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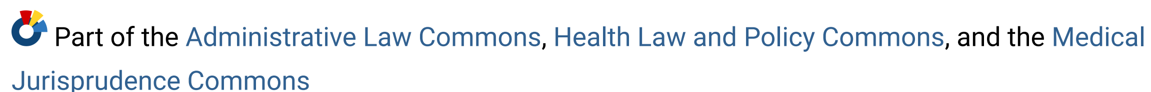
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SANITATION: REDUCING THE ADMINISTRATIVE STATE'S CONTROL OVER PUBLIC HEALTH

*Lauren R. Roth**

ABSTRACT

On April 18, 2022, in Health Freedom Defense Fund, Inc. v. Biden, *United States District Judge Kathryn Kimball Mizelle vacated the mask mandate issued by the Centers for Disease Control and Prevention. Following a framework laid out in other decisions restricting CDC actions in response to COVID-19, the court found that the Agency lacked statutory authority to protect the public from the virus by requiring mask wearing during travel and at transit hubs because Congress did not intend such a broad grant of power. Countering decades of public health jurisprudence, the federal district court failed to defer to experts and prioritized individual liberties over population health. When considered alongside the Supreme Court's recent focus on the major questions doctrine, this lower court's redefinition of the term "sanitation"—away from the meaning it has long held under federal and state jurisprudence and in the public health field—is a big step towards reducing the administrative state's control over public health. While not binding on the states, this decision creates a path for state courts to follow when restricting actions taken by public health agencies, allowing judicially mandated individualism to spread and courts to gain power as they narrow the boundaries of administrative discretion.*

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INTRODUCTION

On April 18, 2022, United States District Judge Kathryn Kimball Mizelle,[1] in the Middle District of Florida, vacated the mask mandate issued by the Centers for Disease Control and Prevention ("CDC") on February 3, 2021 (the "Mask Mandate").[2] On social media, stories circulated of passengers joyfully taking off their masks mid-flight while

1. Judge Mizelle was appointed by President Donald Trump to the bench in November 2020 and received a "Not Qualified" rating by the American Bar Association at the time due to her lack of experience. Eric Lutz, *The Huge Risk Underlying the Biden Administration's Legal Fight to Reinstate the CDC's Mask Mandate*, VANITY FAIR (Apr. 21, 2022), https://www.vanityfair.com/news/2022/04/huge-risk-cdc-appeal-mizelle-mask-mandate-ruling; Madison Alder, *Judge Mizelle Becomes Hero on Right for Her Mask Ruling*, BLOOMBERG L. (Apr. 19, 2022, 5:36 PM), https://news.bloomberglaw.com/us-law-week/trump-judge-in-mask-mandate-case-was-rated-unqualified-by-aba.

2. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1153 (M.D. Fla. 2022).

others looked on fearfully.[3] Several major airlines, Uber, Lyft, and Amtrak quickly ended their mask requirements for passengers, while the White House expressed disappointment at the ruling.[4] Media response included lamentations about the nationwide scope of the decision because the Mask Mandate could no longer be enforced anywhere against anyone (not only the parties to the lawsuit)[5] and general angst about how the ruling could limit the federal government's ability to regulate public health during this pandemic or the next.[6]

Although another federal court in the Middle District of Florida upheld the Mask Mandate on April 29, 2022, in *Wall v. CDC*,[7] the Mask Mandate is no longer in effect. The Department of Justice appealed the court's order striking down the mandate in *Health Freedom Defense Fund, Inc. v. Biden*.[8] Additional litigation over the Mask Mandate in federal courts in Texas and Florida is currently stayed pending the outcome of the appeal in the Eleventh Circuit.[9] Concerns remain, however, about what will happen if the decision is upheld by the conservative-leaning Eleventh Circuit or even the Supreme Court.[10]

The district court has set a dangerous precedent that will have long lasting repercussions for public health jurisprudence. When combined with the development of the major questions doctrine in *West Virginia v.*

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3. Yaron Steinbuch, *Judge's Decision to Void Mask Mandate Prompts Mid-Flight Cheers Among Fliers*, N.Y. POST (Apr. 19, 2022, 7:26 AM), https://nypost.com/2022/04/19/judges-decision-to-void-mask-mandate-prompts-mid-flight-cheers-among-fliers/.

4. Jonathan Franklin, *Justice Department Might Appeal the Mask Ruling if the CDC Says They're Still Needed*, NPR (Apr. 19, 2022. 7:34 PM), http://www.npr.org/2022/04/18/1093364146/a-florida-judge-overturns-the-cdcs-mask-mandate-for-planes-and-other-public-tran ("White House press secretary Jen Psaki expressed frustration with the court's ruling. 'Public health decisions shouldn't be made by the courts. They should be made by public health experts,' Psaki said.").

5. *See, e.g.*, Steve Valdeck, *How a Trump-Appointed Judge Reignited a Major Debate over Power in the Courts*, MSNBC (Apr. 21, 2022, 5:41 AM), http://www.msnbc.com/opinion/msnbc-opinion/cdc-mask-mandate-ruling-scarier-we-thought-n1294639.

6. *See, e.g.*, Melissa Healy, *Q&A: How a Florida Judge's Mask Ruling Could Cause Problems in the Next Pandemic*, L.A. TIMES (Apr. 21, 2022, 9:34 AM), https://latimes.com/science/story/2022-04-21/cdc-travel-mask-mandate-legal-implications.

7. No. 6:12-cv-975, 2022 WL 1619516, at *3 (M.D. Fla. Apr. 29, 2022).

8. Erica N. White et al., *CDC Travel Mask Mandate Litigation*, NETWORK FOR PUB. HEALTH L. 2 (Nov. 4, 2022), https://www.networkforphl.org/wp-content/uploads/2022/11/Western-Region-Memo-CDC-Mask-Mandate.pdf.

9. *Id.* at 3 ("In February 2022, Texas Attorney General Ken Paxton sued the Biden administration in the U.S. District Court for the Northern District of Texas, alleging major over-steps of CDC's authority in issuing the Mandate. Not long after, in March 2022, in the U.S. District Court for the Middle District of Florida, 21 state attorneys general also sued, claiming that enforcement of CDC's Mask Mandate 'harms the states' and interferes with local laws.").

10. Lutz, *supra* note 1.

EPA,[11] the federal courts have substantially restricted the ability of federal agencies to regulate public health and provided a doctrinal map for states to do the same to state and local agencies.

States typically have the lead role in responding to public health crises (even though the federal government's role has increased dramatically since the New Deal). The fragmented and often conflicting responses to the COVID-19 crisis among the states demonstrate both this principle in action and its consequences. Yet the analysis of Judge Mizelle's opinion has not focused on how the ruling could tie the hands of state public health authorities in the future—the exact opposite of what it purports to do.[12]

In this Article, I assert that *Health Freedom Defense Fund, Inc. v. Biden* is only the most extreme in a line of federal cases issued during the COVID-19 pandemic that increases the power of the judiciary to second guess the propriety of agency responses to a public health crisis. This line of cases includes *West Virginia v. EPA*. While recent Supreme Court cases have substantially narrowed the authority of the administrative state, less attention has been paid to the extent this judicial philosophy already pervades recent lower court decisions and goes further than the major questions doctrine in nullifying decisions made by administrative agencies. In public health law, this allows judges to substitute their views on the actions taken to contain the spread of a deadly disease for those of experts.

Part I reviews the administrative law literature related to the Supreme Court's recent pronouncement of the major questions doctrine. Unmooring review of administrative action from *Chevron* has allowed the courts to shift power to the judiciary and deter future regulations in "major" areas (which lower courts can decide upon with few guardrails). Scholars are fearful that the major questions doctrine has turned into a judicial veto, and this Article explores exactly the sort of lower court ruling that the major questions doctrine will increasingly result in.

Part II focuses on Mizelle's redefinition of "sanitation" in the Mask Mandate case. I first review the recent cases on the cruise industry shutdown and the federal eviction moratorium that Judge Mizelle explicitly relied upon in reaching her decision on the Federal Mask

11. 142 S. Ct. 2587 (2022).

12. Leslie Manookian, the president and founder of the Health Freedom Defense Fund, the non-profit group which filed the lawsuit over the Mask Mandate along with two individual plaintiffs (and many other lawsuits related to vaccination requirements and mask mandates), touted the decision as "an important line in the sand to draw in order to ensure that the federal government stays within its bounds." Yasmeen Abutaleb et al., *How a Single Judge's Ruling Upended National Covid Policy*, WASH. POST (Apr. 21, 2022, 3:19 PM), https://www.washingtonpost.com/politics/2022/04/21/covid-transit-mask-mandate/.

Mandate. The reasoning in these opinions forms the backbone of the court's decision, particularly by confining the CDC to specific methods listed as if they are the outer bounds of its authority and limit the broad grant of statutory powers to prevent the spread of disease. Judge Mizelle moves beyond the framework provided by previous cases and redefines a term of art in public health jurisprudence, setting a dangerous precedent for public health law.

To demonstrate why this redefinition will harm the states, in Part III, I explore the historical definition of "sanitation" in cases from the states with the five highest COVID-19 death rates. Sanitation has long been synonymous with preventing the spread of disease and part of a system designed to delegate broad powers to local health authorities in times of crisis.

Finally, in Part IV, I explain why redefining "sanitation" to justify striking down the Mask Mandate reflects a dangerous trend away from deference to public health experts that both harms states and prioritizes courts and individual liberties over population health. Combined with the development of the major questions doctrine, the liberties taken by lower court judges could signal the future obsolescence of the administrative state during public health crises.

I. THE MAJOR QUESTIONS DOCTRINE

In *West Virginia v. EPA*, the Supreme Court ruled that the Environmental Protection Agency ("EPA") lacked the statutory authorization to issue the Clean Power Plan and further developed, or first announced, the major questions doctrine (depending on whether you are reading the majority opinion or the dissent).[13] Relying on both separation of powers concerns and "a practical understanding of legislative intent," the Court announced that certain cases require additional scrutiny of agency claims that Congress has delegated broad authority.[14] Gorsuch's concurrence also nodded towards federalism concerns as a justification for the major questions doctrine.[15] Although

13. *See West Virginia*, 142 S. Ct. at 2616.

14. *Id.* at 2608 ("In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the Agency] has asserted,' and the 'economic and political significance' of that assertion, provide 'a reason to hesitate before concluding that Congress' meant to confer such authority." (alteration in original) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000))).

15. *Id.* at 2621 (Gorsuch, J., concurring) ("But unsurprisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power

the Court stated that these cases involving major questions "have arisen from all corners of the administrative state," it disproportionately cited to public health law cases.[16] Notably, the Court was concerned with agencies using new "tools" in their "toolbox[es]."[17]

Although Gorsuch's concurrence in *West Virginia v. EPA* carefully attempted to trace the long history of the major questions doctrine,[18] the dissent asserted that the (mainly public health law) cases cited as evidence of the Court's past use of the major questions doctrine merely reflect "normal statutory interpretation":

> In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation's terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And

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to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States.").

16. *Id.* at 2608–09 (majority opinion); *see also, e.g.*, *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (denying the Food and Drug Administration the authority to regulate tobacco); Gonzales v. Oregon, 546 U.S. 243 (2006) (denying the Attorney General's authority to rescind a physician's license for prescribing drugs to use in an assisted suicide in a state where assisted suicide is legal); Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (denying the Occupational Safety and Health Administration's authority to require workers to either get vaccinated for COVID-19 or tested weekly); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (denying the CDC the authority to regulate housing during the COVID-19 crisis).

17. *See West Virginia*, 142 S. Ct. at 2613 ("The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly 'raises[s] an eyebrow.' . . . And no one would consider generation shifting a 'tool' in OSHA's 'toolbox,' even though reducing generation at coal plants would reduce workplace illness and injury from coal dust." (alteration in original) (citations omitted)).

18. *See id.* at 2619 (Gorsuch, J., concurring) ("Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statements rules, Article I's Vesting Clause has its own: the major questions doctrine. Some version of this clear-statement rule can be traced to at least 1897, when this Court confronted a case involving the Interstate Commerce Commission, the federal government's 'first modern regulatory agency.'" (citations omitted)); *cf. id.* at 2633–34 (Kagan, J., dissenting) ("[The majority] announces the arrival of the 'major questions doctrine,' which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules. . . . The Court has never even used the term 'major questions doctrine' before. And in the relevant cases, the Court has done statutory construction of a familiar sort.").

> second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here.[19]

The dissent also countered the Court's interpretation of the relevant statutory language, noting:

> Congress used an obviously broad word (though surrounding it with constraints) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. (Once again, dictionaries would tell the tale.)[20]

The dissent's assertion that "dictionaries would tell the tale" seems questionable when courts can select among multiple dictionary definitions, however.[21]

This debate over statutory construction, federalism, and deference to administrative experts is exemplified by the jurisprudence analyzed in this Article, and scholars have opined on this break from past precedent in favor of judicial discretion and constraints upon the administrative state.

