FUNDAMENTALISM IN *ROMAN CATHOLIC DIOCESE V. CUOMO*: THE COURT'S FARRAGO OF RELIGIOUS FREEDOM, PUBLIC HEALTH LAW, AND SCIENTIFIC (ILL)ITERACY

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On October 6, 2020, shortly before the Simchat Torah holiday, New York's former Governor, Andrew Cuomo, promulgated extensive lockdown requirements which all but eviscerated worship in areas heavily affected by COVID-19. The Executive Order instigated a suit by the Roman Catholic Diocese and the Agudath Israel of America, claiming their religious rights had been violated.[1] *Turning its back on 225 years of public health law affirming the states' police powers to protect the public health — even if this trespassed on constitutional rights — the dicta of the majority venerates and expands First Amendment constitutional rights to levels hitherto unseen.*

This research first contextualizes the Roman Catholic Diocese v. Cuomo decision in light of its timing, not a year after New York's measles epidemic concluded. I then contrast the judicial sentiment to past decisions balancing public health and private rights, before comparing similar lockdown orders in Israel which did not invite the same religious push-back. Next, I examine the significant lacuna in scientific understanding demonstrated by the majority which significantly affects the outcome. This deficiency, I suggest, crystalizes the need to evaluate the frisson between public health and First Amendment rights using a multi-factorial science-based inquiry. Reevaluating this case using this methodology as I do here, could provide a valuable guide for future cases sure to arise. Finally, I detail what appears to be a shift in the fabric of Supreme Court views regarding religion and public health, fostering the views of the Conservative right.

"For this to be said of the people of London, that during the whole time of the pestilence the churches of meetings were never wholly shut up, nor did the people decline coming out to the public worship of God. . . ." (Daniel DeFoe, A Journal of the Plague Year (1722), at 157).

"It was never assumed in the United States that the citizen of a free country has a right to do whatever he pleases; on the contrary, more social obligations were there imposed upon him than anywhere else." (Alexis de Tocqueville, Democracy in America (1840), at 65).

[1] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 65–66 (2020) (per curiam).

PART I: INTRODUCTION

In the wake of the Biden orders instituting vaccine mandates, the ensuing court decisions[2] coupled with the scourge on hospital and health care resources, and the stagnant vaccine uptake,[3] we can expect further judicial forays evaluating executive orders and legislative promulgations dealing with the COVID-19 and other future public health crises.

As deaths mounted and hospitals became overwhelmed,[4] and with the increasingly strident anti-vaccine mandate lobby sounding in, governors and legislators were hampered in dealing with the burgeoning caseload.[5] This may well continue. We should also expect continued demands for autonomy-champions to avoid compliance with public health-driven directives on constitutional grounds. Hence, it is incumbent to evaluate the balancing required between the local police power to act on behalf of the public health and individual rights — the most potent perhaps being freedom of religion.

In *Roman Catholic Diocese v. Cuomo*, the Supreme Court grapples with the issue head-on while ignoring time-honored public health principles and precedent under the guise of hagiography of the Free Exercise Clause. Together with current contradictory cases (*see infra*, Part V), the impact for the future of public health law is seriously clouded, depriving us of certainty in assessing the validity of legal constraints and the powers afforded local public-health decision makers during a public health crisis. As Justice Kagan announced in her dissent in the *South Bay* case,[6] decided under the shadow of *Roman Catholic Diocese v. Cuomo*: "This is no garden-variety legal error: In forcing California to ignore its experts' scientific findings, the Court impairs the State's effort to address a public health emergency."[7] Thus, deeper analysis is immediately warranted — to give

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[2] Barbara Pfeffer Billauer, *The Supremes Speak Out on COVID VAX in the Workplace,* AM. COUNCIL ON SCI. AND HEALTH (Jan. 17, 2022), https://www.acsh.org/news/2022/01/17/supremes-speak-out-covid-vax-workplace-16064.

[3] James G. Hodge, Jr. & Jennifer L. Piatt, *Legal Decision-making and Crisis Standards of Care: Tiebreaking During the COVID-19 Pandemic and in Other Public Health Emergencies,* JAMA HEALTH FORUM, Jan. 21, 2022, at 2022;3(1):e214799.

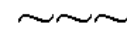
[4] *Id.*; *See also* Barbara Pfeffer Billauer, *Muzzling Anti-Vaxxer FEAR Speech: Overcoming Free Speech Obstacles with Compelled Speech,* 76 U. MIA. L. REV. 1, 4, 41 (2021).

[5] *See, e.g.*, Christina Carrega, *Rhode Island's Governor Calls to Quarantine New Yorkers to Prevent the Spread of COVID-19,* ABC NEWS (Mar. 28, 2020, 10:47 AM), https://abcnews.go.com/US/rhode-islands-governor-calls-quarantine-yorkers-prevent-spread/story?id=69852552 (discussing Rhode Island governor's reverse quarantine directive barring NY license plates from entering, though decision was later rescinded).

[6] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (Kagan, J., dissenting).

[7] *Id.* at 722–23; *see generally infra* note 27.

guidance for future actions to and by the Supreme Court, to provide cautionary insights to the Court, and to provide a reminder of the importance of historical deference[8] to local authority when managing public health crises.[9]



For Orthodox Jews, the Simchat Torah holiday (literally the "happiness of the Torah"), is one of the happiest of the year. Commemorating the completion and beginning of the Torah reading cycle, it is celebrated by joyous communal dancing[10] and singing — even imbibing alcoholic beverages — all considered an integral part of the services of the day.[11] Most would not take too kindly to this celebratory worship being revoked, but that's exactly what Governor Cuomo did in promulgating the public health laws leading to up to *Roman Catholic Diocese v. Cuomo.*[12]

In recent years Simchat Torah has had a rather sordid public health history in New York. On Simchat Torah in 2018, the holiday "happiness" evaporated when a visiting teenager seeded the 2018–2019 measles epidemic in America — the worst the country had seen in thirty years. Ground zero was an ultra-Orthodox synagogue in Rockland County,

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[8] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) ("'[T]he line'" that courts and governments "must draw between the permissible and the impermissible" has to "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014))). Given the Court's position in *Kennedy*, it would seem that there is a pick and choose paradigm of when history will be important to consider and when not, the decision being made on an outcome determinative basis.

[9] The Supreme Court's veneration for a historical assessment in *Dobbs v. Jackson Women's Health Organization* strikes one as disingenuous when it is so flagrantly disregarded here. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) ("Thus, historical inquiries are essential whenever the Court is asked to recognize a new component of the 'liberty' interest protected by the Due Process Clause."); *see* also *id.* at 2242 ("[This] provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

[10] WATCH: *Hakafot at the Western Wall for Simchat Torah*, THE JERUSALEM POST (Oct. 20, 2019), https://www.jpost.com/israel-news/watch-hakafot-at-the-western-wall-for-simchat-torah-605224 (discussing the *Hakafot* tradition of the holiday, dancing in a circle around the *bima*, the place where the Torah is read in a Jewish synagogue).

[11] Menachem Posner, *What to Expect at Simchat Torah Services*, Chabad.org, https://www.chabad.org/library/article_cdo/aid/3076274/jewish/What-to-Expect-at-Simchat-Torah-Services.htm ("Simchat Torah, which follows the holiday of Sukkot, offers synagogue services unlike those you'll see on any other day. Sure, there are the Torahs, and there are Hebrew prayers, but there is also dancing, singing, capering, snacking, and maybe even some (moderate) drinking in the synagogue.").

[12] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

where the young man exposed 7,000 co-parishioners during the worship festivities.[13] That outbreak was joined a day later by a sister outbreak in the Williamsburg and Borough Park neighborhoods in Brooklyn. Communities were targeted by rabid anti-vaccine activists, both local and imported.[14] It took an entire year for the epidemic to be quelled, and it was not until October 1, 2019, that the epidemic was declared over, barely avoiding the U.S. losing its World Health Organization certification for eradicating the disease.[15] The state remained epidemic-free for only five months before COVID took it by storm.

One year after the measles outbreak was eradicated and after months of flouting COVID-19 regulations, the COVID experience in these same Brooklyn communities rose to worrisome levels. Rockland County also boasted an unusually high disease rate.[16] On October 6, 2020,[17] with more than 267,000 confirmed COVID cases and 13,000 deaths recorded in the

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[13] *See* Nick Paumgarten, *The Message of Measles*, THE NEW YORKER (Aug. 26, 2019), https://www.newyorker.com/magazine/2019/09/02/the-message-of-measles.

[14] *See* Barbara Pfeffer Billauer, *Religious Freedom v. Compelled Vaccination: A Case-Study of the 2018-2019 Measles Pandemic or the Law as a Public Health Response,* 71 CATH. U. L. REVIEW 277, 281 n.21 and accompanying text (2022); *see also* Barbara Pfeffer Billauer, *Anti-Vax FEAR* Speech: A Public-Health-Driven Policy Initiative When Counter-Speech Won't Work (*Fake, Flawed, Fraudulent, False, Endangering, and Reckless)*, 32 HEALTH MATRIX 215, 255 n.205 and accompanying text (2022).

[15] Manisha Patel et. al., *National Update on Measles Cases and Outbreaks — United States, January 1–October 1, 2019,* 68 CDC: Morbidity and Mortality Weekly Rep. (Oct. 11, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6840e2.htm.

[16] *The Week in COVID-19: Brooklyn, Here's Everything You Need to Know*, BROOKLYN READER (Oct. 2, 2020), https://bkreader.com/2020/10/02/the-week-in-covid-19-10-02-20-brooklyn-heres-everything-you-need-to-know/ [hereinafter *The Week in COVID-19*]. ("The NYC Health Department continues to track 4 concerning clusters of COVID-19 cases in Southern Brooklyn, Williamsburg, Central Queens, and Far Rockaway. Within these clusters there are 12 neighborhoods where cases continue to grow at an alarming rate, outpacing the citywide average by 3.3 times over the past 14 days … accounting for nearly 30% of new cases citywide over the past 2 weeks despite representing 9% of the city's overall population.").

[17] Wendy Parmet, *Roman Catholic Diocese of Brooklyn v. Cuomo – The Supreme Court and Pandemic Controls*, N. ENG. J. OF MED., (Jan. 21, 2021), https://www.nejm.org/doi/full/10.1056/NEJMp2034280#:~:text=In%20Roman%20Catholic%20Diocese%20of,New%20York%20Governor%20Andrew%20Cuomo.

state[18] (the highest in the country),[19] and seeking to avoid imposing broader state-wide restrictions, a frustrated Governor Cuomo extended New York's lockdown regulations.[20] Many considered this act to be blunt, draconian, ill-conceived, and ostensibly targeted to the offending Brooklyn communities.[21] Allegedly in an effort to contain rabble-rousing and regulation-flouting ultra-Orthodox citizens who appeared accountable for most of the City's disease,[22] the regulations severely restricted communal worship in these locales, torpedoing the eagerly anticipated Simchat Torah services five days hence, along with the *Hoshana Rabba* and *Shemini Atzeret* services that begin two days before.[23] The real "crimes" of these ultra-Orthodox citizens included an erroneous conviction that their community had attained herd-immunity, leading them to flaunt government regulations,[24] along with mistrust of government health-initiatives, and

[18] *See* Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 77 (2020) (per curiam) (Breyer, J., dissenting) (noting 26,000 deaths in New York State, and 16,000 deaths in New York City); *see also* Brief for Respondent at 8, Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020) (per curiam) (No. 20A87).

[19] *The Week in COVID-19*, *supra* note 16.

[20] *See* Brief for Respondent, *supra* note 18, at 6–7. Indeed, the Governor's actions may have been very well conceived—and prudent—at least in retrospect. In 2020, New York boasted the highest COVID death rate in the country, losing three years off its life-expectancy projections, the highest in the country. Katia Dmitrieva, *New York State Led US Life-Expectancy Drop in 2020, CDC Says*, BLOOMBERG (Aug. 23, 2022), https://www.bloomberg.com/news/articles/2022-08-23/new-york-state-led-us-life-expectancy-drop-in-2020-cdc-says. In 2021, the country's life expectancy rates fell even further. *See* Amruta Khandekar & Raghav Mahobe, *U.S. Life Expectancy Fell Further in 2021 Due to COVID*, REUTERS (Aug. 31, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/covid-drives-down-us-life-expectancy-second-straight-year-cdc-data-2022-08-31/ (noting that deaths from COVID 19 accounted for half the overall decline). In 2020, the death rates registered the biggest one-year drop since World War II, with COVID 19 accounting for 75% of the decline.

[21] *See* Executive Order [A. Cuomo] No. 202.28 [9 NYCRR 8.202.28], https://www.governor.ny.gov/sites/default/files/atoms/files/EO202.68.pdf; *see also infra* note 25.

[22] Ben Sales, *Following Orthodox Protests de Blasio and Cuomo Avoid Naming Jewish Community*, TIMES OF ISRAEL (Oct. 8, 2020, 3:37 AM), https://www.timesofisrael.com/following-orthodox-protests-de-blasio-and-cuomo-avoid-naming-jewish-community/.

