

COVID-19, HUMAN RIGHTS, AND JUDICIAL REVIEW IN TRANSAT- LANTIC PERSPECTIVE

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REGROUP

REBUILDING GOVERNANCE AND
RESILIENCE OUT OF THE PANDEMIC



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Culminating more than a decade of crisis in Europe, the Covid-19 pandemic has opened an important window of opportunity for institutional and policy change, not only at the “reactive” level of emergency responses, but also to tackle more broadly the many socio-political challenges caused or exacerbated by Covid-19. Building on this premise, the Horizon Europe project REGROUP (*Rebuilding governance and resilience out of the pandemic*) aims to: 1) provide the European Union with a body of actionable advice on how to rebuild post-pandemic governance and public policies in an effective and democratic way; anchored to 2) a map of the socio-political dynamics and consequences of Covid-19; and 3) an empirically-informed normative evaluation of the pandemic.



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Abstract

The paper examines the protection of human rights during the pandemic in the European Union (EU) and the United States (US) by analysing judicial review of Covid-19 measures. In particular, the paper put together an original dataset of over 300 cases to provide the first ever systematic analysis of how courts in the EU and the US reviewed key Covid-19-related measures, including *non facere* measures, such as church closures and stay-at-home orders, and *facere* measures, namely masks and vaccines mandates. The paper advances 3 hypotheses, based on judicial review of emergency measures in counter-terrorism contexts, and tests their applicability during the pandemic by considering a number of cases dealing with freedom of religion, freedom of movement and personal liberty and autonomy. The paper argues that a significant transatlantic convergence exists on how top courts have reviewed *non facere* measures: in cases reviewing church closures, both in the EU and the US courts have initially deferred to governmental decisions, but tightened their scrutiny over time; and, similarly, in cases reviewing stay-at-home orders, courts have often upheld governmental restrictions but also occasionally invalidated them, particularly when they appeared overblown, or disproportionate. Instead, the paper points out to a transatlantic divergence in the field of judicial review of *facere* measures: while EU courts have systematically upheld the legality of mask mandates, and mandatory vaccinations, when these became available, the US Supreme Court has invalidated a general vaccine mandates, and mask mandates have been struck down by state courts. As the paper points out, this divergence can be explained due to the greater politicization of public health in the US than in the EU, and the growing lack of deference towards, and trust in, scientific expertise in the US. In conclusion the paper suggests that the alternative balancing of human rights and health protection in the US and the EU during Covid-19 reveal contrasting lessons from the pandemic on the relation between risk and resilience in constitutional democracies.

Keywords: Covid-19; human rights; courts; judicial review; scientific expertise

Introduction¹

The Covid-19 pandemic posed a major challenge to the protection of human rights (also called constitutional rights or fundamental rights) as public authorities across the globe had to introduce a number of unprecedented measures to contain the virus. Between 2020 and 2022 in response to the largest public health crisis since the 1918 Spanish flu, governments worldwide adopted sweeping laws designed to mitigate the spread of Covid-19. Governments' actions pursued the noble goal to save lives, in pursuance of the positive duty to protect the rights to life and health of citizens.² In fact, institutional awareness on the need to respect human rights while addressing the pandemic emerged from an early stage.³ Nevertheless, at least in liberal democracies based on the rule of law, Covid-19 containment measures still resulted in the widest interference with human rights ever experienced in recent history. The pandemic was addressed both through measures restricting individual action (e.g. lockdowns, stay-at-home orders and church closures) and measures compelling individuals to act in a specific way, or undergo specific treatment (e.g. masks mandates and especially compulsory vaccinations, when they became available).

The purpose of this paper is to examine the protection of human rights during Covid-19 in constitutional democracies by analysing how top courts in the European Union (EU) and the United States (US) have adjudicated cases challenging the legality of the above-mentioned restrictions and mandates. The focus on courts is motivated by the fact that in liberal constitutional democracies based on the rule of law, the judiciary is the primary guarantor of human rights.⁴ Some scholars have criticized this form of judicial

1 Federico Fabbrini is Full Professor of EU Law, Dublin City University, and Fernand Braudel Fellow, European University Institute. This paper was presented in outline and draft form in several events, including the Conference “Constitutionalism after Covid-19: Transatlantic Perspectives on Risk and Resilience”, co-convened by the author at the Princeton University School of Public & International Affairs on 27-28 April 2023; the online Conference “The Pandemic’s Comparative Impact on Constitutional Checks and Balances” hosted by the University of Innsbruck on 23 May 2023; the seminar organized by the Jagiellonian University Cracow in the framework of the Horizon Europe REGROUP on 15 September 2023; and the seminar organized at the European University Institute Law Department on 18 September 2023. The author is grateful to a number of colleagues for comments and feedbacks on this work, including Fabrizio Cafaggi, Marty Flaherty, John Erik Fossum, Andreas Grimm, Joelle Grogan, Gabor Halmai, Jason Hefetz, Paola Iamiceli, Matthias Kettemann, Niels Kirst, Konrad Lachmayer, Frances Lee, Deborah Pearlstein; Nicolas Petit, Natasza Styczynska, and Piero Tortola. The author is also grateful to David Hollander of the Law Librarian at Princeton University, for his assistance. Usual disclaimers apply.

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2 See e.g. Judith Bueno de Mesquita et al, ‘Lodestar in the Time of Coronavirus? Interpreting International Obligations to Realise the Right to Health During the COVID-19 Pandemic?’ (2023) 23 *Human Rights Law Review* 1.

3 See e.g. Joint European Roadmap towards lifting COVID-19 containment measures, 15 April 2020; and European Parliament resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights, P9_TA(2020)0307.

4 See Andras Sajó & Renata Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017).

supremacy and made the case in favour of political constitutionalism.⁵ Yet, in jurisdictions endowed with written constitutional texts, which entrench human rights and are subjected to more burdensome amendment procedure than ordinary law-making, courts (and especially supreme, constitutional courts) perform the critical task of keeping a check on executives and legislatures, making sure they do not undermine human rights.⁶ This is specifically the case in the EU and the US, as opposed to e.g. the United Kingdom, which still relies on parliamentary supremacy.⁷ Hence, exploring top courts' judicial review of Covid-19-related measures is the ideal perspective to assess human rights' protection during the pandemic.

The paper specifically compares the US and the EU, including also their component member states and the European Court of Human Rights (ECtHR), which is formally separated from the EU but closely connected to it.⁸ To begin with, as I have argued in my prior scholarship, this comparison is methodologically well grounded.⁹ The EU and the US are both large developed economies, both are federal unions of states,¹⁰ both reflect a high degree of internal pluralism,¹¹ but both have powerful high courts, with the authority to enforce advanced human rights documents:¹² the Bill of Rights of the Constitution in the US, and the Charter of Fundamental Rights, and partially also the European Convention on Human Rights (ECHR) in the EU. Comparing them is thus consistent with Ran Hirschl's most similar case logic of comparison,¹³ which is most apt to isolate intervening variables and evaluate their impact.

Moreover, a comparison of judicial review of Covid-19 measures adopted in the EU and the US is particularly helpful because in both these federal unions public health powers constitutionally belong predominantly to the states (as opposed to the US federal government or the EU supranational institutions), which acted in very different ways to address the pandemic.¹⁴ In fact, as several political scientists pointed out, the pandem-

5 See e.g. Richard Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (Cambridge University Press 2007).

6 See e.g. Dieter Grimm, *Constitutionalism: Past, Present, Future* (Oxford University Press 2016).

7 See Mark Elliot et al (eds), *The UK Constitution after Miller* (Hart Publishing 2018).

8 See Helen Keller & Alec Stone Sweet (eds), *A Europe of Rights* (Oxford University Press 2008).

9 See Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (Oxford University Press 2014).

10 See Signe Reihling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021). Admittedly, this characterization of the EU is questioned by some, who see it as just one form of international organization. See e.g. Pavlos Eleftheriadis, *A Union of Peoples* (Oxford University Press 2020). Nevertheless, there is a long tradition of interpreting the EU through a federal perspective, and this approach is very beneficial to understand transformations in EU law. See e.g. Robert Schutze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009).

11 See Robert Schapiro, *Polyphonic Federalism: Towards the Protection of Fundamental Rights* (The University of Chicago Press 2009).

12 See Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009).

13 Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125.

14 See Lindsay F. Wiley, 'Federalism in Pandemic Prevention and Response', March 2021; Maggie Davis et

ic proved a laboratory of democracy in the US,¹⁵ but also in the EU,¹⁶ as states pursued public policies driven by conflicting health and economic considerations: as such, they developed disparate responses to tackle Covid-19, ranging from massive restrictions to almost no action (think Sweden in the EU). Yet, both in the EU and the US states' actions are also subject to courts' review for compliance with human rights. This provides material to examine from a qualitative point of view how top courts in the two systems have reviewed the legality of the responses to the pandemic and adjudicated their human rights compatibility.

The paper argues that a study of judicial review of pandemic-related measures by high courts in the EU and the US reveals transatlantic patterns of both convergence and divergence. Specifically, my argument is twofold, and revolves around a difference between Covid-19 measures requiring individuals not to do something (prohibitions, in Latin: *non facere*) as opposed to doing something (duties, in Latin: *facere*). While to some extent this distinction is artificial (e.g. the requirement *not to leave* one's home resulting from a lockdown order is also a duty to *stay* at home) it helps frame contrasting trends in European and US case law.

On the one hand, on balance, courts in both the EU and the US have upheld measures that imposed a *non facere* restriction on an individual right, showing deference to public health decision-makers - although this deference has declined over-time and did not prevent courts from striking down some egregious, over-sweeping policies. This conclusion seems to be consistent with pattern that while courts usually embrace a hands-off approach towards executives in the immediate aftermath of an emergency, their scrutiny intensifies as time advances. This seems consistent also with the insights that courts are more sensitive to human rights restrictions that apply to everyone (including the judges themselves!) as opposed to specific groups only, as it happens in national security contexts.

On the contrary, courts in the US and the EU seem to have gone down a different path when reviewing decisions by public authority that required individuals to do something, *facere* - notably to undergo compulsory vaccination. Here while apex courts in the EU have univocally upheld the legality of vaccine mandates, in the US the Supreme Court has eventually struck down the federal vaccine mandate (even though on statutory, rather than constitutional grounds). As the paper argues, this divergence can be explained by the different trust of EU and US courts towards scientific evidence and expertise. In fact, a certain disregard for science and technocratic expertise emerges also

al, 'Calling their Own Shots: Governors' Emergency Declarations During the COVID-19 Pandemic' (2020) 12 *Constitutional Law Now* 95.

15 See Frances Lee, 'Federalism, the Pandemic Response and the Laboratories of Democracy', April 2023 (paper on file with author).

16 See Daniele Caramani et al, 'The Health-Economy Divide: A Structural Analysis of Sectoral Affectedness and Covid-19 Policy Preferences in Europe', June 2023 (paper on file with author).

in US cases reviewing *non facere* obligations. In the context of vaccine mandates, however, this becomes a dividing line with European courts, which more readily deferred to science-based decision-making.

The paper is structured as follows. Section 2 provides a literature review and advances the core hypotheses of the study. Section 3 provides the factual evidence of the paper: it sets up an original dataset of 303 apex courts' cases (all listed and classified in the Annex) reviewing several *non facere* and *facere* measures -- including church closures, stay-at-home orders and vaccine mandates -- and provides the first ever systematic analysis to date of rulings dealing with religious freedom, free movement and personal autonomy. Section 4, discusses the results and claims that time, and trust, play an important role in constitutional adjudication during emergencies, highlighting the different deference to expertise in the US and European constitutional democracies, and the polarization of public health politics in the US. Section 5, finally, concludes indicating some caveats and further avenues of research.

Literature review and hypotheses

Since the explosion of Covid-19 a growing body of literature in law and related disciplines has endeavoured to map both the legal measures adopted to contain contagions, and to evaluate their legality.¹⁷ While the nature of the disease and the responses to it made the topic a moving target, scholars in the past three years have contributed to enhance our understanding of how authorities at various levels of government have tackled the greatest public health crisis in a century, or actually refrained from doing so,¹⁸ reflecting generally also on the health of liberal democracy.¹⁹ In particular, extensive work has been produced on the use of states of emergency in dealing with the pandemic,²⁰ and several studies now exist surveying the various restrictions imposed country by country,²¹ and reflecting theoretically on their compatibility with international human

17 See e.g. Matthias Kettermann & Konrad Lachmayer (eds), *Pademocracy in Europe* (Hart Publishing 2021); Joelle Grogan & Alice Donald (eds), *Routledge Handbook of Law and the Covid-19 Pandemic* (Routledge 2022).

18 See e.g. David Pozen & Kim Lane Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 114 *American Journal of International Law* 608.

19 See e.g. Miguel Maduro & Paul Kahn (eds), *Democracy in Times of Pandemic* (Cambridge University Press 2020).

20 See e.g. Maria Diez Crego & Silvia Kotanidis, 'States of Emergency in Response to the Coronavirus Crisis: Normative Response and Parliamentary Oversight in EU Member States during the First Wave of the Pandemic', European Parliament Research Service, December 2020; Beverly Cygler, 'Fighting COVID-19 in the United States with Federalism and Other Constitutional and Statutory Authority' (2021) 51 *Publius: The Journal of Federalism* 673.