Although the major questions doctrine acts too as a check on Congress by instructing it how to draft legislation,[22] the ongoing threat that the nondelegation doctrine[23] will explicitly rear its head is beyond the scope of this Article—particularly given how effective the major questions doctrine is at accomplishing the nondelegation doctrine's goals. For the moment, the Court has avoided discussing the constitutional

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19. *Id.* at 2633 (Kagan, J., dissenting).

20. *Id.* at 2630–33 (citations omitted). Justice Kagan continued, "And when Congress uses 'expansive language' to authorize agency action, courts generally may not 'impos[e] limits on [the] agency's discretion.' That constraint on judicial authority—that insistence on judicial modesty—should resolve this case." *Id.* at 2632–33 (alterations in original) (quoting Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2381 (2020)). Judge Mizelle's redefinition of the word "sanitation" presents a greater threat to states' power to regulate public health than any language in the other decisions discussed. *See infra* Part II.

21. *Id.* at 2630 (Kagan, J., dissenting).

22. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 276 (2022).

23. Cass Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN L. REV. 475, 478 (2021) ("[T]he nondelegation doctrine . . . requires Congress to offer an 'intelligible principle' by which to limit agency discretion.").

issue of nondelegation.[24] I will therefore focus on what the Court's change in doctrine through this clear statement rule accomplishes and how it supports the arguments below about how courts are shifting power to the judiciary and away from administrative experts in public health.

A. *Breaking Away from* Chevron

In *King v. Burwell*,[25] the Supreme Court held that the *Chevron* analysis did not apply to agency regulations addressing a "question of deep 'economic and political significance,'" such as the one in this case of key importance to the Patient Protection and Affordable Care Act ("ACA").[26] The Court instead applied *de novo* review.[27] The case thus heralded an exception to *Chevron* for major questions.[28] Lower courts, with an interest in restricting administrative power, soon applied the major questions doctrine or at least included it in dicta.[29]

Michael Coenen and Seth Davis argued, however, that only the Supreme Court should be able to decide that a question was "'major' enough" to result in an exception to *Chevron*.[30] In part, the problem stemmed from the difficulty in distinguishing between major and minor questions.[31] Although one can disagree about whether the Supreme Court is more capable of screening out "dysfunctions" in the regulatory process than lower courts, and whether the Court can claim "to have been democratically authorized to make national policy" because of its prominent nomination and appointment process,[32] there is significant

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24. *But see* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279 (2021) ("For the first time in modern history, a working majority on the Supreme Court may be poised to give the nondelegation doctrine real teeth."). In a dissenting opinion to *Gundy v. United States*, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, endorsed reviving the nondelegation doctrine. *Id.* (citing Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting)). Justice Alito likewise seemed open to revisiting the doctrine. *Id.* (citing *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring)). Justice Kavanaugh later endorsed Gorsuch's suggestion. *Id.* (citing Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring) (respecting the denial of certiorari)).

25. 135 S. Ct. 2480 (2015).

26. *Id.* at 2489 (quoting Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014)).

27. *Id.*

28. Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 779 (2017).

29. *Id.* at 796.

30. *See id.* at 799 (arguing that "lower courts lack the institutional features necessary" and any lower court application of the major question exception "will inflict unnecessary costs on litigants").

31. *Id.* at 780 ("But the *King* Court did not define 'major questions,' and we think that's because there's no easy way to articulate the contours of any such requirement.").

32. *See id.* at 839–43.

angst among scholars about relying on lower courts to distinguish major questions and effectively make policy in place of administrative agencies. Others, however, pushed back against Coenen and Davis for attempting to "short-circuit" the development of the new major questions doctrine and found a place particularly for circuit courts to add value with supervision from the Court.[33]

The major questions doctrine has changed existing "judicial review of agency action in its method and content, in ways that will have momentous consequences."[34] Untethered from *Chevron*, the courts can no longer uphold administrative action on key regulatory subjects unless Congress states that agencies are authorized to take such action.[35] In cases that addressed the major questions doctrine before *King*, it was but one factor in deciding whether the agency's interpretation of the statute was correct—not the only one—and was only a carve out from the default *Chevron* analysis.[36] Now, *Chevron* is a ghost—mentioned by neither the government in its arguments to the Court nor by the Court in its discussion of the major questions doctrine.[37]

B. *Shifting Power to the Judiciary*

In addition, the literature focuses on the shift of discretion and power to the judiciary, noting that the major questions doctrine "annexes enormous interpretive power to the federal judiciary by enunciating a standard for substantive legitimacy that is so malleable that, at present, it can be said only to mean 'just what [the Court] choose[s] it to mean—neither more nor less.'"[38] Indeed, much of the criticism of the major

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33. Kent Barnett & Christopher Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 163 (2017) ("But if Coenen and Davis's fears of lower court mischief turn out to be well founded, we do not similarly worry that the Supreme Court would fail to intervene to correct course.").

34. Sohoni, *supra* note 22, at 263–64 (noting the "irony" that the Court announced a major shift in deference "without *clearly stating* it was doing so").

35. *Id.* at 264.

36. *Id.* at 271–72 (noting that in previous cases before this Supreme Court term, "the route the Court took to get to that endpoint encompassed far more terrain than a binary inquiry into whether the statute contained a clear statement that authorized the agency to achieve the result sought").

37. *Id.* at 281–82 ("In contrast, the new major questions doctrine does not begin with *Chevron*. The new major questions doctrine does not operate as a factor within the *Chevron* framework, nor is it described as an exception to that framework. None of the quartet even cites *Chevron*. The decision that has loomed over administrative law for almost four decades was essentially erased, as if it never existed.").

38. *Id.* at 266 (alterations in original) (quoting LEWIS CARROLL, *Through the Looking-Glass and What Alice Found There*, *in* ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 196, 244–45 (Richard Kelly ed., 2015)); *see also* Sunstein, *supra* note 23, at 487 ("[T]he line between 'major' and 'nonmajor' questions is not exactly obvious.").

questions doctrine has focused on its "counter-democratic allocation of power from agencies to judges."[39]

There is also a shift in power from Congress to the courts. The major questions doctrine supposedly helps courts to decide if Congress has delegated authority but, in reality, is "invoked to *tell Congress how* it may delegate authority."[40] The courts are telling Congress it cannot use broad terms to delegate broad authority to agencies so they can "adapt to new and unanticipated problems."[41] This is more disturbing if the courts mainly tell Congress how to delegate authority by restricting administrative action only in areas like environmental and public health law. Nathan Richardson states:

> This shift from major questions doctrine to canon is subtle but powerful. More than a further pullback from *Chevron* deference, it is a *reversal* of it. *Chevron* gives agencies some range of interpretive authority when statutes are ambiguous. The major questions doctrine discards that deference, allowing courts to engage directly with statutes (and, therefore, with Congress). But the major questions canon is actively hostile to agency assertions of authority, allowing courts to reject agency interpretations in "major" cases of statutes that are insufficiently unambiguous. The major questions canon is thus a super-*Marbury* for the administrative state.[42]

Thus, the Supreme Court has crafted a new canon that allows judges to know major questions when they see them and assert power over both the administrative state and Congress when regulations encroach into areas where it feels judges can make better policy. As Lisa Heinzerling wrote:

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39. Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 176 (2022) (noting, however, that the doctrine may actually safeguard *Chevron* outside the major questions context).

40. Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 465–66 (2021) ("The difference between those two perceptions of the current major questions doctrine is subtle because the end result is the same: Congress makes its major delegations explicit. But there is a nontrivial distinction between a judicial attempt to elucidate and respect a congressional determination of majorness . . . , and a judicial mandate to use particularly clear legislative language when discussing those policy questions that a court declares to be major. The latter amounts to courts improperly inserting themselves into the Article I, Section 7 lawmaking process.").

41. *See* Sunstein, *supra* note 23, at 489.

42. Richardson, *supra* note 39, at 177; *see also* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937 (2017) ("Consistent with this politically inspired shift in power from the executive branch to the courts, I call the new canons the 'power canons.'").

> The power canons are, in other words, clear-statement principles, directed as much to Congress as to the agencies. And they require clear congressional language to enable an ambitious regulatory agenda but not to disable one. This asymmetry is the power canons' tell; it is a sign that they mask a judicial agenda hostile to a robust regulatory state.[43]

Because the "trigger" for judicial scrutiny (and zero deference) is that the subject is a highly salient political dispute, there are important constitutional implications for the courts transferring power from the administrative state to the judicial branch.[44] Instead of drawing on the statutory language under interpretation, the courts "put a big, grumpy thumb on the scales in interpreting them."[45]

C. *Deterring Agency Action*

The major questions doctrine will also present a major deterrent to agency action that extends far beyond its impact through case-by-case judicial review.[46] Not only will agencies balk at regulating in areas where judges seem particularly active, they are likely to shy away from costly regulations. The COVID-19 cases discussed below focused in part on economic impact to determine what constitutes a major question. Agencies might thus choose less than optimal regulatory options because they are less costly, and thus, less likely to fall under the major questions doctrine.[47]

The result is a "status quo bias."[48] The literature notes that this bias is particularly dangerous when the government needs to respond to emergencies like pandemics that require broad authority.[49] Decisions of agencies not to act are also important policy decisions, and the Court's

43. Heinzerling, *supra* note 42, at 1938.

44. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2023–24 (2018) (highlighting the fact that judicial policymaking in these areas is even more fraught for the balance of power within the government).

45. Heinzerling, *supra* note 42, at 1938, 1980–81.

46. Sohoni, *supra* note 22, at 266 (labeling this deterrent an "*in terrorem* curtailment of regulation on an ongoing basis" and noting how any congressional effort to delegate will require a review of statutes going back decades).

47. *See* Richardson, *supra* note 39, at 196–97 (arguing that the Court's focus on "decontextualized" regulatory costs "creates perverse incentives for agencies, encouraging them to choose regulations with lower cost even if their preferred option has higher net benefits, or to fragment regulatory actions to avoid their being characterized as 'major'").

48. *Id.* at 204.

49. *Id.* (noting that what is "difficult in normal times . . . [is] likely impossible in a crisis").

preference for inaction in environmental and public health law reflects both a policy preference and a political bias.[50]

Blake Emerson has asserted that the doctrine undermines democracy "by failing to respect the deliberative capacities of administrative agencies."[51] Instead of having decisions made by agencies authorized to act by Congress, and by the President and subject to executive action, decisions on important issues will instead be made largely by appointed judges.[52] He argues that this reflects the antibureaucratic philosophy of the modern Court which posits that agencies are filled with technocrats who can only implement legislation instead of helping to make policy.[53] The major questions doctrine assumes that judges should protect against bureaucrats who veer out of their narrow lane,[54] although it overlooks the question of whether judges are veering outside of their own lane in doing so.

Although Emerson has proposed that courts scrutinize the agency's rulemaking process by focusing on how responsive the agency is to the public, and the extent to which it has addressed the "relevant questions of political value,"[55] the Court seems intent on increasing scrutiny based on the subject matter of the regulations rather than the process employed by the agency. This leaves room to argue that it is creating a two-track system of judicial noninterference (formerly known as deference) in areas of low political saliency and judicial activism in areas of high political saliency. However the recent jurisprudence is characterized, it opens the door to judicial activism by lower courts.

In 2021, Cass Sunstein wrote about how the major questions doctrine is actually two doctrines—a weak version and a strong version.[56] The weak version is an exception to *Chevron* where the courts use their own

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50. *See* Heinzerling, *supra* note 42, at 1987–88 (finding in precedent indications that "the Court's real worry was not that the agency would make a really big interpretive decision without clear statutory language telling it to, but that it would make the *wrong* interpretive decision").

51. Emerson, *supra* note 44, at 2024.

52. Richardson, *supra* note 39, at 202–03 ("For reasons that are never explained, Congress is asleep at the wheel and unable to restrain agencies.").

53. *See* Emerson, *supra* note 44, at 2024 ("The doctrine presumes that the reasonable legislator would not have wanted a bureaucratic body to settle policy questions that were left unanswered by statutory law."); *see also* Blake Emerson, *"Policy" in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy*, 97 CHI.-KENT L. REV. 113, 134–35 (2022) (examining how the APA explicitly contemplates that agencies will make policy instead of merely carrying out instructions from Congress).

54. Emerson, *supra* note 44, at 2024 ("The courts, by contrast, are treated as the guardians of principle and policy, who stand ready to prevent over-zealous executive officials from usurping legislative power.").

55. *Id.* at 2028.

56. Sunstein, *supra* note 23, at 475.

judgment instead of deferring to that of agencies when major questions are involved.[57] However, the strong version—rooted in the nondelegation doctrine—blocks agencies from speaking at all on ambiguous statutes.[58] The Supreme Court has now chosen the strong version.

