

Regressive Federalism, Rights Reversals, and the Public's Health

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Abstract: As the United States emerges from the worst public health threat it has ever experienced, the Supreme Court is poised to reconsider constitutional principles from bygone eras. Judicial proposals to roll back rights under a federalism infrastructure grounded in states' interests threaten the nation's legal fabric at a precarious time. This column explores judicial shifts in 3 key public health contexts — reproductive rights, vaccinations, and national security — and their repercussions.

Deconstruction of constitutional norms at the hands of an overly conservative Supreme Court (and corresponding lower-level tribunals) is emerging as a dominant legal trend in the 21st century. Revived assessments of the scope of federalism as a structural foundation are lending to re-examinations of governmental authorities and constitutional rights. Some courts are taking “new federalism” beyond its original moors in the 1990s¹ to a foregone era when states' traditional powers served as definitive boundaries against federal intrusions and supremacy.²

Even as some Justices struggle with limits of their own roles under principles of separation of powers,³ the Supreme Court is poised to roll back rights it previously bestowed, exemplified by its ongoing reassessment of abortion and other reproductive rights. Against decades of precedents, the Court is considering limiting abortion rights at the behest of politicized legislative acts in Mississippi,⁴ Texas,⁵ and other states. If abortion is ripe for constitutional reconsideration, other civil rights — to marry, to intimacy, to privacy, to parent, to travel — may also be subject to reversals.⁶

The emergence of “regressive federalism”⁷ carries additional consequences. Prioritizing traditional police and *parens patriae* powers via the Tenth Amendment enhances states' authorities in definitive areas of public health policy. Resulting limits on federal incursions into such realms, such as vaccinations, alter modern efforts to craft national policies at a precipitous time. Millions of Americans are resisting vaccines due to misinformation, misperception of risks, government distrust, or outright refusal to observe civic responsibilities.⁸ Multiple states actively promote liberty interests over COVID-19 vaccine mandates despite Americans' heightened risk of COVID-19 infection and deaths.⁹ While the Court has allowed state-based vaccine mandates to continue largely unabated,¹⁰ its jurisprudence dispelling federal vaccine requirements affecting large employers is telling.¹¹ Recognition of

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states' interests as a stopgap to federal emergency mandates may upend long-standing, routine school, day-care, and other vaccination laws.¹² The Court's potential recognition of First Amendment rights to religious exemptions to all vaccination mandates could decrease inoculation rates nationally.¹³

Judicial retrenchment in antiquated constitutional concepts is especially treacherous in crises impacting national security. The COVID-19 pandemic warranted the most expansive use of public health emergency (PHE) powers in U.S. history.¹⁴ Just when governmental stability was needed most, the pandemic became a catalyst for judicial "corrections." As states diverged over how, or even whether,

to abortion following the October 2020 confirmation of Justice Amy Coney Barrett. In September 2021, the Court majority refused to block a Texas law which effectively banned abortions in the state.²⁰ Texas Senate Bill 8 enables individuals to enforce a 6-week abortion ban through private lawsuits, a novel legal maneuver which attempted to prevent federal courts from blocking it.²¹ The Court eventually reasoned that Texas' law could be challenged without outright rejecting the notion that carefully-crafted legislation may avoid judicial scrutiny.²²

In December 2021, the Court further signaled *Roe's* impending demise at oral argument in *Dobbs v. Jackson Women's Health Organization*.²³ All

vacy and marry as "court-invented rights"²⁹ from prior Supreme Court jurisprudence.³⁰

Absent constitutional protections, recognition of reproductive interests falls to legislators' discretion — with dire consequences. Abortion rights bills introduced and passed in the House of Representatives in 2021³¹ were blocked by the Senate. That same year 19 states enacted a total of 108 abortion restrictions: "the highest total ... in any year" since *Roe*.³² These included 6–8 week abortion bans, prohibitions in cases of certain genetic anomalies, and limits on abortion medications.

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to use their public health powers,¹⁵ the Court reversed itself mid-pandemic to affirm First Amendment free exercise rights over social distancing measures.¹⁶ It then curtailed federal agencies' authority to forestall residential evictions¹⁷ and assure worker safety. Collectively these themes, discussed below, raise significant public health consequences.

Reproductive Rights Reversals

Since the Court's decisions in *Roe v. Wade* (1973)¹⁸ and *Planned Parenthood v. Casey* (1992),¹⁹ states cannot ban or unduly burden pre-viability abortions (e.g., prior to 24 weeks gestation). The Court now appears poised to overturn *Roe* and de-constitutionalize individual rights

six conservative Justices appeared open to upholding a Mississippi law banning abortions at 15 weeks,²⁴ well before viability. Justice Kavanaugh argued that since the Constitution is "neutral" on abortion, such matters should be left to Congress or state legislatures to decide.²⁵ Arguments grounded in "scrupulous[] neutral[ity]"²⁶ have the potential to eviscerate other rights not expressly spelled-out in constitutional text, as Justice Sotomayor acknowledged during *Dobbs's* oral argument.²⁷ These include rights to make parenting decisions, retain intimacy and privacy, obtain and use contraception, and marry.²⁸ An amicus brief filed by right to life proponents in *Dobbs* characterizes LGBTQ+ rights to pri-

intend to restrict) abortion in the absence of *Roe*, while only 15 states and D.C. expressly protect abortion rights.³³ Not all women in restrictive states will lose access, but those denied abortions are more likely to experience economic hardship, serious pregnancy-related complications, poorer overall health, and reduced self-esteem and anxiety.³⁴ A decade-long study published in 2020 found that "6.3% of women who gave birth reported potentially life-threatening conditions, compared to ... 0.5% of women receiving a first trimester abortion."³⁵ Women denied abortions received welfare benefits 6 months later at almost twice the rate of women who obtained abortions (15% vs. 8%).³⁶