[23] *See* Appl. Writ Inj. Relief at 34, Agudath Israel v. Cuomo, No. 20A90 (U.S. Nov. 12, 2020) ("The Governor timed his religious shutdown to begin on the eve of a Jewish holiday weekend, immediately before *Hoshana Rabbah, Shmini Atzeres*, and *Simchas Torah*—all holidays which preclude observant Jews from traveling by car to worship.") [actually, the assertion is partially erroneous; vehicular travel is permitted on the Hoshana Rabbah holiday].

[24] Ginia Bellafante, *When Covid Flared Again in Orthodox Jewish New York*, N.Y. Times (Oct. 5, 2020), https://www.nytimes.com/2020/10/05/nyregion/orthodox-jewish-nyc-coronavirus.html (reporting on community measures advising: "'DO NOT test your child for Covid.' Any admission that their children …

residual sequelae of anti-vaccination activities and rabid rhetoric of 2018–2019.[25]

Like any dragnet, others who were not at fault were implicated. In this case, under the *Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency*,[26] areas were sequestered into danger zones (by disease levels) and exposure-categories (by types of services rendered). Activities and population movement in these areas were to be reduced or curtailed, depending on the likelihood of disease transmission.[27] In effect, Governor Cuomo was enacting a nuanced and more focused version of a typical state or city-wide "quarantine."[28] Under the category of non-essential services, the law in "red" zones — those with the highest disease indicators — were to restrict attendance at houses of worship to ten people, affecting all religions venued in these localities, including all sects within the umbrella of Orthodox Judaism.

The Roman Catholic Diocese and two Agudath Israel Synagogues were among those afflicted.[29] They both sought redress, culminating in the case of *Roman Catholic Diocese v. Cuomo*.[30] Agudath Israel [hereinafter Agudah] framed the issue thusly: "Whether an executive order violates the Free Exercise Clause when the order, on its face, disfavors worship."[31] Regardless whether the Governor's directives were overbroad, the stark yes-no presentation of the issue blindly ignores the balancing exercise required when the state's police power to protect the health of its citizens conflicts with individual rights.[32] That blindness pervades the Supreme

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exhibit[ed]… the disease … might eventually force a school to close … time and it was 'up to parents' to make sure such an outcome was avoided.").

[25] Barbara Pfeffer Billauer, *Addressing the Demonstrable Effects of Anti-Vax FEAR* Speech with Mandated Public-Health Education and Government Speech (*False, Endangering and Reckless)*, HEALTH MATRIX: J. OF L.-MED. (2020).

[26] Executive Order [A. Cuomo] No. 202.28 [9 NYCRR 8.202.28], https://www.governor.ny.gov/sites/default/files/atoms/files/EO202.68.pdf

[27] *Id.*

[28] *See Quarantine*, WIKIPEDIA, https://en.wikipedia.org/wiki/Quarantine (last visited Aug. 19, 2022) (defining quarantine as "a restriction on the movement of people, animals and goods which is intended to prevent the spread of disease or pests."); *see also* Centers for Disease Control and Prevention, *Isolation and Precautions for People with COVID-19*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html (last updated Aug. 11, 2022) ("Isolation is used to separate people with *confirmed or suspected* COVID-19 from those without COVID-19.").

[29] An interesting query is whether the Roman Catholic Diocese and Agudath Israel can, as organizations, raise the freedom of religion claim.

[30] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

[31] *See* Appl. Writ Inj. Relief at ii, Agudath Israel v. Cuomo, No. 20A90 (U.S. Nov. 12, 2020).

[32] People v. Woodruff, 26 A.D.2d 236, 272 N.Y.S.2d 786, 789 (1966), aff'd, 21 N.Y.2d 848, 236 N.E.2d 159 (1968) (reviewing religious use of peyote and holding that the State's interest outweighed the individual interest) (citing People v. Woody, 394 P.2d 813 (Cal. 1964)) (internal citation omitted); *see also* Sherbert

Court opinion, and those that follow in February's *South Bay United Pentecostal Church*, or what I call *South Bay redux*[33] and *Tandon v. Newsom*.[34]

Two similar cases had reached the Supreme Court in the months prior to the *Roman Catholic Diocese* decision, both addressing the same issue: the relative pre-eminence of the police power to protect the public health against claims of violating the Free Exercise Clause. Both cases, *Calvary Chapel Dayton Valley v. Sisolak*,[35] and *South Bay United Pentecostal Church v. Newsom*,[36] can be distinguished from *Roman Catholic Diocese* on two obvious grounds: the laws involved were not quite as draconian, and the Court's majority at the time were of the liberal persuasion.

The *Roman Catholic Diocese* case, while not necessarily troubling if viewed on an isolated and case-limited factual basis, strips naked modern fundamentalist beliefs held by the majority Justices — with the potential to wreak havoc on a state's management of a health-related emergency. As one pundit opined:

> Roman Catholic Diocese revolutionized the Court's approach to lawsuits where a plaintiff who objects to a state law on religious grounds seeks an exemption from that law….[The case] … redefined what constitutes a "neutral law of general applicability" so narrowly that nearly any religious conservative with a clever lawyer can expect to prevail in a lawsuit.[37]

The state of science-illiteracy and irreverence for scientific evidence also sets us back to the dark days before *Daubert* required judges to be gatekeepers of scientific inquiry.[38] This article lays bare nuggets of scientific ignorance and disdain revealed in these decisions, a situation perhaps

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v. Verner, 374 U.S. 398 (1963); Robert McIver, "*Our Constitution, Our Precedents, and (Our) Own Best Human Judgements": a Survey of Free Exercise State Constitutional Interpretation in the Wake of Oregon v. Smith*, 77 ALB. L. REV. 1643, 1660 (2014).

[33] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021).

[34] Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

[35] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

[36] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

[37] Ian Milhiser, *The Supreme Court is Leading a Christian Conservative Revolution*, VOX (Jan. 30, 2022), https://www.vox.com/22889417/supreme-court-religious-liberty-christian-right-revolution-amy-coney-barrett ("Almost as soon as Justice Barrett was confirmed, the Court handed down a revolutionary 'religious liberty' decision.").

[38] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); *see* Barbara Pfeffer Billauer, *Admissibility of Scientific Evidence Under Daubert: The Fatal Flaws of 'Falsifiability' and 'Falsification'*, 22 B.U. J. SCI. & TECH. L. 21 (2016); *see also* Barbara Pfeffer Billauer, *Daubert Debunked: A History of Legal Retrogression and the Need to Reassess Scientific Admissibility*, 21 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2016).

not encountered since *Buck v. Bell.*[39] It also reveals inherent biases in the judiciary, biases with the potential to corrupt constitutional decision-making. Once laid bare, perhaps steps can be taken to address them. The point of the article is not to discuss the merits of New York's specific restrictions, but to address the Freudian dicta that surfaces in it and the decisions following it, and to assess what they portend.

In Part II, I discuss *Jacobson v. Massachusetts,*[40] heretofore the go-to case regarding limits of the state's police power in the context of a health-emergency, which was loudly trashed by Justice Gorsuch. I also note the conspicuously absent attention to other cases which should have had precedential impact.

In Part III, I reveal the farrago concocted by the judges in their analysis of comparable and essential activities, casting them solely as a derivative of First Amendment protected liberties. This mishmash obscures the scientific infirmities in Justices Gorsuch and Kavanaugh's evaluation of secular activities as comparable or essential to religious ones. I then compare New York's ostensibly constitutionally offensive decision to the Israeli regulations and the reception by the Israeli ultra-Orthodox community. I also highlight the constitutional bias of conservative justices, laying bare the lengths to which justices will go to hide behind the cover of an idiosyncratic "originalism."[41]

Part IV sets out the two-phase analysis required when public health initiatives are balanced against any individual right, but most especially freedom of religion.

Part V illustrates subtle shifts in judicial sentiment in cases following the *Roman Catholic Diocese v. Cuomo* case, suggesting that the pure balancing of public health versus individual rights is not what is driving the issue, but rather it may be judicial idiosyncratic religious views and ego.

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[39] Buck v. Bell, 274 U.S. 200 (1927) (Often touted as the worst Supreme Court decision (at least pre-Dobbs), Buck v. Bell upheld compulsory sterilization of the mentally infirm and intellectually disadvantaged. Justice Oliver Wendell Holmes's line regarding Carrie Buck to wit, "[t]hree generations of imbeciles are enough," is testament to judicial sentiment over science, as it later turned out that Ms. Buck was maligned and the appellation was untrue. *Id.* at 207. Based on the then view of genetics and eugenics, the case has never been expressly overturned.)

[40] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[41] *See* Reynolds v. United States, 98 U.S. 145, 163 (1878) (citing a letter from Thomas Jefferson regarding a proposed draft of the U.S. Constitution).

PART II: THE LEGACY OF *JACOBSON V. MASSACHUSETTS*

A. The State's Police Power to Regulate Health and Safety

As stated in Justice Gorsuch's concurrence: "To justify its result, the concurrence [in South Bay I[42]] reached back 100 years in the U.S. Reports to grab hold of our decision in *Jacobson* v. *Massachusetts*."[43]

Jacobson is not a case ordinarily studied in first year Constitutional Law, or even advanced constitutional law classes. It is, however, a mainstay of public health law,[44] cementing the superiority of the State's police power to protect the public health, even at the expense of individual rights and liberties,[45] and even in the face of competing constitutional provisions.[46] *Jacobson,* a case revolving around refusal to be vaccinated for smallpox on personal liberty grounds, was among the earlier of Supreme Court cases to enunciate the importance of, and reverence for, the state's police power to protect public health and safety, even when it conflicts with other constitutional rights. Right on its heels came *Lochner v. New York,*[47] addressing maximum working hour laws, which attempted to reign in *Jacobson*.[48] Even commentators of the day complained that "from the standpoint of public health, the opinion was wrong, [noting that] able writers have questioned its legal soundness."[49] "At any rate, the Court subsequently has more or less ignored this decision and *Bunting v. Oregon,*[50] decided in 1917 … overruled it by upholding a State law regulating hours of labor"[51] in effect re-instating Jacobson.

It is crucial to understand that the stakes in *Jacobson* — dealing with a smallpox epidemic — far surpassed those of *Lochner*, notwithstanding the beginnings of recognition of the harm associated with poor working

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[42] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, J. concurring).

[43] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J. concurring).

[44] LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT, 117, 122 (U. Cal. Press ed. 2000) ("Jacobson was an iconic case reconciling individual rights with the collective good, and the Court's resolution continues to reverberate in modern times."); *see also* Mark A. Hall et al., *The Legal Authority for States' Stay-at-Home Orders*, 383 NEW ENG. J. MED. e29(1), e29(3) (2020) (calling the case "seminal.").

[45] *Jacobson*, 197 U.S. at 26–27 (1905).

[46] *See, e.g.*, Compagnie Francaise de Navigation Vapeur v. La. State Bd. of Health, 186 U.S. 380, 385–86 (1902); *infra* notes 165-66.

[47] 198 U.S. 45 (1905).

[48] *See* Wendy E. Parmet, Rediscovering *Jacobson* in the Era of COVID-19, 100 B.U. L. REV. ONLINE 117 (2020). https://www.bu.edu/bulawreview/files/2020/07/PARMET.pdf.

[49] James A. Tobey, *Public Health and the United States Supreme Court*, 11 A.B.A. J. 707, 710 (1925).

[50] 243 U.S. 426 (1917) (illustrating a maximum working hour case).

[51] Tobey, *supra* note 49, at 710.

conditions, enunciated earlier by the Supreme Court in 1908 in *Muller v. Oregon*.[52] Nevertheless, the power of the states to regulate health and safety of their constituents has been recognized since the inception of the country:

> All the cases agree that this [police] power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights…But neither the [14th] Amendment — broad and comprehensive as it is — nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people.[53]

As noted above, the *Jacobson* case tethered police power holdings to epidemic management. *Jacobson* arose during the 1901–1903 Boston smallpox epidemic. No stranger to massive mortality from smallpox in its past, the Boston Municipal Board of Health ordered mandatory vaccination or subjected the violator to a fine. In actuality, the state was battling two epidemics: the disease and fear incident to the disease. Given its history, emergence of public panic — of both the disease and the vaccine — was not unreasonable.[54] Addressing public fear was one predicate for the decision, even in the face of admitted uncertainty regarding efficacy of the vaccine.[55] The notion of addressing fear, rather than a reason not to impose

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[52] 208 U.S. 412 (1908).

[53] Lochner v. New York 198 U.S. 45, 65 (1905) (citing Barbier v. Connolly, 113 U.S. 27, 31 (1884)); *see also Id.*; Viemeister v. White, 72 N.E. 97, 98 (N.Y. 1904) ("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.") (citations omitted); *see also* Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State,* 120 PUBLIC HEALTH REPS. 20, 21 (Supp. 1) (2005) ("State police power was validated for the first time a few years after the end of the Revolutionary War, when Philadelphia was isolated to control the threat of yellow fever.") (citing Smith v. Turner, 48 U.S. (7 How) 283, 340–41 (1849) (noting "*[s]alus populi suprema lex esto*" (Latin: The health (welfare, good, salvation, felicity) of the people should be the supreme law, (or highest) law)) (upholding New York's quarantine laws). *See also* Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L. Q. 511, 512 (2000).

[54] MICHAEL WILLRICH, POX: AN AMERICAN HISTORY (2011).