II. REDEFINING SANITATION

A. *COVID-19 Precedent*

Before the Mask Mandate was struck down, other federal courts pushed back against the CDC's actions to contain the COVID-19 pandemic. Reflecting a hostility towards the size of the administrative state and its use of novel measures to attack novel problems, conservative judges clashed with the executive branch during the Biden administration.

Judge Mizelle relied on two other COVID-19 cases, *Florida v. Becerra* and *Alabama Association of Realtors v. Department of Health and Human Services*, that restricted the CDC's authority under 24 U.S.C. § 264(a)—§ 361(a) of the Public Health Service Act ("PHSA"). As she explained:

> Within the past two years, the CDC has found within § 264(a) the power to shut down the cruise ship industry, stop landlords from evicting tenants who have not paid their rent, and require that persons using public conveyances wear masks. Courts have concluded that the first two of these measures exceeded the CDC's statutory authority under § 264. No court has yet ruled on the legality of the third. At first blush, it appears more closely related to the powers granted in § 264(a) than either the sail order or the eviction moratorium. But after rigorous statutory analysis, the Court concludes that § 264(a) does not authorize the CDC to issue the Mask Mandate.[59]

As Judge Mizelle acknowledged, the Mask Mandate case seems distinct. The federal government shut down the entire cruise industry for a

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57. *Id.*

58. *Id.* at 475, 479–80 ("Perhaps a general movement toward the strong version of the major questions doctrine should be celebrated as a way of cabining agency power and serving some of the purposes of the nondelegation doctrine. Or perhaps such a movement should be lamented as a way of forbidding agencies from interpreting ambiguous language in a way that takes advantage of their accountability and expertise. However one evaluates the strong version, there is no doubt that it would have significant consequences.").

59. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1157, (M.D. Fla. 2022) (citations omitted).

lengthy period, resulting in drastic economic consequences.[60] Although cruises were uniquely susceptible to COVID-19 outbreaks because of the large number of people confined within relatively small spaces for an extended period, the balance between risk of infections/deaths and economic harm shifted back and forth as the pandemic progressed.[61] Whether the CDC was authorized to weigh that balance when regulating in favor of a long-term shut down and extensive measures to resume operations seems less clear because of the unprecedented nature of the crisis and the novel measures used by the CDC.

Even further along the spectrum of novel public health regulation was the federal eviction moratorium.[62] The economic disruption caused by COVID-19 resulted in much higher rates of rent delinquency and a government concerned about evictions.[63] This left record numbers of people more vulnerable to COVID-19 because living with additional family members or moving to a shelter would increase their risk of exposure to the virus.[64] Yet, the eviction moratorium was an unprecedented tactic during an extreme crisis. How much greater the risk of COVID-19 exposure would be if evictions proceeded was unclear, and the federal government seemed as concerned with harms unrelated to COVID-19 exposure as with the spread of the virus.[65] Again, this case involves the CDC venturing into unfamiliar territory and preventing landlords from using their property in well-settled ways.[66]

The Mask Mandate case, however, involves the use of masks—a proven method for slowing the spread of the virus that requires little individual effort or sacrifice and has only a small impact on the economy.[67] Yes, there were individuals unable to travel because they

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60. Florida v. Becerra, 544 F. Supp. 3d 1241, 1253 (M.D. Fla. 2021).

61. *Id.* at 1303.

62. *See* Wall v. CDC, No. 21-cv-975, 2022 WL 1619516, at *3–4 (M.D. Fla. Apr. 29, 2022) (finding that the CDC did not violate the major questions doctrine with the Mask Mandate). The court stated:

> Unlike the CDC's moratorium on eviction, which obviously placed a large financial burden on landlords, the masking and testing requirements place negligible financial burdens on travelers. In fact, the CDC correctly pointed out that the [Mask Mandate] helps *prevent* the imposition of economic burdens by stymying the spread of COVID-19 and, consequently, avoiding future lockdowns and resulting losses.

Id. (citation omitted).

63. Ala. Ass'n of Realtors v. United States, 141 S. Ct. 2485, 2486–89 (2021).

64. *Id.* at 2488.

65. *Id.* at 2489.

66. *Id.*

67. *See* KRISTIN L. ANDREJKO ET AL., EFFECTIVENESS OF FACE MASK OR RESPIRATOR USE IN INDOOR PUBLIC SETTINGS FOR PREVENTION OF SARS-COV-2 INFECTION—CALIFORNIA, FEBRUARY–DECEMBER 2021, at 1 (2022), https://www.cdc.gov/mmwr/volumes/

suffered from anxiety and could not wear a mask for a lengthy period of time—or who simply did not want to do so. However, because most people were willing to follow this evidence-backed precaution, the economic externalities were small.[68]

With this background, I examine the two precedent cases relied on by Judge Mizelle to understand both why restricting the power of the CDC in these cases is a slippery slope and also why there was no need to redefine "sanitation." The cruise and eviction cases provided a conservative framework for restricting the CDC's power. The discussion about the word "sanitation" is instead the next step towards restricting states' rights to regulate public health under their police powers.

1. Cruise Ship Shutdown

After outbreaks aboard cruise ships early in the COVID-19 pandemic, the CDC stopped the cruise industry from setting sail from March 2020 through October 2020.[69] Effective October 30, 2020, the CDC issued a "conditional sailing order" providing for a four-phase re-opening of the cruise industry.[70] The four phases included: (1) building a laboratory on the vessel to test crew members for COVID; (2) obtaining medical and housing agreements at each port-of-call to handle COVID cases that arise during voyages and then engaging in a simulated first voyage; (3) applying for a conditional sailing certificate at least sixty days prior to the resumption of passenger voyages; and (4) restricting voyages to no more than seven days with CDC monitoring in place.[71] While the CDC issued additional guidance on April 2, 2021, the industry maintained that the requirements were both vague and too burdensome.[72]

71/wr/pdfs/mm7106e1-H.pdf; Alison Durkee, *Statewide Mask Mandates Are Better for Economy than Local Ones, Study Finds*, FORBES (Nov. 24 2020, 10:31 AM), https://www.forbes.com/sites/alisondurkee/2020/11/24/statewide-mask-mandates-are-better-for-economy-than-local-ones-study-finds/?sh=4236fa76498d.

68. *See* Dave Kolpack, *Majority of Americans Support Mask Mandates for Travel, AP-NORC Poll Finds*, PBS (Apr. 20. 2022, 12:41 PM) https://www.pbs.org/newshour/health/majority-of-americans-support-mask-mandates-for-travel-ap-poll-finds.

69. Florida v. Becerra, 544 F. Supp. 3d 1241, 1246 (M.D. Fla. 2021).

70. *Id.*

71. *Id.* at 1248–49 (noting that the conditional sailing order was likely to remain in effect for at least a year).

72. *Id.* at 1249 (detailing industry claims that the CDC mandates focused on "a zero-risk objective rather than the mitigation approach to COVID that is the basis for every other U.S. sector of our society").

Florida then sued and moved for a preliminary injunction.[73] The CDC continued to issue guidance to the cruise industry about how to meet the requirements for resuming passenger voyages.[74]

In the lawsuit, Florida argued that the conditional sailing order exceeded the CDC's authority.[75] The court reviewed the federal government's historical public health role as "only an assistant to the states."[76] As the court observed, "For roughly a hundred years the states principally exercised the quarantine power, understood as a component of the police power of the states."[77] Then, in the mid- to late-nineteenth century, bouts of yellow fever and cholera resulted in conflicting state quarantine laws, and the federal government assumed more of a role in quarantine efforts to ensure consistency and efficiency.[78]

Responding to concerns about malaria, Congress passed the Public Health Service Act in 1944. In lieu of "conferring new duties, the Public Health Service Act largely organized, consolidated, and clarified the federal government's existing legal authority."[79] In the last fifty years, the federal government's quarantine powers were characterized by the court as "largely episodic and limited to an *ad hoc* response to an acute circumstance."[80]

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73. *Id.* at 1251. The court found that Florida had standing as a result of lost revenue from the cruise industry and additional unemployment payments to employees made due to delays in the resumption of cruises—in addition to the potential for the cruise industry to leave the state entirely as a result of the CDC's conditional sailing order requirements and the lack of clarity about future shutdowns. *Id.* at 1253–58.

74. *Id.* at 1250–51 (stating that only two ships had received conditional sailing certificates as of June 4, 2021).

75. *Id.* at 1258.

76. *Id.* at 1258–59 (reviewing how federal officers aided the enforcement of state quarantine law and how Congress enacted a federal inspection system for maritime quarantines to care for ill seamen and help the states).

77. *Id.* at 1259 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (discussing how public health laws were only the powers reserved for the states by the Tenth Amendment)).

78. *Id.* With the Supreme Court's frequent use of the Commerce Clause to support its efforts, federal law trumped state quarantine law, but the parties in reality worked together in this area. *Id.* at 1259–60.

79. *Id.* at 1262–63 (finding that the measures listed in the PHSA—inspection, fumigation, disinfection, sanitation, pest extermination, and similar measures—merely reiterated measures historically used as part of federal quarantine powers).

80. *Id.* at 1263 (explaining, e.g., that the vessel sanitation program launched after outbreaks of gastrointestinal illness on cruise ships). According to the court:

> The history shows (1) that the public health power, including the power to quarantine, was traditionally understood—and still is understood—as a function of state police power; (2) that the federal quarantine power has both expanded and contracted; (3) that historically the federal quarantine power was limited to a discrete action, such as inspection and sanitation at a port of entry, as well as detention for the duration of a disease's incubation period; (4) that although the

Interpreting the language of section 264(a) of the PHSA, the court also asserted that the second sentence of the provision limits the first. Section 264(a) provides:

> The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, *the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary*.[81]

According to the court, the CDC's authority is thus limited to "inspection, fumigation, disinfection, sanitation, [and] pest extermination."[82] It found that "[t]he second sentence of Section 264(a) discloses, illustrates, exemplifies, and limits to measures similar in scope and character the measures contemplated and authorized by Congress when enacting the statute."[83] Because the statute does not list items similar to an eviction moratorium or halting travel by cruise ship (or mandating masks on flights and in transit hubs), the CDC lacks authority to enforce such measures.[84] This is a very narrow view of what

> federal government has detained vessels, conditioned pratique, and banned a discrete item, federal deployment of these measures has been distinctly limited in time, scope, and subject matter; and (5) that the Public Health Service Act of 1944 codifies the limited regulatory power typical of preventing diseases caused by a discrete item or a person at a major port of entry.

Id. at 1263–64. Ironically, of course, shutting down the cruise industry under threat from COVID-19 can be classified as "an *ad hoc* response to an acute circumstance." *See id.* at 1263.

81. 42 U.S.C. § 264(a) (emphasis added); Wall v. CDC, No. 21-cv-975, 2022 WL 1619516, at *1 n.4 (M.D. Fla. Apr. 29, 2022) (explaining how these powers granted to the Surgeon General ended up with the CDC because Congress abolished the Office of the Surgeon General and transferred its operations to the Secretary of Health, Education, and Welfare in 1966—which later became the Department of Health and Human Services ("HHS")—and even though the Office of the Surgeon General was reestablished in 1987, the Secretary of HHS retained these functions and "delegated his enforcement and implementation authority to the CDC").

82. *Becerra*, 544 F. Supp. 3d at 1268.

83. *Id.*

84. *Id.* (explaining that the second sentence of the statute is "superfluous" unless it limits the first).

the statute authorizes, given both the first sentence of section 264(a) and historical deference to public health authorities.

Similarly, the court held that the phrase "and other measures" in the second sentence of section 264(a) does not expand the CDC's authority. This "residual phrase" is simply providing for the use of measures like those already enumerated in the sentence under the canon of *ejusdem generis* (i.e., when a general word follows a list, it includes only items of the same sort as those in the list).[85] Similarly, the canon of *noscitur a sociis* counsels that the court should find the meaning of this phrase using neighboring words.[86] The court did not address why the legislators would have included this phrase if it effectively means only what is stated in the other phrases nearby.

Among the other points that the court in *Florida v. Becerra* cited to justify its holding was that the CDC essentially argued for unlimited authority that the director can do whatever is "necessary" (as the plain language seems to suggest when it states that the authorization extends to "other measures, as in his judgment may be necessary").[87] The court stated that it was concerned about a separation of powers issue that might render the statute unconstitutional, an outcome courts try to avoid.[88] At a minimum, the court found that the "major questions doctrine" signifies that Congress "speaks clearly" when assigning broad authority to agencies over important economic or political issues and that it had not done so here.[89]

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85. *Id.* at 1268–69; *Ejusdem generis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.").

86. *Becerra*, 544 F. Supp. 3d at 1269; *Noscitur a sociis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A canon of construction holding that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it.").

87. 42 U.S.C. § 264(a); *Becerra*, 544 F. Supp. 3d at 1264.

88. *Becerra*, 544 F. Supp. 3d at 1269.