21 See e.g. Joelle Grogan, 'Impact of COVID-19 measures on democracy and fundamental rights: Best practices and lessons learned in the Member States and third countries', study commissioned by the European Parliament special Committee on the pandemic, November 2022.

rights principles.²²

However, the literature on Covid-19 and human rights suffers of some limitations. First, particularly in Europe, where legal formalism and positivism are still influential, scholarly analysis has primarily focused on the legislative measures adopted to contain Covid-19, rather than on courts' judicial review that followed. Yet, given the role of courts in preserving rights in constitutional democracies, a study of judicial rulings yields a better picture of human rights protection during a pandemic. Secondly, with several notable exceptions,²³ most scholarly analyses focused on single-country studies, as opposed to cross-countries comparisons.²⁴ Yet, a lesson from comparative law is that single-country studies, while informative, tend to yield limited heuristic value as they cannot control for idiosyncratic variables. Thirdly, again with some notable exceptions,²⁵ scholarly analysis has failed to provide a systematic analysis of judicial review of Covid-19 measures, often focusing on specific courts or specific rulings only. Yet, casuistic studies suffer of several idiosyncratic features and thus provide only partial evidence of the dominant trends.

This paper, therefore, seeks to offer a systematic comparative analysis of high courts' rulings of Covid-19 measures in the EU and US. To do so, the article departs from the assumption that while the pandemic was certainly special, it was still an emergency, and as such can plausibly be examined in light of the wider literature on emergency governance. In fact, before the explosion of Covid-19, a solid body of legal scholarship had approached the question of human rights protection, and judicial review, in times of emergency.²⁶ In particular, at the start of the century, in the context of the so-called war on terrorism, comparative lawyers had developed theories explaining and predicting how public authorities would respond to emergencies, how courts would review such responsive measures, and what consequences would ensue for human rights protection. The purpose of this paper, therefore, is to build on this pre-existing body of comparative literature, testing whether several of the hypotheses developed in the

22 See e.g. Alessandra Spadaro, 'COVID-19: Testing the Limits of Human Rights' (2020) 11 *European Journal of Risk Regulation* 317; Karima Bennoune, "'Lest We Should Sleep": COVID-19 and Human Rights' (2020) 114 *American Journal of International Law* 666.

23 See Tom Ginsburg & Mila Versteeg, 'The bound executive: Emergency powers during the pandemic' (2021) *International Journal of Constitutional Law* 1 (providing an early comparative analysis of global responses to the pandemic).

24 See e.g. Grogan & Donald (n ___) (including a global overview of Covid-19 responses through country-specific chapters on New Zealand, China, the United Kingdom, the United States, Singapore, Finland, India, Colombia, Thailand, Kenya, Brazil, Sweden, Turkey, Hungary, Pakistan, Taiwan, Rwanda, Germany, South Africa, Iran, Egypt, Malaysia, France, the Philippines and Australia).

25 See Kenny Mok & Eric Posner, 'Constitutional Challenges to Public Health Orders in Federal Courts during the Covid-19 Pandemic' (2022) 102 *Boston University Law Review* 1729 (providing a systematic analysis of all available federal courts' ruling reviewing Covid-19 restrictions between 2020 and 2022).

26 See e.g. David Cole & James Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (The New Press 2002); Michel Rosenfeld, 'Judicial Balancing in Times of Stress: Comparing the American, British and Israeli Approaches to the War on Terror' (2006) 27 *Cardozo Law Review* 2079.

framework of counter-terrorism apply to Covid-19, and using a comparison between the EU and the US as a controlled framework for the analysis.

In light of this, and in line with social science practice, the paper advances three hypotheses.

First, comparative constitutional law literature on national security has demonstrated that time matters when courts review emergency measures.²⁷ In particular, in the aftermath of a terrorist attack, courts are far more willing to defer to the political branches of government and upheld the measures executives and legislatures enact to tackle the emergency. However, as time goes by and the emergency wanes, also from collective memory, courts do tighten their scrutiny, and become far more willing to strike down governments' measures which impact on fundamental constitutional rights.²⁸ Hypothesis 1 of this paper, therefore, is that courts would reject challenges against the legality of Covid-19-related restrictive measures in the early phases of the pandemic, but become more willing to review them overtime.

Second, scholarship on counter-terrorism has also emphasized that courts are more deferential to the political branches of government when national security measures have a limited reach, notably by targeting only specific groups or minority communities. Instead, judges exercise stricter scrutiny of counter-terrorism measures that impact also on people like themselves (such as e.g. widespread GPS surveillance).²⁹ While this conclusion seems to be counter-intuitive, given that courts often proclaim to be guardians of insular minorities,³⁰ history is ripe of empirical examples that confirm this.³¹ In particular, David Cole has revealed how post-9/11, US counter-terrorism developed double-standards, targeting only a specific group of alleged 'enemy aliens'³² - essentially by racially profiling Muslim men as potential terrorist threats³³ - and this largely escaped review. Hypothesis 2 of this paper therefore is that courts will be deferential in reviewing restrictive measures affecting the rights of specific groups only, but more attentive when the measures have a broader reach.

Third, comparative constitutional law literature - both in the national security context and beyond - tells us that courts are keen to defer to experts. In counter-terrorism and

27 See Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press 2006).

28 See Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice' (2009) 28 *Yearbook of European Law* 664.

29 See Federico Fabbrini & Mathias Vermeulen 'GPS Surveillance and Human Rights Review: The European Court of Human Rights and the US Supreme Court in Comparative Perspective' in F. Davis et al (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Routledge 2013) 134.

30 See *United States v. Carolene Product*, 304 U.S. 144 (1938), Fn 4.

31 *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing the internment of Japanese during WWII).

32 David Cole, *Enemy Aliens: Double Standards and Constitutional Freedom in the War on Terrorism* (The New Press 2003).

33 See also Sahar Aziz, *The Racial Muslim: When Racism Quashes Religious Freedom* (University of California Press 2022).

foreign affairs, courts have given political branches of government wide latitude of decision-making due to their greater knowledge of the intelligence and military matters³⁴ - a fact often criticized in the literature.³⁵ Yet, the same applies also in other, less controversial, domains too; and courts regularly accept the guidance of technocrats on, say, the uncompetitive effects of mergers, or the approval of GMOs.³⁶ In fact, in some jurisdictions such as the US long standing precedents held that public health authorities deserve great deference on how to address sanitary crises.³⁷ Vicki Jackson has shown that constitutional democracies depend on knowledge institutions - ranging from educational establishments, to scientific epistemic communities to independent data-gathering public offices - and argued that courts should accept the greater expertise of these bodies.³⁸ As a result, Hypothesis 3 of this paper is that courts will defer to medical and scientific experts regarding the introduction of public health measures, respecting their greater knowledge.

A qualitative analysis of apex courts' rulings on Covid-19

This section, which constitutes the bulk of the paper, undertakes an examination of circa 300 pandemic-related cases which are emblematic of how top courts in the EU and the US have reviewed key public health measures adopted in response to Covid-19. In particular, I examined all Covid-19-related judgments delivered before 30 June 2023³⁹ by the US federal Supreme Court, and the Supreme Courts of all 50 US states; as well as by the ECtHR, the European Court of Justice (ECJ) and the apex courts of 25 EU member states - all except Hungary and Poland:⁴⁰ As is well known, these two EU member states are experiencing a dramatic process of rule of law backsliding,⁴¹ and their constitutional

34 See e.g. Scott M. Matheson, *Presidential Constitutionalism in Perilous Times* (Harvard University Press 2009).

35 See e.g. Martin Flaherty, *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs* (Princeton University Press 2019); and Deborah Pearlstein, 'After Deference: Formalizing the Judicial Power in Foreign Relations Law' (2011) 159 *University of Pennsylvania Law Review* 783.

36 See Cass Sunstein, 'The Most Knowledgeable Branch' (2015) 164 *University of Pennsylvania Law Review* 1607; and Marta Morvillo, 'The Role of Experts in Political Decision-Making', Max Planck Encyclopedia of Constitutional Law.

37 *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (rejecting a legal challenge against a public health order requiring mandatory vaccination to fight small pox in Cambridge, Massachusetts).

38 Vicki Jackson, 'Knowledge Institutions in Constitutional Democracies' (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 156.

39 The deadline roughly corresponds to the end of the pandemic emergency in the US (11 May 2023) but is set to include the US Supreme Court Spring term 2023 (which ended on 30 June 2023).

40 See also Gabor Halmai, 'The Pandemic and Illiberal Constitutional Theories' in Matthias Ketterman and Konrad Lachmayer (eds), *Pandemocracy in Europe* (Hart Publishing 2021).

41 In fact both countries have been subjected to the special procedure envisaged by Article 7 TEU. See European Commission reasoned proposal in accordance with Article 7(1) Treaty on European Union for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 20 December 2017, COM(2017)835 final; European Parliament resolution of 12 September

courts can no longer be regarded as independent,⁴² hence I have excluded them for the purpose of this study.

Admittedly, by focusing here only on the rulings by top courts I exclude from the analysis a much larger body of case law by first instance and appellate courts, hence restricting the relevant dataset to a smaller sample of cases. As such this paper differs from that by Mok and Posner, which has considered all rulings by US federal courts.⁴³ Yet, top courts are clearly the more important in the judicial hierarchy, as their rulings have precedential value and shape the law, so it is appropriate to prioritize them in the analysis. Moreover, this paper tries something that has not been done so far, namely examining systematically rulings by apex courts in the US and the EU, including also *all* US state supreme courts, as well as their European national and supranational counterparts. And with over 300 cases listed, the dataset is statistically significant to draw relevant conclusions.

Dataset

In the Annex to this paper, I report the full list of 303 cases I have identified and considered in this study. This constitutes my dataset.

The identification of relevant US cases has been made using WestLaw digital catalogue, a widely used US legal database.⁴⁴ For the US Supreme Court, a plain language search for terms “covid-19, restrictions, challenge” was run filtering US Supreme Court cases delivered after 1 February 2020 and before 30 June 2023. This yielded 22 cases, listed in Table 1. For the 50 US state supreme courts, instead, a multi-step process was used, to avoid both risks of under- and over-inclusiveness. Firstly, a generic search was undertaken using the words “covid-19 and challenge”. Subsequently, in the awareness that algorithmic searches are often unprecise, a new more advanced search for terms and connectors was run with the plain language terms “covid-19, restrictions, challenge”. Finally, the results of these two searches were combined, examining all cases one by one to check their relevance. This yielded 68 rulings by US states’ supreme courts, listed in Table 2. As highlighted in the Annex, however, 14 of these 68 cases are odds, and so only 54 are truly relevant for the study.

The search of European cases has been more complicated for two reasons. On the one

2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8_TA(2018)0340.

42 See also ECtHR, *Xero Flor v Poland*, App. 4907/19, judgment of 7 May 2021, para. 290 (holding that the Constitutional Court of Poland can no longer be regarded as a tribunal established by law, given the illegal appointment made by the government).

43 Mok and Posner (n __) 1733.

44 I am grateful to David Hollander, the Law Librarian at Princeton University, for his technical assistance in carrying out this search.

hand, there is a greater institutional complexity. Whereas in the US all 50 states have the same, unified judicial system, with a Supreme Court at the top of the judicial pyramid empowered to review both executive and legislative acts, EU member states pertain to different legal traditions and as such have diverse judicial structures: some countries prohibit judicial review of legislation, others attribute this task to the ordinary supreme court, while many others are endowed with a separate constitutional court vested with this specific power. In almost every EU member states, moreover, a separate order of administrative courts, with a Council of State at the top, is tasked to exercise judicial review of executive action, and sometimes this court is the most influential in the legal order. As a result, in considering which state court constitutes the *highest* court in a given member state, I had to make choices, taking into account the peculiarities of that country's judicial structures and traditions.⁴⁵

On the other hand, there is also a technical complexity to searching European case law - as there is no single European equivalent of WestLaw, and rulings by top courts are delivered in a plurality of languages (and hardly ever translated in English). Given the circumstances, to identify existing rulings by the ECJ, ECtHR and EU member states top courts I relied on the data available on the Covid-19 Litigation Database,⁴⁶ an open-access source, which includes over 2000 cases worldwide.⁴⁷ I have conducted a search for top courts' rulings by jurisdiction, which yielded 1 ECJ ruling, 4 ECtHR judgments, and 199 cases from top national courts. Yet, in the awareness of the database' under-inclusiveness, I also undertook additional research and managed to integrate the cases reported in the Covid-19 Litigation Database with 9 additional cases, which were not listed there but I could find by reading secondary literature. This brings the total number of EU states' apex courts' cases to 208. The complete list of 5 supranational and 208 national cases I counted is reported in tables 3 and 4.

Subject to those caveats, the dataset I collected provides some interesting information. From a quantitative viewpoint, as pointed out in Table 5, legal cases relating to Covid-19 measures are not evenly distributed across states, or jurisdictions. There is a relevant number of US states and EU member states in which top courts never adjudicated the matter. Instead, unsurprisingly, a significant caseload exists either in jurisdictions (e.g. France, or Belgium) that have powerful administrative courts tasked to review executive action through expedited procedures, or in jurisdictions (e.g. Germany, or Austria) that have constitutional courts able to hear individual direct petitions. Moreover, there are four time more state apex courts' cases in the EU (206), than in the US (54), but with 22 rulings the US Supreme Court jurisprudence amounts to a significant share of US case law, a bit less than 1/3 of the total, while rulings by the ECJ and ECtHR have so far

45 See generally, Mark Tushnet & Vicki Jackson, *Comparative Constitutional Law* (West 2013).

46 See <https://www.covid19litigation.org/>

47 The database was compiled by the University of Trento Law School with funding from the World Health Organization, and covers comprehensively litigation dating from 2020 to 2022. I am grateful to Prof. Paola Iamiceli, the scientific director of the project, for sharing with me information on data collection.

been very limited (5 cases to date).