[55] Jacobson v. Massachusetts, 197 U.S. 11, 34 (1905) (Harlan, J.) ("It must be conceded 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. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract

restrictions as claimed by the Agudah,[56] was regarded as a valid defense of public health-decision making in *Jacobson*.

To be sure, the *Jacobson* case did not pit the Free Exercise rights against the police power. It "merely" addressed the conflict between the individual's due process rights to autonomy and personal liberty and the state's police power to protect public health. But the court held that in the context of a health emergency, the police power trumped individual constitutional rights without qualification or caveat, not limiting their reasoning to vaccination, and specifically including quarantine:

> [T]he police power [is] a power which the State did not surrender when becoming a member of the Union under the Constitution. …[T]his court has … distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" … According[ly] … the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.[57]

True, the police power is subject to constitutional obligations. But *Jacobson* reminds us that individual rights secured under the Constitution — even First Amendment rights — are not without limits.[58] Indeed, "[t]he free exercise of religion is a highly protected interest but is not absolute."[59] Most especially during public health emergencies, individual rights are subordinate to the reasonable exercise of that police power:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and

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it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession.").

[56] Appl. Writ Inj. Relief, Agudath Israel of Am. v. Cuomo, No. 20A90 (U.S. Nov. 12, 2020) ("The Governor has admitted that the restrictions are *not* based on science, but rather on 'fear' and 'emotion'…").

[57] *Jacobson*, 197 U.S at 25 (Harlan, J.) (emphasis added); *see also* Zucht v. King, 260 U.S. 174 (1922) (Brandeis, J.)

[58] Catholic Charities of Diocese v. Serio, 7 N.Y.3d 510, 524 (2006), *rearg. denied,* 8 N.Y.3d 866 (2007), *cert. denied,* 552 U.S. 816 (2007) (citing Article I, § 3 of the New York Constitution: "'The free exercise and enjoyment of religious profession and worship, … shall forever be allowed in this state to all humankind…. but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.'"); *see also* Stoltzfus v. Cuomo, 2019 WL 7593710, No. 20190311 (N.Y. Sup. Ct. Nov. 4, 2019) (noting "that a parent may not assert free exercise as a grounds for refusing to obtain medical attention for a child as 'an omission to do this is a public wrong, which the state, under its police powers, may prevent'") (citing People v. Pierson, 176 N.Y. 201, 211 (1903)).

[59] *See* La Rocca v. Lane, 338 N.E.2d 606, 608 (N.Y. 1975).

> in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.... [But] the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.[60]

B. Tarnishing Jacobson's Legacy

In his concurrence in *Roman Catholic Diocese v. Cuomo,* Justice Gorsuch wastes not a moment before distinguishing the first *South Bay* case, and diminishing the *Jacobson* case, which — to him — is the root of the many evils: "Not only did the [first] *South Bay* [case] concurrence address different circumstances than we now face, that opinion was mistaken from the start."[61]

Perhaps ignorant of the history of the case, the deference *Jacobson* has been traditionally afforded in public health law, or the background of the opinion's author, Justice John Marshall Harlan,[62] a Bible scholar and highly religious man, himself,[63] Justices Kavanaugh and Justice Gorsuch trivialize the case's precedential import.[64] "Why have some mistaken this Court's *modest* decision in Jacobson for a towering authority that overshadows the Constitution during a pandemic?" says Justice Gorsuch.[65] Indeed, further demeaning the significance of the case, Justice Gorsuch allows that the *Jacobson* court *only* required Pastor Jacobson to pay "a $5.00 fine (about 40% of the average weekly salary of the time) [66] which he

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[60] *Jacobson*, 197 U.S. at 26.

[61] 141. S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

[62] James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism,* 85 MARQ. L. REV. 317, 368 (2001) ("Harlan's opinions...make it clear that he believed strongly in the rule of law, the exercise of government power, and strict constitutionalism.").

[63] *Id.* at 366.

[64] *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct 2603, 2608 (2020) (Alito, J., dissenting) ("it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic.").

[65] Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring) (emphasis added); (Cf. legal scholars in public health law calling the case "iconic" or "seminal."). *See* footnote 44; *see also S. Bay*, *supra* note 36.

[66] WILLRICH, *supra* note 54, at 285 ("[t]he penalty was not trivial; the average weekly wage of an American factory worker was about $13 and it is unlikely that an immigrant minister earned much more than that."); *Salaries for Members of Congress, Supreme Court Justices, and the President*, National Taxpayers Union Foundation (last updated Jan. 2022), https://www.ntu.org/foundation/tax-page/salaries-for-members-of-congress-supreme-court-justices-and-the-president (evidencing the salary of a Supreme Court justice as a bit over $268,000).

claims is equivalent to $140.00 today."[67] In reality, despite the Court's attempt to minimize the impact of the fine, that sum translates to over $2,000 if compared to a Supreme Court Justice's weekly salary today.

But *Jacobson* is hardly alone in the Supreme Court's veneration of the police power to protect public health, even when it conflicts with other constitutional rights.[68] Nevertheless, finding *Jacobson* totally irrelevant to the present situation, Justice Gorsuch believes that "the textually explicit right to religious exercise" exculpates the Court from following time-honored rules regarding emergency restrictions. "*Jacobson* hardly supports cutting the Constitution loose during a pandemic," he says without support,[69] claiming that "[t]hat decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction."[70]

Interestingly, the restrictions in *Jacobson* involve compelling invasion of bodily integrity (required vaccination) which Gorsuch apparently believes is not nearly as significant as disallowing congregating for public worship. Turning a blind eye to *Jacobson's* reminder that constitutional rights are not absolute, he says that "[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[71] His opinion, unsupported by the vast repository of case law, asserts: *Free Exercise Uber Alles*.[72]

C. The Limits of Free Exercise?

While the court plays lip service to the notion that it should respect the judgment of those with medical expertise and public health responsibility, it then proceeds to countermand it.[73] The obeisance to the

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[67] Valueatainment, *Heated Vaccine Debate: Kennedy Jr. vs Dershowitz*, YOUTUBE (JULY 23, 2020), https://www.youtube.com/watch?v=IfnJi7yLKgE (A claim quixotically identical to the one Robert Kennedy Jr. makes on his anti-vax group Children's Health Defense in the video, wherein he debates Alan Dershowitz).

[68] Powell v. Pennsylvania, 127 U.S. 678, 683 (1888) ("It is scarcely necessary to say that if [a]… statute is a legitimate exercise of the police power of the state for the protection of the health of the people…, it is not inconsistent with that [14th] amendment, for it is the settled doctrine of this Court that as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects."); *see also* Tobey, *supra* note 51.

[69] *Roman Catholic,* 141 S. Ct. at 70 (Gorsuch, J., concurring).

[70] *Id.*

[71] *Id.*

[72] *See generally* Cass R. Sunstein, *Our Anti-Korematsu*, (HARV. PUB. L., WORKING PAPER NO. 21-21, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756853 (discussing discriminatory aspects of free exercise).

[73] Michelle M. Mello & Wendy E. Parmet, *Public Health Law after COVID-19*, 385 NEW ENG. J. MED. 1153 (2021), https://www.nejm.org/doi/pdf/10.1056/NEJMp2112193?articleTools=true.

Constitution ("in the name of religion") is their mantra and their excuse for disavowing their own directive:

> [E]ven in a pandemic the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty.[74]

The majority thus sets blind adherence to promoting an individual's constitutional right of freedom of religion above competing rights of the State to protect public health. Justice Alito does the same in his dissent in the earlier *Calgary Chapel* case *(*signed onto by Justice Thomas and Kavanaugh*)*: "We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility."[75]

It is interesting to compare these sentiments canonizing freedom of religion with Justice Alito's dissent (writing for himself, Justices Thomas, and Scalia) in *United States v. Alvarez*[76] addressing freedom of speech, which he clearly does not find as deserving of protection. In that dissent, Justice Alito explicitly notes limitations and restrictions exist for First Amendment rights,[77] and bows to the importance of deferring to legislative views,[78] a pick-and-choose notion of strict scrutiny.

Of perhaps sadder significance is that cases abound that balance the freedom of religion against the state's police powers to protect public health, including vaccination,[79] weighing in on the transcendency of the latter — but nary a one is cited by the court (nor, to be fair, were they raised by New York State). Thus, as New York's highest court has proclaimed: "The right to practice religion freely does not include liberty to

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("Courts have historically been deferential to health orders, especially during disease outbreaks…[and while] [m]ost courts haven't read *Jacobson* as expansively, but have nevertheless granted considerable deference to health officials.").

[74] *Roman Catholic*, 141 S. Ct. at 68.

[75] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020).

[76] United States v. Alvarez, 567 U.S. 709, 739 (2012) (Alito, J., dissenting) ("By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases….").

[77] *Id.* at 740.Validating the Stolen Valor Act, which restricts false speech, preserves the integrity of military honors and protects against infliction of substantial harm such as "obtain[ing] financial or other material rewards, … lucrative contracts and government benefits." *Id.* at 741. These "harms" Alito would hold superior to the harm of increased illness, death, and depletion of health-related resources caused by rampant transmission of the CoVid19 virus.

[78] *Id.*

[79] *See, e.g.*, Prince v. Massachusetts 321 U.S. 158, 166 (1944) ("neither rights of religion nor rights of parenthood are beyond limitation.").

expose the community to communicable disease or the latter to ill health or death."[80]

Even on the Supreme Court level, such cases exist, albeit in dicta.[81] Thus, in *Prince v. Massachusetts* the court clearly stated "[t]he right to practice religion freely does not include the right to expose the community... to communicable diseases...."[82] The plaintiff therein claimed her freedom of religion rights were being violated, "and [that] no creature has a right to interfere with God's commands,"[83] yet the court ruled that the State may enact superseding orders to protect its citizens. This is not a novel concept. Historically, states respected the exercise of freedom of religion — but only if it did not harm public safety.[84]

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[80] *Id.*; *see also* People v. Pierson, 68 N.E. 243 (N.Y. 1903) (cited by Justice Barret in her decision not to block an Indiana vaccine mandate in universities); Nick Niedzwiadek, *Federal Judge Rejects Bid to Block Indiana University Vaccine Mandate,* POLITICO (July 19, 2021), https://www.politico.com/news/2021/07/19/indiana-university-vaccine-mandate-lawsuit-500117; Maeve Sheehey, *Justice Amy Coney Barrett Declines to Block Indiana University's Vaccine Mandate*, POLITICO (Aug. 12, 2021), https://www.politico.com/news/2021/08/12/amy-coney-barrett-indiana-university-vaccines-504322; *see also* Matthew Wills, *What Makes Vaccine Mandates Legal?*, JSTOR DAILY (Sept. 3, 2021), https://daily.jstor.org/what-makes-vaccine-mandates-legal/#:~:text=The%20majority%20opinion%20in%20Prince,have%20become%20common%20more%20recently.

[81] *See* Employment Div. v. Smith, 494 U.S. 872, 889 (1990), a decision written by Justice Scalia (citing *Cude v. State,* 237 Ark. 927, 377 S.W.2d 816 (1964)).

[82] *Prince*, 321 U.S. at 166–67; *see Id.* at 176 (Murphy, J., dissenting) (recognizing limitations inherent in applying the freedom of religion clause); *see also* Zucht *v.* King, 260 U.S. 174, 176 (1922); Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015) (noting preventing communicable diseases is a compelling interest); Workman v. Mingo Cnty. Bd. of Educ. 419 F. App'x 348 (4th Cir. 2011); Wright v. DeWitt Sch. Dist. No. 1, 238 Ark. 906, 385 S.W.2d 644, 648 (1965); Viemeister v. White, 179 N.Y. 235, 72 N.E. 97, 99 (1904); Abeel v. Clark, 84 Cal. 226, 24 P. 383, 384 (1890); Love v. State Dep't of Educ., 29 Cal. App. 5th 980, 240 Cal. Rptr. 3d 861 (2018); F.F. v. State of N.Y., 2019 NY Slip Op 29261, 65 Misc. 3d 616, 108 N.Y.S.3d 761, 774 (N.Y. Sup. Ct. 2019); *F.F., as Parent of Y.F. v. New York*, SCOTUS BLOG (petition for certiorari denied on May 23, 2022), https://www.scotusblog.com/case-files/cases/f-f-as-parent-of-y-f-v-new-york/.

[83] *Prince*, 321 U.S. at 162, 164, 165, 166–67 ("[T]he great liberties insured by the First Article can be given higher place than the others .... To make accommodation between these freedoms and an exercise of state authority always is delicate. .... [The police power] authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience ...") (citing *People v. Pierson,* 176 N.Y. 201, 68 N.E. 243 (1903), where a father refused to seek medical attention for his daughter believing religion was the cure).

