century and more since the *Jacobson* decision, the state's police power to regulate against infection has increasingly been offset by a recognition that citizens lead lives that are never wholly delimited by their status as objects of public health treatment and surveillance. This evolution helps contextualize the legal conflicts that arose during the first phase of the coronavirus pandemic.

III. Which Sovereignty?—Covid-19 and the Constitution

America, as is well known, is a litigious society, and Covid-19 was one of the biggest disruptors of normal life that Americans as a whole had experienced in a very long time. That such an event would give rise to lawsuits was almost a foregone conclusion, and indeed thousands of suits were filed within months of the onset of crisis. Many of these involved claims against employers, and others targeted a wide variety service providers, alleging injuries from broken contracts, insurance denials, harmful prison conditions, and wrongful death. The object here is not to review the landscape of litigation in its entirety, but to illuminate the most salient controversies of 2020 in which the dual identities of the biomedical and sociopolitical subject were most starkly at loggerheads and in which the resolution centered to some degree on the status accorded to public health expertise in relation to law within the apparatus of civil liberties.

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51 World Care Council, The Patients' Charter for Tuberculosis Care – patients' rights and responsibilities. *Kekkaku*. 4(6):503-4 (2009).

52 World Health Organization, *Treatment of Tuberculosis: Guidelines. 4th edition* (Geneva: WHO, 2010), Chapter 6, Supervision and Patient Support, https://www.ncbi.nlm.nih.gov/books/NBK138737/ (accessed October 10, 2020).

53 Bayer and Dupuis, "Tuberculosis, Public Health, and Civil Liberties," p. 314.

A. Elections

Regular elections are the lifeblood of a democracy, an occasion for every citizen to assert a voice, and yet they may have to be postponed or canceled under exigent circumstances.[54] The early months of the Covid-19 crisis presented such a situation, in which cases and deaths were rising rapidly, uncertainty and confusion reigned, and it was clear that large gatherings could turn into "superspreader events" that might overwhelm scarce local and regional hospital resources. By mid-August in a hard-fought and highly consequential presidential election year, at least sixteen states had postponed or otherwise modified their primary elections, citing the risks and difficulties of holding them during the pandemic.[55] Some of these decisions led to lawsuits, and two deserve particular attention: one in New York and one in Wisconsin. Both cases arose from complexities of local politics that led to a bending of the normal election rules. In both, a federal judge ordered the election to go forward as originally planned, but the decisions rested on very different grounds and displayed sharply divergent responses to the claims put forward by the advocates of rebalancing the right to vote against the threat to health.

The New York case involved a decision in late April to cancel the presidential primary that had been rescheduled for June 23, following concerns about the spread of the virus. By this time, almost all the leading Democratic contenders had withdrawn from the field, making it certain that former Vice President Joseph Biden would be the party's nominee. The New York State Board of Elections, controlled by Democrats, decided to call off the election as lacking meaning and imposing needless cost and risk on the public. Andrew Yang, a former presidential candidate, spearheaded a lawsuit to overturn the decision, claiming irreparable harm to himself and his campaign, and in May a federal district judge, Analisa Torres, ruled in his favor and ordered the primary to go forward.[56] Yang and his co-plaintiffs, she noted, including the two-time presidential contender Bernie Sanders, had indeed withdrawn from the national presidential primaries, but they had not thereby surrendered their right to remain on the state ballot and amass delegates to represent them and influence the party platform at the national convention. To deprive them of this opportunity, Torres ruled, would adversely affect their rights to free association and political expression.

The state commissioners argued in their defense that holding the primary would endanger poll workers and voters under conditions that made social distancing impossible, as well as needlessly open extra polling places in locations where the presidential primary

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54 Toby S. James and Sead Alihodzic, "When Is It Democratic to Postpone an Election? Elections During Natural Disasters, COVID-19, and Emergency Situations," *Election Law Journal: Rules, Politics, and Policy* 19 (3), Published Online:17 Sep 2020, https://doi.org/10.1089/elj.2020.0642 (accessed October 10, 2020).

55 Nick Corasaniti and Stephanie Saul, "16 States Have Postponed Primaries During the Pandemic. Here's a List," New York Times, August 10, 2020, https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html (accessed October 10, 2020).