Moreover, in terms of substance, the dataset reveals that courts had to deal with a variety of Covid-19 related issues, including business closures; face masks; vaccine mandates; lockdowns; abortion; contact tracing and data collection; changes to voting, prison, and asylum laws; school closures; eviction moratoriums or even students' loan debt relief - all of which led to litigation.⁴⁸ In tables 1, 2, 3 and 4, I summarily list the object of each case of the data using several synthetic descriptors, to provide the reader with a quick sense of what the litigation was about. At the same time, I indicate also the outcome of the court's ruling (either rejecting the legal challenge or upholding them, sometimes in part, or declaring the litigation moot). The Annex thus provides a general overview of the cases which comprise my dataset.

In this study, however, I restricted the analysis, by selecting and examining only judgments reviewing church closures; stay-at-home orders, business closures and prohibition of public gatherings; and face mask or vaccine mandates. Needless to say, this constitutes a sub-set of the overall dataset. However, these cases deal with some of the most important public health measures adopted to address Covid-19, and concern core human rights to religious freedom, free movement (and relatedly freedom of assembly and freedom of enterprise), and personal autonomy. As such, they offer an ideal viewpoint to assess the protection of human rights during the pandemic in constitutional democracies, and to evaluate whether the hypotheses outlined in the prior section hold true also in a context of a health emergency.

Before diving into a qualitative analysis of the case law, however, some standard caveats are in order. To begin with, one should be aware of several well-known peculiarities in the style and form of judicial reasoning when examining and comparing courts' rulings in the EU and the US.⁴⁹ Judgments by US federal and state courts tend to be longer and much more articulated, mostly because of the possibility for dissenting and concurring opinions, which allow judges to express their views more plainly and freely, outlining alternative approaches in the resolution of a case. With the exception of the ECtHR, on the contrary, European top courts, including the ECJ deliver a single opinion of the court only, which makes identifying both the reasoning and the disagreement, if any, more challenging. At the same time, the legal techniques used by courts to review the legality of human rights restrictive measures are not identical: while European courts mainly rely on proportionality, US courts follow balancing and tiered scrutiny -

48 See e.g. *Alabama Association of Realtors v. Department of Health*, 594 U.S. ___ (2021) (US Supreme Court striking down a nation-wide eviction moratorium introduced by the federal government to assist people who are behind with their rents due to Covid-19); and *Biden v. Nebraska*, 600 U.S. ___ (2023) (US Supreme Court striking down a nation-wide students' loan debt relief program introduced by the US federal government to address the economic fall-out of Covid-19).

49 See Mitchel de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009); and Andras Jakab et al (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017).

and although in practice the differences between these may be overblown, linguistic diversities do arise.⁵⁰

Moreover, another caveat should be taken into account: while European and US courts have adjudicated similar Covid-19 related issues, the procedural mechanisms by which cases have been brought in front of the court are very much dependent on national peculiarities.⁵¹ This inevitably requires piercing the web of procedural technicalities which are specific to each court and legal system in order to identify the functional component of the comparison - for instance whether courts have upheld a Covid-19 *facere*, or *non facere* measure, or not. Needless to say this approach cannot do justice to all the nuances and particularities of the reasoning of any given court. However, it can yield helpful insights on the matter under analysis here, regarding transatlantic trends in judicial review of Covid-19 measures. For this reason, however, the study does not consider rulings where courts declared the controversy moot, or inadmissible - failing to reach a decision on the merit, and setting aside the case on purely procedural grounds (such as lack of standing or termination of the controversy).

Freedom of religion and church closures

Freedom of religion is a cherished right in both the US and the EU - even though the religious freedom jurisprudence on the two sides of the Atlantic has traditionally differed with regard to secularism and public display of faith.⁵² The First Amendment to the US Constitution famously states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”. Article 10 of the EU Charter of Fundamental Rights and Article 9 ECHR proclaim with identical wording that “Everyone has the right to freedom of thought, conscience and religion. This right includes [...] freedom, either alone or in community with others and in public or private, to manifest religion or belief, in worship, teaching, practice and observance”. Moreover, important free exercise provisions have been historically enshrined in state constitutions in both Europe and the US.⁵³

During Covid-19, however, to mitigate the spread of the pandemic state authorities in the EU and the US introduced church closures prohibiting the gathering of people in places of worship. While such measures were taken on the understanding that in places

50 See generally also Alec Stone Sweet & Jude Matthews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press 2019).

51 See already Mauro Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* (Giuffrè 1972) (discussing procedural mechanisms of judicial review of legislation in comparative perspective).

52 See Susanna Mancini, ‘The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty’ (2010) 6 *European Constitutional Law Review* 6.

53 See e.g. Virginia Declaration of Rights (1776), Section 16, which is now incorporated as Article I, Virginia Constitution (1971); and French Declaration of the Right of Men and Citizen (1789), Article 10, which is now incorporated in Preamble, French Constitution (1958).

of worship individuals are at close contact, and often sing, hence increasing the spread of Covid-19, church closures significantly restricted the free exercise of religion. This led to a number of constitutional challenges against these non-*facere* measures, making the issue of church closures, and prohibition to access places of worship one of the most litigated matters during the pandemic, particularly in the US. In this field, apex courts have embraced an incremental approach, initially deferring to governments' decisions, but subsequently tightening their scrutiny as the pandemic continued, to protect fundamental constitutional rights.

In the US, constitutional challenges against church closures mostly occurred at the federal level. In May 2020, the US Supreme Court validated church closures imposed by the states of California and Nevada in several 5-to-4 rulings, namely *South Bay United Pentecostal Church v. Newsom (South Bay I)*⁵⁴ and *Calvary Chapel v. Sisolak*.⁵⁵ In *South Bay I*, in particular, Chief Justice Roberts emphasized that “the precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement”,⁵⁶ and citing precedents, stated that the “Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States”, who enjoy wide latitude in areas fraught with medical and scientific uncertainties.⁵⁷ This original stance of the US Supreme Court also matched the position taken in the early phase of the pandemic by state Supreme Courts, e.g. in Oregon.⁵⁸

Nevertheless, as the pandemic continued, the Supreme Court enhanced its scrutiny and eventually in several 6-to-3 rulings, *Roman Catholic Diocese of Brooklyn v. Cuomo*,⁵⁹ *South Bay Pentecostal Church v. Newsom (South Bay II)*⁶⁰ and *Tandon v. Newsom*,⁶¹ invalidated subsequent church closure orders or prohibition of at home religious gathering imposed by the states of California and New York as in breach of the US Constitution First Amendment. In particular, in *South Bay II*, delivered in February 2021, Chief Justice Roberts reaffirmed the deferential view he had articulated in *South Bay I*⁶² but simultaneously held that “the Constitution also entrusts the protection of the people’s rights to the Judiciary.”⁶³ As such, the Chief Justice pointed out how the state’s ongoing prohibition to access places of religious worship reflected an “insufficient appreciation or consideration of the interests at stake” and conclusively changed his vote, holding that: “Deference, though broad, has its limits.”⁶⁴ Again, the latest stance of the federal

54 590 U.S. ___ (2020).

55 591 U.S. ___ (2020).

56 590 U.S. ___ (2020) (Roberts C.J. concurring) at 2.

57 590 U.S. ___ (2020) (Roberts C.J. concurring) at 2 (internal citations omitted).

58 See *Elkhorn Baptist Church v Brown*, 366 Or. 506, 12 June 2020.

59 592 U.S. ___ (2020).

60 592 U.S. ___ (2021).

61 593 U.S. ___ (2021).

62 See supra note ___.

63 592 U.S. ___ (2021) (Roberts C.J. concurring) at 2.

64 *Ibid*.

judiciary also spilled over at state level, as witnessed by 2021 and 2022 rulings of the Supreme Courts of Wisconsin⁶⁵ and Louisiana⁶⁶ invalidating Covid-19-related restrictions on access to churches on religious freedom grounds.

Along a similar line, courts in the EU have initially upheld church closures imposed on public health motives - but here too, judicial scrutiny of Covid-19-related *non facere* measures has intensified overtime. For example, the Belgian Council of State (Conseil d'Etat / Raad van State) initially rejected in May 2020 challenges against church closures,⁶⁷ but later in December 2020 it ruled that restrictions were disproportionate and struck them down.⁶⁸ Similarly, the German Constitutional Court (Bundesverfassungsgericht) ruled in April 2020 that a state regulation banning all religious gatherings was compatible with the German Basic Law,⁶⁹ but quickly reversed itself and ruled that the prohibition was overly broad and had to be made more proportionate, at least by foreseeing exceptions.⁷⁰

An interesting evolution emerges also from the case law of the French Council of State (Conseil d'Etat) - with shifts from a more deferential to a stricter scrutiny in every wave of the pandemic. As will be pointed out also in the next sub-section, in the first wave of the pandemic in Spring 2020, the court initially upheld lockdown measures imposed by the government,⁷¹ but subsequently required greater proportionality in limiting access to religious establishments.⁷² Similarly, during the second wave of the pandemic in November 2020, the court first ruled that a complete ban on religious services was permitted,⁷³ but subsequently changed its approach, and required the government to exercise greater proportionality in restricting freedom of religion and access to churches.⁷⁴ In particular, the French Court emphasized how the limitations on access to places of worship had “un caractère disproportionné au regard de l’objectif de préservation de la santé publique et constitue ainsi, eu égard au caractère essentiel de la composante en cause de la liberté de culte, une atteinte grave et manifestement illégale à cette dernière.”⁷⁵ Finally, again, in March 2021 the court upheld restrictions on religious gatherings,⁷⁶ suggesting a shifting approach to restrictions in light of the evolving sanitary emergency.

65 James v Heinrich, 397 Wis.2d 517, 11 June 2021.

66 State v. Spell, 339 So.3d 1125, 13 May 2022.

67 Conseil d'Etat (Be.), Suens et al, no. 247.674, May 28, 2020.

68 Conseil d'Etat (Be.), Congregation Yetev et al, no. 249.177, December 8, 2020. See also Conseil d'Etat (Be.), no. 249.314 (A. 232.469/AG-149), 22 December 2020.

69 BVerfG (Ger.), Judgment of 10 April 2020, 1 BvQ 28/20; and Judgment of 10 April 2020, 1 BvQ 31/29.

70 BVerfG (Ger.), Judgment of 15 April 2020, 1 BvR 828/20; and Judgment 29 April 2020, 1 BvQ 44/20.

71 Conseil d'Etat (Fr.) 22 March 2020, Decision No. 439674.

72 Conseil d'Etat (Fr.) 18 May 2020, Decision No. 440366.

73 Conseil d'Etat (Fr.) 7 November 2020, Decision No. 445825.

74 Conseil d'Etat (Fr.) 29 November 2020, Decision No. 446930, No. 446941, No. 446968, No. 446975.

75 Ibid par 20.

76 Conseil d'Etat (Fr.). 29 March 2021, Decision No. 450893.

Free movement and stay-at-home orders

Free movement is an important right - especially in federal unions of states like the EU and the US.⁷⁷ In the EU, Article 45 of the EU Charter of Fundamental Rights, which is identical to Article 20(2) Treaty on the Functioning of the EU, states that “every citizens of the Union has the right to move and reside freely within the territory of the Member States”. In the US, otherwise, a constitutional right to inter-state travel has long been implicitly recognized by the US Supreme Court in the structure of the US Constitution.⁷⁸ Moreover, free movement is an important human right within the states.⁷⁹ In fact, freedom of movement is the logical precondition to the exercise of a number of other constitutional rights, from the right to peacefully assembly,⁸⁰ to the freedom to conduct a business.⁸¹

One of the most widespread policies adopted by public authorities in response to Covid-19, however, has been the introduction of lockdowns or stay-at-home orders, which prohibited individuals from leaving their domiciles, except for a limited set of enumerated purposes (including accessing essential services, such as hospitals or groceries). In fact, most nations worldwide also introduced travel bans and border closures, limiting inter-state movement. Connected to states’ stay-at-home orders were also other non-*facere* measures, such as prohibition of public gatherings, and business closures forcing non-essential economic operators to shut down. Given the significance of these measures, multiple challenges have been raised against lockdown orders, prohibition of public gatherings and business closures. The outcome of these judicial reviews however is mixed. In many cases courts have upheld the measures under review. Yet, the judiciary has not been insensitive to individual rights arguments, and have occasionally limited public health restrictions imposed by executives, especially when these were disproportionate, or did not rely on legislative authority.

For example, challenges against Covid-19 restrictions, including nation-wide lockdown measures, business closures for hospitality places, and curfews were rejected in the EU by apex courts in Bulgaria,⁸² France,⁸³ Germany,⁸⁴ Ireland,⁸⁵ Portugal,⁸⁶ Slovakia⁸⁷ and

77 See Francesca Strumia, ‘Citizenship and Free Movement: European & American Features of a Judicial Formula for Increased Comity’ (2006) 12 *Columbia Journal of European Law* 713.

78 See *Saenz v. Roe*, 526 U.S. 489 (1999).

79 See e.g. Art 16 Const. Italy (stating that every citizen can move and reside freely in every part of the national territory, except for the limitations that the law may introduce in a general way for reasons of health or safety).

80 Compare Art 12 EU Charter of Fundamental Rights and Art 11 ECHR (freedom of assembly) with US Const, First Amend (right of the people peaceably to assembly).