[84] Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) (describing the founding-era state constitutions setting forth "safety" exceptions to free-exercise guarantees) (noting e.g., at 920, 921, that in Delaware, freedom of worship would

In a sound bite, and at the extreme end, the Court in *Roman Catholic Diocese* could have reached the very same resolution by limiting itself to deciding whether the requirement of using the least restrictive alternative was met.[85] Indeed, this was the approach used by Justice Breyer in *United States v. Alvarez*,[86] side-stepping the inquiry of the level of scrutiny required regarding the exercise of a similar constitutional right, free speech. The Agudah provides ample factual basis for this approach in its briefs. Instead, the majority rushes in and treads on the history of public-health decision-making, where few have gone before, revealing a lacuna in science-literacy[87] and a hubris in failing to own up to it.[88] Instead, Justices Gorsuch and Kavanaugh, seconded by Justices Thomas and Alito, unnecessarily tout an overarching supreme reverence for the freedom of religion at the expense of the state's interest and the necessity of safeguarding community health.[89] They also reveal their *belief* in the essentiality of public worship as a constitutionally sacrosanct endeavor — protected even at the expense of public health. To be sure, it is incumbent on the lawyers before the court to educate the judges. The pervasiveness of scientific ignorance within the legal community, then, becomes manifest here.

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lie, unless "under Colour of Religion, any Man disturb the Peace, Happiness or Safety of Society.").

[85] Alternatively, the Court could have held rank discrimination appeared on the surface, predicating its decision on *Church of Lukumi Babalu Aye, Inc. v. City of Hia*leah, 508 U.S. 520 (1993), or *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) rationale — without getting into the predicates for public health decision-making, as they did here, and which may prove quite dangerous now and in the future. The absence of a compelling state interest, however, in *Lakumi*, may prove it distinguishable from the circumstances here.

[86] 567 U.S. 709, 730 (2012) (Breyer, J., concurring and opting for an intermediate level of scrutiny) ("I do not rest my conclusion [of the level of scrutiny required] upon a strict categorical analysis. Rather, I base that conclusion upon the fact that the statute works *First Amendment* harm, while the Government can achieve its legitimate objectives in less restrictive ways.").

[87] *See supra* notes 74-80 and accompanying text. *Cf.* Sotomayor, J., dissenting and noting the distinctions between exposures in businesses and houses of worship at note 3.

[88] *See* S. Bay Pentecostal Church v. Newsom, 141 S. Ct. 716, 719 (2021) (Kagan, J., dissenting) ("Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic," evidencing this humility.).

[89] Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS., 20-27 (Supp. 1) (2005) (noting that "the doctrine of state 'police power' was adopted in early colonial America from firmly established English common law principles mandating the limitation of private rights when needed for the preservation of the common good.").

In sum, it has long been recognized that freedom of religion has limits and is subordinate to protecting the health and safety of society.[90] Courts have "often drawn a distinction between the right to hold religious beliefs and the right to act on them."[91] Even religious education, which the Agudah touts as being equivalent to worship,[92] falls before threats to public health.[93] The Constitution *Uber Alles* of Justices Kavanaugh and Gorsuch isn't real. Preserving the populace is more important. If there is no populace, there is no country — and if there is no country, of what use is the Constitution?

D. The State's Police Power to Quarantine

While many cases, including *Jacobson*, deal with police powers in the context of vaccination and some balance compelled vaccination against the free exercise clause, balancing other constitutional rights with the state's power to quarantine has also been dealt with – repeatedly and at the Supreme Court level.[94] That regulation, quarantine, is identical in

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[90] Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 921 (1992) http://rfraperils.com/a-constitutional-right-of-religious-exemption-an-historical-perspective-philip-a-hamburger-60-geo-wash-l-rev-915-1992 (noting *inter alia*, Georgia's constitution said that "'all persons … shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State'"). *See also* Reynolds v. United States, 98 U.S. 145, 163–64 (1878) (citing Thomas Jefferson writing that there was a distinction between religious belief and action that flowed from religious belief). *See also* Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 844 (2004); WILLIAM VAN SCHREEVEN & ROBERT L. SCRIBNER, REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE 272, 277 & n.26 (Brent Tarter & Robert L. Scribner eds., 1983).

[91] Julie A. Koehne, Comment, *Witnesses on Trial: Judicial Intrusion Upon the Practices of Jehovah's Witness Parents*, 21 FLA. ST. U. L. REV. 205 (1993). *See also* Reynolds v. United States, 98 U.S. 145, 166 (1878) ("[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."); Bowen v. Roy, 476 U.S. 693, 702 (1986); Public Health Trust v. Wons, 541 So.2d 96, 105 (Fla. 1969) (Overton, J., dissenting) ("Although the right to religious belief is absolute, the manner in which those beliefs are conducted may clearly be restricted by governmental action…").

[92] Reply Br. for Applicants at 15, Agudath Israel of Am. v. Cuomo, No. 20A90 (U.S. Nov. 22, 2020).

[93] *See* Ass'n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 217 (N.D.N.Y. 2020); *see also* NM v. Hebrew Acad. Long Beach, 155 F.Supp.3d 247 (E.D.N.Y. 2016).

[94] Mello & Parmet, *supra* note 73; *see also* Linda A. Sharp, *COVID-19 Related Litigation: Constitutionality of Stay-at-Home, Shelter-in-Place, and Lockdown Orders*, RACE, RACISM AND L. (Jan. 29, 2021), https://racism.org/articles/basic-needs/311-health-and-health-care/public-health/9060-covid-19-related-litigation-03 (describing the balancing of constitutional rights even under the caveat of strict scrutiny, so long as three conditions are fulfilled: "the rules or

purpose and scope to Governor Cuomo's order "to reduce the spread of contagion or infection."[95] While balancing quarantine orders against the freedom of religion might be a novel issue as far as the Supreme Court is concerned, balancing the State's quarantine power against other constitutional powers is not. Thus, in *Compagnie Francaise. v. Board of Health*, the Court upheld the supremacy of the police power to protect public health against the constitutional protection of the commerce clause:

> That … the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question …. [and], are not repugnant to the Constitution of the United States, although their operation affects interstate or foreign commerce …[96]

Broadening conventional quarantine-restricting movement of exposed persons in the face of conflict with the Commerce Clause,[97] the *Compagnie* decision empowered the State Board of Health to exclude *healthy* persons from entering a locality infested with a contagious or infectious disease. Indeed, the veneration the Supreme Court affording a state's police powers was so great, that the only laws superseding a state's public health initiatives were held to be public health laws enacted by Congress.[98] Even respect for international treaties did not encroach on the state's police power to safeguard the health and safety of its people.[99]

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regulations must: (1) be necessary to fulfill a compelling state interest; (2) be narrowly tailored to fulfill that interest; and (3) utilize the least restrictive means to achieve the purpose of the law."). It is the third prong to which the Court could have limited their finding, a la Breyer's ruling in *United States v. Alvarez.*

[95] *See* Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health, 186 U.S. 380, 385 (1902) ("The object in view was to keep down, as far as possible, the number of persons to be brought within danger of contagion or infection, and by means of this reduction to accomplish the subsidence and suppression of the disease and the spread of the same.").

[96] *Id.* at 387, 391–92.

[97] *Morgan's Steamship Co. v. La. Bd. of Health,* 118 U.S. 455 (1886) (noting in the syllabus that "the system of quarantine laws established by statutes of Louisiana is a rightful exercise of the police power for the protection of health, which is not forbidden by the Constitution of the United States."); *see also* Louisiana v. Texas, 176 U.S. 1, 21 (1900); Knue, infra note 108 (noting that "the Commerce Clause grants Congress the power to regulate anything that has an effect on interstate or international commerce." Under that authority, it enacted 42 U.S.C. § 264(d)(1) (2002) which "provide[s] for the apprehension . . . of any individual reasonably believed to be infected with a communicable disease . . .").

[98] *Compagnie*, 186 U.S. at 391 ("[T]his implies no limitation on the power to regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even although interstate and foreign commerce is affected."); *see also* Hennington v. Georgia, 163 U.S. 299 (1896).

[99] *Compagnie*, 186 U.S. at 394.

Further, even if the purpose of the quarantine, as expressed in Justice Brown's dissent,[100] was merely to reduce the number of persons who might become ill — it is sanctioned.

E. Deference to State Expertise

Deference to local authorities has been a mainstay of Supreme Court doctrine in the face of epidemic management.[101] Even the court in *Roman Catholic Diocese* pays lip service to this maxim before disregarding it entirely.[102]

As Justice Roberts explained:

> [O]ur Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States ... [And these officials' decisions] should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

Two practical reasons are customarily given for this deference other than the traditional usurpation by states of matters relating to health. One, is that the state's directives usually emanate from or with the backing of experts from their departments of health. The other is that the directives are more in tune with local conditions that might mandate a particular or specific localized response. As Chief Justice Roberts notes in his concurring opinion in *South Bay I*:[103]

> There are good reasons why the Constitution "principally entrusts the safety and the health of the people" to state officials, not federal courts.... First among them is that judges "lack[] the background, competence, and expertise to assess public health." Ibid. To state the obvious, judges do not know what scientists and public health experts do.... I cannot imagine that any of us delved into the scientific research on how COVID spreads, or studied the strategies for containing it. So it is alarming that the Court

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[100] *Id.* at 399–400.

[101] Mello & Parmet, *supra* note 73; *see also* Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 525 (N.Y. 2006) ("We now hold that substantial deference is due the Legislature, and that the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom.").

[102] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 74 (2020).

[103] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, J., concurring).

> second-guesses the judgments of expert officials, and displaces their conclusions with its own.[104]

Deferral to health experts, initially the public health service (PHS), was established early on in our history and "[t]he broad deference given to PHS officers in deciding on medical exclusions did not shrink in the following years."[105] In one 1938 case "the Southern District of New York granted almost absolute deference to a PHS officer's decision to exclude a temporary visitor from Europe on the grounds that she was infected with ringworm of the toenails."[106] Even though the court did not reject the petitioner's claim that the condition was comparable to athlete's foot, "it upheld the medical officer's decision, showing complete deference to the Surgeon General's judgment in deciding which diseases would suffice to exclude an immigrant,"[107] setting a standard for great deference to the judgement of PHS officers.

In 1963, the Court in *United States ex rel. Siegel v. Shinnick*[108] reaffirmed this deference yet again in another quarantine case. Here, a Public Health Service officer detained the Swedish traveler based on a World Health Organization declaration that Stockholm — where the detainee that visited previously — was "infected" with smallpox, and the traveler didn't have a valid vaccination certificate. Therein, the petitioner's daughter argued that she had only been in Stockholm for the four days prior to July 25, while the last case of smallpox in Stockholm had occurred on June 22. Nonetheless, the court concluded:

> It is idle and dangerous to suggest that private judgment or judicial ipse dixit can, acting on the one datum of the date June 22 as the last identified and reported case, undertake to supersede the continuing declaration of the interested territorial health administration that Stockholm is still a small pox infected local area.[109]

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[104] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 723 (2021) (Kagan, J., dissenting).

[105] K. Vanderhook, *Origins of Federal Quarantine and Inspection Laws*, LEDA HARV. L. SCH. (2002), https://dash.harvard.edu/bitstream/handle/1/8852098/vanderhook2.html (n.194–97 and accompanying text); *see also* Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States,* 99 COLUM. L. REV. 59 (1999).

[106] K. Vanderhook, *supra* note 105, at n.196–99 and accompanying text.

[107] *Id.*

[108] United States ex rel Siegel v. Shinnick, 219 F. Supp. 789 (E.D.N.Y. 1963); *see also* Chloe Knue, Can the Government Forcibly Quarantine People With Coronavirus? UNIV. CIN. L. REV. (Mar. 30, 2020), https://uclawreview.org/2020/03/30/can-the-government-forcibly-quarantine-people-with-coronavirus.

[109] *Siegel,* 219 F. Supp. at 791; K. Vanderhook, *supra* note 105, at n.200 and accompanying text.

Deference to local health authorities on the grounds of unique knowledge of local conditions is also well-entrenched.[110]

PART III: FREE EXERCISE, COMMUNAL WORSHIP, AND ESSENTIAL ACTIVITY: THE HOLY TRINITY – ARE THEY ONE?

How then did the Court in *Roman Catholic Diocese* reach its unique conclusion? Answer: (1) by commingling what constitutes freedom of religion violations with what constitutes "essential activities" and elevating that determination over public health inquiry, and (2) by avoiding careful scientific inquiry.

A. Restricting Communal Worship Equates with Violating Religious Freedom

As stated above, the Agudah frames the issues as binary e.g.: "Whether an executive order violates the Free Exercise Clause when the order, on its face, disfavors worship."[111] Cleverly, they do not raise the categorization of worship as a discreet issue. Rather, they claim that the Executive Order disfavors freedom of religion and the Free Exercise Clause, which includes worship simply because worship is not treated as charitably as "essential" activities, assuming — without predicate — that the two are equivalent (i.e., that because worship is arguably protected by the First Amendment, that means it is an essential activity). This bootstrap argument comingles the determination of the "essentiality" of a religious activity with those activities deemed essential for economic or physiological reasons, (i.e., basic survival). Exposure potential is not considered in their equation. In other words, based solely on its religious status and without regard to its exposure potential, they claim that religious worship qualifies as essential, and because it wasn't treated thusly, the state violated their constitutional rights. The State falls prey to this trap by arguing that worship is treated more favorably than other non-essential activities, into which category it asserts communal worship belonged also without explanation. That worship may be considered essential — without invoking First Amendment status — is not considered by either party. That a

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[110] *See, e.g.*, Young v. Flower, 22 N.Y.S. 332 (1893) (demonstrating the remarkable situational difficulties, political, class, as well as contagion presented by local conditions). *See also* Barbara Pfeffer Billauer, *Politics, Pandemics, and Pariahs: Age Discrimination and CoVid19 Exit Strategies*, 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607888; Katharine Van Tassel, *Politics, Pandemics, and Pariahs: Age Discrimination and CoVid19 Exit Strategies*, HEALTH LAW PROFESSORS BLOG (JULY 25, 2020), https://lawprofessors.typepad.com/healthlawprof_blog/2020/07/politics-pandemics-and-pariahs-age-discrimination-and-covid19-exit-strategies.html; FORUM BIOETHICS REPORT OF THE ACADEMIC COLLEGE OF SAFED (Hebrew).