89. *Id.* at 1269–70. This foreshadows the reliance of the Supreme Court on the major questions doctrine in both *Alabama Ass'n of Realtors v. Department of Health & Human Services* and *West Virginia v. EPA*. *See id.* Beyond the measures employed, the *Florida v. Becerra* court also found that section 264(a) "allows the regulation of only an infected or infecting item." *Id.* at 1270. It finds that the phrase "found to be so infected or contaminated" limits the statute since "an animal or article must present more than a possibility or a remote risk of infection due to an instance of infection in another animal or article." *Id.* One question here is whether, given the incidence of COVID-19 among the general population at the time—often among asymptomatic individuals—any individual can really be considered a "remote risk of infection" instead of an "infecting item." *See id.* The court noted that while subsections (b) through (d) permit detention of individuals, these sections do not expand the measures listed in subsection (a) because they instead limit the CDC's quarantine powers to foreign citizens arriving at a U.S. port. *Id.* at 1271.

The CDC, however, argued that Congress had ratified its authority to issue a conditional sailing order to prevent COVID-19 transmission when it passed the Alaska Tourism Restoration Act in 2021.[90] The Act defined a "covered cruise ship" to include a foreign-flagged ship that "has been issued, operates in accordance with, and retains a COVID-19 Conditional Sailing Certificate of the Centers for Disease Control and Prevention."[91] The court, however, found that there was not enough evidence to show that Congress explicitly ratified such a broad interpretation of section 264 and it could not ratify an "unconstitutional delegation of legislative authority, which Florida alleges."[92] The first half of this finding seems questionable because if Congress explicitly approved of the conditional sailing order, then it dictated to the courts that section 264 of the PHSA should be interpreted broadly in this manner. It seems unlikely that any previous Supreme Court would have found section 264 to be an unconstitutional delegation of legislative authority given historical judicial deference to public health authorities, but, as these cases show, and as this Article explains, the federal courts are ascendant over public health regulators.

In refusing to defer to the CDC, the *Florida v. Becerra* court made much of the CDC's unwillingness to cabin its alleged authority except by whatever is "necessary" to achieve zero transmission of the virus.[93] Looking at a few extreme hypotheticals, the court mused whether the CDC could "generally shut down sexual intercourse in the United States."[94] A big part of the court's concern with such broad federal power over public health was, at least allegedly, federalism and powers appropriately left to the states: "And recent history demonstrates that the power of the director of CDC, unless and until corrected by the judiciary, can oust the ability of a state to exercise the police power—all without formal notice and comment from the public and continuing from year-to-year."[95]

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90. *Id.* at 1276–77.

91. *Id.* at 1277 (quoting Alaska Tourism Restoration Act, Pub. L. No. 117-14, 135 Stat. 273 (2021).

92. *Id.* at 1276–78.

93. *Id.* at 1266.

94. *Id.* at 1280–81 ("Political prudence (and difficulty of enforcement) might counsel CDC against this particular prohibition, but the statute, as understood by CDC, certainly erects no barrier.").

95. *Id.* at 1281. In dicta, the court addressed whether the non-delegation doctrine would be violated *if* it had found that the CDC had such broad authority under the statute (which it did not) and announces that it would. *Id.* Reviewing the lengthy history of the doctrine, in which there were only a couple of key decisions in the 1930s finding that the legislature had impermissibly delegated authority to the executive branch, the court bemoaned the unchecked expansion of executive power and attempted to define and revive the non-

The court's focus here on state police power over public health regulation demonstrates either that states' rights are an essential component of this decision limiting agency power over public health—or at least that this rhetoric is an acceptable (perhaps palatable) justification for restricting a federal agency's power. In fact, the court determined that the conditional sailing order was arbitrary and capricious because the CDC "found that state and local governments cannot adequately regulate a ship whose operations are international and interstate in nature" without examining the steps actually taken by state and local authorities to prevent the spread of the virus.[96]

In the end, the court ruled that the CDC's conditional sailing order was substantively and procedurally deficient and issued a preliminary injunction that was stayed until when the conditional sailing order would become "non-binding."[97] Notably, the court used the safe operation of the airline industry to justify the resumption of cruises without the conditional sailing orders.[98] Indeed, masking was among the voluntary protocols adopted by the cruise industry that the court used to justify the lack of a need for greater CDC regulation through the conditional sailing order.[99]

2. Eviction Moratorium

The federal eviction moratorium presented another example of public health authorities using new methods to combat the harm of a pandemic, and the interaction of Congress and the executive branch in this space also complicated judicial review. In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act, which imposed a 120-day eviction moratorium for properties that were part of federal assistance programs or funded by federal loans.[100] After the congressional moratorium expired, the CDC issued a new nationwide

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delegation doctrine. *Id.* at 1288. As the court stated, "Unaccountable administrative law, unbounded by ascertainable directives from the legislative branch, is not the product of an ascendant and robust constitutional republic." *Id.* at 1287.

96. *Id.* at 1292–94 ("To recapitulate, although several of Florida's arguments remain unpersuasive on this record, the conditional sailing order is arbitrary and capricious because the order imposes vague and shifting (but binding) legal requirements and because the order fails to offer any reasoned explanation about the inadequacy of local measures.").

97. *Id.* at 1305.

98. *Id.* at 1303 ("Further, CDC offers guidance to prevent the spread of COVID-19 on an airplane, which safely transports thousands of people each day. The safe operation of comparable industries strongly counsels against finding that moderating the conditional sailing order would endanger the public health.").

99. *Id.*

100. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021).

moratorium with criminal penalties.[101] Acknowledging (and seeming to ratify) the CDC moratorium, Congress extended it for one month.[102] It was then set to expire in January 31, 2021, but the CDC extended the expiration date several times until July 2021.[103]

The plaintiffs obtained summary judgment from the District Court for the District of Columbia vacating the moratorium, which the court stayed pending appeal because of the "serious legal question on the merits."[104] Although, on the first appeal to the Supreme Court, Justice Kavanaugh concurred with Justices Thomas, Alito, Gorsuch, and Barrett that the CDC did not have authority to issue the moratorium, he declined to vacate the stay at that time since the moratorium was expiring shortly.[105]

Three days after the moratorium expired on July 31, 2021, the CDC issued another one.[106] The district court wrote approvingly of vacating the stay because the government was unlikely to succeed on the merits given the previous Supreme Court opinion.[107] The court also noted the balance of equities had changed because vaccines and federal rental support had been implemented, militating against the need for an eviction moratorium.[108] However, it declined to vacate the stay because of the previous opinion from the D.C. Circuit Court.[109] On appeal, the D.C. Circuit once again refused to vacate the stay.[110]

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101. *Id.*

102. *Id.* at 2492 (Breyer, J., dissenting) (noting that "the current Congress did not bristle at the Government's reading of the statute" and "extended the CDC's moratorium").

103. *Id.* at 2487 (majority opinion).

104. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 539 F. Supp. 3d 211, 216–218 (D.D.C. 2021) (granting stay), *motion to vacate stay denied*, 2021 WL 2221646 (D.C. Cir. June 2, 2021), *motion to vacate stay denied*, 141 S. Ct. 2320 (2021), *motion to vacate stay denied*, 557 F. Supp. 3d 1 (D.D.C 2021), *motion to vacate stay denied*, 2021 WL 3721431 (D.C. Cir. Aug. 20, 2021), *stay vacated*, 141 S. Ct. 2485, *appeal dismissed*, No. 21-5093, 2021 WL 4057718 (D.C. Cir. Sept. 3, 2021).

105. *Alabama Realtors*, 141 S. Ct. at 2487–88.

106. *Id.* at 2488; *see also id.* at 2492 (Breyer, J., dissenting). This moratorium order was more narrowly tailored and only applied to counties with "substantial or high levels of community transmission." *Id.* at 2490. A tenant also had to attest that she had tried to obtain rental assistance, met income requirements, was unable to pay rent due to loss of income or extraordinary medical expenses, was continuing to try to make partial rent payments, and has no other place to live. *Id.* at 2491. Landlords could challenge the tenant's assertions. *Id.*

107. *Id.* at 2487–88 (majority opinion).

108. *Id.*

109. *Alabama Realtors*, 557 F. Supp. 3d at 6–7, *vacated*, 141 S. Ct. 2485, *appeal dismissed*, 2021 WL 4057718.

110. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 3721431 (D.C. Cir. Aug. 20, 2021) (per curiam), *vacated*, 141 S. Ct. 2485, *appeal dismissed*, 2021 WL 4057718.

The Supreme Court then vacated the stay in a *per curiam* opinion.[111] In deciding whether the government had shown that it was likely to succeed on the merits, the Supreme Court also found that the second sentence of section 264(a) limited the broad authority granted in the first sentence.[112] However, the Court stated that it did so by "illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles."[113] The Court made much of the direct connection between these measures and "preventing the interstate spread of disease by identifying, *isolating*, and destroying the disease itself."[114] In contrast, the moratorium operated "far more indirectly" because evictions could result in some tenants moving to another state and infecting people in that state with COVID-19; "[t]his downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute."[115]

The Court's language about how the second sentence merely illustrates the kinds of measures that could be necessary, and its focus on the need for a direct connection between the measures and preventing the spread of disease by isolating the disease itself, did not go as far as the district court in *Florida v. Becerra*. Indeed, the idea that this opinion could support striking down the Mask Mandate seems unlikely at this point in the text.[116] The *per curiam* opinion supports a broader interpretation of the CDC's powers under section 264(a) of the PHSA.

In the federal eviction moratorium case, the Court's second major reason for vacating the stay was the "sheer scope of the CDC's claimed

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111. *Alabama Realtors*, 141 S. Ct. 2485; *see also Per Curiam Opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The most controversial form of summary disposition is a *per curiam* opinion that simultaneously grants certiorari and disposes of the merits at some length, discussing both the facts and the issues involved. The result is usually a reversal of the judgment below. . . . The parties are given no opportunity to file briefs on the merits or to argue orally before the Court." (alteration in original) (quoting ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 320 (8th ed. 2002)).

112. *Alabama Realtors*, 141 S. Ct. at 2488.

113. *Id.*

114. *Id.* (emphasis added).

115. *Id.* ("Reading both sentences together, rather than the first in isolation, it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium.").

116. The dissent rejected the notion that the second sentence of section 264(a) narrows the first. Instead, it found that the second sentence was added to "expressly authorize . . . inspections and . . . other steps necessary in the enforcement of quarantine." *Id.* at 2491–92 (Breyer, J., dissenting) (alterations in original) (quoting *Hearing on H.R. 3379 Before the Subcomm. of the Comm. on Interstate and Foreign Com.*, 78th Cong. 139 (1944)).

authority," which rings familiar from *Florida v. Becerra*.[117] The justification here is about the number of people impacted and the extent to which they were impacted—between six and seventeen million tenants facing eviction and the $50 billion in emergency rental assistance authorized by Congress serving as a proxy for the burden on landlords when they cannot evict tenants.[118] Beyond the numbers, the Court claimed that the moratorium "alter[ed] the balance between federal and state power and the power of the Government over private property."[119] Here again, the Court was ostensibly focused on federalism but also on the rights of individual landlords—in a sign of a shift in public health jurisprudence if not in previous Supreme Court jurisprudence restricting agency power.

Expressing concern with giving the CDC such authority because of a slippery slope, the Court posed a few hypothetical questions, like the court in *Florida v. Becerra*:

> Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?[120]

These comparisons are hyperbolic, but they fail as a line of legal analysis for two reasons. First, is requiring landlords to let people keep their housing temporarily so they are not homeless and moving around during a pandemic equivalent to mandating free grocery delivery, computers, and internet service? The comparison shows a lack of understanding about the lives of those living in or on the verge of poverty. Second, what would be wrong with mandating free grocery delivery if it were shown that the virus spreads when people shop for groceries? Times and methods of combatting disease outbreaks change. The law is flexible enough to allow public health authorities to embrace new measures without explicit legislative authorization of each measure.

The Court also found that the balance of the equities did not justify the stay.[121] Many small landlords faced irreparable harm from the lack of rent payments and uncertainty of being made whole.[122] Furthermore,

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117. *Id.* at 2489 (majority opinion).
118. *Id.*
119. *Id.* (citing U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1850 (2020)).
120. *Id.* ("Section 361(a) is a wafer-thin reed on which to rest such sweeping power.").
121. *Id.*
122. *Id.*

"preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude."[123] At the same time, the government's interests changed with additional time to provide rental assistance funds to keep tenants in place.[124] This part of the opinion emphasized the importance of individual liberties (in this case property rights) over the traditionally dominant value of population health during a public health crisis.