81 See Art 16 EU Charter of Fundamental Rights.

82 Constitutional Court (Bg.), 23 July 2020, No. 7/2020.

83 See e.g. Conseil d’Etat (Fr.), 8 December 2020, Decision No. 446715.

84 BVerfG (Ger.), Judgment of 5 May 2021, 1 BvR 781/21.

85 Supreme Ct (Ie.), *O’Doherty & Waters v. Minister for Health, Ireland and Attorney General*, [2022] IESC 32, 5 July 2022

86 Tribunal constitucional (Pt.), 27 May 2021, Acórdão 352/2021.

87 Constitutional Court (Slovakia), 14 October 2020, Case PL.ÚS 22/2020-104.

Slovenia.⁸⁸ In such cases, the restrictive measures were held necessary and proportionate to deal with the health situation. Similarly in the US, the Supreme Courts of several states - including Connecticut,⁸⁹ Florida,⁹⁰ Massachusetts,⁹¹ New Mexico,⁹² North Dakota,⁹³ Pennsylvania,⁹⁴ and Washington⁹⁵ - rejected constitutional challenges against executive emergency decrees banning public gatherings, and ordering business closures.

However, in the US, the Supreme Courts of Wisconsin and North Carolina struck down in executive orders restricting capacity at hospitality places,⁹⁶ or forcing business closures.⁹⁷ Similarly in Europe, courts upheld challenges to business closures in Czechia⁹⁸ and Latvia,⁹⁹ while restrictions on accessing elderly care facilities were declared invalid in Finland.¹⁰⁰ At the same time, the Austrian Constitutional Court (Verfassungsgerichtshof) delivered a series of ruling at the start of the pandemic upholding constitutional challenges to restrictions to free movement and business closures on the argument that contested measures had been adopted in breach of the principle of legality.¹⁰¹ This provided guidelines to public authority, subsequently restrictions were better justified, and the court rejected later challenges.¹⁰²

Moreover, the ECtHR ruled in 2022 in *Communauté Genevoise d'Action Syndicale v. Switzerland* that a blanket prohibition against trade unions rallies imposed in response to Covid-19 constituted a breach of the right to peacefully assembly protected by Article 11 ECHR.¹⁰³ (This case is under appeal before the ECtHR Grand Chamber). On the merits, the ECtHR acknowledged “la menace que représente le coronavirus pour la société et la santé publique.”¹⁰⁴ However, it held that the state measure under review did not pass the proportionality test. As the ECtHR pointed out: “à la lumière de l'importance de la liberté de réunion pacifique dans une société démocratique, et en particulier des thématiques et des valeurs que l'association requérante défend en vertu de ses statuts, du caractère général et de la durée considérablement longue de l'interdiction des manifestations publiques entrant dans le champ des activités de l'association requérante,

88 Constitutional Court (Slovenia), 27 August 2020, No. U-I-83/20-36.

89 *Casey v. Lamont*, 338 Conn. 479, 29 March 2021.

90 *Ambramson v. De Santis*, 2020 WL 3464376, 25 June 2020.

91 *Desrosiers v. The Governor*, 486 Mass. 369, 10 December 2020.

92 *Grisham v. Reeb*, 480 P.3d 852, 5 November 2020; and *Grisham v. Romero*, 483 P.3d 545, 15 February 2021.

93 *State v. Riggin*, 959 N.W.2d 855, 20 May 2021.

94 *Friends of Danny Devito v. Wolff*, 658 Pa. 165, 13 April 2020.

95 *In the matter of the Recall of Jay Inslee*, 199 Wash.2d 416, 28 April 2022.

96 *Fabick v. Evers*, 396 Wis.2d 231 (2021), 31 March 2021.

97 *North Carolina Bowling Proprietors Association v. Cooper*, 2020 WL 4369403, 7 July 2020.

98 See Constitutional Court (CZ), 16 February 2021, P.I. US 106/20.

99 See Constitutional Court (Latvia), 11 December 2020, No. 2020-26-0106.

100 See Supreme Administrative Court (Fin.), 7 January 2021, KHO 2021:1.

101 See e.g. VGH (At.), 14 July 2020, judgment n. G202/2020 et.al.; 14 July 2020, judgment n. V363/2020.

102 See e.g. VGH (At.), 24 June 2021, judgements n. V592/2020, V593/2020; 17 March 2022, judgement No. V294/2021.

103 ECtHR, App. No. 21881/20, judgment of 15 March 2022.

104 *Ibid.* para 91.

ainsi que de la nature et de la sévérité des sanctions prévues, que l'ingérence dans l'exercice des droits protégés par l'article 11 n'était pas proportionnée aux buts poursuivis."¹⁰⁵

With regard to stay-at-home orders, moreover, another analogous comparative pattern emerging both in the US and the EU during the pandemic is the policing of executive-legislative relations, with courts requiring legislation (as opposed to executive orders) to restrict free movement. For instance, at US state level the Supreme Courts of Wisconsin¹⁰⁶ and Michigan¹⁰⁷ invalidated Covid-19 emergency executive action and compelled the governor to obtain specific statutory authorization from the legislature to impose Covid-19 restrictions. In particular, the Michigan Supreme Court ruled that the Emergency Power of the Governor Act, a statute used by the state governor to impose Covid-19-related restrictive orders, violated the state constitution's non-delegation principle, which prohibits the legislature from delegating its powers to the executive. Similarly, in Spain the Constitutional Court (Tribunal constitucional) ruled in July 2021 that the lockdown rules imposed by the government through a state of alarm run afoul of the Spanish Constitution, as a restriction of fundamental rights ought to have rather been based on a state of emergency - which requires parliamentary approval.¹⁰⁸ Moreover, along a similar line, courts in France,¹⁰⁹ Italy¹¹⁰ and Portugal¹¹¹ quashed restrictive measures adopted by local or regional authorities, holding that only the national legislature had the constitutional power to restrict fundamental rights.

Personal liberty and vaccine mandates

Personal liberty and autonomy underpin the entire constitutional edifice of the American and European legal systems. Constitutionalism, in its liberal conception, departs from the understanding that individuals enjoy a series of inalienable rights, which the state simply recognizes, and as such creates limitation on governmental powers to preserve individual freedoms.¹¹² Given the centrality of the idea of personal liberty to constitutional democracy, a right to personal freedom and autonomy is not explicitly codified in the US Constitution - but one finds it in Article 6 EU Charter of Fundamental Rights, Article 5 ECHR and in some influential state constitutions.¹¹³ Moreover, several constitutions include provisions on the basis of which, for instance, no one can be

¹⁰⁵ Ibid.

¹⁰⁶ Wisconsin Legislature v. Palm, 391 Wis.2d 497, 13 May 2020.

¹⁰⁷ Midwest Institute of Health v Governor, 506 Mich. 332, 2 October 2020.

¹⁰⁸ Tribunal constitucional (Sp.), 14 July 2021, No. 148/2021.

¹⁰⁹ Conseil d'Etat (Fr.) 17 April 2020, No. 440057.

¹¹⁰ Corte costituzionale (It.), 12 March 2021, sentenza n. 37.

¹¹¹ Tribunal constitucional (Pt.), 31 July 2020, Acórdão 424/2020.

¹¹² See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Knopf 2005).

¹¹³ See Basic Law Germany (1949) art. 2 (stating that "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law").

subjected personal duties, and specifically medical treatments, against his/her will, except when a statute so provides within the limit of the respect of human dignity.¹¹⁴

To address and prevent the spread of Covid-19, however, public authorities in liberal-democratic countries have introduced a number of *facere* measures, imposing on individuals specific actions - from the obligation to wear masks, to mandatory health tests, to compulsory vaccinations, when anti-Covid-19 vaccines became widely available in early 2021. Such mandates were moreover backed up by sanctions, either in the form of fines, or even suspension or termination of employment in case of violation. As such, it is unsurprising that several constitutional challenges have been raised against these *facere* measures, both in the US and the EU. And when reviewing this *facere* measure US and EU courts have parted ways, revealing diverging perceptions of the role of experts.

With regard to face mask mandates, courts in Europe upheld school mask requirements in Austria,¹¹⁵ Belgium¹¹⁶ and France,¹¹⁷ which also rejected challenges against mask mandate in public places.¹¹⁸ In the US, instead, while there was much litigation on the topic, few rulings are available. Most challenges against mask mandates were declared moot, because by the time cases reached apex courts, mask mandate had been lifted due to the evolving sanitary conditions. So the US Supreme Court never ruled on the matter.¹¹⁹ However, in one case dealing with the obligation for children to wear Covid-19 masks in schools, the Supreme Court of Pennsylvania did rule that the order imposed by the state Department of Health was unconstitutional *ab initio*.¹²⁰

On the contrary, a larger volume of lawsuits surrounded the introduction of vaccine mandates. In the EU, the (so far) only Covid-19 related ruling of the ECJ focuses precisely on this matter. In *Roos*,¹²¹ the ECJ General Court was asked to rule on the legality of a European Parliament (EP) decision requiring its members to show a Covid-19 certificate to access the legislature's building. A Covid-19 certificate could be obtained through vaccination or testing. The ECJ rejected the legal challenge and upheld the EP mandate. (This case is under appeal). Similarly, the ECtHR Grand Chamber in *Vavříčka and others v. Czech Republic* - a case delivered during Covid-19, which however con-

114 See e.g. Const Italy (1948) art. 32(2) (stating that “No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person”).

115 VGH (At.), 10 June 2021, judgement n. V35/2021-7.

116 Conseil d’Etat (Be.), 4 September 2020, no. 248.213.

117 Conseil d’Etat (Fr.), 25 January 2021, No. 448169.

118 Conseil d’Etat (Fr.), 11 January 2022, No. 460002.

119 But see *Health Freedom Defense Fund v. Biden*, 599 F. Supp. 3d 1144 (U.S. District Court, M.D. Fla., Apr. 18, 2022) (federal district court judge striking down the mask mandate imposed by the Biden administration on commercial flights).

120 *Corman v. Acting Secretary of the Pennsylvania Department of Health*, 266 A.3d 452, 23 December 2021.

121 ECJ, *Joined Cases T-710/21, T-722/21 and T-723/21, Roos and others vs. European Parliament*, judgment of 27 April 2022.

cerned a mandatory vaccination policy for children before the pandemic - held that the vaccine mandate did not violate Article 8 ECHR, which protects a right to private and family life.¹²² Moreover, with the exception of Slovenia,¹²³ vaccines mandates were upheld by apex courts in every EU state in which they were challenged, including Austria,¹²⁴ France,¹²⁵ Germany,¹²⁶ Greece,¹²⁷ and Italy.

In Italy, in particular, the Constitutional Court (Corte Costituzionale) in 3 connected rulings delivered in January 2023¹²⁸ upheld as fully compatible with the Italian Constitution the legislative requirement for personnel in the medical, education and security sectors, as well as for elderly citizens, to undergo compulsory vaccination. While the failure to vaccinate would result for professionals in temporary suspension of work, with no pay, and for the elderly in an administrative fine, the Court found that the decision to impose a vaccine mandate was motivated by social solidarity obligations derived from the Constitution's right to health, and heavily relied on scientific expertise to justify its conclusions. In particular, the Italian Constitutional Court emphasized how the vaccine mandate introduced by Parliament stood "within an area of scientific credibility, in light of the best knowledge reached at that historical moment, as defined by the medical-scientific authorities institutionally set up to make that determination."¹²⁹ The Court acknowledged that "medical-scientific knowledge is by its nature transitory"¹³⁰ as it develops when new evidence is found, but underlined that *rebus sic stantibus* the vaccine mandate was not unreasonable as the legislature based its decision on "scientific data - made available by the authorities in the field, which cannot be substituted by different sources, often by self-proclaimed 'experts' in the field."¹³¹

This approach contrasts instead with that of the US Supreme Court. Since the introduction of Covid-19 vaccines, the US Supreme Court was asked to review both state, and federal mandates, applying both to medical professionals only, to the military, and to a broader set of workers. With regard to state mandates, the court rejected on procedural grounds challenges against laws adopted by Maine and New York.¹³² In particular, in 2021, in *Does v. Mills*,¹³³ the US Supreme Court with a 6-3 majority refused on procedural grounds to grant injunctive relief in a challenge raised against a vaccine mandate for health workers imposed by the state of Maine. But in a strongly worded 122 ECtHR, *Vavřička and others v. Czech Republic*, App. nos. 47621/13 and 5 others, judgment of 8 April 2021, (GC)

123 Constitutional Court (Slovenia), 29 November 2021, Decision No. U-I-210/21.

124 VGH (At.), 23 June 2022, judgement G37/2022, V137/2022-11.

125 Conseil d'Etat (Fr.), 18 January 2022, Decision No. 457879; 28 January 2022, Decision No. 457879; and 14 February 2022, Decision No. 460891.