[111] Appl. Writ Inj. Relief at ii, Agudath Israel of Am. v. Cuomo, No. 20A90 (U.S. Nov. 12, 2020).

religious activity may not be essential as defined by the governor, is also not considered.

B. The Comparability of Communal Worship with Business Activities

Justice Kavanaugh begins our journey in his *South Bay I* dissent by setting the stage for this mélange: first by designating communal worship, *abra cadabra,*[112] (or *ipse dixit*) equivalent to *comparable* secular activities deserving preferred status. Further, he protests that houses of worship were not treated as "comparable" businesses, like florist shops and cannabis dispensaries.[113] In the first step down the path of abandoning evidence in favor of "judicial feelings," Justice Kavanaugh dispenses this caveat without data, proof, testimony, or a demonstrated understanding of the principles of infectious disease contagion or industrial hygiene, the supposed basis of the public health determination. This approach is called out by Chief Justice Roberts in his concurring opinion:

> When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad .... Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. [citations omitted.] That is especially true ... here...[114]

Not six months later, as the Courts' complexion turned floridly conservative, suddenly the history of legislative deferral on medical issues is annihilated.[115] The justices now interpose, *sua sponte,* their "feelings" regarding the reasonableness of public health interventions, interposing their views of comparison of transmission potential of different activities, even in the face of medical *amici* to the contrary.

From the outset of his opinion in *Roman Catholic Diocese*, Justice Gorsuch similarly proclaims that the religious activities in question should

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[112] Translated kabbalisticly as "I will create as I speak." Rabbi Julian Sinclair, *Abracadabra,* THE JEWISH CHRONICAL (July 5, 2018, 17:00), https://www.thejc.com/judaism/jewish-words/abracadabra-1.466709?reloadTime=1658672245619.

[113] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting).

[114] *Id.* at 1613–14 (Roberts, C.J., concurring).

[115] McIver, *supra* note 32, at 1663; *see also* Cath. Charities of Diocese v. Serio, 859 N.E.2d 459, 525 (N.Y. 2006) ("We now hold that substantial deference is due the Legislature, and that the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom.").

not be treated "worse than *comparable* secular activities"[116] without exhibiting the slightest understanding why the religious activities in question cannot be considered comparable, either in survival or exposure potential. Indeed, the two metrics must be evaluated separately, but hopelessly commingled in this opinion. Perhaps the misimpression of the Justices revolves around the dumbing down of the science as presented by the State and even in the amicus brief.

To be sure, the AMA submitted an amicus brief in *Roman Catholic Diocese* to help the court make their decision "based on sound science."[117] The brief denotes five risk factors (which they call exposure settings) that increase the likelihood of transmission: Enclosed spaces, large groups, close proximity to others, long duration of exposure and staying in one place, and loud talking and singing. They also report on several physician surveys identifying religious worship as being at the top of the exposure factor gradient.

Perhaps a more detailed or alternative scientific explanation might have helped.[118] To assess risks, in addition to a qualitative designation of risk factors or exposure settings, a formal "exposure assessment" ordinarily is performed by an industrial hygienist, along with producing actual objective and quantitative measurements (i.e., data).[119] Exposure assessments involve calculating "the intensity, frequency, and duration of human exposure to an agent present in the environment,"[120] along with identifying the number of sources and the type of exposure.[121] The longer someone spends in an area that fosters transmission (like an enclosed space) *and* the more intense the source (such as loud talking or singing or blowing spit), the higher the exposure is likely to be. While the state identifies risks triggered by various activities, this assessment omits a true exposure picture by not integrating the ***cumulative*** ***duration*** of exposure and the *proximity to* and the *number* of exposure *source(s), i.e.,* ***cumulative***

[116] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (emphasis added).

[117] Br. for Am. Med. Assoc. et al. as Amici Curiae Supp. Resp't at 1, Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020) (No. 20A87).

[118] A "statement" by Justice Gorsuch in *South Bay redux* references four areas of concern, omitting perhaps the most salient, concurrent speech vocalization. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J., joined by Thomas, J. and Alito, J.).

[119] Of the type typically done by NIOSH and OSHA inspectors in workplace settings. *See also* JOSEPH V. RODRICKS, CALCULATED RISKS 17 (1st ed. 1992).

[120] RISK ASSESSMENT AND RISK MANAGEMENT OF INDUSTRIAL AND ENVIRONMENTAL CHEMICALS 5 (C. Richard Cothern, Myron A. Mehlman, William L. Marcus, eds., 1988).

[121] CURTIS D. KLAASEN ET AL., CASARETT & DOULL'S TOXICOLOGY: THE BASIC SCIENCE OF POISONS 73 (Louis J. Casarett, Mary O. Amdour et al., eds., 5th ed. 1999).

intensity, and the *form* of the exposure — e.g., large particles, droplets,[122] and how long these transmission vectors are likely to stay in the breathing zone. Ambient monitoring can also be of assistance to provide objective evidence of the quanta of aerosol or droplet infection generated by each activity.[123] None of these standard occupational and environmental health metrics were performed nor even estimated, let alone provided.

With these principles in mind, it becomes easier to understand why standing and sitting in a house of worship for a few hours three times a day,[124] next to multiple people continually vocalizing the prayers (as required in an Orthodox service), sometimes loudly, cannot compare to a transient and one-on-one meeting with a florist or a cannabis dispenser. Compounding the worship experience with many worshippers praying aloud, singing, and dancing together — as is incumbent on the Simchat Torah holiday — leads to an even higher exposure potential. The two experiences are simply not *scientifically* "comparable," and Kavanaugh brings no scientific evidence to dispute this, although perhaps the Justice was referring to some idiosyncratic emotional or gestalt comparability of the events.[125]

Indeed, the Agudah also seems blind to this scientific fact or disregards it. They bemoan the fact that their synagogue building would be allowed to accommodate a business, but not the religious services, noting that "[t]he Governor offers no response because the charge is true: worshipping G[o]d is constrained while worshipping mammon—in the same

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[122] Adriaan Box et al., *SARS-CoV-2 Transmission Via Speech-generated Respiratory Droplets*, THE LANCET (Sept. 11, 2020), https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30726-X/fulltext. ("The medical community has long acknowledged infection via speech-generated respiratory droplets, including droplet nuclei that might stay airborne for an extended time.").

[123] *Basic Information about Air Emissions Monitoring*, U.S. Env't Protection Agency, https://www.epa.gov/air-emissions-monitoring-knowledge-base/basic-information-about-air-emissions-monitoring (last updated Aug. 30, 2021) ("Monitoring is a general term for on-going collection and use of measurement data or other information for assessing performance against a standard or status with respect to a specific requirement.").

[124] *See* Billauer, *Case Study*, supra note 14*; See also Driving on Sukkos,* DINONLINE (Sept. 15, 2013), https://dinonline.org/2013/09/15/can-you-drive-on-sukkot/; Menachem Posner, *What Is Sukkot? A Guide to The Jewish Holiday of Sukkot, The Feast of Tabernacles, and the Meanings Behind it*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/4784/jewish/What-Is-Sukkot.htm (last visited July 24, 2022).

[125] The Agudah brief contends that if they used their same building for some approved purpose other than religious worship—running a brokerage service, selling widgets, or reporting the news—they would not face such draconian limits. Appl. Writ Inj. Relief at 29, Agudath Israel of Am. v. Cuomo, No. 20A90 (U.S. Nov. 12, 2020). It is hard to believe they do not understand that it is the extent of contagion generated by a particular activity, not the category of the activity per se, that determines level of containment.

building and for longer hours—is not."[126] These applicants, while providing a pithy turn of phrase, just don't "get it." Nor does the court. It is not the building or the hours of activity that determines the level of restriction — it is the *type of activity* within the space: the proximity and means of verbal interchange that must be assessed, as to duration, intensity, proximity, and frequency of the offending behavior — notably speech, singing, and dancing. Prayer, at least Orthodox Jewish prayer, is generally not done quietly.[127] For example, the Hoshana Rabbah holiday,[128] occurring two days prior to Simchat Torah, in some synagogues involves blowing of the shofar, a high-level spittle-producing event.[129] The service also requires a process of continuous vocalization — for an hour or more, three times a day.[130] Whereas even if banking or selling might involve longer time frames, the vocalization involved is quieter and shorter. Indeed, Israeli studies demonstrated that synagogues do present a higher risk of infection transmission.[131]

C. What Makes Religious Activity Essential?

In *Roman Catholic Diocese,* the court expanded the notion of *comparability*, outraged that First-Amendment-protected communal worship is not treated with the same deference as *essential* activities.[132] While

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[126] Reply Br. for Applicants at 13, Agudath Israel of Am. v. Cuomo, No. 20A90 (U.S. Nov. 22, 2020).

[127] Shiezoli, *Hoshana Raba With Zimigrod'er Rebbe Part 1*, YOUTUBE (Oct. 20, 2008), https://www.youtube.com/watch?v=F4a2SHNwv-4.

[128] *What is the Source for Blowing the Shofar During Hoshannot*, MI YODEYA, https://judaism.stackexchange.com/questions/64018/what-is-the-source-for-blowing-the-shofar-during-hoshannot (last edited Oct. 6, 2015).

[129] Lenny Ben-David (@lennybendavid), TWITTER (Aug. 30, 2020, 1:42AM), https://twitter.com/lennybendavid/status/1299945513144418304 ("Seriously. Do you realize how much spittle flies out?"); *see also* Arthur L. Finkle, *Shofar Sounding Techniques: Secrets*, HEARING SHOFAR (July 13, 2010), http://hearingshofar.blogspot.com/2010/07/shofar-sounding-techniques-secrets.html ("If your shofar 'gurgles,' you have spittle in the horn. The best remedy is to use a coffeepot brush to remove the spittle. In fact, after each section of the service in which the shofar is sounded, you should clean out the shofar to avoid this problem.").

[130] For a cumulative total of some 25 hours or more a week in the Orthodox Jewish setting compared to a one-hour weekly mass for Catholic worshippers, a setting perhaps familiar to Gorsuch, Alito, Thomas, Kavanaugh, and Barrett, and mistakenly applied to the issues raised by the Agudah.

[131] Stuart Winer, *Synagogues Top Coronavirus Hotspot List, Epidemiological Report Finds,* TIMES OF ISRAEL (Mar. 24, 2020), https://www.timesofisrael.com/synagogues-top-coronavirus-hotspot-list-epidemiological-report-finds/. To be sure, the record indicates that this situation did not occur in Agudath branches or and Roman Catholic institutions; App. to Appl. Writ Inj. Relief at 2-3, Agudath Israel of Am. v. Cuomo, No. 20A90 (U.S. Nov. 12, 2020).

[132] *See* General Elec. Co. v. Joiner, 522 U.S. 136 (1997).

communal worship may indeed be an essential need, discussed below, the mere fact that it is associated with the Free Exercise Clause alone does not confer upon it that status. Nor does the fact that houses of worship are treated differently than other activities, *per se* "imply that it is singled out for especially harsh treatment" because of their religious nature,[133] as opposed to the nature of activity involved, such that the challenged restrictions "violate the minimum requirement of neutrality to religion."[134]

No one is arguing, for example, that bookstores should be open simply because freedom of the press is a constitutional right. Similarly, this is true with freedom of assembly — no one seems to be claiming that unfettered group activities should be allowed, simply because the Constitution also affords us this right. There is a logical disconnect regarding religion here which is fostered by the State's failure to enunciate the criteria for designating activities as essential or not. But statements that "a large store in Brooklyn … could 'literally have hundreds of people shopping on a given day' … but they are treated less harshly than the Diocese's churches and the Agudath Israel synagogues"[135] used as a predicate for demonstrating non-neutrality, makes one wonder if the court read the AMA amicus brief — as lacking in hard science and data as it was — and understands that the activity of concern is speech, vocalization, and ambient viral transmission, not shopping or banking while one may or may not be speaking, vocalizing, or coughing.

1. The Science of Exposure Assessments – or the Lack of It

The viscerally appealing argument that religious services are being discriminated against comes from the disparate treatment afforded businesses that the Governor considers "essential." These "include hardware

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[133] Cath. Charities of Diocese v. Serio, 859 N.E.2d 459, 465–65 (N.Y. 2006), *rearg. denied,* 8 N.Y.3d 866 (2007), *cert. denied,* 552 U.S. 816 (2007) (merely because the challenged law provided some religious exemptions did not mean it was not overall a neutral statute of general applicability). *See also* N.Y. State Emp. Rels. Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960, 963 (N.Y. 1997) ("Now, a generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment."); Cath. Charities of Sacramento, Inc. v. Superior Ct., 32 Cal 4th 527, 85 P.3d 67, 105 (2004) (Brown, J., dissenting) ("Strict scrutiny is not what it once was. Described in the past as 'strict in theory and fatal in fact' [cite omitted], it has mellowed in recent decades. . .").