In the end, the Court held that it was up to Congress to act to keep the moratorium in place despite the strong public interest in containing the COVID-19 pandemic.[125] Given the infrequency with which Congress speaks, however, and the tradition of judicial deference to public health authorities in times of a crisis, this decision contributes to the ascendancy of the federal judiciary over public health matters.[126] The Supreme Court has since relied, in part, on the *per curiam* to further rein in the administrative state in *West Virginia v. EPA*.[127]

B. Striking Down the Federal Mask Mandate

In the wake of the COVID-19 cases discussed above, much of the controversy over Judge Mizelle's order surrounds the court's definition of the word "sanitation."[128] This redefinition, however, reflects and enhances the current hostility towards the administrative state. Changing a term with particular meaning in the public health context reveals that the federal judiciary is not in the middle of curtailing federal authority to regulate public health in favor of the traditional state police power—but instead, that it is in the early days of shifting power over public health regulation to the courts themselves to favor individual liberties instead of population health and judicial power instead of administrative policymaking.

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123. *Id.*

124. *Id.* at 2490 ("But our system does not permit agencies to act unlawfully even in pursuit of desirable ends."); *cf. id.* at 2493 (Breyer, J., dissenting) (finding that the balance of equities favors maintaining the stay because "the CDC projects a strong 'likelihood of mass evictions nationwide' with public-health consequences that would be 'difficult to reverse.'") (quoting 86 Fed. Reg. 43247, 43252 (Aug. 6, 2021))).

125. *Id.* at 2490 (majority opinion).

126. Interestingly, the dissent to the *per curiam* found that "the public interest is not favored by the spread of disease or a court's second-guessing of the CDC's judgment." *Id.* at 2493 (Breyer, J., dissenting) (attributing a thirty percent increased risk of COVID-19 infection to those evicted and those who live with them following eviction and finding over 433,000 cases and 10,000 deaths resulting from the end of state eviction moratoria). In this, the liberal members of the Court sided with tradition and supported the interests of the broader population over individual liberties of landlords. *Id.*

127. 142 S. Ct. 2587, 2608 (2022).

128. *See, e.g.*, Valdeck, *supra* note 5.

On January 21, 2021, President Joe Biden issued Executive Order 13998, which stated that masks "can mitigate the risk of travelers spreading COVID-19" and directed the executive branch to require masks on various methods of transportation and at "transit hubs."[129] On February 3, 2021, the CDC issued the Mask Mandate. The CDC reasoned that this would "prevent this spread [of the virus] by 'blocking exhaled virus' and 'reducing inhalation of these droplets.'"[130]

Judge Mizelle emphasized the breadth of the Mask Mandate.[131] The mandate applied to those traveling by airplane, train, ride-sharing service, or other means of transportation and while they were in a transportation hub, which included airports, bus terminals, train stations, subway stations, and ports.[132]

Because COVID-19 can be spread by both asymptomatic and pre-symptomatic individuals, in addition to those who are symptomatic, the Mask Mandate applied to all individuals who did not fit within an exception:

> First, the mandate excludes children under the age of two years old and persons with a disability that prevents them from being able to safely wear a mask. The latter exception applies only to individuals who cannot wear a mask because of a disability that is within the scope of the Americans with Disabilities Act (ADA). Second, it excludes "personal, non-commercial use" of vehicles and commercial vehicles occupied by a single person. Third, it excludes situations where, for example, a person must wear an oxygen mask; or is actively "eating, drinking or taking medication"; or must remove the mask to verify his identity; or to catch his breath after "feeling winded"; or to communicate with someone who is hearing impaired.[133]

The individual plaintiffs who joined the lawsuit with plaintiff Health Freedom Defense Fund, Ana Daza and Sarah Pope, claimed that their

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129. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1154 (M.D. Fla. 2022) (quoting Exec. Order No. 13998, Promoting COVID-19 Safety in Domestic and International Travel, 86 Fed. Reg. 7205 (Jan. 21, 2021)).

130. *Id.* (quoting Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 3, 2021)). The opinion noted that it "did not differentiate between kinds of masks based on their efficacy at blocking transmission" and instead only included a footnote referring to the "attributes of acceptable masks." *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1155 (citations omitted).

anxiety and panic attacks were aggravated by having to wear a mask but that they did not fall under the ADA exception.[134]

As discussed above, the PHSA[135] authorizes the CDC to issue regulations "aimed at 'identifying, isolating, and destroying' diseases."[136] Specifically, it provides:

> The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgement may be necessary.[137]

While Judge Mizelle found that "[a]t first blush" the Mask Mandate "appears more closely related to the powers granted in [section] 264(a) than" the CDC's COVID-19 restrictions on the cruise ship industry and efforts to prevent landlords from evicting tenants with unpaid rent, she still found that the CDC had exceeded its statutory authority.[138] She held that the authority to issue regulations "to prevent the introduction, transmission, or spread of communicable diseases" was limited by the next sentence to "such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles . . . and other measures, as in his judgment may be necessary."[139]

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134. *Id.*

135. 42 U.S.C. § 264(a); 42 C.F.R. § 70.2 (2023).

136. *Health Freedom*, 599 F. Supp. 3d at 1156 (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488 (2021)).

137. 42 U.S.C. § 264(a). Other subsections provide for "apprehension, detention, or conditional release of individuals" only for "preventing the introduction, transmission, or spread of such communicable diseases" (subsection (b)) if they are "coming into a State or possession from a foreign country or a possession" (subsection (c)), including individuals who are "a probable source of infection" (subsection (d)). *Id.* § 264(b)–(d).

138. *Health Freedom*, 599 F. Supp. 3d at 1156.

139. *Id.* at 1156–57 (quoting 42 U.S.C. § 264(a)); *cf.* Wall v. CDC, No. 21-cv-975, 2022 WL 1619516, at *4 (M.D. Fla. Apr. 29, 2022) ("It follows that the second sentence does not *limit* the scope of the first; such a construction would not only conflict with the expansive grant of power in the first sentence, but it would also read restrictive language into the second. Rather, the second sentence *clarifies* the breadth of the first by enumerating various

To this point, the decision parallels the two precedent cases discussed above—both of which found that the second sentence of section 264(a) narrows the powers granted by the first sentence.[140] However, the decision veers off on a different course here because the CDC argued that the Mask Mandate was a "sanitation" measure or "other measure" under the statute.[141] Given that the Mask Mandate looked like a traditional public health response to a virus, the court took further steps to strike down the Mask Mandate than were taken in the precedent cases.

To define the term "sanitation," the court looked to (1) dictionaries from the time of the PHSA's enactment; (2) customary usage of the word; (3) contextual clues; and finally (4) the history of section 264(a).[142]

1. Dictionary Definitions

Because the term "sanitation" is undefined in the PHSA, the court first looked to dictionaries from the early to mid-twentieth century. There, Judge Mizelle found two types of definitions: (1) "measures that clean something or that remove filth, such as trash collection, washing with soap, incineration, or plumbing"; and (2) "measures that keep something clean" including "air filters or barriers, masks, gowns, or other personal protective equipment."[143] As the ruling states, "Put simply, sanitation as used in the PHSA could have referred to active measures to cleanse something *or* to preserve the cleanliness of something."[144]

Here, the court dropped a footnote that inexplicably rejected a third "sense" or dictionary definition of the word "sanitation" as "relating to the public health."[145] According to Judge Mizelle, this third definition could not be correct under the statute because then inspection, fumigation, and

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'tools' at the CDC's disposal . . . . That is, the second sentence is not an exhaustive list; it is merely a list of examples or suggestions." (citations omitted)).

140. *Health Freedom*, 599 F. Supp. 3d at 1157.

141. *Id.*

142. *Id.* at 1158–63; *cf.* West Virginia v. EPA, 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting) ("We do not assess the meaning of a single word, phrase, or provision in isolation; we also consider the overall statutory design. And that is just as true of statutes broadly delegating power to agencies as of any other kind. In deciding on the scope of such a delegation, courts must assess how an agency action claimed to fall within the provision fits with other aspects of a statutory plan.").

143. *Health Freedom*, 599 F. Supp. 3d at 1158.

144. *Id.*; *cf. Wall*, 2022 WL 1619516, at *5 ("Because both [sanitation and inspection] have multiple permissible meanings, they are inherently ambiguous.").

145. *See Health Freedom*, 599 F. Supp. 3d at 1158 n.1 (rejecting the broader definition of "sanitation" as "the practical application of sanitary science").

disinfection would be "superfluous."[146] Her reasoning assumed, however, that inspection, fumigation, and disinfection always relate to the public health and would be subsumed within this broader sense of the word "sanitation."

In addition, Judge Mizelle asserted that Congress would have "spoken more clearly if it had delegated such unbounded power to the CDC."[147] In this, the court mirrored language of the precedent COVID-19 cases that stated Congress should have spoken more clearly if it wanted to delegate broad powers that would include suspending operations of an entire industry or preventing landlords from evicting tenants. If this broad definition of "sanitation" as relating to the public health was the one most commonly used and understood at the time when discussing public health issues, though, then Congress did speak clearly. Thus, the major questions doctrine has little force, however, when applied to language and measures typically employed by public health authorities. The district court's ruling implies that Congress must list every method that public health experts may employ with great specificity in enabling legislation instead of delegating any authority to the executive branch.

Returning to the two definitions of "sanitation" that Judge Mizelle found acceptable ("active measures to cleanse something *or* to preserve the cleanliness of something"), the court started by saying that the second sense of the word seems to permit the Mask Mandate while the first does not.[148] Relying on "the statute's context, including the surrounding words, the statute's structure and history, and common usage at the time," Judge Mizelle found that the first sense of the word, related to the process of cleaning, is the correct one and that the Mask Mandate did not fit this definition:[149]

> Wearing a mask cleans nothing. At most, it traps virus droplets. But it neither "sanitizes" the person wearing the mask nor "sanitizes" the conveyance. Because the CDC required mask wearing as a measure to keep something clean—explaining that it limits the spread of COVID-19 through prevention, but never

146. *Id.* (noting the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute" (quoting Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1890 (2019))).

147. *Id.*

148. *Id.* at 1158 ("Accordingly, the Court must determine which of the two senses is the best reading of the statute.").

149. *Id.* at 1159.

contending that it actively destroys or removes it—the Mask Mandate falls outside of § 264(a).[150]

The court then explained why the second sense of the word, this preservation of cleanliness or "the promotion of hygiene and prevention of disease by maintenance of sanitary conditions," as the government explained it, cannot be an acceptable definition here.[151] First, there is the "immediate context."[152] The words surrounding sanitation in the statute—inspection, fumigation, disinfection, pest extermination, and destruction—all involve "identifying, isolating, and destroying the disease itself"—"not maintain[ing] the status of being 'disinfected' or 'fumigated.'"[153] Indeed, the court found that these items involve a "discrete action" aimed at the disease.[154] What this explanation fails to consider, however, is that efforts to destroy the disease go hand in hand with efforts to maintain a status of disinfected.[155] Why bother to eliminate the disease if one only plans to allow it to again spread at will?

The court next detailed how analysis of customary usage, context, and history of the statutory provision support its choice of dictionary definitions—all without examining the technical and historical meaning of the word sanitation in the field of public health.

2. Customary Usage

The court also found that sanitation means active cleaning because of customary usage when the statute was passed. To determine the customary usage, the court searched the Corpus of Historical American English ("COHA") to find the words "sanitation" and "variants like 'sanitary' and 'sanitize' between the years 1930 and 1944," resulting in 507 hits.[156] The court found that most frequently, the terms were used to

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150. *Id.*

151. *Id.* (explaining that there are four reasons why this additional or alternative definition is not acceptable). *But see* West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong. The current Court is textualist only when being so suits it." (alteration in original) (citations omitted)).

152. *Health Freedom*, 559 F. Supp. 3d at 1159.

153. *Id.* at 1159–60 (quoting Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2488 (2022)).

154. *Id.* at 1160.

155. This also illustrates why the government's examples of preserving cleanliness involve cleaning, such as hand sanitizer and sanitizing wipes. The court takes the fact that these examples also demonstrate the first definition as proof that they only fit the first definition instead of proof that the two senses of the word are intertwined and both applicable to the PHSA. *See id.*

156. *Id.* at 1160 n.3.

describe cleaning, including references to "garbage disposal, sewage and plumbing, or direct cleaning of a dirty or contaminated object."[157] Only five percent of the data set used sanitation to describe the preservation of cleanliness.[158]

According to the COHA website, "COHA contains more than 475 million words of text from the 1820s–2010s . . . and the corpus is balanced by genre decade by decade."[159] Notably, the genres are TV/movies, fiction, popular magazines, newspapers, and non-fiction books.[160] In the 1930s and 1940s, the decades from which the court drew its analysis, approximately fifty-four percent of the texts fall into the TV/movies or fiction genres,[161] making it unlikely that they would be discussing the word sanitation and its variant in the context of public health efforts. In fact, when considering how few sources in this database are using sanitation in a relevant context, the five percent of the data set that use the word to describe the preservation of cleanliness could encompass most or all of the usage relevant to a public health law.

In the end, the court made an important misstep here. When interpreting a public health law, it makes sense to look to how the term was defined at the time by public health experts and sources. Looking to its usage in TV/movies and fiction offers little useful information. The court's refusal to defer to regulators even when looking at how they define a word contradicts traditional deference to experts about what measures are necessary to contain illness and safeguard the population.