126 BVerfG (Ger.), 1 BvR 2649/21, Judgment 27 April 2022.

127 Council of State (Greece), Decision n. 133/2021, 29 June 2021.

128 Corte Costituzionale (It.), sentenza 14/2023, sentenza 15/2023, sentenza 16/2023.

129 Corte Costituzionale (It.), Sentenza 14/2023, para 8.2 (my translation).

130 Ibid (my translation).

131 Ibid, par 11 (my translation).

132 See *Dr. A. v. Hochul*, 595 U.S. ___ (2021); and *Dr. A. v. Hochul*, 597 U.S. ___ (2022).

133 595 U.S. ___ (2021).

dissent 3 justices (Gorsuch, Thomas, Alito) made clear that they viewed the rule as unconstitutional because it did not allow for a religious exemption, and questioned the scientific evidence that the state relied on for its vaccine mandate. In their view, “if human nature and history teach anything it is that civil liberties face grave risks when governments proclaim indefinite state of emergency;”¹³⁴ and Maine’s vaccine mandate, in failing to include religious exemptions, constituted “a serious error.”¹³⁵

With regard to federal mandates, the US Supreme Court upheld narrow mandates imposed on the military and the medical professionals. In *Austin v. Navy Seals*,¹³⁶ the US Supreme Court, with a 6-3 majority, refused to interfere with the decision of the US Secretary of Defense to require active military personnel to vaccinate. But the court did so “for a simple overarching reason [that ...] the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces”,¹³⁷ and again over the strongly worded dissent of 3 justices who found the vaccine mandates in breach of the soldiers’ right to religious freedom. Similarly, in *Biden v. Missouri*,¹³⁸ the US Supreme Court in a 5-to-4 ruling held that the vaccine mandate for staff at healthcare facilities was not ultra vires, but four dissenters vigorously objected, stating that the federal government had no such power.

Crucially, in the 2022 landmark case *National Federation of Independent Business (NFIB) v. Department of Labor, Occupational Safety and Health Administration (OSHA)*,¹³⁹ the Supreme Court struck down 6-3 the OSHA’s mandate for workers at private businesses employing 100 staff to vaccinate or test - a vaccine requirement which applied to almost 100 million US citizens. While the Court reached its conclusion on statutory grounds, holding that OSHA as an administrative agency did not have the power to decide on major questions which were not specifically assigned to it by Congress, the ruling effectively nullified the federal vaccination mandate thus thwarting the national effort to increase Covid-19 vaccinations numbers. In a strongly voiced dissent, however 3 justices (Sotomayor, Breyer, Kagan) lambasted the majority for disregarding scientific evidence, and causing a severe public health risk. As they pointed out, “the majority, in overturning [OSHA’s] action, substitutes judicial diktat for reasoned policymaking”¹⁴⁰ and perversely deprives the administration of the power to address “one of the gravest workplace hazards in the agency’s history.”¹⁴¹ Ultimately, as the dissenters emphasized, “[u]nderlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the Pres-

134 Ibid (Gorsuch J. dissenting) at 6-7.

135 Ibid at 8.

136 595 U.S. ___ (2022).

137 Ibid (Kavanaugh J. concurring) at 1.

138 595 U.S. ___ (2022)

139 595 U.S. ___ (2022).

140 Ibid (Breyer, Sotomayor and Kagan J.J. dissenting) at 9.

141 Ibid at 10.

ident authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?”¹⁴²

Evaluating judicial review during a pandemic

The qualitative analysis of the Covid-19 related case law undertaken in section 3 provides evidence to verify the hypotheses advanced in section 2, to identify transatlantic trends, and to evaluate the protection of human rights during a pandemic. As the case law of apex courts dealing with Covid-19-related *non facere* and *facere* measures reveals, some - but not all - of the hypotheses initially put forward are validated in the context of the pandemic. Moreover, EU and US courts have converged in their judicial review of *non facere* measures, but diverged when deciding challenges to *facere* measures. From this viewpoint, therefore, the analysis highlights different forms of balancing risk and resilience in constitutional democracies during a health crisis. As this section suggests, the abovementioned transatlantic patterns can be explained both with the impact of time in emergencies, and with the role of scientific expertise and trust in government decision-making and judicial scrutiny.

Emergency & time

The case law examined in the prior section confirms that, as far as the protection of fundamental rights is concerned, a pandemic generates dynamics which are akin to those of any other emergency. Contrary to the view by Abiri and Guidi that a pandemic is a peculiar type of crisis,¹⁴³ Covid-19 was not fundamentally different than other national security crises. In particular, time played a key role in explaining judicial review - with courts being far more willing to defer to the political branches of government in the early stages of an emergency, albeit within limits. In fact, the analysis of EU and US case law confirms Hypothesis 1 in both systems: while courts usually defer towards political branches of government in the immediate aftermath of an emergency, their scrutiny intensifies as time advances. Moreover, also Hypothesis 2, according to which courts are more sensitive to emergency-related human rights restrictions that apply to everyone (including the judges themselves!) as opposed to specific minority groups only, seems validated in both the EU and the US during Covid-19. While courts upheld many Covid-19 restrictions, they occasionally struck them down when these appeared over-broad.

As the prior section revealed, no major transatlantic difference seems to emerge in

¹⁴² Ibid at 12.

¹⁴³ See Gildad Abiri & Sebastian Guidi, ‘The Pandemic Constitution’ (2021) 60 *Columbia Journal of Transnational Law* 68 (arguing that the pandemic is different from other emergencies).

how courts have reviewed *non facere* restrictions of human rights during the pandemic. In fact, in line with Hypothesis 1, which emphasizes the importance of time in judicial review of emergency measures, courts both in the US and the EU have initially deferred to public health authorities, acknowledging that the political branches of government were in a better position to address a global health emergency. However, courts have subsequently tightened their scrutiny as the pandemic continued. This is most evident in the example of church closures: as cases from the US, Belgium, France, and Germany highlight, top courts have consistently shifted from an initial phase (at the start of the pandemic, or of one of its subsequent waves), when they deferred to orders limiting access to places of worship, to a subsequent phase when the judiciary intensified their judicial review and invalidated public health measures unduly or disproportionately restricting the important constitutional, fundamental rights of freedom of religion.¹⁴⁴

Moreover, the analysis in the prior section also highlighted that courts have not been wholly deferential to *non facere* measures that applied to everyone. This is in line with Hypothesis 2, which underlines how emergency measures with a broad impact tend to receive greater judicial scrutiny than those targeting a specific minority group only. From this point of view, the example of lockdowns, stay-at-home orders and business closures offers some evidence of the validity of Hypothesis 2 in a pandemic. All in all, deferential decisions coexist in both the EU and the US with stricter scrutiny of human rights restrictions.¹⁴⁵ In a plurality of cases courts have upheld public policy measures restricting freedom of movement, the right to travel, freedom to conduct a business and freedom of assembly. However, both in the EU and the US one finds ruling where courts have struck down lockdown-like *non facere* measures, faulting them for being either disproportionate or approved by the executive without proper legislative involvement (or by subnational levels of government).¹⁴⁶

On the contrary, a transatlantic difference seems to be visible in how courts have reviewed *facere* measures introduced during the pandemic - including mask mandates and most notably laws requiring individuals to undergo compulsory Covid-19 vaccinations, when these became available in 2021. Vaccine mandates have been unequivocally upheld in Europe by top national and supranational courts. On the contrary, the US Supreme Court, while falling short of invalidating state vaccine mandates, has struck down the federal vaccine mandates imposed on employers. Admittedly, the divide be-

144 See also Mark Hill, 'COVID-19, Constitutions and the Courts: Evaluating the Impact of Coronavirus Pandemic on Religious Liberty' (2022) 64 *Journal of Church and State* 702, 720; and Georgia Alida du Plessis & Adina Portaru, "Restrictions to Religious Worship during Covid-19: A Bird's-Eye View of Court Decisions from Selected European Countries and the European Court of Human Rights" (2022) 64 *Journal of Church and State* 641.

145 See also Ginsburg & Versteeg (n ___).

146 See e.g. Tania Pagotto, 'La Corte EDU promuove un approccio "olistico" alla Convenzione e accerta la violazione della libertà di riunione avvenuta durante la pandemia' (2023) *Osservatorio costituzionale* 1; William Amberger, 'Between Scylla and Charybdis: The Courts, the Constitution, and Covid-19' (2022) 55 *Indiana Law Review* 113.

tween the EU and US approaches mostly results from a single major US Supreme Court case - *NFIB v. OSHA*, which was technically decided on statutory, rather than constitutional grounds - so a risk of reading too much in the data must be acknowledged. Nevertheless, *NFIB v. OSHA* ended mandatory Covid-19 vaccinations that applied to almost 100 million US citizens - roughly a third of the country's population - so it was extremely consequential. Moreover, US case law reveals that courts have also struck down mask mandates. Hence a transatlantic difference in judicial review of *facere* measures can be identified. This disproves as far as the US is concerned Hypothesis 3, according to which courts defer to technical experts when exercising judicial review.

So why did European and US courts take a similar approach when reviewing *non facere* measures but differed when reviewing *facere* measures? Moreover, what can explain the different stance embraced by apex courts in Europe and the US when reviewing *facere* measures during Covid-19? In other words, why did European courts unanimously uphold vaccine mandates, while US courts did not?

On the one hand, it seems plausible to argue that a transatlantic similarity in judicial review of *non facere* measures can be detected because church closures and lockdowns were the first to be imposed during the pandemic, and so cases challenging Covid-19 prohibitions were the first to be brought in front of courts. This led to the early judicial deference which conventionally operates during the initial phases of an emergency (albeit with limits). Indeed, one can find prominent judicial affirmation for the view that time has been driving judicial responses to emergency. In this regard, US Supreme Court Justice Gorsuch has been explicit in *Roman Catholic Diocese v. Cuomo*, when he explained his support for overruling *South Bay I* as follows: "At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale [for deference] has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. [...C]ourts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain."¹⁴⁷

On the other hand, transatlantic differences can also be explained by deference to medical expertise, or the lack thereof. European courts have trusted medical advice on the importance and safety of vaccines, while the US Supreme Court has shown a certain disregard towards the prevailing scientific evidence and proved willing to strike down vaccine mandates.¹⁴⁸ Judges themselves have been quite explicit on the matter. As the Italian Constitutional Court pointed out, "the evolution of scientific research and the determinations taken by the supranational and national authorities charged to protect

147 *Roman Catholic Diocese* (Gorsuch J., concurring) at 3.

148 See also Anna Katherina Mangold, 'Germany and COVID-19: Expertise and Public Political Deliberation' in Joelle Grogan & Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge 2022) 336.

health play a very significant role.”¹⁴⁹ In fact, the ECJ in *Roos* even took the unusual step to cite in its judgment studies published in leading scientific journals such as the *Lancet* to uphold the EP decision to require a Covid-19 pass to enter the EP.¹⁵⁰ The US Supreme Court’s majority instead has taken a different stance. Justice Gorsuch, in particular, stated in *South Bay II* that “of course we are not scientists, but neither may we abandon the field when government officials with expertise in tow seek to infringe a constitutionally protected liberty.”¹⁵¹ And in *Arizona v. Mayorkas*,¹⁵² he claimed that “[s]ince March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country”¹⁵³ and complained that “[a] leader or an expert who claims he can fix everything, if only we do exactly as he says, can prove an irresistible force”¹⁵⁴ - calling for courts to oppose that trend.

Expertise & trust

Needless to say, there is an intense scholarly debate on what is the right approach courts should take vis-à-vis experts and scientists during a health emergency. In the legal field, some scholars have criticized deference to science,¹⁵⁵ and others have pointed out that during pandemics “[t]he eagerness with which politicians defer to medical experts to find answers--answers that sometimes do not exist--opens the door to technocracy.”¹⁵⁶ In fact, some social scientists and ethicists have questioned the prevailing approach embraced during Covid-19 to “following the science,”¹⁵⁷ challenging the internal functioning of epistemic communities, and emphasizing how often this led to irrational decisions. Nevertheless, on the opposite side of the spectrum, other legal scholars have emphasized how second-guessing of evidence-based public health decisions is also problematic.¹⁵⁸ Moreover, while admittedly scientists were initially uncertain on how best to assess the Covid-19 threat, and respond to it, a number of certainties did emerge later in the pandemic. For instance, there is large scientific consensus on the fundamental importance and safety of Covid-19 vaccines in overcoming the pandemic.¹⁵⁹

149 Corte Costituzionale (It.), Sentenza 15/2023, par 10.3.2 (my translation).

150 ECJ, *Roos* para 230-1.

151 *South Bay II* 592 U.S. ___ (2021)(Statement of Gorsuch J.) at 2.

152 598 U.S. ___ (2023) (declaring moot the litigation on the order adopted during Covid-19 to seal the southern border of the US in order to prevent entry of immigrants and spread of Covid-19).

153 *Ibid* (Statement of Gorsuch J.) at 4.

154 *Ibid* at 6.

155 See e.g. Patricia Popelier et al, ‘The Role of Courts in Times of Crisis: A matter of Trust, Legitimacy and Expertise’, Council of Europe Paper 2020. See also Lord Sumption, ‘COVID-19 and the Courts - Expediency or Law?’ (2021) 137 *Law Quarterly Review* 353 (criticizing government’s restrictions of civil liberties).

156 Abiri & Guidi (n ___) 110.

157 Zeynep Pamuk, ‘Following the Science’ (on file with author)

158 See Posner & Mok (n ___) 1736.

159 See e.g. John Ioannidis, ‘The end of the Covid-19 Pandemic’ (2022) 52 *European Journal of Clinical Investigation* 1.

With that said, how to explain why in the context of vaccine mandates, Hypothesis 3, according to which courts defer to technical experts, is confirmed only in the EU, but disproved in the US? Several justifications - dealing with both structural factors and contingent, ideologically-related, reasons - may play a role here in determining a transatlantic difference on judicial review of *facere* measures.