56 *Yang v. Kellner*, No. 20-cv-3325 (AT), —F. Supp. 3d—, 2020 WL 2129597 (S.D.N.Y. May 5, 2020).

was the only contest. In a barrage of numbers, they informed the court that "not going forward with the presidential primary would reduce the number of voters faced with an election by 1,488,715, and would result in '615 fewer poll sites opened for 15 hours of in-person voting,' '22 fewer early voting sites opened for sixty hours of early voting spanning nine days,' and '4,617 fewer poll workers needed'."[57] Torres considered but dismissed the weightiness of these public health arguments. She noted that provisions had been made for every voter in the state to request a mail-in ballot and it should therefore be assumed that in-person voting would be reduced, making distancing measures easier. She concluded, "In sum, removing Yang, Sanders, and other candidates from the Democratic primary ballot will protect the public from COVID-19 only to a limited extent. But barring Plaintiffs and Plaintiff-Intervenors from participating in an election for party delegates will sharply curtail their associational rights."[58]

On appeal, the Second Circuit Court of Appeals unanimously affirmed the lower court's ruling.[59] The judges noted that even in the absence of a *presidential* primary New York's most populous counties would be conducting primaries for other governmental positions, and the countries where no other primaries were taking place were located in the least densely populated part of the state. From a health impact standpoint, the draconian option of canceling a primary election would therefore be relatively inconsequential in the court's view. New York, moreover was the only state to have taken such an extreme step. The balance therefore tipped in favor of the plaintiffs, whose political rights were deemed more important than the election commission's countervailing assertion of serious risks to public health.

The Wisconsin decision also arose from a local political quarrel, this time between the Democratic governor and the Republican-dominated legislature and majority in the state supreme court. At stake in this election was a seat on the high court, which rendered the process even more contentious. Party strategies centered on influencing voter behavior, with Democrats trying to facilitate efforts to vote by mail to avoid the public health crisis, and Republicans trying equally hard to ensure that alternative means of voting would be as limited as possible. In March, with coronavirus cases mounting dangerously in the state and the election looming, Democratic leaders turned to the federal courts to ask for an injunction to stay the election or at least to allow a longer period for sending in absentee, mail-in ballots. Federal District Judge William M. Conley declined to delay the election, seeing that as an overextension of judicial power, but in view of the risks of in-person voting during a pandemic and the chaos surrounding the distribution of absentee ballots and slow mail services, he ordered that ballots reaching election officials by April 13, six days after the election date, could still be counted.

57 *Yang v. Kellner*, at p. 24.

58 *Yang v. Kellner*, at pp. 25-26.

59 *Yang v. Kosinski,* No. 20-1494-cv (2d Cir. Jun. 1, 2020).

The Republicans immediately appealed this decision, and on April 6, a day before the scheduled election, the US Supreme Court struck down the lower court's ruling in a terse, unsigned, four-page opinion. For the Court, the decision was narrow: whether Judge Conley was authorized, in effect, to delay the election, because now ballots would not have to "be mailed and postmarked by election day, Tuesday, April 7, as state law would necessarily require," but "instead may be mailed and postmarked after election day, so long as they are received by Monday, April 13."[60] The decision made much of the fact that absentee ballots could now be *postmarked* after election day, provided only they got to their destination by the stated due date. This modest relaxation, the Court held, constituted a clear violation of its repeated injunction that "lower federal courts should ordinarily not alter the election rules on the eve of an election."[61] The opinion also stressed, contrary to fact as many commentators pointed out, that the petitioners had not requested the District Court to grant the form of relief that Judge Conley had ordered. The decision thus turned exclusively on the Court's preexisting judgments about the limits of federal power to intervene in a state's sovereign right to arrange its electoral process, provided these were consistent with applicable federal norms of the right to vote. Public health concerns and the coronavirus might just as well not have existed at all.