Reassessment of Vaccine Laws and Policies

On January 13, 2022, against the backdrop of the largest surge in COVID-19 cases seen during the pandemic due to the Omicron variant, the Supreme Court declined to allow the Occupational Safety and Health Administration (OSHA) to enforce its Emergency Temporary Standard (ETS).³⁷ The standard, issued on November 5, 2021, required covered employers with more than 100 employees to ensure workers were vaccinated against COVID-19 or submit to weekly testing and mask wearing on the job, subject to certain exemptions or accommodations.³⁸ Saving thousands of American lives was the goal. In *National Federation of Independent Businesses (NFIB) v. OSHA*, however, the Court questioned OSHA's statutory authority³⁹ despite an extensive regulatory history of protecting workers from multivariate risks.⁴⁰ While "Congress has indisputably given OSHA the power to regulate occupational dangers," reasoned the Court, "it has not given that agency the power to regulate public health more broadly."⁴¹ On January 25, 2022, OSHA withdrew the ETS as an enforceable rule.⁴²

The Court's decision not only erodes existing *Chevron* deference typically granted to federal agencies⁴³ but also has rippling effects in other cases. On January 21, 2022, a federal district court in Texas preliminarily stopped enforcement of President Biden's Executive Order requiring federal employees to be vaccinated for COVID-19.⁴⁴ Relying on *NFIB v. OSHA*, Judge Vincent Brown reasoned the President lacked authority to require the vaccine as a condition of employment because COVID-19 was a "universal risk" and not a "workplace risk." On February 9, the Fifth Circuit Court of Appeals declined to allow enforcement of the federal employee mandate while on appeal,⁴⁵ resulting in its temporary abeyance.⁴⁶

For over a century, the Supreme Court has affirmed states' authority to require vaccinations under their police powers.⁴⁷ However, current legislation in multiple states reveals

an alarming penchant for COVID-19 and other vaccine prohibitions akin to federal limits set by the Court. Initial legislation introduced in Georgia, for example, prescribed that "[n]o agency shall require proof of any vaccination of any person as a condition of providing any service."⁴⁸ Opponents feared that the bill would derail existing school vaccination requirements, although its sponsor later proposed narrowing its coverage solely to COVID-19 vaccines.⁴⁹ Passage of state-based anti-vaccination legislation may lead to vaccine-preventable disease outbreaks not seen in decades.

Regressive Federalism and National Security

Aggressive judicial limits on the scope and breadth of executive powers to quell the pandemic in the interests of national security surfaced in other contexts. After initially ruling inappositely in California⁵⁰ and Nevada⁵¹ in the summer of 2020, the Supreme Court limited governments' social distancing powers later that same year in New York,⁵² and then California⁵³ in early 2021. States were prohibited from broadly enforcing emergency executive orders limiting occupancy to prevent the spread of COVID-19 in religious institutions and gatherings. Placating separation of powers concerns, the Court prioritized First Amendment free exercise rights over PHE measures.

On August 26, 2021, it blocked a residential eviction moratorium⁵⁴ set by the Centers for Disease Control and Prevention (CDC)⁵⁵ to reduce the spread of COVID-19 by encouraging social distancing and preventing homelessness. That same month the Court lifted part of a New York State moratorium on residential evictions.⁵⁶ CDC's moratorium was initially authorized by Congress in March 2020 pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act.⁵⁷ When Congressional authorization expired in July 2020, CDC reinstated the moratorium under the federal Public Health Service Act (PHSA).⁵⁸ The Act authorizes the Department of Health and Human Services (HHS)

(and its subsidiary, CDC) to "make and enforce such regulations ... necessary to prevent the introduction, transmission, or spread of communicable diseases."⁵⁹ Corresponding federal regulations permit CDC to prevent the spread of infectious diseases when state or local responses are insufficient.⁶⁰ Initial judicial challenges to CDC's eviction moratorium were rebuffed by the Supreme Court in June 2021.⁶¹ Yet, when the moratorium lapsed and CDC attempted to renew it, the Court pounced. In *Alabama Association of Realtors v. HHS*, it determined that CDC lacked the "sweeping authority" under the PHSA to issue the moratorium,⁶² questioning the scope of agency delegations, a theme it used later to reject OSHA's power. It is "up to Congress, not the CDC," concluded the Court, "to decide whether public interest merits further action here."⁶³

Together the Court's COVID-19 cases limit federal agency powers, prioritize free exercise principles, narrow legislative authority, and elevate traditional states' interests. Curtailed national emergency responses based on settled constitutional doctrine is one thing; limiting them based on re-constituted constitutional interpretations is another. The former is predictable and grounded; the latter is erratic and reckless. As noted by Justice Sotomayor, legal instability related to constitutional norms during pandemics can be deadly.⁶⁴

Retrenchments of rights coupled with pronounced shifts in federalism and limits on agency authority via a conservatively-centered Supreme Court are concerning. Columnist Charles Blow queries whether we are "at an inflection point for an age of regression."⁶⁵ There is unquestioned potential for generational-shifting of constitutional norms even after the Court's membership changes with the impending retirement of Justice Breyer. Yet, this approach may also collapse. The role of the Constitution in protecting Americans from governmental abuses and malfeasance does not stop at the steps of Con-

gress or the door of the White House. Sometimes, as seen throughout U.S. history,⁶⁶ the abuses that the Constitution are designed to prevent emanate from the Court itself.

Note

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