Firstly, at a structural level, the pandemic may have reinforced pre-existing transatlantic differences on reliance on technocracy, as opposed to democracy, as a legitimate source of decision-making.¹⁶⁰ Because of its history,¹⁶¹ in the European brand of constitutionalism, democracy is more constrained at both national and supranational level by the existence of constitutionally-entrenched independent authorities. Indeed, in the EU and its member states there are several institutions - from the European Commission to national central banks - that exercise important shares of governmental power exclusively on the basis of output legitimacy, i.e. their performance, rather than input legitimacy, i.e. the legitimacy that derives from the electoral process.¹⁶² This is less so the case in the US where ultimately all the power reverts to “we the people”¹⁶³ through the democratic political process.

Secondly, at a contingent level, the pandemic has also led to much greater political polarization in the US than it has in the EU, where distrust towards science has remained at the fringe of the political debate. This is not to deny that of course the existence of Covid-19 scepticism in the EU: the lead challenger of the EU vaccine mandate in the *Roos* case is the Vice Chairman of the far-right European Conservative group in the EP. Nevertheless, admittedly public health decision-making has become much more contentious in the US.¹⁶⁴ Indeed, political scientists have highlighted a remarkable degree of partisanship on Covid-19, with Republican voters sceptical of the virus, and distrustful of the government’s measures to contain it, and Democratic voters fearful of the pandemic, and supportive of public health measures to address it.¹⁶⁵ This dynamic, which is part and parcel of the Republican attack on evidence-based politics led by former President Donald Trump,¹⁶⁶ had dramatic costs. Among others, empirical data revealed that the excess death rate in Republican-majority US counties turned out to be much

160 See also generally Miguel Centeno, ‘The New Leviathan: The Dynamics and Limits of Technocracy’ (1993) 22 *Theory & Society* 307.

161 Christoph Möllers, “‘We are (afraid of) the people’: Constituent Power in German Constitutionalism’ in Martin Loughlin & Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007) 87.

162 See generally also Vivien Schmidt, *Europe’s Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020).

163 US Const, Preamble.

164 See also Stephen Macedo, ‘Covid and Democratic Dysfunction’ (on file with author).

165 See Shana Gadarian et al, ‘Partisanship, health behaviour and policy attitudes in the early stages of the COVID-19 Pandemic’ (2021) *PloS ONE*.

166 See Mark Graber, ‘COVID-19, the United States and Evidence-Based Politics’, in Joelle Grogan & Alice Donald (eds), *Research Handbook of Law and the COVID-19 Pandemic* (Routledge 2022) 72, 74; and generally Lawrence Rosenthal, *Empire of Resentment: Populism’s Toxic Embrace of Nationalism* (New Press 2020).

greater than that in Democratic-majorities ones - as residents refused to follow public health guidance and particularly to vaccinate.¹⁶⁷

At the same time, polarization, partisanship, and the Republican populist distrust towards science and experts inevitably spilled over on the US judiciary, at both state and federal level - and this helps explain different judicial patterns in the US and Europe. Whereas in Europe state courts' judges are career officials, hired through a technical state competition for life, and constitutional courts judges are appointed through processes which are largely non-partisan, in most US states judges are elected. Therefore, US state judges are directly influenced by the political competition between the Democratic and Republican parties. In fact, one should be aware that, e.g., when the Supreme Courts of Wisconsin, Michigan, Pennsylvania and North Carolina struck down Covid-19-related measures, as discussed in section 3, they all had majorities of judges elected as Republicans.

At the US federal level, instead judges are appointed for life by the US President with the advice and consent of the US Senate, and thus are reflective of the political preferences of the executive and legislative majorities nominating them. As a result, as Mok and Posner have highlighted, the success-rate of constitutional challenges to public health orders in the US is directly correlated to the partisanship of courts, with Republican-appointed federal judges much more willing to strike down Covid-19 measures than Democratic-appointed federal judges.¹⁶⁸ Furthermore, partisanship is statistically much more significant in the US Supreme Court than in lower federal district and appeals courts: based on the data that Mok and Posner collected for the period 2020 to 2022, in fact, plaintiffs succeeded in challenging Covid-19 measures 75% of the time before the US Supreme Courts, whereas their success rate in lower courts amounted to just 14,2% on average.¹⁶⁹ The cases examined in this paper, which include rulings delivered after 2022, largely confirm this, with the US Supreme Court boldly striking down several important Covid-19 related measures.

Otherwise, the pandemic jurisprudence of the US Supreme Court must be located in the context of a court that - thanks to the 3 appointments made by President Donald Trump - has become ever more right-wing, and hostile to the administrative state.¹⁷⁰ From this viewpoint, the US Supreme Court decision in *NFIB v. OSHA* striking down the federal vaccine mandate mirrors the stance that the Court's majority has taken against other agencies. In a string of recent rulings, the US Supreme Court has undermined the functioning of the Consumer Financial Protection Bureau (CFPB),¹⁷¹ invalidated the pow-

167 See Lydia Denworth, People in Republican Counties have Higher Death Rates than Those in Democratic Counties, *Scientific American*, 18 July 2022.

168 Mok and Posner (n ___) 1745.

169 Ibid 1742, Table 1.

170 See e.g. Gillian Metzger, 'Foreword: 1930s Redux: The Administrative State under Siege' (2017) 131 *Harvard Law Review* 1.

171 *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ___ (2020).

ers of the Environmental Protection Agency (EPA) to regulate air and water pollution,¹⁷² and uncertainty lingers on the authority of the Food & Drug Administration (FDA) to regulate the approval and market access of pharmaceuticals.¹⁷³ Such rulings have been based on a radical theory, whereby Congress should not delegate powers to administrative agencies on major questions, and have resulted in a full-blown attack against the administrative state.¹⁷⁴ In fact, the Conservative turn in the US Supreme Court is increasingly imperilling the *Chevron* doctrine,¹⁷⁵ which requires courts to defer to the greater expertise of administrative agencies in interpreting legislation. If that were to happen, however, the contingent would become structural, further driving apart the US and EU judiciary, which remains attached to the idea that institutions of knowledge, experts and scientists should be given a due degree of deference as proven by national and supranational cases examined here.

Conclusion

This paper has examined the protection of human rights during Covid-19 in the EU and the US, focusing on judicial review of pandemic-related non-*facere* and *facere* measures. The paper advanced three hypotheses, based on lessons learned from judicial review of emergency measures during national security crises. It hypothesized 1) that courts are more deferential at the beginning of an emergency, but tighten their scrutiny over time; 2) that courts are more attentive to overbroad measures that apply to the entire population; and 3) that courts listen to scientific experts and accept their greater knowledge. The paper tested these hypotheses by considering 303 rulings delivered before 30 June 2023 by the US Supreme Court and the Supreme Courts of the 50 US states, and by the ECJ, ECtHR and apex courts of 25 EU member states. Specifically the paper focused on cases challenging the legality of church closures, stay-at-home orders and masks and vaccines mandates, thus addressing questions of religious freedom, free movement, and personal liberty or autonomy.

As the paper pointed out, a significant convergence exists in the judicial approach of EU and US courts when reviewing non-*facere* measures such as church closure and stay-at-home orders, which confirm the validity of Hypotheses 1 and 2. Both in the EU and the US courts have initially deferred to government's decisions taken in the first stages of the pandemic. However, over time, they intensified their scrutiny and, in particular,

172 *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022) (reducing EPA powers under the Clean Air Act); *Sackett v. EPA*, 598 U.S. ____ (2023) (reducing EPA powers under the Clean Water Act).

173 See *Food and Drug Administration v Alliance for Hippocratic Medicine*, 598 U.S. ____ (2023) (Alito J dissenting).

174 See also Cass Sunstein, 'There are Two "Major Questions" Doctrines' (2021) 73 *Administrative Law Review* 475.

175 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

invalidated measures imposing church closures as incompatible with freedom of religion. Similarly, both in the EU and the US courts have upheld public health restrictions on free movement, freedom of assembly and freedom to exercise a business, but have not refrained from striking down non-*facere* measures which were overblown, or disproportionate.

On the contrary, as the paper pointed out, a remarkable transatlantic divergence seems to exist in the judicial approach of EU and US courts when reviewing Covid-19-related *facere* measures, including mask mandates and especially compulsory vaccinations. In the EU, national and supranational courts have consistently backed up such public health measures, relying on scientific expertise. In the US, on the contrary, courts have invalidated mask mandates, and in *NFIB v. OSHA* the Supreme Court annulled a vaccine mandate that applied to one third of the country's population. As I argued, this decision, while based on statutory arguments, had the result to vilify the prevailing scientific wisdom on the importance of mass vaccination to fight Covid-19, and thus disproves in the US the validity of Hypothesis 3. The opposite approach of EU and US courts on the review of *facere* measures can be due to both structural and contingent reasons. Nevertheless, political polarization and ideological distrust towards science clearly play a key role in the US jurisprudence on Covid-19 - as it does indeed for much of its jurisprudence beyond pandemic-related matters.

Needless to say, this comparative study is based only the dataset reported as Annex I. Since this was created through searches which relied on other, pre-existing database, it is likely that it may be under-inclusive. Indeed, I myself acknowledged finding a handful of extra cases outside the databases, which suggests that the dataset cannot be scientifically hardwired. Moreover, the dataset considers only cases delivered before the cut-off date of 30 June 2023. Because of the procedural mechanisms and timing through which cases are heard by top courts, it is possible that new rulings may well be in the pipeline - particularly for the ECtHR, which is the last to hear cases on any given matter, as plaintiff must first exhaust remedies in state courts before being able to access it.¹⁷⁶ With that said, the abovementioned limitations are typical of empirical research in the social sciences. Moreover, subject to these caveats, the conclusions of this study yield some interesting insights on alternative forms of constitutional approaches to pandemic risks in liberal constitutional democracies. While it is tempting to conclude that the transatlantic divergence in the pandemic jurisprudence is the result of “radicals in robes”¹⁷⁷ in the US, the fact remains that US courts have been more open than European ones to accept greater societal risks in name of defending individual rights - or rather some preferred ones among them, especially freedom of religion.

¹⁷⁶ See also du Plessis & Portaro (n ___) 655 (discussing cases pending before the ECtHR).

¹⁷⁷ Cass Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (Basic Books 2005).

On the contrary, European courts have assessed the proportionality of Covid-19 measures by seeking to better reconcile individual and collective interests. As once again the Italian Constitutional Court pointed out, the right to health has both an individual and a collective dimension which have to be balanced, and “the imposition of a mandatory health treatment is justified in the principle of solidarity that represents the basis of social coexistence.”¹⁷⁸ This approach seems to be in line with the emphasis on resilience, which is at the core of the EU response to the pandemic. Indeed, as the EP pointed out in a recent extensive report on Covid-19, lessons learned and recommendations for the future, “building trust in public institutions and authorities [...] is one of the cornerstones of resilient democratic societies”¹⁷⁹ - and this requires both protecting fundamental rights and strengthening the capacity of institutions to respond to unforeseen events.

While in the US the pandemic has deepened the politicization of public health, and now resulted in a swath of laws passed by Republican states depriving public health authorities of powers to intervene in the event of a next sanitary crisis,¹⁸⁰ the EU has rather taken steps towards a Health Union, seeking greater prevention capacity and preparedness.¹⁸¹ It is to be hoped that we will not experience any time soon another pandemic testing which strategy is best. Certainly however the Covid-19 pandemic exposed alternative approaches to risk and resilience in constitutional democracies based on the rule of law and the protection of human rights, and further research is needed to unearth all the facets of this state of affairs.¹⁸²

178 Corte Costituzionale (It.), Sentenza 14/2023, par 5.1 (internal citations omitted) (my translation).

179 European Parliament resolution of 12 July 2023 on the Covid-19 pandemic: lessons learned and recommendations for the future, P9_TA(2023)0282, para 387.

180 See also David Wallace-Wells, “‘I think we tried. I know we tried’ Interview with Anthony Fauci”, *The New York Times Magazine*, 30 April 2023, 36.

181 European Parliament (n __), para.s 560-586.

182 See also Caroline Bock and Matthias Kettermann, “The Pandemic’s Comparative Impact on Constitutional Checks and Balances”, Horizon Europe REGROUP wp forthcoming.