Liberal commentary on the opinion was predictably scathing. Linda Greenhouse, longtime observer of the Supreme Court for the *New York Times* and an instructor at Yale Law School, called it "a squirrelly, intellectually dishonest lecture in the form of an unsigned majority opinion."[62] She specifically took issue with the use of the word "ordinarily," pointing out that *nothing* about the circumstances of this election was ordinary—polling places closed, poll workers absent, people fearful of contracting a deadly virus, an avalanche of absentee ballots, and voters forced to stand in line for hours wearing masks. She could have added that insistence on a postmark by a certain date was a further act of carelessness, if not outright dishonesty, in handling the facts.[63] To Greenhouse, the Court's refusal to engage with these circumstances signaled a lack of "situational awareness to navigate the dire situation that faces the country" and a display of "raw partisanship" overwhelming the right to vote.

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60 *Republican National Committee et al. v. Democratic National Committee et al.,* 589 U. S. ___ (2020), https://www.supremecourt.gov/opinions/19pdf/19a1016_o759.pdf (accessed October 14, 2020), p. 1.

61 *Id.* at p. 2.

62 Linda Greenhouse, "The Supreme Court Fails Us," *NewYork Times*, April 9, 2020, https://www.nytimes.com/2020/04/09/opinion/wisconsin-primary-supreme-court.html (accessed October 15, 2020).

63 This harping on the postmark was itself noteworthy because the Supreme Court's imaginary of how the Postal Service works evidently did not square with the reality of the practice. A commentator noted: "As it turns out, the post office does not place any postmark at all on some mail, such as ballots sent via metered mail. In other cases, ballots had postmarks which merely said the ballot was mailed at some point in April of 2020, without giving a specific date. In some other cases, the postmark was too illegible to determine on what date it was mailed." Ian Millhiser, "Thousands of Wisconsin ballots could be thrown out because they don't have a postmark," *Vox*, Apr 11, 2020, https://www.vox.com/2020/4/11/21217546/wisconsin-ballots-postmark-supreme-court-rnc-dnc (accessed October 15, 2020).

While Greenhouse was right in her analysis, she failed to tease out the full extent of the quarrel at the heart of the Supreme Court's April ruling. To be sure, it was a Republican majority with a history of hostility toward the right to vote prevailing over a Democratic minority that favored greater protection of that fundamental right,[64] a sensitivity that guided Judge Torres in the *Yang* decision. But there were other ideologies of sovereignty, delegation and deference at play here that relate to the seeming disregard for biomedical expertise that marked the Supreme Court's April judgment. These became clear in a further standoff between Judge Conley and his superiors in the Seventh Circuit in September and October 2020.

Spurred by the chaos of the April primary, Wisconsin Democrats again requested adjustments to the absentee ballot rules for the November election, and on September 21 Judge Conley again announced some deadline extensions to accommodate the predicted surge of absentee ballots. Specifically, he extended the deadline to register by mail or online by a week, to October 21, and ruled that mailed ballots postmarked on or before November 3, election day, could be received as late as November 9 and still be counted. On October 9, however, a 2-1 majority of the Court of Appeals for the Seventh Circuit vacated Conley's ruling on the grounds that, first, "a federal court should not change the rules so close to an election; second, that political rather than judicial officials are entitled to decide when a pandemic justifies changes to rules that are otherwise valid."[65] The second reason is the one that commands attention in the context of this paper's analysis, for here the court used a separation of powers argument to take sides in a far more consequential battle over the limits of science in relation to law, and the extent to which bioconstitutional rights, grounded in science's understanding of what life demands, can override political rights and limitations embedded in the words of the law. For the Seventh Circuit's appellate majority, the bottom line was that it is up to state legislatures to decide how pandemics should affect the rules of political behavior, and if as in Wisconsin the resulting choices were bitterly partisan and contrary to expert advice, then so be it. Even a demonstrated abrogation of the right to vote[66] did not change the court's formal evaluation of where the authority to shape elections lies—not in the apparatus of public health protection, nor even in the judicial power to protect the franchise, but in the machinery of state legislative politics. Judge Ilana Rovner, the lone dissenter, noted the bleakness of the choice her colleagues offered to voters: "In the United States of America, a beacon of liberty founded on the right of the people to rule themselves, no citizen should have to choose between her health and her right

64 See Jim Rutenberg and Rebecca Ruiz, "Federal Appeals Courts Emerge as Crucial for Trump in Voting Cases," *New York Times*, October 17, 2020, https://www.nytimes.com/2020/10/17/us/politics/federal-appeals-courts-trump-voting.html (accessed October 17, 2020).