[134] Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 104 (2015) (treating exclusion of students with religious exemptions from public schools during chicken pox outbreak as law of "'neutral and . . . general applicability [that] need not be justified by a compelling governmental interest …'").

[135] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam).

stores, acupuncturists and liquor stores."[136] As Justice Gorsuch sums it up:

> The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. That is exactly the kind of discrimination the First Amendment forbids.... In far too many places, for far too long, our first freedom has fallen on deaf ears.[137]

Sadly, neither side brings forth sound science to support their designation of the activity in question — worship — as essential or not, which is a separate issue from the transmission potential of each activity. This is not for lack of data or research. It is likely for lack of scientific literacy.[138] Taking judicial notice of scientific information might have augmented the Court's decision-making.[139] Even in the absence of fuller legislative or administrative backup for the designation decisions, [140] deference is better given to the state[141] or local health determination made by their public

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[136] *Id.* at 69. (Gorsuch, J., concurring).

[137] *Id.* at 69–70. (Gorsuch, J., concurring).

[138] Over a hundred years ago, prior to his elevation to the Supreme Court, Louis Brandeis submitted a 100-page brief, in the case of *Muller v. Oregon*, of which 98 pages were sociological and epidemiological evidence regarding the effects of long work hours on people. 208 U.S. 412 (1908). The famed "Brandeis Brief" was applauded by a court capable of reading and understanding it, included Justice Holmes. *See also* Barbara Pfeffer Billauer, *Daubert Debunked: A History of Legal Retrogression and the Need to Reassess "Scientific Admissibility,"* 21 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2016).

[139] Veimeister v. White, 72 N.E. 97, 98–99 (N.Y. 1904). *See also* F.F. v. State of New York, 114 N.Y.S.3d 852, 865 2019 NY Slip Op 29376 (N.Y. Sup. Ct. 2019) (noting "The Legislature is entitled to rely on findings and recommendations of the CDC and other public health officials; it was not required to hold fact finding hearings and debates about the science and medicine..."); *F.F., as Parent of Y.F. v. New York*, SCOTUS BLOG (petition for certiorari denied on May 23, 2022), https://www.scotusblog.com/case-files/cases/f-f-as-parent-of-y-f-v-new-york/.

[140] Cath. Charities of Diocese v. Serio, 859 N.E.2d 459, 466 (2006), *cert. denied,* 552 US 816 (2007) ("We now hold that substantial deference is due the Legislature, and that the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom.").

[141] *Id.* at 467 (noting "'[i]f recent precedent is any guide, a state's interest is compelling if the state says it is.'"); Price v. Illinois, 238 U. S. 446 (1915) ("It is not enough to condemn a police statute as unconstitutional under the due process clause that the innocuousness of the prohibited article be debatable, for, if debatable, the legislature is entitled to its own judgment."); Holden v. Hardy, 169 U.S.

health officers on the scene[142] — and certainly NOT to Supreme Court justices sitting some 250 miles away from the outbreak.[143] In the absence of such deferral, decisions would revert to the Justices, who would have no basis to opine, other than personal belief. This approach is unsustainable. As the Court in *Laurel Hill* stated:

> [I]n questions of this kind, great caution must be used in overruling the decision of the local authorities or in allowing it to be overruled … If every member of this bench clearly agreed … and thought the Board of Supervisors and Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief.[144]

2. The Science of Essentiality: Maslow's Hierarchy of Needs

To objectively assess what constitutes essential activities, one can look, for example, at the work of Abraham Maslow and his hierarchy of needs.[145] Certainly, food, medicine, and shelter are at the core basic level — physiological needs — justifying exemptions for food stores and

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366, 392 (1898) (noting that the police power may be "lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature…") (citing *Lawton v. Steele,* 152 U.S. 133, 136 (1894)); Weaver v. Palmer Bros. Co., 270 U.S. 402, 407 (1926) (Holmes J., dissenting,) ("[w]here there is any doubt as to whether or not a thing prohibited is obnoxious, poisonous or harmful, [and hence regulatable under the police power], the determination by the legislature is conclusive.)".

[142] Laurel Hill Cemetery v. San Francisco, 216 U.S. 358, 366 (1910); Zucht v. King, 260 U.S. 174, 176 (1922) ("the municipality may vest in its officials['] broad discretion in matters affecting the application and enforcement of a health law."); *see also* New York ex rel. Lieberman v. Van de Carr, 199 U.S. 552, 562 (1905); Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 288 (1987), (noting "courts normally should defer to the reasonable medical judgment of public health officials.").

[143] Powell v. Pennsylvania, 127 U.S. 678, 685 (1888) ("One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.") (discussing regulating oleomargarine as dangerous).

[144] *Laurel Hill Cemetery*, 216 U.S. at 365; *see also* Sinking Fund Cases, 99 U.S. 700, 718 (1878) (noting that "[e]very possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.").

[145] *A Guide to the 5 Levels of Maslow's Hierarchy of Needs,* MASTERCLASS, https://www.masterclass.com/articles/a-guide-to-the-5-levels-of-maslows-hierarchy-of-needs (last updated June 7, 2021).

pharmacies. These fall under Maslow's tier one category.[146] But a review of the Maslow hierarchy establishes that financial security comes second in the tier of importance. Tier 1 and Tier 2 are both considered basic needs. And these must be filled before those higher on the pyramid hierarchy.[147] Hence, it is not surprising that Governor Cuomo determined that maintaining the collective economy — attending the population's financial needs — was also crucial, determining certain businesses were essential for this reason.

Thus, rather than dissing the worship of mammon, the Agudah should take note of a maxim of its own teachings, both as to the deferral of most religious injunctions when they present a threat to life and health,[148] and concern for preservation of the means to earn a living. As it is written: "If there's no sustenance — there's no Torah."[149] Managing this epidemic requires not just evaluation of public health matters, but also weighing proposed measures against a collapsing economy. As to which businesses are most critical to maintaining the economy — perhaps one can argue — but one cannot criticize the governor for trying to keep the state financially afloat, thereby making sure that people don't descend into poverty.

So where does spiritual endeavor fall on Maslow's chart? It doesn't. None of Maslow's categories embrace what the applicants claim is an absolute requirement for their continued existence: feeding their soul via communal worship, although perhaps it might fall under Maslow's third category — love and belonging needs. Perhaps the religiously inclined should gather evidence supporting the notion that communal religious activities are as essential as those falling under the second-tier security of safety and financial security, which may well be the case. On the other hand, if a discreet segment of the population determines that feeding the soul is as important as feeding the body — but ignore exposure potentials— while *everyone* requires food and financial security, some groups will have to do without communal prayer and pray alone that they will be alive to worship in the future. [150]

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[146] Saul McLeod, *Maslow's Hierarchy of Needs*, SIMPLY PSYCHOLOGY, https://www.simplypsychology.org/maslow.html (last updated Apr. 4, 2022).

[147] *See id.*

[148] Elliot Cosgrove, *A Plea to My Fellow Jews: Protect Yourselves and Your City From COVID-19*, NEW YORK DAILY NEWS (Oct. 9, 2020), https://www.nydailynews.com/opinion/ny-oped-a-plea-to-my-fellow-jews-20201009-34qkbzhue5e2dg775n2n3uha3y-story.html.

[149] Rabbi Marcia Plumb, *No Food, No Torah; No Torah, No Food*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/no-food-no-torah-no-torah-no-food; *Congregation Beth Am Affordable Membership Initiative*, BETH AM, https://bethambg.org/wp-content/uploads/2020/05/FAQMembership.pdf (last updated May 2016).

[150] Louis "Lou" Piel, *Piel: Church Building Not Important, Not Essential; Faith is Essential*, CARROLL CNTY. TIMES (May 9, 2022), https://www.baltimoresun.com/maryland/carroll/lifestyles/cc-rl-piel-050920-20200509-rzvmvq7uizfcnbwj2bz7cvgg5i-story.html.

In sum, communal worship may be a right, albeit one that is not absolute,[151] but it is not a need — at least not based on present scientific or psychological evidence.[152] Further, the non-essentiality of communal worship — at least in the Orthodox Jewish quarter — can be seen by considering Israel's lockdown directives, which were cumulatively the longest in the world.[153]

3. Communal Worship (in Israel) as a Non-Essential Activity

Indeed, Israeli laws — in effect at the time, which then required assent of the ultra-Orthodox parties — were far more restrictive than New York's: Prayers may only be held with up to 5 congregants indoors and up to 10 congregants in outdoor attendance.[154] Acupuncturists were allowed to stay open — and so were liquor stores — as long as they sold food. Same, albeit to a reduced degree, with hardware stores. Israel considered these essential services, and were allowed to be open as long as masking and social distancing were enforced. There was virtually no protest from the Haredi, the ultra-Orthodox community, either about the restriction on worship or the disparate rules regarding secular activities.[155] Two of the

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[151] "Your right to swing your arms ends just where the other man's nose begins." Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

[152] It is possible, in light of the outpouring of demand for services that this case suggests, that Maslow's chart needs to be reconfigured and edited. On the other hand, the latest Pew research suggests that affiliation with organized religion has been dropping. *See* Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RESEARCH CENTER, https://www.pewforum.org/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/ (Dec. 14, 2021) (noting "The secularizing shifts evident in American society so far in the 21st century show no signs of slowing," although the Catholic percentage has remained constant over the last decade at 21%.).

[153] Tzvi Joffre, *Israel Leads the World in Time Spent in Coronavirus Lockdowns*, JERUSALEM POST (Feb. 4, 2021), https://www.jpost.com/health-science/israel-leads-the-world-in-time-spent-in-coronavirus-lockdowns-657028.

[154] Jeremy Sharon, *Ahead of COVID-19 Lockdown, Health Ministry Urges Haredim to Pray Outside*, JERUSALEM POST (Jan. 7, 2021), https://www.jpost.com/israel-news/ahead-of-covid-19-lockdown-health-ministry-urges-haredim-to-pray-outside-654640 (noting "The new lockdown prohibits indoor gatherings of more than five people, meaning that communal Jewish prayer services, which require a quorum of 10 men, are forbidden from taking place in synagogues."); *see supra* note 86.

[155] *Covid forces Jerusalem's Great Synagogue to Shut in New Year First*, FRANCE 24 NEWS (Sept. 16, 2020), https://www.france24.com/en/20200916-covid-forces-jerusalem-s-great-synagogue-to-shut-in-new-year-first (In Israel, the premier Orthodox synagogue in the country, Great Synagogue, shut down over Rosh Hashana. Under the new Israeli measures "it could in theory welcome about 200 people. 'But we decided we won't take any risks,' the Great Synagogue's president, Zalli Jaffe, told AFP.")

most reactionary Rabbinic leaders of that community "issued a joint statement calling on the [H]aredi public to adhere to health guidelines to stop the spread of infection. . ."[156] Further, Justice Gorsuch's paternalistic screed regarding the edict's impact on Orthodox women[157] who would be barred from a "minyan" of ten people, is troubling: While some Orthodox feminists were miffed about the regulations,[158] there is no requirement in Orthodox Judaism for women to participate in communal prayer at all — even in non-pandemic times[159] — rendering the Court's determining "essentiality" under America's anti-discrimination laws an unfortunate and erroneous incursion into religious determination.[160]

Many leading Orthodox rabbis hold that praying in an indoor minyan in the time of a pandemic is forbidden. *See* Rav Asher Weiss, Minchat Asher, Ch. 16, Subch. 1, 36, 35, 40; *see also* Michel Broyde, *Jewish Law During a Pandemic: The 35 Responsa of Rabbi Hershel Schachter Issued Due to COVID-19,* BERKLEY CENTER (Apr. 27, 2020), https://berkleycenter.georgetown.edu/responses/jewish-law-during-a-pandemic-the-35-responsa-of-rabbi-hershel-schachter-issued-due-to-covid-19. On Feb. 7, 2021, three weeks before the Purim holiday which features similar cavorting and frolic as the Simchat Torah service, the Agudah produced a booklet, itself curtailing traditional worship activities and a major Orthodox Yeshiva in Lakewood cancelled some of its activities. *See* Andrew Silow-Carroll, *Flagship New Jersey Yeshiva Cancels Purim Celebrations,* JEWISH TELEGRAPHIC AGENCY (Feb. 16, 2021), https://www.jta.org/quick-reads/flagship-new-jersey-yeshiva-cancels-purim-celebrations.

[156] Sharon, *Ahead of COVID-19 Lockdown, supra* note 155 ("Rabbi David Stav, chair of the religious-Zionist Tzohar rabbinical association, has publicly opposed prayer services of 10 men outdoors, saying it will not be possible to restrict them to only 10.").

[157] "In 'red zones,' houses of worship are all but closed—limited to a maximum of 10 people. In the Orthodox Jewish community that limit might operate to exclude all women, considering 10 men are necessary to establish a *minyan*, or a quorum." Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 69 (2020) (per curiam) (Gorsuch, J., concurring).