Annex: Dataset - List of cases

Federico Fabbrini

Table 1: Cases from the US federal Supreme Court

Institution	Case Identification	Topic	Outcome of the challenge
US Supreme Court	South Bay United Pentecostal Church v. Newsom, 140 S.Ct. 1613 (Mem) (2020)	Church Closure	Rejected
	Calvary Chapel Dayton Valley v. Sisolak, 140 S.Ct. 2603 (Mem) (2020)	Church Closure	Rejected
	Little v. Reclaim Idaho, 140 S.Ct. 2616 (Mem) (2020)	Voting	-
	Food and Drug Administration v. American College of Obstetricians and Gynaecologists, 141 S.Ct. 10 (2020)	Abortion	-
	Democratic National Committee v. Wisconsin State Legislature, 141 S.Ct. 28 (Mem) (2020)	Voting	-
	Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63 (2020)	Church Closure	Upheld
	Food and Drug Administration v. American College of Obstetricians and Gynaecologists, 141 S.Ct. 578 (Mem) (2021)	Abortion	-
	South Bay United Pentecostal Church v. Newsom, 141 S.Ct. 716 (Mem) (2021)	Church Closure	Upheld
	Harvest Rock Church, Inc. v. Newsom, 141 S.Ct. 1289 (Mem) (2021)	Church Closure	Upheld
	Tandon v. Newsom, 141 S.Ct. 1294 (2021)	Church Closure	Upheld
	Fulton v. City of Philadelphia, 141 S.Ct. 1868 (2021)	N/A	-
	Alabama Association of Realtors v. Department of Health..., 141 S.Ct. 2485 (2021)	Eviction moratorium	-
	Does 1-3 v. Mills, 142 S.Ct. 17 (Mem) (2021)	Vaccines	Rejected
	Dr.A v. Hochul, 142 S.Ct. 552 (Mem) (2021)	Vaccines	Rejected
	Biden v. Missouri, 142 S.Ct. 647 (2022)	Vaccines	Rejected

Institution	Case Identification	Topic	Outcome of the challenge
	National Federation of Independent Business v. Department of Labor, Occupational Health and Safety Administration, 142 S.Ct. 661 (2022)	Vaccines	Upheld
	Austin v. U. S. Navy Seals 1-26, 142 S.Ct. 1301 (Mem) (2022)	Vaccines	Rejected
	Dr. A. v. Hochul, 142 S.Ct. 2569 (Mem) (2022)	Vaccines	Rejected
	West Virginia v. Environmental Protection Agency, 142 S.Ct. 2587 (2022)	Admin	-
	Arizona v. Mayorkas, 143 S.Ct. 478 (2022)	Asylum & Immigration	-
	Arizona v. Mayorkas, 143 S.Ct. 1312 (Mem) (2023)	Asylum & Immigration	-
	Biden v. Nebraska, 143 S.Ct. 2355 (2023)	Student loans	-

Table 2: Cases from the US states Supreme Courts¹⁸³

Institution	Case Identification	Topic	Outcome of the challenge
Alabama Supreme Court	Munza v. Ivey 334 So.3d 211	Face Masks	Procedural
Alaska Supreme Court	State v. Arctic Village Council, 495 P.3d 313 (2021)	Voting	-
	State R. v. Department of Health & Social Services, 2022 WL 3906704	N/A	
Arizona Supreme Court	Arizonans for Second Chances, Rehabilitation, and Public Safety, 249 Ariz. 396 (2020)	Voting	-
Colorado Supreme Court	In re Interrogatory on House Joint Resolution 20-1006, P.3d 1053 (2020)	Legislative procedure	Rejected
	Griswold v. Ferrigno Warren, 462 P.3d 1081 (2020)	Voting	-
Connecticut Supreme Court	Fay v. Merrill, 338 Conn. 1 (2021)	Voting	-
	Casey v. Lamont, 338 Conn. 479 (2021)	Business closure	Rejected

¹⁸³ This table includes 68 cases. Cases highlighted in green were identified via the first, generalist search on WestLaw using “covid-19 and challenge”. Cases identified in blue were identified via the second, more refined, search on WestLaw using terms and connectors “covid-19, restrictions, challenges”. Cases identified in yellow are cases which were fished through both the two abovementioned searches. As is typical in database searches, this delivered also cases which are fished by mistake: these 14 are identified with a strike-through in the table, and are not relevant.

Institution	Case Identification	Topic	Outcome of the challenge
	CT Freedom Alliance, LLC v. Department of Education, 346 Conn. 1 (2023)	School masks	Moot
Florida Supreme Court	Abramson v. DeSantis, 2020 WL 3464376	Lockdowns	Rejected
Georgia Supreme Court	State v. Federal Defender Program, 315 Ga. 319 (2022)	N/A	
Iowa Supreme Court	Riley Drive Entertainment I, Inc. v. Reynolds, 970 N.W.2d 289 (2022)	Business closures	Moot
Kansas Supreme Court	Kelly v. Legislative Coordinating Council, 311 Kan. 339 (2020)	Lockdowns	Procedural
	Butler v. Shawnee Mission School District Board of Education, 314 Kan. 553 (2022)	Face Mask	Moot
Kentucky Supreme Court	Beshear v. Acree, 615 S.W.3d 780 (2020)	Business closure	Rejected
	Beshear v. Ridgeway Properties, LLC, 647 S.W.3d 170 (2022)	Business closure	Rejected
Louisiana Supreme Court	State v. Spell, 339 So.3d 1125 (2022)	Church closure	Upheld
Maine Supreme Judicial Court	Alliance for Retired Americans v. Secretary of State, 240 A.3d 45 (2020)	Voting	-
	State v. Gaston, 250 A.3d 137 (2021)	N/A	-
Massachusetts Supreme Judicial Court	Goldstein v. Secretary of Commonwealth, 484 Mass. 516 (2020)	Voting	-
	Grossman v. Secretary of the Commonwealth, 485 Mass. 541 (2020)	Voting	-
	Desrosiers v. Governor, 486 Mass. 369 (2020)	Business closure	Rejected
	Shaw's Supermarkets, Inc. v. Melendez, 488 Mass. 338 (2021)	N/A	-
	Committee for Public Counsel Services v. Barnstable County, 488 Mass. 460 (2021)	Prisons	-
	City of Lynn v. Murrell, 489 Mass. 579 (2022)	Business closure	Moot
Michigan Supreme Court	Midwest Institute of Health, PLLC v. Governor of Mich In re Certified Questions From United States District Court, 506 Mich. 332 (2020)	Business closure	Upheld
	House of Representative s v. Governor, 943 N.W.2d 365 (2020)	Lockdown	Rejected / Procedural
Minnesota Supreme Court	Snell v. Walz, 985 N.W.2d 277 (2023)	Lockdowns	Moot

Institution	Case Identification	Topic	Outcome of the challenge
	Buzzell v. Walz, 974 N.W.2d 256 (2022)	Business closure	Rejected
	State v. Bell, --- N.W.2d --- (2023) → DECIDED JULY 2023	Crimimnat	
Missouri Supreme Court	Missouri State Conference of National Association, 607 S.W.3d 728 (2020)	Voting	-
	J.A.T. v. Jackson County Juveni- le Office, 637 S.W.3d 1 (2022)	Criminal procedure	-
	C.A.R.A. v. Jackson County Juvenile Office, 637 S.W.3d 50- (2022)	N/A	
Montana Supreme Court	Matter of A.M.G., 410 Mont. 25- (2022)	N/A	
	State v. Walsh, 411 Mont. 244- (2023)	N/A	
Nebraska Supreme Court	State v. Abernathy, 310 Neb. 880 (2022)	N/A	
New Hampshire Supre- me Court	State v. Mack, 173 N.H. 793 (2020)	N/A	
New Jersey Supreme Court	New Jersey Republican State Committee v. Murphy, 243 N.J. 574 (2020)	Finance	-
New Mexico Supreme Court	Grisham v. Reeb, 480 P.3d 852 (2020)	Business closure	Rejected
	Grisham v. Romero, 483 P.3d 545 (2021)	Business closure	Rejected
	State v. Wilson, 489 P.3d 925 (2021)	Business closure	Rejected
	Pirtle v. Legislative Council Committee of New Mexico Legis- lature, 492 P.3d 586 (2021)	Legislative proce- dure	-
	Anderson v. State, 518 P.3d 503 (2022)	Prison	-
North Carolina Supreme Court	North Carolina Bowling Proprie- tors Ass'n, Inc. v. Cooper III, 2020 WL 4369403 (2020)	Business closure	Upheld
	North Carolina Bowling Proprie- tors Association, Inc. v. Cooper, 375 N.C. 374 (2020)	Business closure	Moot
North Dakota Supreme Court	State v. Rigglin, 959 N.W.2d 855 (2021)	Business closure	Rejected
Ohio Supreme Court	State ex rel. Lichtenwalter v. DeWine, 158 Ohio St.3d 1476 (2020)	Prisons	-
	Highland Tavern, L.L.C. v. DeWi- ne, --- N.E.3d --- (2023) → DECIDED 1 AUGUST 2023	Business closure	Moot

Institution	Case Identification	Topic	Outcome of the challenge
Oklahoma Supreme Court	Greenwood Centre, Ltd. v. Nightingale in and for Tulsa County, 465 P.3d 1269 (2020)	Lockdowns	Rejected / Procedural
	Ritter v. State, 520 P.3d 370 (2022)	Vaccines	Upheld / Procedural
Oregon Supreme Court	Elkhorn Baptist Church v. Brown, 366 Or. 506 (2020)	Church closures	Rejected
Pennsylvania Supreme Court	Friends of Danny DeVito v. Wolf, 658 Pa. 165 (2020)	Business closure	Rejected
	Wolf v. Scarnati 660 Pa. 19 (2020)	Lockdowns	Rejected
	Corman v. Acting Secretary of the Pennsylvania Dept. of Health, 266 A.3d 452	Face masks	Upheld
Tennessee Supreme Court	Fisher v. Hargett, 604 S.W.3d 381 (2020)	Voting	-
Texas Supreme Court	Abbott v. Anti-Defamation League Austin, Southwest, 610 S.W.3d 911 (2020)	Voting	-
	In re Hotze, 627 S.W.3d 652 (2020)	Voting	-
	In re Luther, 620 S.W.3d 715 (2021)	Business closure	Upheld
Vermont Supreme Court	State v. Stearns, 288 A.3d 173 (2022)	N/A	
	In re A.B., (2021)	N/A	
Virginia Supreme Court	Park v. Northam, 2020 WL 5094626	Business closure	Moot
West Virginia Supreme Court	State v. Byers, 247 W.Va. 168 (2022)	N/A	
Wisconsin Supreme Court	Wisconsin Legislature v. Palm, 391 Wis.2d 497	Lockdowns	Upheld
	Fabick v. Evers, 396 Wis.2d 231 (2021)	Lockdowns	Upheld
	James v. Heinrich, 397 Wis.2d 517 (2021)	Church closure	Upheld
Washington (state) Supreme Court of	Colvin v. Inslee, 195 Wash.2d 879 (2020)	Prisons	--
	Johnson v. Inslee, 198 Wash.2d 492 (2021)	Vaccination	Procedural
	Matter of Recall of Inslee, 199 Wash.2d 416 (2022)	Lockdowns	Rejected

Table 3: Cases from the ECJ & the ECtHR

Institution	Case Identification	Topic	Outcome of the challenge
European Court of Justice General Court	T-710/21, T-722/21 and T-723/21, Roos and others vs. European Parliament	Vaccines	Rejected
European Court of Human Rights	App. No. 21881/20, Communauté Genevoise d'Action Syndicale (CGAS)	Lockdowns	Upheld
	App No. 19090/20, Fenech v Malta	Prison	Rejected
	App. nos. 47621/13 et al, Vavříčka and others v. Czech Republic,	Vaccines	Rejected
	App No. 18108/20, R.L.M. v. France	Lockdowns	Inadmissible

Table 4: Cases from the EU member states apex Courts

Institution	Case Identification	Topic	Outcome
Austria Constitutional Court (Verfassungsgerichtshof)	23 June 2022, G37/2022, V137/2022-11	Vaccination	Rejected
	9 April 2022, V35/2022	Vaccination	Rejected
	29 April 2022, V23/2022	Vaccination	Rejected
	17 March 2022, No. V294/2021	Lockdown	Rejected
	3 March 2022, V231/2021-15	Business closure	Rejected
	3 March 2022, V319/2021	Business closure	Rejected
	15 December 2021, G233/2021	Business closure	Rejected
	6 October 2021, V86/2021-19	Business closure	Rejected
	29 September 2021, V155/2021-8	Mask mandate	Rejected
	23 September 2021, V5/2021-7	Business closure	Upheld
	24 June 2021, Judgements n. V592/2020, V593/2020	Business closure	Rejected
	24 June 2021, Judgement n.V2/2021	Church closures	Upheld
	23 June 2021, E 4044/2020	Business closure	Upheld
	23 June 2021, E1702/2021	Business closure	Rejected
	16 June 2021, V34/2021 ua (V34/2021-12, V136/2021-11)	Lockdown	Upheld
	10 June 2021, V35/2021-7	Mask mandate	Rejected
	10 March 2021, V 573/2020	Contact tracing	Upheld
	10 March 2021, Judgement n. V574/2020	School closure	Rejected
	25 February 2021, V570/2020-13	Lockdown	Rejected
	10 December 2020, V 436/2020-15	School closure	Upheld
	1 October 2020, V428/2020	Lockdown	Upheld
	1 October 2020, V392/2020	Business closure	Upheld

Institution	Case Identification	Topic	Outcome
	1 October 2020, V405/2020	Business closure	Upheld
	14 July 2020, V411/2020	Business closure	Upheld
	14 July 2020, V363/2020	Lockdown	Upheld
	14 July 2020, G202/2020 et.al.	Business closure	Upheld
Belgium Council of State (Conseil d'Etat / Raad van Staat)	10 February 2022, decision n°252.960	Business closure	Rejected
	7 January 2022, No. 252.586	Business closure	Rejected
	7 December 2021, No. 252.470	Business closure	Rejected
	26 March 2021, No. 250.236 (A. 233.183/VI-22.009)	Lockdown	Rejected
	2 March 2021, No. 249.948	Lockdown	Rejected
	25 February 2021, No. 249.913 (A. 232.911/VI-21.980)	Lockdown	Rejected
	25 February 2021, No. 249.919	Business closures	Rejected
	24 February 2021, No. 249.904 (A. 232.921/XI-23.428)	Business closures	Rejected
	2 February 2021, No. 249.685	Business closures	Upheld
	31 December 2020, No. 249.400 (A. 230.760/XV-4423)	Lockdown	Rejected
	22 December 2020, No. 249.314 (A. 232.469/AG-149)	Church closure	Upheld
	8 December 2020, No. 249.177	Church closure	Upheld
	7 December 2020, No. 249.163 (A. 232.323/XI-23.313)	Asylum & immigration	-
	13 November 2020, No. 248.918	Business closure	Rejected
	31 October 2020, No. 248.820	Business closure	Rejected
	29 October 2020, No. 248.798	Business closure	Rejected
	28 October 2020, No. 248.781	Business closure	Rejected
	9 October 2020, No. 248.541	Business closure	Upheld
	24 September 2020, No. 248.353	Prison	-
	15 September 2020, No. 248.270	Business closure	Rejected
	4 September 2020, No. 248.213	Face masks	Rejected
	21 August 2020, No. 248.167	Lockdown	Rejected
	17 August 2020, No. 248.151	Lockdown	Rejected
	13 August 2020, No. 248.144	Business closures	Rejected
	5 August 2020, No. 248.124	Mask mandates	Rejected
	3 August 2020, No. 248.108	Mask mandates	Rejected
	3 August 2020, No. 248.109	Mask mandates	Moot
	31 July 2020, No. 248.104	School closure	-
	3 July 2020, No. 247.995	Public contracts	-
	22 June 2020, No. 247.856	Eviction moratorium	-
	14 June 2020, No. 247.790	Lockdown	Rejected
	8 June 2020, No. 247.727	Public contracts	-
	28 May 2020, no. 247.674 ¹⁸⁴	Church closure	Rejected