65 *Democratic National Committee et al. v. Bostelmann et al.,* No. 20-2835 (7th Cir Oct. 8, 2020), p. 3.

66 See dissenting opinion by Judge Ilana Rovner; see also Mark Joseph Stern, "A Disastrous New Ruling Will Likely Disenfranchise Tens of Thousands of Wisconsin Voters," *Slate*, October 8, 2020, https://slate.com/news-and-politics/2020/10/wisconsin-pandemic-absentee-voting-disenfranchised.html (accessed October 15, 2020).

to vote."[67] Yet, for the tens of thousands of voters who might not be able to vote absentee in November because of massive breakdowns in the mail service, this was the only option that the court left standing. The apparatus of civil liberties was weaponized in the name of judicial deference to state election rules to deprive citizens of public health safeguards if they wished to exercise their right to vote.

B. Religion

Covid-19 had an explosive impact on normal social life, introducing distance where there had been closeness and isolation where there had been community. Lockdowns worldwide split apart couples, families, friends, schoolrooms, sports teams, orchestras, workplace relationships, virtually any form of social life that depended on sharing space with others of one's kind. One form of togetherness, that of faith, enjoys special protection under the First Amendment's protection of the "free exercise" of religion. A cluster of lawsuits challenged the right of states to impose public health restrictions on places of worship, arguing that these constituted unlawful discrimination against religion. One of these reached the Supreme Court, against a political backdrop that again implicated the role and reach of the executive branch in policymaking.

In mid-April, barely a month into the US crisis, the Justice Department issued a statement signaling the Trump administration's willingness to fight for the cause of religious freedom, albeit in language that paid homage to the need for rigorous social distancing.[68] National guidelines were necessary "because the virus is transmitted so easily from person to person, and because it all too often has life-threatening consequences for its victims, it has the potential to overwhelm health care systems when it surges." However, the statement went on to affirm that "government may not impose special restrictions on religious activity that do not also apply to similar nonreligious activity." Therefore, any guidelines applicable to churches should be the same as those applied to "comparable places of assembly." Religious institutions should not be "singled out for special burdens." Of course, the key issue here for any student of expert practices centers on the definition of "comparable." What should churches be compared to? An answer came in a decision where an unexpected concurrence by Chief Justice Roberts tilted the outcome in favor of the Court's liberal wing and state executive authority.

The California governor's executive order on Covid-19 limited attendance at places of worship to 25% of capacity and placed a cap of 100 on such gatherings. The South Bay Pentecostal Church sued for injunctive relief against the requirement, but its petition was denied on May 20, 2020.[69] In his concurrence, Roberts sided decisively with the regime

67 *Democratic National Committee et al. v. Bostelmann et al.,* No. 20-2835, p. 7.

68 Attorney General William P. Barr, "Statement on Religious Practice and Social Distancing," Department of Justice, April 14, 2020, https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0 (accessed October 15, 2020).

69 *South Bay United Pentecostal Church v. Newsom*, 590 U.S. ___ (2020), https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf (accessed October 15, 2020)

of public health sovereignty as handed down since *Jacobson*. Citing that historic decision for the proposition that politically accountable state officials are responsible for public health and safety, Roberts held back from any "second-guessing" of their rules by an "unelected federal judiciary." He noted that the same restrictions applied to spaces where people gather "in close proximity for extended periods of time" (though not in places like banks, laundromats, and grocery stores) and hence there was no discrimination against religion. Doctrinally, though in this case not in outcome, Roberts' reasoning tracked well enough both Barr's remarks at Hillsdale College and the Court's own reasoning in the Wisconsin election cases. Protecting citizens' civil liberties, including the freedom of religion, was indeed a federal prerogative, but it had to yield in this case to local decisionmakers who are better able to assess public health and are also accountable to the people's will. Roberts proved willing even to rule against religion to assert his still more basic commitment to local fact-finding and decentralized enforcement of civil liberties.

