The Partisan Transformation of American Public Health Law, 1918 to 2020

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See also Navarro and Markel, p. 416, and the COVID-19 & History section, pp. 402–445.

In "Politics, Pushback, and Pandemics: Challenges to Public Health Orders in the 1918 Influenza Pandemic" (p. 416), Navarro and Markel clear away an influential but incorrect impression about epidemic policy in US history. Figures like Associate Justice Samuel Alito of the US Supreme Court have asserted that the pandemic regulations of 2020 and 2021 are like nothing the country has seen before.[1] Navarro and Markel, however, identify powerful continuities between state governments' efforts to contain infection today and such efforts in 1918. The authors document, moreover, parallel cultures of protest a century ago and today against mask mandates, business closures, and school closures. The article particularly focuses on a distinctive new element in our 21st-century pandemic: the rise of novel partisan dimensions in the opposition to regulatory interventions.

Navarro and Markel, however, mostly omit a vital new part of the story that supports and extends their basic argument. In the 21st-century epidemic, the United States is witnessing almost entirely unprecedented partisan pushback against public health measures by the courts. The partisan transformation of the courts is indispensable for anyone aiming to understand the similarities and differences between 1918 and 2020. The influenza pandemic of 1918 produced an outpouring of regulations designed to slow the spread of infection—and protest followed. Crowds inveighed against business closures. Local politicians spluttered against costly closure orders. Lawsuits followed, as they have today.

But there is a crucial difference between the lawsuits of 1918 and those of 2020. A century ago, such challengers sued to force officials to carry out their authority appropriately. Today, legal challengers sue to assert that officials have no authority at all. Plaintiffs in the courts during the 1918 influenza contended that regulations were unfair, that they violated public health law, or that they otherwise exceeded the authority of the actor making the regulation. Sometimes they won. The Supreme Court of New Jersey set aside the conviction of a saloonkeeper in Paterson on the ground that the violation charged was not actually a violation of the relevant statute against public nuisances (*Board of Health v. Clayton*, 106 A. 813, N.J., 1919). Such victories sent public health officials back to the drawing board to come up with regulatory interventions anew. But mostly courts rebuffed such challenges (e.g., *Globe School Dist. No. 1 v. Board of Health*, 179, Ariz., 1919, p. 55). Courts were loath to override public health measures when their own expertise was lacking. As the Supreme Court of Kansas put it in 1919, it was "indispensable to preservation of the public health that some administrative officer or board should be clothed with authority to make adequate rules which have the force of law" (Ex Parte McGee, 185, Kan., 1919, p. 14).

In 1918, legal challenges almost never contended that state or federal constitutions prevented regulators altogether from intervening to slow the spread of the flu. The police power to regulate epidemics was too deeply embedded in US law to make such claims plausible. As the Massachusetts Supreme Judicial Court put it in 1868, state boards of health were

> clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed and delayed as little as possible by the necessary observance of formalities. (*City of Salem v. E. R. Co.*, 98 Mass. 431, 443, 1868, p. 502)

Chief Justice John Marshall of the US Supreme Court agreed, acknowledging the power of states to enact "inspection laws, quarantine laws, [and] health laws of every description" (*Gibbons v. Ogden*, 22 US 1, 203, 1824). By the end of the 19th century, state supreme courts like Wisconsin's could say confidently that the police power to regulate for

epidemics was essentially a "law of overruling necessity," one that was "coextensive with self-protection" and a part of the "inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society" (*State v. Burdge*, 70 N.W. 347, 349, 1897). Even libertarian-leaning jurists of the era concurred.[2,3]

In 1905, little more than a decade before the 1918 influenza pandemic struck, the long history of the police power culminated in Associate Justice John Marshall Harlan's opinion in the Supreme Court in *Jacobson v. Massachusetts.* Upholding an order by the city of Cambridge, Massachusetts, requiring vaccination against smallpox, Justice Harlan wrote, "The rights of the individual in respect of his liberty may at times . . . be subjected to such restraint . . . as the safety of the general public may demand" (*Jacobson v. Massachusetts*, 197 US 11, 29, 1905).

By my count, the lawbooks from the 1918 influenza pandemic contain only one reported judicial opinion in which a plaintiff had the temerity to challenge the right of a state to restrict behavior during the pandemic. A federal court of appeals had no difficulty upholding the power of Alamance County, North Carolina, to prohibit a traveling amusement show from opening for business during the influenza pandemic (*Benson v. Walker*, 274 F. 622, 624, 4th Cir., 1921).

In 1918 and 1919, courts also made clear that broad delegations of authority to state boards of public health were an inevitable and salutary feature of the law of epidemics. As the Kansas high court put it, "Generally the public welfare is best promoted by delegating power to make administrative regulations to fulfill the expressed intention of the Legislature" (Ex Parte McGee, 185, 16, Kan., 1919, p. 14).

In 2020, by contrast, Americans have filed hundreds of constitutional challenges to pandemic regulations. A number have been successful. In Kansas, where courts sustained public health powers in 1919, a federal court issued a restraining order against limits on gatherings in churches (*First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, D. Kans., 2020). In Wisconsin, where courts had once been at the forefront of sustaining public health powers, the state high court struck down stay-at-home and business closure orders and warned that such orders were "something we normally associate with a prison, not a free society" (*Wisconsin Legislature v. Palm*, 942 N.W.2d 900, 939, Wis., 2020). In Michigan, the state supreme court majority struck down the state's emergency powers legislation on the theory that it unconstitutionally delegated the legislature's power—although the delegation at issue closely resembled broad delegations going back to 1918 and before (*Midwest Inst. of Health v. Governor of Michigan*, N.W.2d, 22020 WL 5877599, Oct. 2, 2020).

As of this writing, the most significant decision in the line of constitutional cases arising from the COVID-19 pandemic comes from the US Supreme Court, which the day before Thanksgiving 2020 issued an unprecedented decision blocking New York State's emergency pandemic limits on the size of religious gatherings (*Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 US, 2020). A century ago, analogous claims that California's influenza regulations infringed on religious freedoms made no headway at all.[4,5] But now five justices on the US Supreme Court (and state judges around the country) insist that constitutional constraints preclude certain long-standing regulatory interventions.

What explains the new surge of judicial resistance to public health measures? Much of the answer lies in the "national partisan battle" Navarro and Markel cite. For the first time in a century and a half, the US Supreme Court is bitterly divided along party lines. (The court's Thanksgiving decision came only after the October confirmation of Justice Amy Coney Barrett, who swung the court in a new direction by replacing Democratic appointee Ruth Bader Ginsburg.) Many of the US state high courts are in similar positions. Republican judges, moreover, have put market regulation in the crosshairs as part of a broader critique of the New Deal consensus in constitutional law. In recent years, that effort has extended to bitter attacks on expertise and on the constitutionality of the administrative state.

In our pandemic emergency, legal partisanship has emerged as a new source of pushback. Judges have found themselves doing public health politics by constitutional law means. AJPH

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CONFLICTS OF INTEREST

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