¹⁸⁴ case found in the literature not in the Covid19 Litigation Database

Institution	Case Identification	Topic	Outcome
Bulgaria Constitutional Court (Конституционен съд на Република България)	23 July 2020, No. 7/2020	Lockdown	Rejected
Croatia Supreme Court (Vrhovni sud Republike Hrvatske)	26 October 2020, Kž-394/2020	Prison	-
Czech Constitutional Court (Ustavni Soud)	16 February 2021, P.I. US 106/20	Business closure	Upheld
Cyprus Supreme Court (Ανώτατο Δικαστήριο Κύπρου)	11 August 2020, No. 96/2020	Lockdown	Rejected
	31 July 2020, Antoniou v. Police	Lockdown	Partially rejected // partially upheld
Finland Supreme Administrative Court (Korkein hallinto-oikeus)	7 January 2021, KHO 2021:1	Lockdown	Upheld
	23 October 2020, KHO 2020:108	Lockdown	Rejected
France Council of State (Conseil d'Etat)	3 June 2022, No. 459711	Voting	-
	25 May 2022, No. 450085	Asylum & immigration	-
	19 May 2022, No. 454621	Vaccination	Rejected
	29 April 2022, No. 450885	Lockdown	Upheld
	23 April 2022, No. 463437	Voting	-
	14 February 2022, No. 460891	Vaccination	Rejected
	28 January 2022, No. 454927	Vaccination	Rejected
	18 January 2022, No. 457879	Vaccination	Rejected
	11 January 2022, No. 460002	Mask mandate	Rejected
	14 December 2021, No. 458876, 458955, 458965, 459037, 459053, 459124	Vaccination	Rejected
	29 October 2021, No. 457520, 457562, 457656, 457679, 457688, 457690, 457704	Testing	Upheld
	6 July 2021, No. 453505	Data collection	Rejected
	11 June 2021, No. 453236	Lockdown	Rejected
	21 May 2021, No. 452294	Business closures	Rejected
	12 May 2021, No. 451130	Business closures	Rejected
	6 May 2021, No. 451455	Lockdown	Rejected
	6 May 2021, No. 451940	Lockdown	Rejected
	30 April 2021, No. 451849, 451991	Schools	-
	19 April 2021, No. 451136	Business closures	Rejected
	14 April 2021, No. 451085	Business closures	Rejected
	10 April 2021, No. 450928	Asylum & immigration	-
	9 April 2021, No. 450884	Lockdown	Upheld

Institution	Case Identification	Topic	Outcome
	1 April 2021, No. 450956	Lockdown	Rejected
	29 March 2021, No. 450893 ¹⁸⁵	Church closures	Rejected
	12 March 2021, No. 450163	Data collection	Rejected
	3 March 2021, No. 449764	Lockdown	Upheld
	3 March 2021, No. 449759	Lockdown	Upheld
	16 February 2021, No. 449605	Business closures	Upheld
	5 February 2021, No. 449081	Prison	-
	28 January 2021, No. 440129	Admin matter	Rejected
	27 January 2021, No. 448732	Business closures	Rejected
	25 January 2021, No. 448169	Face masks	Rejected
	21 January 2021, No. 447878	Asylum & immigration	-
	15 January 2021, No. 441265	Lockdown	Upheld
	10 January 2021, No. 456004	Vaccination	Rejected
	7 January 2021, No. 448029	Lockdown	Rejected
	30 December 2020, No. 448201	Business closure	Upheld
	30 December 2020, No. 440286	Admin matter	-
	24 December 2020, No. 447900	Business closures	Rejected
	23 December 2020, No. 447698	Business closures	Rejected
	22 December 2020, No. 446155	Data protection	Upheld
	16 December 2020, No. 440214	Abortion	-
	11 December 2020, No. 447208	Business closures	Rejected
	8 December 2020, No. 446715	Business closures	Rejected
	29 November 2020, No. 446930, No. 446941, No. 446968, No. 446975	Church closures	Upheld
	27 November 2020, No. 446712	Prison	-
	26 November 2020, No. 439674	Lockdown	Rejected
	13 November 2020, No. 445883	Business closures	Rejected
	7 November 2020, No. 445825	Church closures	Rejected
	23 October 2020, No. 445430	Lockdown	Rejected
	16 October 2020, No. 445102	Business closures	Rejected
	15 October 2020, No. 444425, 444916, 444919, 445029, 445030	Admin	-
	13 October 2020, No. 444937	Data collection	-
	8 October 2020, No. 444741	Prison	-
	25 September 2020, No. 444793	Asylum & migration	-
	6 September 2020, No. 443750	Face masks	Partially upheld
	13 July 2020, No. 441449	Business closures	Rejected
	6 July 2020, No. 441257	Lockdowns	Upheld
	26 June 2020, No. 441065	Data collection	-
	19 June 2020, No. 440916	Data collection	-
	11 June 2020, No. 440439	Business closures	Rejected
	9 June 2020, No. 440809	Business closures	Upheld
	8 June 2020, No. 440701	Face masks	Rejected

¹⁸⁵ case found in the literature not in the Covid19 Litigation Database.

Institution	Case Identification	Topic	Outcome
	18 May 2020, No. 440442	Data collection	-
	18 May 2020, No. 440366 ¹⁸⁶	Church closures	Upheld
	30 April 2020, No. 440250, 440253	Asylum & immigration	-
	17 April 2020, No. 440057	Face masks	Upheld
	22 March 2020, No. 439674 ¹⁸⁷	Lockdown	Rejected
Germany Federal Constitutional Court (Bundesverfassungsgericht)			
	27 April 2022, No. 1 BvR 2649/01		
	8 March 2022, No. 2 BvE 1/22 -, Rn. 1-66		
	10 February 2022, No. 1 BvR 2649/21 -, Rn. 1-23		
	16 December 2021, No. 1 BvR 1541/20 -, Rn. 1-131		
	6 December 2021, No. 2 BvR 2164/21		
	19 November 2021, 1 BvR 781/21 Rn. 1-306		
	20 May 2021, No. 1 BvR 968/21		
	20 May 2021, No. 1 BvR 928/21		
	20 May 2021, No. 1 BvR 900/21		
	5 May 2021, No. 1 BvR 781/21		
	9 April 2021, No. 1 BvQ 39/21		
	16 December 2020, No. 1 BvR 1541/2020		
	5 December 2020, No. 1 BvQ 145/20		
	16 November 2020, 2 BvQ 87/20		
	11 November 2020, 1 BvR 2530/20		
	30 August 2020, 1 BvQ 94/20		
	29 August 2020, 1 BvR 2038/20 -, Rn. 1-5		
	16 July 2020, 1 BvR 1541/20		
	15 July 2020, 1 BvR 1630/20		
	27 June 2020, 1 BvQ 74/20		
	18 June 2020, No. 1 BvQ 69/20		
	16 May 2020, 1 BvQ 55/20		
	13 May 2020, 1 BvR 1021/20		
	29 April 2020, No. 1 BvQ 44/20		
	15 April 2020, No. 1 BvR 828/20, Rn. 1-19		
	10 April 2020, 1 BvQ 31/29 ¹⁸⁸		

186 case found in the literature not in the Covid19 Litigation Database.

187 case found in the literature not in the Covid19 Litigation Database.

188 case found in the literature not in the Covid19 Litigation Database.

Institution	Case Identification	Topic	Outcome
	10 April 2020, 1 BvQ 28/20		
	31 March 2020, No. 1 BvQ 63/20		
Greece Council of State (Συμβούλιο της Επικρατείας)	29 June 2021, Decision n. 133/2021	Vaccination	Rejected
Ireland Supreme Court	O'Doherty & Waters v. Minister for Health, Ireland and Attorney General, 5 July 2022, [2022] IESC 32 ¹⁸⁹	Lockdown	Rejected
	24 January 2022, [2022] IESC 1	School closures	-
Italy Constitutional Court (Corte Costituzionale)	9 February 2023, No 16 ¹⁹⁰	Vaccine	Rejected
	9 February 2023, No. 15 ¹⁹¹	Vaccine	Rejected
	9 February 2023, No. 14 ¹⁹²	Vaccine	Rejected
	11 November 2021, No. 213	Eviction moratorium	Rejected
	22 October 2021, No. 198	Lockdowns	Rejected
	12 March 2021, No. 37	Lockdowns	Upheld
	14 January 2021, No. 4	Lockdowns	Upheld
	23 December 2020, No. 278	Criminal law	Rejected
	24 November 2020, No. 245	Prison	Rejected
Latvia Constitutional Court (Latvijas Republikas Satversmes tiesa)	26 May 2022, Decision No. 2021-33-0103	School closures	Rejected
	10 March 2022, Decision No. 2021-24-03	Business closures	Upheld
	11 December 2020, No. 2020-26-0106	Business closures	Upheld
Lithuania Constitutional Court (Lietuvos Respublikos Konstitucinis Teismas)	2 July 2020, No. 1A-81/2020 of April 10, 2020	Lockdown	Rejected
Netherlands Council of State (Raad van State)	7 February 2021, No. 202004786/1/V3	Prison	-
	17 February 2021, 202004036/1/V3	Asylum & immigration	-
	15 February 2021, 202100952/1/A2	Voting	-
	8 April 2020, No. 201907322/1/V1, 201907435/1, and 202001915/1	Asylum & immigration	-
	7 April 2020, 202001949/1/V3	Asylum & immigration	-
	7 April 2020, 202002016/1/V3	Asylum & immigration	-

¹⁸⁹ case found in the literature not in the Covid19 Litigation Database.

¹⁹⁰ case found in the literature not in the Covid19 Litigation Database.

¹⁹¹ case found in the literature not in the Covid19 Litigation Database.

¹⁹² case found in the literature not in the Covid19 Litigation Database.

Institution	Case Identification	Topic	Outcome
Portugal Constitutional Court (Tribunal Constitucional)	11 October 2021, Acórdão 868/2021 - Processo 937/2020	Business closures	Rejected
	14 July 2021, Acórdão No. 545/2021 - Processo 356/2021	Budgetary matters	-
	27 May 2021, Acórdão 352/2021 - Processo 397/2020	Lockdowns	Rejected
	14 April 2021, Acórdão 216/2021 - Processo 2/2021	Prison	-
	21 December 2020, Acórdão 769/2020	Lockdowns	Rejected
	31 July 2020, Acórdão 424/2020	Regional powers	Upheld
Romania Constitutional Court (Curtea Constituțională a României)	20 October 2021, No. 672	Legislative procedures	Upheld
	8 June 2021, No. 392	Access to court	-
Slovakia Constitutional Court (Ústavného súdu Slovenskej republiky)	14 October 2020, Case PL.ÚS 22/2020-104	Lockdown	Rejected
	13 May 2020, No. PL.ÚS 13/2020-103	Data collection	-
Slovenia Constitutional Court (Ústavného súdu Slovenskej republiky)	29 November 2021, Decision No. U-I-210/21	Vaccination	Upheld
	7 October 2021, Decision U-I-155/20	Business closures	Upheld (but suspension of effects)
	16 September 2021, Decision No. U-I-8/21	School closures	-
	17 June 2021, Decision U-I-50/21	Lockdown	Upheld
	13 May 2021, Decision U-I-79/20	Lockdown	Upheld (but suspension of effects)
	21 December 2020, U-I-473/20-14	School closures	-
	3 December 2020, U-I-445/20-13	School closures	-
	27 August 2020, No. U-I-83/20-36	Lockdown	Rejected
Spain Constitutional Court (Tribunal Constitucional)	2 June 2022, No. 70/2022	Lockdown	Upheld
	27 October 2021, No. 183/2021	Lockdown	Partially upheld
	5 October 2021, No. 168/2021	Legislative procedure	Upheld
	14 July 2021, No. 148/2021	Lockdown	Upheld
	30 April 2020, No. 40/2020	Lockdown	Rejected

Table 5: Cases per jurisdiction (Europe)

Country	Number of cases
Austria	26
Belgium	33
Bulgaria	1
Croatia	1
Czechia	1
Cyprus	2
Denmark	0
Estonia	0
Finland	2
France	68
Germany	29
Greece	1
Hungary	--
Ireland	2
Italy	9
Latvia	3
Lithuania	1
Luxembourg	0
Malta	0
Netherlands	6
Poland	--
Portugal	6
Romania	2
Slovakia	2
Slovenia	8
Spain	5
Sweden	0
<i>TOTAL</i>	208
EU/ECHR	5
<i>TOTAL</i>	211