3. Context

Third, the court used "contextual clues" to justify its definition of sanitation as active cleaning. The court again stated that the government's reading would make surrounding words like disinfection and fumigation superfluous, without explaining why or how every example of disinfection or fumigation would fall under the definition of sanitation as preserving cleanliness and preventing the spread of the virus.[162] In fact, if disinfection and fumigation both target the virus, as

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157. *Id.* at 1160.

158. *Id.* The court did not explain why Congress could not have meant to include all the common usages of the word "sanitation" in its drafting of the statute, including the preservation of cleanliness.

159. CORPUS OF HIST. AM. ENG., https://www.english-corpora.org/coha (last visited Apr. 6, 2023).

160. Texts and Registers, CORPUS OF HIST. AM. ENG., https://www.english-corpora.org/coha/help/texts.asp (last visited Apr. 6, 2023).

161. *See id.*

162. *Health Freedom*, 599 F. Supp. 3d at 1160–61 ("Instead, sanitation more likely refers—consistent with its most common usage at the time—to acts that remove refuse or

the court states, then it seems more likely—not that sanitation must be in the list to do the same thing—but instead, to focus on preventative measures once the cleaning is done. In effect, the court said that the words in the list must be similar but cannot be too similar to make the other words unnecessary.

The court's linguistic gymnastics here show a pattern of erasing words and provisions to narrow delegated authority. As discussed further below, this has consequences not only for the federal public health authorities but also for the states.

4. History of Section 264

Finally, the court looked to the history of section 264. It noted that the federal government's quarantine power was historically used in a limited fashion and applied to individuals already thought to be infected by a disease.[163] Ignoring the inapt comparison between quarantines and mask mandates in her focus on this history, Judge Mizelle's main point seems to be that the states held most of the power to protect the public health:

> The federal government's authority to inspect and quarantine was used to assist States, which held the primary authority to institute public health measures. Though the government once conceded that § 264(a) merely "consolidates and codifies" this history, it now finds a power that extends far beyond it to population-wide preventative measures like near-universal mask requirements that apply even in settings with little nexus to interstate disease spread, like city buses and Ubers. Such a definition reverses the import of history as well as the roles of the States and the federal government.[164]

Here, the court extolled the virtues of its narrow interpretation of federal law in preserving the state police power over public health—even though the states have long shared power in this area with the federal government.[165] Nowhere did the court acknowledge that this

debris from an area or object, a reading that preserves independent meaning for the other terms in § 264(a).").

163. *Id.* at 1161.

164. *Id.* (citations omitted). The court returned to the notion that states typically held the power to regulate public health throughout the opinion. *See, e.g.*, *id.* at 1165 ("And yet, in this statute, the CDC finds a power over public health that 'was traditionally understood—and still is understood—as a function of state police power.'").

165. *See* Wendy E. Parmet, *Fights Between U.S. States and the National Government Are Endangering Public Health*, SCI. AM. (Oct. 19, 2022), https://

interpretation of the word "sanitation" is likely to curtail state power as well as federal power.

In addition, following the pattern from the other COVID-19 cases discussed, the court moved on to emphasize the importance of individual liberties—the reason that appears to be dominant in striking down the Mask Mandate.[166] The court's opinion focused on how section 264(a) operates only on property and not on liberty interests (again equating the requirement to wear a mask when traveling to a loss of liberty or some type of quarantine measure).[167]

Finally, the court explained that the Mask Mandate must also be struck down because of procedural deficiencies in approving the Mask Mandate under the Administrative Procedure Act ("APA").[168] The question arises why the court did not confine its opinion to the APA deficiencies instead of issuing a sweeping decision with extensive implications for public health law, but the court was focused on reducing the role of administrative agencies making policy. From the opinion, however, narrowing states' police power seems to be an unintended consequence of other priorities—increasing the role of the federal judiciary and prioritizing individual liberties over population health—because states' rights take a distant third place to these alternate goals.[169]

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www.scientificamerican.com/article/fights-between-u-s-states-and-the-national-government-are-endangering-public-health/.

166. *Health Freedom*, 599 F. Supp. 3d at 1161–62.

167. *Id.* at 1161–63.

168. *See* Amy Davidson Sorkin, *The Hazard-Filled Ruling on the Transportation Mask Mandate*, NEW YORKER (Apr. 22, 2022), http://www.newyorker.com/news/daily-comment/the-hazard-filled-ruling-on-the-transportation-mask-mandate ("This part of Mizelle's order[—holding that the CDC failed to comply with the Administrative Procedure Act—]is more tethered to reality, and, if her order had vacated the mandate solely because of such procedural issues, it would have been far less troubling.").

169. *See Health Freedom*, 599 F. Supp. 3d at 1161–64. Days later, the court in *Wall v. CDC* upheld the Mask Mandate:

> Cognizant that it is not the judiciary's role to impose its own construction on the statute, the Court finds that the CDC's interpretation of the PHSA is permissible and that it did not act arbitrarily and capriciously in issuing the [Mask Mandate and testing requirements]. Given the ambiguity of the statutory text, the statutory context, and the legislative history, the CDC's broad reading of Section 361(a) is certainly reasonable.
>
> Moreover, even setting aside Section 361(a)'s wide-ranging catch-all provision for other "necessary" measures, it is reasonable to categorize the [Mask Mandate] as a "sanitation" measure. As a matter of common sense, masks control the number of particles inhaled from the public airspace by the wearer and the number of particles exhaled by the wearer into the public airspace. In other words, masks have two functions: (1) they protect the wearer from breathing in harmful air

III. A BRIEF HISTORY OF "SANITATION"

Missing from *Health Freedom Defense Fund, Inc. v. Biden* is any discussion of how public health authorities and professionals define the word "sanitation." Looking to contextual clues should not include focusing only on its general use within the English language historically, but instead how it is used within the field of public health. Particularly important, given how the court stated that it wants to shrink federal power to restore the traditional dominance of states in this area, would be reference to how state courts define the term. Although not binding on federal courts interpreting a federal statute, neither is the COHA website.

Historically, the creation and enhancement of sanitation systems was done to prevent the spread of communicable diseases.[170] Cleanliness was the means to an end—even if it was completed with a religious fervor that imbued cleanliness with a connection to godliness.[171] Before germ theory made it clear exactly how cleanliness prevented the spread of disease, people observed the connection and tried to develop waste removal and sewer systems, for example, to stave off future outbreaks.[172] When science developed and explained why cleanliness prevented illness and disease, public health merely layered this understanding on top of

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> particles . . . ; and (2) they prevent the wearer from breathing out harmful air particles . . . . In this way, masks (to varying degrees) promote the public health by checking the transmission of airborne viruses, such as SARS-CoV-2, and thus fit within the definitions of "sanitation."

Wall v. CDC, No. 21-cv-97, 2022 WL 1619516, at *6 (M.D. Fla. Apr. 29, 2022).

170. LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 345, 652 n.1 (3d ed. 2016) ("Gastrointestinal infections were among the leading causes of death from the 1800s (especially cholera) into the 1910s (other food- and water-borne diseases) before tapering off in the early 1930s as a result of improved sanitation and food safety."); *see* David Rosner, *Introduction* to HIVES OF SICKNESS: PUBLIC HEALTH AND EPIDEMICS IN NEW YORK CITY 6–13 (David Rosner, ed., 1995) (finding that "the inadequate sewerage system, the polluted water supply, the filthy streets, the overflowing garbage, the collapsing tenement houses and other airless, overcrowded firetraps" spread disease and noting that "the germ theory of disease was incorporated into older sanitarian notions regarding the relationship between cleanliness, godliness, and health"—formally connecting cleanliness with disease prevention through modern science).

171. *See* Rosner, *supra* note 170, at 13.

172. GOSTIN & WILEY, *supra* note 170, at 15 ("Many of public health's most potent activities are oriented toward community prevention (e.g., sanitation and waste removal systems to reduce exposure to infectious agents . . .) and primary prevention (e.g., vaccination against infectious diseases . . .)."); *see In re* Mergentime's Estate, 113 N.Y.S. 948, 952 (App. Div. 1908) (noting in a case related to whether a bequest to a museum was exempt from taxation as primarily for an educational purpose that "[w]ith the advance of knowledge of medical science in the last half century, the prevention of disease has been ascertained to depend largely upon the habits and sanitary regulations of individuals").

traditional sanitary practices.[173] In effect, science explained why cleanliness and preventing exposure to germs was important, but new techniques were layered on top of the old.

Because of the states' police power over the health of their citizens, states were the main actors in the sanitation and public health arena in the nineteenth and early twentieth centuries. Their historical and legal understanding of the words "sanitation" and "sanitary" is the context missing from Judge Mizelle's examination of the federal statute. In fact, "[i]t is a basic canon of statutory interpretation that '[w]ords of technical or special meaning are construed according to their technical sense, in the absence of anything to indicate a contrary legislative intent.'"[174] If federalism is the reason for restricting federal power, then well-established state jurisprudence should provide the accepted meaning for "sanitation."

To provide this context and to show how a broad definition of sanitation enhanced state power to regulate public health, I next examine case law from five states: New York, Mississippi, Arizona, Alabama, and West Virginia. These are the five states with the highest COVID-19 death rate per 100,000 as of May 26, 2022.[175] Examining the use of the words "sanitation" and "sanitary" in statutes and common law from these states over time is the best way to consider what the impact of any decision narrowing the definition of the word in those states might be.[176] While a federal district court's decision is not binding on the states, it sets a dangerous precedent that may be viewed as persuasive—particularly in states where a focus on individual liberties dominated the recommendations of public health experts during the COVID-19 crisis and resulted in hostility toward state and local public health agencies.

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173. *See* McKinley v. Reilly, 393 P.2d 268, 271 (Ariz. 1964) ("The sciences of bacteriology and pathology and others allied with the prevention of the spread of infectious disease have advanced immeasurably during the past fifty years. . . . A high degree of skill and knowledge in sanitation and hygiene must be possessed by an embalmer in order to prevent the transmission to or infection by others.").

174. People v. Reed, 705 N.Y.S.2d 592, 600 (App. Div. 2000) (citing N.Y. STAT. LAW § 233 (McKinney 2000)); *see In re* Moran Towing & Transp. Co. v. N.Y. State Tax Comm'n, 527 N.E.2d 763, 767 (N.Y. 1988) (explaining how undefined terms in statutes are typically defined according to established meanings taken from jurisprudence).

175. *See COVID Data Tracker: United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100k (last visited Apr. 6, 2023). Notably, the data for New York City is listed separately from the data for the rest of New York. New York City leads the COVID-19 death count, even without the numbers from the rest of the state included. *Id.*

176. The cases discussed in this Part were found on Westlaw using a Boolean search (sanita! /s prevent!) within the databases for state cases in New York, Mississippi, Arizona, Alabama, and West Virginia.

A. *Purposeful Prevention*

Generally, states followed the same path toward using sanitary measures to prevent the spread of contagious diseases. The police power allowed them to enact laws to prevent the spread of disease, so they created state and local boards of health with broad authority to issue rules and regulations in service of this mission.[177] Sanitation was a method by which they carried out this duty—even if they did not initially understand the science behind why cleanliness prevented disease outbreaks.[178]

Initially, trash removal[179] and sewer systems were among the only tools available to improve public health. As the Supreme Court of Alabama noted in 1903, when upholding a proposed sewer system, "[t]he prevention of diseases is oftener better and cheaper than to cure them when they come."[180]

Later, when medicine drastically expanded the measures available, they became part of this pre-existing "sanitation" system. Health, medicine, and sanitation have long been intimately connected:

> "The science of medicine is the theory of diseases and remedies." Definitions might be quoted from other writers, but these will suffice to show not only that the word "medicine" is a technical word, denoting a science or art comprehending not only therapeutics, but the art of understanding the nature of diseases,

177. *See, e.g.*, Hawkins v. Hoye, 66 So. 741, 743 (Miss. 1914) (discussing statutes giving the state board of health the "duty . . . to investigate the causes and means of prevention of endemic and epidemic diseases" and protect the health of the public through powers including "reasonable sanitary rules and regulations"); Bellows v. Raynor, 101 N.E. 181, 183 (N.Y. 1913) ("The department of health of the city of New York is charged by law with the responsibility of preventing pestilence and disease in the city of New York. Its duty is to enforce all laws applicable to the preservation of human life and the promotion of health.").

178. *See* Wheat v. Ramsey, 224 So. 2d 649, 652–53 (Ala. 1969) ("As before stated, one of the most important objects of municipal government is the preservation of the public health; and science has demonstrated that nothing contributes more to secure the end than a sanitary system of sewerage and water-closets connected therewith." (quoting Spear v. Ward, 74 So. 27, 30 (Ala. 1917)).