C. Democracy and Executive Power

The idea that the people themselves can question the sovereign's expert judgments is a feature of American civic epistemology[70] that surfaced repeatedly during the Covid-19 crisis in the form of growing challenges to statewide lockdown and masking orders issued by governors' offices throughout the country. In these cases, it was almost as if the figure of Henning Jacobson, armed now with populist rhetoric, partisan legal advice, and sometimes even firearms, had returned from the dead to challenge the power of elected executives to compel compliance with science-driven protective mandates. Though not always successful, these sometimes near-violent uprisings continued the trend toward asserting political agency against the power of public health sovereignty that had manifested itself in far more civil discourse during the heyday of the AIDS epidemic.

Illinois, Michigan, and Wisconsin, all battleground states for the November election, emerged as unlikely frontiers for a kind of insurrection normally associated with far western, rural areas of the United States. In all three states, Democratic governors faced with a surge in coronavirus cases had ordered tough public health measures, including "stay-at-home," social distancing, and mask orders, using their established emergency powers. In each state, resisting citizens took governors to court alleging overuse or abuse of those powers, and in Michigan the results were especially corrosive. In a rapidly moving legal landscape, a comprehensive review of these cases is neither possible nor especially informative. It is their aggregate implications for public health sovereignty that deserves attention. In each state, governors justified their actions on the basis of scientific authority to stem the catastrophic spread of disease. Resisters for their part claimed a breakdown in representative democracy, with tyrannical governors exercising emergency powers in disregard of the legislature's duty to act for the public benefit.

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70 Jasanoff, *Designs on Nature*, pp. 261-262.

In Clay County, Illinois, a state judge ruled that Governor Jay Pritzker's stay-at-home order could not be enforced against Republican state representative Darren Bailey because it was unconstitutional.[71] The governor responded: "History … will also remember those who, so blindly devoted to ideology and the pursuit of personal celebrity, that they made an enemy of science, and of reason."[72] In Wisconsin, the state supreme court in May overruled Governor Tony Evers' emergency stay-at-home order (Emergency Order 28) as administrative overreach for failing to follow correct rulemaking procedures[73]; and in August residents of the state's conservative western region sued to repeal the governor's statewide mask order, claiming that he lacked the authority to impose it.[74]

Michigan, with the tenth-highest number of Covid-related deaths in the country as of late October 2020,[75] became one of the most visible sites of protest against public health orders. Emboldened and inflamed perhaps by Donald Trump's vilifying rhetoric against Governor Gretchen Whitmer, thousands of people mobilized by conservative and libertarian groups, some carrying rifles, gathered in the state capital in April 2020 to protest her emergency orders.[76] In October, a narrow Republican majority of the Michigan supreme court issued a surprise ruling that all of Whitmer's emergency measures in effect after April 30 were invalid because the legislature had not authorized extending emergency declarations beyond that date.[77] Yale law professor John Fabian Witt decried this and similar decisions around the country as "devastating," and as the work of "a new generation of judges, propelled by partisan energies, [who] look to deprive states of the power to fight for the sick and dying in a pandemic in which the victims are disproportionately Black and brown."[78] And as the nation's mood grew darker, the

71 *Bailey v. Pritzker*, Case No. 3:20-cv-474-GCS (S.D. Ill. Jun. 29, 2020), https://casetext.com/case/bailey-v-pritzker-1 (accessed October 15, 2020).

72 Shia Kapos, "Pressuring Pritzker on Shutdowns," *Politico*, April 28, 2020, https://www.politico.com/newsletters/illinois-playbook/2020/04/28/pressuring-pritzker-on-shutdowns-biden-woos-chicago-dissecting-council-votes-489055 (accessed October 15, 2020).

73 *Wisconsin Legislature v. Palm, et al.*, Case No. 2020AP765-OA, 942 N.W.2d 900 [ALSO 391 Wis. 2d 497] (Wis. Oct. 2, 2020), https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=260868 (accessed October 15, 2020).

74 Scott Bauer, "Lawsuit seeks repeal of Wisconsin governor's mask mandate," *AP News*, August 25, 2020, https://apnews.com/article/68d3830e0416be33fc5575834b5cda2b (accessed October 15, 2020).

75 Statista, "Number of deaths from coronavirus (COVID-19) in the United States as of October 22, 2020, by state," https://www.statista.com/statistics/1103688/coronavirus-covid19-deaths-us-by-state/ (accessed October 25, 2020).