[158] *See generally* FEDDD UPPPPP, *I'm Also Fed Up with the Way Women are Treated in Orthodoxy*, FACEBOOK, https://www.facebook.com/groups/womeninorthodoxy. (FEDDD UPPPPP is a "Feminist Forum For Empowerment and Exchange to Discuss, Debate, Defuse and Unpack Unfair and Uncompassionate Patriarchal Practices and Paradigms in Positive and Proactive Ways.").

[159] In my own Orthodox synagogue, women were expressly "disinvited" – even to the outdoor service at the height of the pandemic. This was not a misogynistic degree. The much-esteemed chair of the synagogue is a woman.

[160] The Haredi (ultra-Orthodox) community itself was split regarding compliance with COVID restrictions. *See, e.g.*, Reuven Bluarblau, *Beating in Borough Park Backlash Against New COVID Restrictions Sends Hasidic Man to Hospital*, THE CITY (Oct. 7, 2020), https://www.thecity.nyc/brooklyn/2020/10/7/21505813/beating-in-borough-park-backlash-against-new-covid-restrictions-sends-hasidic-man-to-hospital#:~:text=brooklyn-

PART IV: A TWO-STEP ANALYSIS

By now it should be clear that to determine the proper scope of review, the court needs to defer to the local authorities who not only have the expertise of their health departments to guide them, but who are also familiar with idiosyncratic local conditions that impact the determination.

It also should be apparent that when religion and exposure potential (i.e., public health considerations) are both at issue, the legal determination cannot be based on a knee-jerk, single-feature, strict-scrutiny rubric applied in a vacuum. The multiplicity of outcomes when both parameters — exposure potential and the degree of essentiality — are factored into the legal decision-making paradigm, clearly indicate this is not a binary yes-no decision, as the Agudah would have the Court believe. This is demonstrated by the chart below:

ACTIVITY	ESSENTIALITY	EXPOSURE LEVEL
1. Supermarket & pharmacies	High (Maslow Level 1)	Low
2. Liquor Stores selling food/non-alcohol drink	High (Maslow Level 1)	Low
3. Banking/Cannabis/ Hardware/acupuncturist	Moderate (Maslow Level 2)	Moderate
4. Church/Eucharist	Maslow Level 2 or Maslow Level 3	Low
5. Synagogue on upcoming holiday	Low according to most "*poskim*" (*halachic arbiters)* (Maslow Level 3-4)	Moderate to High

,beating%20in%20borough%20park%20back-lash%20against%20new,sends%20hasidic%20man%20to%20hospi-tal&text=the%20family%20of%20berish%20getz,6%2c%20202 (reporting that "[a] 34-year-old Hasidic man was beaten unconscious by a crowd in Brooklyn angry over Gov. Andrew Cuomo's action to limit synagogues in COVID-19 hot zones to 10 people and close schools in the area, according to videos from the scene and the man's brother."). Indeed, the locality dependent rationale for imposing strictures can be seen from statistics from the city's health department, which report that "[m]ore than 8% of COVID tests in Borough Park's main ZIP code, 11219, have showed positive results in the past week, compared with 1.65% citywide. . .". *Id.*

The *Roman Catholic Diocese v. Cuomo* case, however, raises additional and serious legal concerns which have yet to be addressed by the Court. While it is hoped that the Supreme Court can integrate an analysis that incorporates exposure potential to assess whether the incursion is the least invasive available, the question remains, what happens if the worship of two different religions poses vastly differing exposure potential? Even assuming the services can be modified so that singing and dancing is eliminated, Orthodox Jewish worship requires three visits to the synagogue *per day*, compared to one *per week* for Catholic parishioners, vastly multiplying the exposure potential.[161] Addressing this issue is sure to vex any jurist — indeed, it is not even clear if there is a predicate to do so.

PART V: DECIPHERING THE HIGH COURT'S WAVERING VIEWS ON RELIGION AND PUBLIC HEALTH

The power of precedent seeks to provide certainty regarding judicial resolution of a matter of law.[162] The concept refers to "[a]n adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law."[163] But, as policy expert and legal commentator Ian Millhiser has written, the current Court is no longer as interested in respecting precedent as its predecessors.[164] The implications of this in terms of managing a public health crisis, at least, are horrifying — "permit[ing]. . . religious objectors to defy state public health rules intended to slow the spread of a deadly disease."[165] Millhiser continues:

> [RC Diocese]… is part of a much bigger pattern. Since the Court's Republican majority became a supermajority, the Court has treated religion cases as its highest priority….[and] made historic changes to the law governing

[161] Compare the approximately 25 hours a week for Orthodox Jewish services versus approximately one hour a week for Catholic ones. Muslims worship five times a day, albeit for shorter time periods, meaning that their exposure potential also likely exceeds those of Christian parishioners.

[162] Although this maxim may have been diluted under *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

[163] *Precedent*, THE LAW DICTIONARY, https://thelawdictionary.org/precedent/.

[164] Ian Millhiser, *The Supreme Court is Leading a Christian Conservative Revolution*, VOX (Jan. 30, 2022, 8:00 AM), https://www.vox.com/22889417/supreme-court-religious-liberty-christian-right-revolution-amy-coney-barrett ("There are also worrisome signs that the Court's new majority cares much less than its predecessors about stare decisis, the doctrine that courts should typically follow past precedents. Just look at how the Court has treated *Roe v. Wade* if you want a particularly glaring example of the new majority's approach to precedents it does not like.").

[165] *Id.*

> religion. . . [t]ak[ing]… on new religion-related cases at a breakneck pace.[166]

Further, the religious devotion of the Court is disturbingly partisan:

> . . . [F]or the most part, the Court's most recent religion cases have been extraordinarily favorable to the Christian right, and to conservative religious causes generally….[T]he Court nearly always sides with religious conservatives who seek an exemption from the law, even when granting such an exemption is likely to injure others.[167]

A barometer of judicial adhesion to religious hagiography can be seen by the cast of opinions in *South Bay (redux)*. There, the petitioner sought an injunction against state regulations, effectively banning indoor religious services, including:

- Imposing a 25% capacity limitation on religious services
- Banning singing and chanting during indoor services

On one side, Justices Gorsuch and Thomas would have granted the petitioners' application in toto, enjoining all state regulations. Justice Alito would "stay for 30 days an injunction against the percentage attendance caps and the prohibition against indoor singing and chanting" subject to the State's showing of necessity and otherwise grant the application. Justices Kagan, Sotomayor, and Breyer would have denied it in toto. In the middle, Justices Barrett and Kavanaugh, along with the Chief Justice, would have allowed the ban on singing and chanting.

After reading *South Bay United Pentecostal Church v. Newsom (redux)*[168] in conjunction with *Tandon v. Newsom,*[169] both of which followed *RC Diocese* and were decided two and four and a half months later respectively, one might be inclined to believe that to the Republican majority, religious choices supersede public health mandates in *all* cases — at least all those relating to COVID-19. The *South Bay* case involved similar promulgations as *Roman Catholic Diocese*. *Tandon* addressed at-home religious gatherings. Such an assumption, it turns out, is not the case, as can be seen from *Does v. Mills* and *Dr. A. v. Hockshul*[170] where the majority deferred to the State's vaccine mandate and rejected the religious objections of the petitioner. The question becomes — why, suddenly is there such a departure from the trajectory previously demonstrated by the

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[166] *Id.*

[167] *Id.* "Prior to *Hobby Lobby*, religious exemptions were not granted if they would undermine the rights of third parties."

[168] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021); *see also* Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021).

[169] 141 S. Ct. 1294 (2021).

[170] Does v. Mills, 142 S. Ct. 581 (2021); Dr. A v. Hochul, 142 S. Ct. 552 (2021).

Court? And it appears we may arrive with a troubling conclusion. We begin first with a detailed look at *Tandon*.

Tandon forces the middle-grounders (especially Barrett and Kavanaugh) to crystalize their positions. Yet, the language in *Tandon* articulates a different landscape of analysis than that provided in the *RC Diocese* decision. That, or the conservative majority realizes the infirmities of the reasoning in *Roman Catholic Diocese* and corrects them, but without changing their minds regarding the outcome. *Tandon* recaps the predicates of the *Roman Catholic Diocese* case as follows:

1. If any "comparable" activity is treated more favorably than a religious one, automatically governmental regulations are considered not neutral and strict scrutiny is required. "Comparability," the Court states here, is determined by the risks they present — not the reason people gather.
2. Whether two activities are comparable for Free Exercise purposes must be judged against the asserted governmental interest.
3. The government has the burden to overcome strict scrutiny obstacles. They must show that measures less restrictive of First Amendment activity could not achieve the governmental interest. (They said no such thing in R*C Diocese*). Where the government allows other activities to proceed — "it must show that the religious exercise at is more dangerous than those activities even when the same precautions are involved.")[171]

The *Tandon* court seems to be saying that if two risk-comparable events are regulated differently, secular ones should be treated the same as religious ones, regardless of the level of essentiality, *ipse dixit* elevating the need for religion to the level of buying food, drink, and medicine. The nonsense of this is apparent when one realizes that in the context of a pandemic — all face-to-face encounters, even of the masked variety, are potentially hazardous, and the degree of necessity involved provides the context for a risk-benefit analysis. Indeed, the articulation of the predicates enunciated in *Tandon* is in no way synonymous with the analysis in *Roman Catholic Diocese v. Cuomo,* where the Court focused on the activities involved, identified as religious or secular, and presumed the risks, say of exposure in a church and a laundromat or florist shop, were the same. It is true, as stated above, that the government did a poor job providing evidence that the religious activities are riskier — although a simple review of at least Orthodox Jewish requirements would reveal that merely the duration of exposure (three times a day for a total of three to five hours) far exceeds the ordinary foray to a florist shop or liquor store.

[171] Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021).

More recently, governmental orders in the form of mandated vaccination, as opposed to quarantine, threaten to crumple any straight-lined logic or consistency in the jurists' opinions. Cases such as *Does v. Mills* and the Biden mandate cases[172] are illustrative. In the first, both Kavanaugh and Barrett move center, allowing the State of Maine to eviscerate religious exemptions.[173] As opposed to quarantine or lockdown orders, vaccine mandates in some states allow self-help remedies — the invocation of a religious exemption.[174] Yet, here, strangely, Justice Barrett refuses to help the religious objectors. While Justice Barrett enunciates a procedural bent for her decision, such as refusing to use the emergency docket for cases requiring evaluation on the merit, one is hard-pressed not to be taken in — as other cases in which she fully participated presented themselves to the Court in like fashion.

The evolution of Supreme Court opinion on deferral to governmental expertise on public health matters is further manifested by federal mandates of vaccines. In these cases, reported a month after *Does*, Justice Kavanaugh continues his centrist move (along with the Chief Justice), siding with the liberal side of the bench and allowing it.[175] While the Chief Justice's history regarding cases preceding *Roman Catholic Diocese v. Cuomo* is more centrist and hence his opinion is not personally aberrant, Justice Kavanaugh's move is surprising. The question is why did Justice Barrett not follow suit — and how does her personal religion influence her legal views?

The answer might be seen in a deeper evaluation of *Does v. Mills* and similar cases which pit laws mandating COVID vaccines against a claimed religious objection, including personal religious objections used as a self-help remedy.[176] Yet here, strangely, Justice Barrett refuses to help the religious objectants.

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[172] Barbara Pfeffer Billauer, *The Supremes Speak Out On COVID VAX in The Workplace*, J. Am. Council Sci. & Health (Jan. 17, 2022), https://www.acsh.org/news/2022/01/17/supremes-speak-out-covid-vax-workplace-16064; Barbara Pfeffer Billauer, *Beware: The Supremes Allow The Health Worker Jab. Post Hoc And After Shock,* J. Am. Council Sci. & Health (Jan 24. 2022), https://www.acsh.org/news/2022/01/24/beware-supremes-allow-health-worker-jab-post-hoc-and-after-shock-16072.

[173] *F.F., as Parent of Y.F. v. New York*, SCOTUS BLOG (petition for certiorari denied on May 23, 2022), https://www.scotusblog.com/case-files/cases/f-f-as-parent-of-y-f-v-new-york/.

[174] Kay Lazar, *A Murky Battle over Religious Beliefs and COVID-19 Vaccination Continues: Cottage Industry Helps People Avoid Shots by Claiming it Violates Their Faith,* GLOBES (Sept. 18, 2021), https://www.bostonglobe.com/2021/09/18/metro/murky-battle-over-sincerely-held-religious-beliefs-covid-19-vaccination/.

[175] *Biden v. Missouri,* 142 S. Ct. 647 (2022) (Case No. 21A240); *Becerra v. Louisiana,* Case No. 21A241 (U.S. Jan. 13, 2022).

[176] Lazar, *supra* note 174.