179. *See* State v. Clayton, 492 So. 2d 665, 667–68 (Ala. Crim. App. 1986) (connecting statutory regulation of unauthorized waste dumping to the prevention of disease even in modern times).

180. *See* Keene v. Jefferson Cnty., 33 So. 435, 438 (Ala. 1903) (upholding act to construct a new sewer system and noting that "[t]he health of the valleys drained is of great importance to every citizen of the county, in preventing the spread of contagious and infectious diseases throughout its borders").

> the causes that produce them, as well as the art of knowing how to prevent them,—hygiene, sanitation, and the like.[181]

State sanitary codes developed in the early 1900s with a broad mission to preserve health.[182] Sanitation is thus tied as much—or more so—to its purpose of preventing disease as it is to cleanliness. Without understanding the reason for sanitary measures historically, one cannot understand the meaning of the word when used in the public health context. When cleaning is detached from disease prevention, context is lost.

In addition, and relevant to the recent shift in federal jurisprudence, sanitary codes did not require the consent of individuals to whom they applied:

> "When the sole object and general tendency of legislation is to promote the public health, there is no invasion of the Constitution, even if the enforcement of the law interferes to some extent with liberty or property. These principles are so well established as to require no discussion and we cite but a few out of many authorities relating to the subject." The court took note that the result reached was not to be nullified by the circumstance that "some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox." A similar principle underlies all of the legislation and sanitary code enactments relating to preventing the spread of communicable diseases by measures pursued without regard to the consent of the individual concerned.[183]

Thus, public health common law in these five states reflects the traditional emphasis on using sanitary measures—of various types—to prevent disease. In addition, the jurisprudence emphasizes that these measures improve population health, even if it is at the expense of constitutionally protected individual liberties. The states struck a balance that is dramatically different than that reflected in recent federal court decisions.

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181. Bragg v. State, 32 So. 767, 770 (Ala. 1902).

182. *See* Chiropractic Ass'n of N.Y. v. Hilleboe, 187 N.E.2d 756, 760–61 (N.Y. 1962) (enumerating the topics covered by the New York State Sanitary Code, including food safety, the milk industry, blood donation, and barber shops).

183. *Id.* at 758 (citations omitted).

B. Prioritizing Health over Business

In addition to prioritizing population health over individual liberties, state public health law historically prioritized health over the resulting economic impact of state laws or their enforcement. Even in the early 1800s, public health officials had the right to interfere with businesses when they affected public health. As a New York court recognized in 1866:

> More than fifty years ago, the body then known as the commissioners of the health office, were authorized by the act of March 30, 1801, to order the removal, abatement or discontinuance of any manufactory, trade, work, business or repository, which, in their judgment, was a nuisance, or by which, in their opinion, the public health or that of individuals might be endangered; and if it were not removed within the time limited by them, then, upon their representation, the mayor or recorder was required to issue a warrant commanding the sheriff to cause the removal or abatement of the nuisance forthwith.[184]

As a result, state and local public health laws apply to enterprises as varied as embalming;[185] the dairy industry and food industry more broadly,[186] including slaughterhouses;[187] and barber shops.[188] This is so despite any economic impact caused by additional burdens placed on these businesses—small and large.

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184. Cooper v. Schultz, 32 How. Pr. 107, 121–22 (N.Y. Ct. Com. Pl. 1866) (finding restrictions on driving cattle through the city and the maintenance of slaughterhouses within the board of health's authority).

185. McKinley v. Reilly, 393 P.2d 268, 271 (Ariz. 1964) (en banc) ("A high degree of skill and knowledge in sanitation and hygiene must be possessed by an embalmer in order to prevent the transmission to or infection by others."). *But see* People v. Ringe, 90 N.E. 451, 454 (N.Y. 1910) (overturning conviction for working as an undertaker without a license because statute appeared designed to protect business interests instead of health and noting that "the relation which the business bears to the general health, morals, and welfare of the state had much less influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions").

186. *See, e.g.*, People *ex rel.* Lieberman v. Van De Carr, 67 N.E. 913, 914 (N.Y. 1903) ("The sanitary code is a gradual growth, and made up, in part, of laws and ordinances enacted during a period of many years, invoking the exercise of the police power for the protection of the public health. It contains about 50 sections, among others, providing for the issuing of permits regulating the conduct of business and the vending of food."), *aff'd*, 199 U.S. 552 (1905).

187. *See, e.g.*, *Cooper*, 32 How. Pr. at 137.

188. *See Chiropractic Ass'n*, 187 N.E.2d at 761.

Restrictions on businesses due to public health concerns have always had the simultaneous consequence of restricting individuals—the owners and the patrons of such establishments. The landlords, cruise industry, and airline patrons of today have much in common with the funeral directors and barbers of previous times. Though the businesses regulated may have been smaller, the impact was similar. Among previous burdens to individual liberty permitted because of state public health authority are limitations on smoking indoors[189] and housing regulations.[190] Housing regulations were common even at times and in places where population increases resulted in housing shortages.[191] In fact, courts often found that health regulations were more necessary when housing was scarce and tenants had little bargaining power.[192]

Sanitation was so urgently needed to prevent the spread of disease that the Supreme Court allowed it to burden interstate commerce.[193] The state police power over public health was important enough for the Supreme Court to allow some burdens on interstate commerce even though lesser state interests would not permit such interference.[194]

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189. *See* Found. for Indep. Living, Inc. v. Cabell-Huntington Bd. of Health, 591 S.E.2d 744, 753–54 (W. Va. 2003) (finding that local boards of health had authority "to protect the public health by prohibiting smoking in enclosed public places and places of employment").

190. Wheat v. Ramsey, 224 So. 2d 649, 652–53 (Ala. 1969) ("Private property must be held subordinate to reasonable police regulations . . . ." (quoting Spear v. Ward, 74 So. 27, 30 (Ala. 1917)).

191. Teller v. McCoy, 252 S.E.2d 114, 122 (W. Va. 1978).

192. *See, e.g.*, *id.* (noting that the West Virginia legislature had passed laws to remedy the shortage of "sanitary, decent and safe residential housing" but citing a well-known case on the implied warranty of habitability for the principle that the "need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, caveat emptor" (first citing W. VA. CODE § 31-18-2(a) (1978); then citing Pines v. Perssion, 111 N.W.2d 409, 412–13 (Wis. 1961))).

193. *See* Helena-Glendale Ferry Co. v. State, 57 So. 362, 363 (Miss. 1912) ("In the above case the Supreme Court of the United States holds that the only burdens which the state may impose upon interstate commerce are those known as 'harbor duties or port charges exacted by the state from vessels in its harbors, or from their owners, *for other than sanitary purposes are sustained*. We say for other than sanitary purposes, for the power to prescribe regulations to protect the health of the community and prevent the spread of disease is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce.'" (emphasis added) (discussing Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 214 (1885))).

194. *Gloucester Ferry*, 114 U.S. at 214.

C. *"Burning Down the House"*

State courts have also typically granted public health authorities leeway when using sanitary measures to prevent the spread of disease.[195] Not only have people been quarantined to prevent the spread of disease, but they have even had their houses and possessions burned and destroyed.[196]

As the Alabama Supreme Court stated:

> [S]tatutes and ordinances dealing with and relating to such subjects [including the preservation of public health], together with provisions for the enforcement thereof, will be indulged by the courts, with the presumptions in their favor, as to their necessity, propriety, and validity, in the absence of a showing to the effect that they are unreasonable, arbitrary, unduly oppressive, or inconsistent with the legislative policy of the state. It must be made to appear to the courts that this police power has been manifestly transcended or abused, before courts will set aside or declare void ordinances which are intended to promote the public health. The special provisions and the extent of such ordinances are matters usually, and almost of necessity, left in a large measure to the discretion and judgment of the municipal authorities. They have, of course, no absolute power to pass any arbitrary ordinance which their caprice or whim might desire; but the law does of necessity vest in them judicial discretion to be exercised reasonably, with regard to the circumstances of each

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195. *See* Globe Sch. Dist. No. 1 v. Bd. of Health, 179 P. 55, 59–60 (Ariz. 1919) (upholding order to close schools during the Spanish flu epidemic where board of health had statutory power to prevent the spread of disease through quarantine and "other powers with regard to removing the source of disease by sanitary measures" while noting that "[n]ecessity is the law of time and place, and the emergency calls into life the necessity for the operation of the law. The emergency calls forth the occasion to exercise the power to protect the public health"); *see also* Parke v. Bradley, 86 So. 28, 29 (Ala. 1920) ("The prevention of disease and the conservation of health . . . is universally recognized as one of the most important and imperious duties of government, and in the construction of statutes enacted for such a purpose, under the police powers of the state, courts are agreed that great latitude should be allowed to the Legislature in determining the character of such laws, and how, when, and by whom, in their practical administration, they should be applied.").

196. Haupt v. Maricopa Cnty., 68 P. 525, 525 (Ariz. 1902). While reference is made to the famous song by the Talking Heads, here I mean the words literally and not metaphorically. *See* TALKING HEADS, *Burning Down the House*, *on* SPEAKING IN TONGUES (Sire Records 1983).

particular case, the objects to be accomplished, had the existing necessity of the occasion.[197]

Thus, great discretion is typically afforded to state and local authorities protecting public health to decide what methods to use to contain outbreaks and best protect the greater needs of the population—even where the cost to an individual may be high.[198] Where some may have disagreed with the methods used (and indeed, they would not be used today because they are now considered unnecessary or ineffective), courts deferred to the experts.

In 1900, there was an outbreak of diphtheria in Gila Bend in the Territory of Arizona.[199] The Maricopa County Board of Supervisors sent a doctor, Dr. Woodruff, to Gila Bend to "eradicate and prevent the spread of the disease."[200] Dr. Woodruff advised the board to provide a tent and bedding to those who were sick and, after the end of their quarantine, to "move them into the tent and burn their house, which is a small affair."[201] Once the board approved, Dr. Woodruff carried out the instructions, telling the appellant in the case that he would be reimbursed for "all property destroyed" in the fire.[202] However, when the appellant itemized and submitted a claim for damages totaling $988.08, the board would only reimburse $400.[203] When the appellant initially sued, the board of supervisors argued—surprisingly—for a narrow view of its powers that demonstrated it did not have the power to enter into contracts such as the one to reimburse the appellant.[204] The trial ended in a directed verdict for the defendant.[205]

The appellate court, however, found that the board of supervisors had the power to "adopt such provisions for the preservation of the health" of the county and "make and enforce all such local, police, sanitary, and other regulations as are not in conflict with general laws."[206] Appellant

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197. Wheat v. Ramsey, 224 So. 2d 649, 652–53 (Ala. 1969) (quoting Spear v. Ward, 74 So. 27, 29 (Ala. 1917)).

198. *See id.* at 653.

199. *Haupt*, 68 P. at 525.

200. *Id.*

201. *Id.*

202. *Id.* at 526 (stating that the appellant was told he would be reimbursed by the county "for all property destroyed, set fire to and burned the house which had been occupied by the sick family, and all the furniture, household effects, stores, and personal property therein contained").

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 526–27 (noting the additional power "to provide for the care and maintenance of the indigent sick").

argued that the board had the authority, through its representative—Dr. Woodruff, to contract with him to destroy his property and reimburse him for the loss incurred.[207] The board then ratified the contract and accepted its liability.[208] The board argued instead that it had the power to abate a nuisance but not to enter into a contract such as the one alleged here.[209] In contrast to many early public health cases, the board argued that its powers over public health were narrower than those alleged by its opponent to avoid a financial liability.

Reversing the directed verdict in the district court, the appellate court refused to limit the sweeping powers of the board to regulate public health:

> The language used indicates a broad grant of power, and that it was intended to intrust to the board a large discretion concerning the means to be employed for the preservation of the public health. It would not be the part of wisdom to unduly hamper with restrictions the exercise of so important a function. The prevalence of contagion may require the adoption of different measures, according to the peculiar exigencies of the situation which is presented, and we do not feel justified in prescribing a limitation which might, in effect, tie the hands of the board when the urgency was the greatest.[210]

Historical context shows then that public health authorities have broad powers to decide how best to manage a health crisis and execute their decisions. Although much was made of the burden imposed during COVID-19 by having to wear masks for extended periods of time and how that infringed on individual liberties, the cases discussed in this Part demonstrate that (1) this is a small burden compared to health measures that courts have historically approved to combat illness; and (2) even where courts and/or the public may not agree with the exact methods employed by public health authorities, there is a longstanding tradition of deference to experts in this field. Given that federal and state public health regulators have traditionally worked in tandem, any effort to break with the tradition of deference to health experts regarding methods employed during a crisis—particularly by reinterpreting a word like "sanitation" that cannot be defined without reference to traditional state regulation and jurisprudence—is likely to diminish states' police power.

207. *Id.* at 526.

208. *Id.* (finding that this was not a case of tort liability or a question of the board's powers of eminent domain).

209. *Id.*

210. *Id.* at 527 (remanding the case for a jury trial).

