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

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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 “coex
tensive 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 ju-
rists 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
t power culminated in Associate Justice
John Marshall Harlan’s opinion in the
Supreme Court in Jacobson v. Massa-
chusetts. Upholding an order by the city of Cambridge, Massachusetts, requiring
vaccination against smallpox, Justice
Harlan wrote, “The rights of the indi-
nual 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 Car-
olina, 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 Legisla-
ture” (Ex Parte McGee, 185, 16, Kan.,
1919, p. 14).

In 2020, by contrast, Americans have
filed hundreds of constitutional chal-
lenges to pandemic regulations. A
number have been successful. In Kan-
sas, 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 sust-
taining public health powers, the state
high court struck down stay-at-home
and business closure orders and
warned that such orders were “some-
thing 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 su-
preme court majority struck down the
state’s emergency powers legislation on
the theory that it unconstitutionally
deployed the legislature’s power—
although the delegation at issue closely
resembled broad delegations going
back to 1918 and before (Midwest Inst. of

As of this writing, the most significant
decision in the line of constitutional
cases arising from the COVID-19 pan-
demic comes from the US Supreme
Court, which the day before Thanksgiv-
ing 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 jus-
tices on the US Supreme Court (and
state judges around the country) insist
that constitutional constraints pre-
clude certain long-standing regulatory
interventions.

What explains the new surge of judi-
cial resistance to public health mea-
sures? 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. Republi-
can judges, moreover, have put market
regulation in the crosshairs as part of a
broader critique of the New Deal con-
sensus in constitutional law. In recent
years, that effort has extended to bitter
attacks on expertise and on the con-
stitutionality 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.

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REFERENCES


Our Communities Our Sexual Health

Awareness and Prevention for African Americans

Edited By: Madeleine Sutton, MD, MPH; Jo A. Valentine, MSW; and William C. Jenkind, PhD, MS, MPH

This groundbreaking book provides a comprehensive historical perspective of the disproportionate burden of HIV and other sexually transmitted infections (STIs) among African Americans. Chapters that follow explore the context of HIV and STIs in African American communities and include discussions of sexuality and the roles of faith and spirituality in HIV and STI prevention efforts. Additional chapters provide insight into strategies, e.g., HIV testing, condom distribution and marketing campaigns, parent-child communication, effective clinical care and support, and partnerships, for addressing HIV and other STI-related health disparities within these communities. The book is a valuable resource for practitioners, scholars, clinicians, educators, providers, policy makers and students.