76 Nicholas Bogel-Burroughs and Jeremy W. Peters, "'You Have to Disobey': Protesters Gather to Defy Stay-at-Home Orders," *New York Times*, April 20, 2020, https://www.nytimes.com/2020/04/16/us/coronavirus-rules-protests.html (accessed October 15, 2020).

77 *Midwest Institute of Health, PLLC v.Whitmer*, Docket No. 161492, October 2, 2020, https://www.scribd.com/document/478471723/In-Re-Certified-Questions-OP#fullscreen&from_embed (accessed October 15, 2020).

78 John Fabian Witt, "Republican Judges Are Quietly Upending Public Health Laws," *New York Times*, October 15, 2020, https://www.nytimes.com/2020/10/15/opinion/coronavirus-health-courts.html (accessed October 15, 2020.

Federal Bureau of Investigation (FBI) announced just days after the Michigan supreme court decision that they had arrested 13 men accused of plotting to kidnap Whitmer and put her on trial for her actions to control the coronavirus.[79] One can only wonder what sorts of evidence the would-be kidnappers would have mobilized in such a process.

Conclusion: Pathologies of Liberty

In 1816, the 28-year-old George Gordon (Lord Byron) visited the castle of Chillon on Lake Geneva and there was captivated by the legend of François Bonivard, Protestant reformer and political activist, who was imprisoned in an underground chamber for several years in the 1530s. Byron's sonnet celebrating Bonivard's undying patriotism could be read today as an expression of the ongoing contention between biopower and political liberty. As Byron contemplated the marks left on the stone floor by Bonivard's incessant pacing, he imagined liberty ("Eternal spirit of the chainless mind! Brightest in dungeons") overcoming bondage ("fetters, and the damp vault's dayless gloom") and soaring free. Something of that spirit of resistance, the desire of the mind to fight against control of the body, animates rebellions against public health sovereignty—from Henning Jacobson's refusal to be vaccinated against his will to the AIDS activists' struggle not to be criminalized for their sexual conduct to Yang's insistence on a New York presidential primary despite Covid-19 to the militias demonstrating against Whitmer's emergency orders in Lansing, Michigan's capital city. The health and welfare of the body politic, all these cases seem to say, cannot justify intrusive, longterm restraints on people's movements and behavior, least of all without accountability to the people who elected the sovereign responsible for ordering those restraining moves.

Faced with a virus that spreads with impunity, disproportionately affecting the poor and the socially marginalized as Witt rightly observes, how should the progressive, pro-government wing of the American polity respond to these arguments in favor of greater political agency and autonomy? Not by asserting that science dictates answers that all must follow unquestioningly, because that would simply substitute modernity's tyranny of facts and expertise for the undemocratic tyrannies of earlier ages. There are enough uncertainties surrounding the coronavirus for something more democratic to be called for as the groundwork for social policy than naked appeals to "science and reason." That something else might include explicit humility in the face of ignorance, precaution in the face of complexity, compassion in the face of inequality, and solidarity in the face of rampant individuality, such as Trump's rejection of the seriousness of the disease based on his own extra-special (and extra-expensive) treatment as America's patient-in-chief.

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79 Nicholas Bogel-Burroughs, Shaila Dewan and Kathleen Gray, "F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer," *New York Times*, October 8, 2020, https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html?searchResultPosition=2 (accessed October 15, 2020).

One should recognize, moreover, that the apparatus of liberty, no less than the apparatus of biopolitics, contains its own contradictions and pathologies. Constitutional arguments are not always liberating. It matters who interprets the law. As the US Supreme Court demonstrated in its decision on the Wisconsin primary in April 2020, it is possible to invent the facts, deny the legitimacy of expertise, and reject reasonable compromise all for the sake of ratifying a partisan political victory in the dialectics of American federalism. In that case, liberty lost, not because the Court denied science but because it hid its own arbitrariness under a dishonest veneer of deference and invoked a false imagination of orderliness to deny people the right to express their political will in exceptionally disorderly circumstances. Public health sovereignty, like any other form of power, should indeed be subject to limits, and unchecked assertions of sovereignty by experts is not alone the answer to pandemic policy. Sadly, American bioconstitutionalism has not yet developed the modes of reasoning to take on the task of balancing biopower against liberty and to fulfill that mandate with care for people's moral and political agency along with their community's physical health and safety.