Even a federal case interpreting a federal statute—and even if it is overturned or affirmed on other grounds on appeal—can reflect a trend toward judicial supremacy over public health and in favor of individual liberties.

IV. HOW REDEFINING SANITATION HARMS STATES

People have traditionally looked to the states to protect them in a crisis as the federal government seems distant and less aware of local needs.[211] Construing federal public health authority narrowly instead of deferring to the CDC, however, has implications not only for federalism, but also for the balance between state power and individual liberties.[212]

Over time, the balance between regulation of public welfare by states and by the federal government has shifted.[213] With the New Deal, the scale tipped towards the concentration of power, and the federal government became ascendant.[214] The recent federal court COVID-19 decisions discussed above contain rhetoric about a shift of power back toward the states, but the way they are likely to actually narrow state power signals that federalism is not the true motivation for these decisions. Instead, individual liberties are ascendant now (with federal courts playing referee when public health authorities step over the blurry new lines of the major questions doctrine), and federalism concerns play a lesser role—with perhaps devastating consequences for regulating public health.

Public health law often requires individual liberties to give way to a larger population's needs in a time of crisis.[215] For many years, courts have recognized that individual behavior has a large impact on whether and how quickly viruses spread.[216] At some point, individual liberties—such as to behave as one desires—violate the rights of others to remain healthy and avoid illnesses. Living freely can harm others during a public health emergency.

As I explain in this Part, I call this new framework in federal jurisprudence judicially mandated individualism in public health law.

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211. *See* Daniel B. Rodriguez, *Public Health Emergencies and State Constitutional Quality*, 72 RUTGERS U. L. REV. 1223, 1232–33 (2020).

212. James G. Hodge Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 311–12 (1997).

213. *Id.* at 311.

214. *Id.* at 330–38 ("Activities of state and local public health authorities have increasingly been influenced or overtaken by federal programs, grants, initiatives, or laws.").

215. *See id.* at 325.

216. *Id.* at 324–25.

The federal courts have rolled back traditional deference to public health authorities to prioritize a philosophy of individual rights and liberties over those of society as a whole.[217] During COVID-19, federal and state regulators enforced lockdowns and mask and vaccine requirements, resulting directly in the federal judiciary restricting the CDC's regulatory authority and signaling where state public health jurisprudence will go next with the added tool of the major questions doctrine.[218]

A. *Narrowing State Public Health Powers*

The question of how federal courts backing individualism over population health impacts the states involves both political and legal trends. Typically, the balance between a state's police power over public health and an individual's liberty involves discussion of the landmark case of *Jacobson v. Massachusetts*.[219] In *Jacobson*, the board of health of Cambridge, Massachusetts, required all individuals to be vaccinated for smallpox, with an exception made for children deemed "unfit" for vaccination.[220] Jacobson refused to be vaccinated and was found guilty by a jury and ordered to pay a fine of five dollars.[221]

Notably, and as discussed above regarding the traditional deference of courts to local health authorities, the Court in *Jacobson* found that states could reasonably delegate their police power over public health to local boards of health and experts with a demonstrated expertise in safeguarding population health—even where the measures employed protected population health at the expense of individual liberties.[222] In a key passage, the Court stated:

> If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some, . . . the

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217. *See supra* Part II.
218. *See supra* notes 74–89 and accompanying text.
219. 197 U.S. 11 (1905).
220. *Id.* at 12–13; *see also id.* at 25 ("[T]he state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, [to the Constitution].").
221. *Id.* at 14.
222. *Id.* at 26–28 ("The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement.").

> answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. . . . [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.[223]

The Court continued that people may be compelled to serve in the armed forces, so they can be compelled to submit to public health measures.[224]

The Court exercised judicial restraint in refusing to substitute its judgment about the best measures to combat an outbreak of smallpox for those of local health authorities, even saying this would "usurp the functions of another branch of government."[225] It applied a standard that if the measures had a "real or substantial relation to the protection of the public health and the public safety," then it was not for the Court to contradict the board of health.[226] In particular, the Court discussed how the methods to combat disease need not be "universal" to be a valid exercise of the police power.[227] In fact, it highlighted that science may later find that these methods used were not appropriate or effective.[228] Regardless, "what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not."[229]

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223. *Id.* at 28–29.

224. *Id.* at 29–30 (discussing limitations on the freedoms secured by the Fourteenth Amendment). Similarly, as Mark Seidenfeld said in our conversation at the 2023 AALS Annual Meeting, he told law students who did not want to wear masks and argued that the school's requirement infringed on their individual liberties, "They make you wear clothes, don't they?"

225. *Id.* at 28 (noting that smallpox was "prevalent and increasing at Cambridge" at the time).

226. *Id.* at 31–32 (noting that vaccination was a common method of protecting the public against smallpox). *But see* James R. Steiner-Dillon & Elisabeth J. Ryan, Jacobson *2.0: Police Power in the Time of COVID-19*, 84 ALBANY L. REV. 383 (2021) (proposing a new test for determining the extent of state police power during a public health emergency—*Jacobson* 2.0—that balances traditional deference to states during such an emergency with more recent jurisprudence protecting civil rights and liberties).

227. *Jacobson*, 197 U.S. at 35.

228. *Id.*

229. *Id.* (finding deference to the legislature and public health boards appropriate in spite of a lack of universal acceptance of its methods because "there is scarcely any belief that is accepted by everyone").

There are several reasons why the narrowing of federal public health powers in *Health Freedom Defense Fund, Inc. v. Biden*[230] is likely to result in the narrowing of state powers as well. First, failing to interpret statutory terms according to historical common law and the technical meanings of those terms in public health law puts public opinion on appropriate public health tools to combat a pandemic on the same level as tools backed by years of scientific experience.[231]

Second, a big part of the legal reasoning inherent in the COVID-19 cases discussed above is that the CDC has never used these methods before, so it cannot use them now unless Congress specifically authorizes their use.[232] This reasoning would apply with equal force to any new measures to combat viruses by the states.[233] Although the courts used the states as a safeguard in effect by saying that the purpose of narrowing federal powers over public health is to make sure they remain with the states, if the states also may not use new, modern methods to combat outbreaks and pandemics, then no one has the authority to manage population health in a crisis except the legislature. And the legislatures are not nimble or knowledgeable enough to quickly authorize specific public health tools if another crisis occurs.

B. Shifting Power to the Judiciary

Worse than the "patchwork" of response seen in the states' varying responses to COVID-19[234] will be the non-response likely to occur in the next pandemic.

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230. 599 F. Supp. 3d 1144 (M.D. Fla. 2022).

231. This is where the "I did my own research" movement clashes with science and evidence-based "truth."

232. *See, e.g.*, State v. Becerra, 544 F. Supp. 3d 1241, 1264 (M.D. Fla. 2021). If this logic sounds familiar, it may be because it stands on similar foundations to the holding in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2253 (2022). The purported reasoning is that because abortion was criminalized in three-quarters of states in 1868, when the Fourteenth Amendment to the Constitution was adopted, the Constitution's protections cannot possibly apply to abortion, and the federal or state legislatures must specifically adopt any such protections—or not. *See id.* ("The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions.").

233. If only federal courts were as protective of historical methods when it came to historical judicial deference to public health authorities, but alas, the courts here seem to apply a different standard of traditionalism to public health regulators than they do to themselves.

234. *See* Katherine Florey, *COVID-19 and Domestic Travel Restrictions*, 96 NOTRE DAME L. REV. REFLECTION 1, 3 (2020) ("[A]n inevitable effect of nonuniform reopening is to create a patchwork of COVID-19 restrictions, where conditions and regulations in one state or even one county may differ starkly from those in a nearby one."); Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 27–31 (2020) (discussing concerns about institutional competence where a lack of federal

As the opinions discussed above clarify, the federal government also regulates public health. In addition, states can delegate their police power to entities outside of the state. For example, in *Dyer v. Sims*,[235] the Supreme Court found that a state can delegate its police power to other states and to the federal government where West Virginia was one of eight states to enter into a compact to maintain the Ohio River basin "in a sanitary condition through the administrative mechanism of the Ohio River Valley Water Sanitation Commission, consisting of three members from each State and three representing the United States."[236] The auditor of West Virginia refused to pay an appropriation for the state's share of the expenses of the commission.[237] In the resulting lawsuit, the Court found that West Virginia could delegate its authority to control pollution in a river system that crosses state boundaries.[238]

There are times when states not only work with the federal government to best manage public health issues, but even delegate their police power to a broader group. Flexibility about the players involved and the methods utilized has long been a staple of public health law.

The recent trend towards judicially mandated individualism, however, sacrifices flexibility in an effort to limit not only the players who can get involved but also the methods they can use. After all, that is the only way to prioritize individual liberties above population health—by preventing public health authorities from regulating.

The idea that this trend would stop at the boundaries between federal and state jurisprudence is disingenuous, however. One can imagine how the political landscapes in different states might look.

First, in blue states, public health authorities might continue to act aggressively to combat disease outbreaks even when these measures aimed at protecting population health run up against individual liberties. Lockdowns and masks will abound. Courts are likely to employ their usual deference to public health authorities, and the state police power will be secure. Dissenters within these blue states are likely to follow the federal framework, however, and attempt to re-craft the state judiciary with more conservative elected or appointed judges. They are unlikely to exact systematic change on the judiciary because of their numbers, however, and public health law in these states will remain roughly the

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response resulted in a "patchwork" of state responses to COVID-19, including limitations on interstate travel).

235. 341 U.S. 22 (1951).

236. *Id.* at 24–25, 31–32.

237. *Id.* at 25.

238. *Id.* at 30–32 ("Here, the State has bound itself to control pollution by the more effective means of an agreement with other States. The Compact involves a reasonable and carefully limited delegation of power to an interstate agency.").

same in terms of judicial deference to agencies and prioritizing population health over individual liberties.

Next, in red states, the landscape will shift. Public health authorities will act less in service of combatting disease outbreaks because most public health measures exact some toll on individual liberties. Regardless, any actions are likely to be restricted by activist state courts that strike them down in the name of individual liberties and the wisdom of a judicial veto. "Sanitation" and similar words will be redefined to advance the new public health legal order. The federal courts have provided the blueprint—even when their rulings are not binding. In this way, the state police power will shrink in red states as state courts take away the discretion traditionally allowed to state and local health boards. Ironically, conservative federal judges claiming to protect the state police power will instead help bring about its demise in many states.

In purple states, public health law is likely to shift along with the political tides. Public health authorities will be more or less active depending on popular opinion and judicial reaction. Judicial reaction will shift as the composition of the state judiciary changes. Although the Republican Party invested large sums to ensure their numbers in statehouses and on the federal bench, they are likely now to focus on state courts in purple states when they are in power.

Among the problems with recent efforts to examine federal and state regulation of public health during the COVID-19 pandemic is that the courts have sometimes failed to take the "subordinate role" to scientific experts that they have historically played.[239] Typically, during times of disease outbreak, states take an expansive view of their police power over health, and the public and courts accept such efforts. Then, after the crisis passes and public support for such efforts retreats, state power shrinks back. In the COVID crisis, however, courts have been far more willing to "substitute their own judgment for that of public officials."[240]

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239. *See* Wall v. CDC, No. 21-cv-975, 2022 WL 1619516, at *7 (M.D. Fla. Apr. 29, 2022) ("And, most importantly, Congress delegated the administration of the PHSA, 'in light of everyday realities,' to the CDC, the nation's health protection experts, not to federal judges, who are neither 'experts in the field' nor 'part of the political branch of the Government.'"); Rodriguez, *supra* note 211, at 1234 ("In *Jacobson*, the Supreme Court acknowledged that the courts would have a more limited role in superintending the policy process, even when constitutional liberties were in issue, because of the more promising intervention of scientists and the appropriate humility of non-expert courts. But it is striking that, in both the early and later legal controversies, the expectations that state government would look to science first in tackling public health challenges and that the law would take a subordinate role were prominent and persistent." (footnote omitted)).

240. Edward P. Richards, *A Historical Review of the State Police Powers and Their Relevance to the COVID-19 Pandemic of 2020*, 11 J. NAT'L SEC. L. & POL'Y 83, 104–05 (2020)

That means that even in times of crisis, when state police power is typically at its height, some states will not use such power. Redefining "sanitation" leads down a slippery slope toward states surrendering their police powers when judges decide against deference.

CONCLUSION

Judicially mandated individualism in public health law effectively means the absence of regulation, which is seemingly a goal of the major questions doctrine. The basic norms of public health law favor actions in the best interests of a larger population—even when they restrict or harm individuals within that population. By striking down the Mask Mandate, but more so by redefining "sanitation" to suit its whims, one federal court has moved a step further down a path towards judicial and individual supremacy that limits action and innovation in public health regulation. State police power is the next fundamental tool of public health law to retreat.

("When the pandemic is over and the appeals are done, it will be interesting to see what has survived of the traditional police powers.").