In August 2021, Justice Barrett allowed an Indiana University rule mandating vaccines to stand.[177] A similar resolution transpired in a New York case.[178]

This approach is again manifested in Justice Barrett's opinion in *Does v. Mills,*[179] where the Roman Catholic petitioners claimed that because the vaccine contained fetal cells, it was religiously contraindicated. Yet, she rejects this religiously based claim.[180] The *Does* case clearly reflects her inner conflict, as Justice Barrett pronounces:

> [p]laintiffs [who] are all healthcare workers in Maine [and] who have sincerely held religious beliefs that preclude them from accepting any of the COVID-19 vaccines because of the vaccines' connections to aborted fetal cell lines and for other religious reasons that have been articulated to Defendants.[181]

In a 6-3 opinion, the Court declined to overturn the district court ruling enabling Maine to set its own religious exemption rules. As noted, in this case Justice Barrett surprisingly sides with the liberal wing, now including Chief Justice Roberts and Justice Kavanaugh. Even Justice Kavanaugh's views are surprising in this context in view of his strident tone defending the primacy of religion enunciated *in Roman Catholic Diocese v. Cuomo*. Given that Justice Barret was similarly inclined in *Roman Catholic Diocese*, the question is why she is willing to disregard religious claims regarding vaccination, yet uphold them for rules involving lockdown and prayer?

The answer is not clear — but one conjecture is most troubling. Before getting there, though, it is worthwhile to examine the approach of the extreme conservative branch — more closely, that of Justices Alito, Thomas,

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[177] Ariane de Vogue, *Justice Amy Coney Barrett Denies Request to Block Indiana University's Vaccine Mandate*, CNN (Aug. 12, 2021), https://edition.cnn.com/2021/08/12/politics/supreme-court-indiana-university-vaccine-mandate/index.html.

[178] *See also*, *Dr. A. v. Hochul*, 142 S. Ct. 552, 552 (2021) ("The application for injunctive relief presented to JUSTICE SOTOMAYOR and by her referred to the Court is denied. JUSTICE THOMAS would grant the application. JUSTICE GORSUCH, with whom JUSTICE ALITO joins, dissenting from the denial of application for injunctive relief.").

[179] Does v. Mills, 142 S. Ct. 581 (2021).

[180] *See* Does v. Mills, Case No. 21A90, App. Of Exs., Ex. 5 at 8 (Dist. Ct. Decision) (U.S. Oct. 20, 2021), https://www.supremecourt.gov/DocketPDF/21/21A83/196589/20211015163927213_Appendix%20of%20Exhibits.pdf ("Plaintiffs also object to the J&J vaccine, asserting that aborted fetal cell lines were used in both its development and production. They allege that the use of fetal cell lines to develop the vaccines runs counter to their sincerely held religious beliefs that cause them to oppose abortion.").

[181] *Id.*, Ex. 6 at 6.

and Gorsuch,[182] who seem to be vying to outdo each other in commandeering the extreme right, as further illustrated in the cases addressing Biden's COVID-19 vaccine mandates.[183]

In their dissents, Justices Gorsuch, Alito, and Thomas claim that public health decisions, including vaccine mandates, are reserved entirely to the states.[184] But apparently only on their terms,[185] as they find a way to oppose Maine's vaccine mandate, which disallows religious exemptions. The trio, themselves unelected decision-makers,[186] have no problem trampling on that power by limiting the state's decision when it trespasses on religious freedom — the same situation presented in *Does v. Mills* and related cases.[187] In reality, they give limited powers to the state, and reserve the rest to themselves — the conservative court majority.

Recent indicia seem to portend that there is some sort of internecine competition to replace the arch-conservative void left by Justice Scalia[188]

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[182] Dahlia Lithwick & Mark Joseph Stern, *Gorsuch's Crusade Against Vaccine Mandates Could Topple a Pillar of Public Health,* SLATE (Dec. 15, 2021, 5:01 PM), https://slate.com/news-and-politics/2021/12/vaccine-mandates-supreme-court-religious-liberty-pandemic.html.

[183] *See* Biden v. Missouri, 142 S. Ct. 647 (2022); *see also* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022); Barbara Pfeffer Billauer, *Omicron, Best Laid Plans, and the Supreme Court*, AM. COUNCIL SCI. & HEALTH (Jan. 27, 2022), https://www.acsh.org/news/2022/01/27/omicron-best-laid-plans-and-supreme-court-16082; Barbara Pfeffer Billauer, *Beware: The Supremes Allow the Health Worker Jab. Post Hoc and After Shock*, AM. COUNCIL SCI. & HEALTH (Jan. 24, 2022), https://www.acsh.org/news/2022/01/24/beware-supremes-allow-health-worker-jab-post-hoc-and-after-shock-16072; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392); N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen, 142 S. Ct. 2111 (2022) (No. 20–843).

[184] Allen Smith, *Supreme Court Again Declines to Block Maine's Vaccine Requirement*, SHRM (Nov. 1, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-supreme-court-again-declines-to-block-maine-vaccine-requirement.aspx#:~:text=Supreme%20Court%20Again%20Declines%20to%20Block%20Maine's%20Vaccine%20Requirement,-allen.smith%40shrm&text=The%20U.S.%20Supreme%20Court%20on,that%20allows%20no%20religious%20exemptions.

[185] *Id.* ("[I]n a dissent, 'Where many other states have adopted religious exemptions, Maine has charted a different course. There, health care workers who have served on the front line of a pandemic for the last 18 months are now being fired and their practices shuttered. All for adhering to their constitutionally protected religious beliefs. Their plight is worthy of our attention.'").

[186] A fact repeatedly pointed out by Justice Kagan in her dissents in *Dobbs*, slip op. at 1 and in *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

[187] *See* Does v. Mills, 142 S. Ct. 581 (2021).

[188] Kathryn Rubino, *Neil Gorsuch's Call for Civility Was Always Just for Show*, ABOVE THE LAW (Jan. 18, 2022, 3:45 PM), https://abovethelaw.com/2022/01/neil-gorsuchs-call-for-civility-was-always-just-for-show/.

opined by some pundits.[189] Gorsuch seems to be leading the pack, in both word and deed, going so far as even to refuse the Chief Justice's appeal for members of the Court to wear masks, in deference to 67-year-old Justice Sotomayor whom he sits alongside and who also suffers type I diabetes, a key risk factor for COVID.[190]

The irony is that Scalia himself would have approved elevating public health concerns over religious preferences — at least as far as vaccines go. As he wrote in *Employment Division v. Smith:*[191]

> [P]recisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference, [citation omitted]192 and precisely because we value and protect that religious divergence," we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[193]

Specifically regarding mandatory vaccination, in *Employment Division v. Smith,* Scalia invoked a 1964 Arkansas Supreme Court case, *Cude v. State,* involving custody of children who were not in school because

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[189] *Id.* (quoting a social media post of Nina Totenberg) ("Now, though, the situation had changed with the omicron surge, and according to court sources, Sotomayor did not feel safe in close proximity to people who were unmasked. Chief Justice John Roberts, understanding that, in some form asked the other justices to mask up. They all did. Except Gorsuch, who, as it happens, sits next to Sotomayor on the bench. His continued refusal since then has also meant that Sotomayor has not attended the justices' weekly conference in person, joining instead by telephone.").

[190] Andrew P. McGovern et al., *The Disproportionate Excess Mortality Risk of COVID-19 in Younger People with Diabetes Warrants Vaccination Prioritization*, 64 DIABETOLOGIA 1184–1186 (2021).

[191] Emp. Div. v. Smith, 494 U.S. 872 (1990) ("[T]he [Free Exercise] Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. *See, e.g., Reynolds v. United States,* 98 U. S. 145, 166-167.") (alteration in original) (holding that the state could deny unemployment benefits to a person fired for violating a state prohibition on the use of peyote even though the use of the drug was part of a religious ritual).

[192] *Smith,* 494 U.S. at 892 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)) (holding that forbidding the sale of various retail products on Sunday was not an unconstitutional interference with religion as described in the First Amendment) (of course the resolution of that case was in conformity with Scalia's own religious view).

[193] *Smith*, 494 U.S. at 888.

their parents, for religious reasons, refused to have them vaccinated against smallpox. The language of the case is apt:[194]

> For the purposes of the appeal, we will assume that the Cudes, in good faith because of their religious beliefs, will not permit the children to be vaccinated.... Then the question is whether they have the legal right to prevent vaccination. The answer is that they do not have such right.[195]

One possible rationale for the differing views of Kavanaugh and Barrett between the lockdown (quarantine) cases and the vaccine cases involving religious exemptions might arise from the way that the lockdown orders specifically targeted religious organizations. By contrast, as Justice Scalia noted, vaccination is "content-neutral" as applying to everyone. Nevertheless, Gorsuch raises similar strange differentiations between religious exemptions and vaccines, claiming religious exemptions for vaccines target only religious individuals, while medical exemptions for vaccines affect everyone, such that religious exemptions become a suspect activity. This argument again focuses on activity, not on risk. Differentiating medical exemptions on the basis of risk allows us to factor in the danger to the potential vaccinee.

Clearly, vaccines are not targeted to a particular religious group, and Gorsuch's disingenuous effort to create a dichotomy by comparing it to the medical exemptions is bogus on its face. Scalia also tamped a lid on the libertarian miasma infecting the anti-vaccine mandate crowd noting that the "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[196]

Another more troubling explanation for Justice Barrett's side-stepping on vaccine mandates, allowing it even if religious exemptions are not honored but denying it when the order comes from the federal government, might be traceable to her own religious views. Commandeering,

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[194] Marcia Coyle, *3 Decades Ago, Justice Scalia Foresaw Challenges to Vaccine Mandates*, ALM (Sept. 16, 2021, 2:21 PM), https://www.law.com/nationallawjournal/2021/09/16/3-decades-ago-justice-scalia-foresaw-challenges-to-vaccine-mandates/?slreturn=20220114044912.

[195] Cude v. State, 377 S.W.2d 816, 818 (Ark. 1964). As Justice Scalia noted in *Smith*, "[T]he [Free Exercise] Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. *See, e.g., Reynolds v. United States,* 98 U. S. 145, 166-167." *Smith,* 494 U.S. at 874 (alteration in original).

[196] Emp Div. v. Smith, 494 U.S. 872, 890 (1990).

misappropriating, misrepresenting, and perverting religion in the name of an anti-vax stance is not new. Generally, courts have seen through these guises and have not been taken in.[197] Moreover, the evisceration of the religious exemption regarding vaccines does not trespass on Justice Scalia or Barrett's own religious views, as say, abortion would.[198]

The Supreme arbiter of the Catholic view on vaccines, the Pope, has ruled that even if there is a fetal-cell component, vaccines are still legitimate, appropriate, and not against Catholic teachings.[199] Thus, I suggest that if some individual feels otherwise, raising the flag of Catholic theology to support the claim, — their stance might be considered bogus in Barrett's view, and hence could not qualify as a sincerely held religious view. By comparison, refusing worship at a weekly mass would be definitely in violation of her views, especially when the action is brought by a Diocese, itself.

PART VI: CONCLUSION: CONSTITUTIONAL FAVORITISM

The *Roman Catholic Diocese* decision goes to great lengths to disavow any precedential value of the *Jacobson* case, which pertains to balancing vaccination requirements against due process. In that this case involves a form of quarantine balanced against the Free Exercise clause, the Court seems to think it has carte blanche to disregard local public health determinations and reify Religious Freedom at the expense of public health — something American courts have been loath to do for hundreds of years.

Without focusing on whether a more limited public health directive was in order here, and while an exact precedent might be lacking, relevant stare decisis and dicta abound which are completely ignored. The court merely needed to apply rules of logic to cohere these rulings to the case at hand.

Thus, courts have previously ruled:

1. The supremacy of constitutional rights falls before reasonable use of the police power to protect public health. Hence constitutional rights are limited in these cases.
2. Specifically, the Free Exercise clause has limits when its exercise affects the public health.

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[197] *See* NM v. Hebrew Acad. Long Beach, 155 F. Supp. 3d 247 (E.D.N.Y. 2016); Davis v. State, 451 A.2d 107 (Md. 1982).

[198] Dobbs v. Jackson, 142 S. Ct. 2228 (2022) (No. 19–1392), https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

[199] Laurel Wamsley, *Vatican OKs Receiving COVID-19 Vaccines, Even If Research Involved Fetal* Tissue, NPR (Dec. 21, 2020, 6:28 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/12/21/948806643/vatican-oks-receiving-covid-19-vaccines-even-if-research-involved-fetal-tissue.

3. Originalist doctrine limits Free Exercise to belief — not actions.[200]
4. Justices Alito and Thomas held that another First Amendment right, Freedom of Speech, falls before what they consider a superior government interest[201] — which canonized the concept of national honor, indicating that their reasoning and veneration of constitutional right here is, itself, violative of equal protection analysis.
5. The police power of *quarantine* falls before constitutional rights — specifically the Commerce Clause.
6. Individual choices cannot drive a democracy.

These six predicates seriously undermine the majority reasoning in *Roman Catholic.* Further, in view of the fact a repository of cases exists sustaining these principles, one wonders how the Supreme Court can justify their dicta here.

Finally, the scientific lacuna used to amalgamate considerations of comparability and essentialness of various activities calls into question the specific holding, itself. It is precisely because courts are not experts in these matters, that judicial deference has been the practice. One can only assume that religious fundamentalism on the part of the majority allowed them to override precedent and judicial practice and enabled this decision.

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[200] *See also* the writings of Thomas Jefferson, cited in *Reynolds v. U.S.*, 98 U.S. 145, 163–64 (1878).

[201] United States v. Alvarez, 567 U.S. 709 (2012).