Within a few months, the US Supreme Court has eliminated the right to terminate a pregnancy, expanded the right to carry a gun, restricted the ability of the US Environmental Protection Agency to reduce power plant emissions, and stopped the Occupational Safety and Health Administration from protecting workers from COVID-19. These cases are likely to have severe and lasting consequences, exposing US residents to higher rates of maternal mortality and gun violence, to more extreme weather and other climate-related risks, and to a more lethal pandemic.

It is no coincidence that, in these cases, the Supreme Court also declared itself unwilling to consider the potential results of its actions. In its major decisions this term, both those involving constitutional rights and those involving the relationship among the government’s 3 branches, the Supreme Court adopted new principles that expressly exclude consideration of medical and public health evidence about the law’s effect on life, health, and safety. Together, these decisions abandon a long-standing and productive exchange between the Supreme Court and the scientific community that substantially advanced the development of the law over the last century.

In Dobbs v Jackson Women’s Health Organization, the Supreme Court’s majority opinion pronounced Roe v Wade “egregiously wrong,” in substantial part because the Court that decided Roe, in balancing the rights of women and the state’s interest in protecting fetal life, “conducted the sort of fact-finding that might be undertaken by a legislative committee.” The opinion criticized Roe for considering how the “mortality rates for abortion” compare with the “mortality rates for childbirth” at particular stages of pregnancy and statements from the American Medical Association and the American Public Health Association on the effect of abortion restrictions on women’s health and well-being.

Similarly, in New York State Rifle & Pistol Association v Bruen, the Supreme Court majority found that Second Amendment rights should not depend on “empirical judgments” about “the costs and benefits of firearms restrictions” or on “evidence” about “crimes committed by individuals with firearms.” In dissent, Justice Stephen Breyer observed that, under its new approach, the Supreme Court “refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be.”

In West Virginia v Environmental Protection Agency and National Federation of Independent Business v Department of Labor, Occupational Safety and Health Administration, both cases involving the relationship between Congress and executive branch agencies, the Supreme Court declined to consider evidence of the potential benefits of agency actions or the costs of inaction. Experts projected the Occupational Safety and Health Administration rule would prevent thousands of COVID-19–related deaths and hundreds of thousands of hospitalizations, but, in disallowing the rule, the Supreme Court stated that “[i]t is not our role to weigh such tradeoffs.” In the climate case, the Supreme Court conceded, but disregarded as irrelevant, that it might be “sensible” to cap carbon dioxide emissions “at a level that will force a nationwide transition away from the use of coal to generate electricity.”

This banishment of “empirical judgments” about the law’s real-world effects fundamentally changes constitutional and administrative law. Previously, in a case asserting that a statute impermissibly infringed on constitutional rights, a court would evaluate the nature of the right implicated and the extent to which it was infringed, the importance of the public goal that the legislature sought to achieve, and whether the infringement was necessary to achieve the goal.
Evidence of the law’s effect on public health could, and often did, inform every step of this analysis, including in Roe and many other landmark decisions of 20th century constitutional law.

In Brown v Board of Education, for example, the decision that inaugurated modern civil rights law, the Supreme Court identified evidence of harm to Black schoolchildren as its core basis for finding that racially segregated public education unconstitutionally infringed on those children’s right to equal protection under the law. In West Coast Hotel Co v Parrish, in determining that the Constitution does not block minimum wage laws and other modern workplace protections, the Supreme Court gave critical weight to the “recent economic experience” of the Great Depression, recognizing that “the denial of a living wage is...detrimental to [workers’] health and well being.”

Under the Supreme Court’s new approach, however, “our Nation’s history and tradition” has become the sole basis for deciding how the Constitution applies to modern problems. In Dobbs, while finding irrelevant the evidence that reproductive rights are essential to women's autonomy, health, and economic freedom, the majority opinion examined what lawmakers and judges understood the term quickening to mean in the 18th and 19th centuries, a time when women could not vote, let alone serve as lawmakers or judges. In New York State Rifle & Pistol Association, while dismissing as immaterial the contemporary effect of the proliferation of increasingly lethal firearms, the majority opinion sifted through centuries of weapons regulations, going back to daggers in medieval England, to determine that New York’s laws regulating the carrying of firearms—laws themselves more than 100 years old—must now be regarded as unconstitutional.

Previously, the Supreme Court understood that, in addressing new problems in an increasingly complex society, the executive and legislative branches of government ought to be afforded significant flexibility. Now, under its new “major questions doctrine,” first set out in the COVID-19 and climate change cases, the Supreme Court overlooks information about the problem at hand to conduct a different type of historical analysis. The Supreme Court asks whether Congress—in statutes that, as with the Occupational Safety and Health Administration and the Environmental Protection Agency, may have been enacted decades earlier—gave “clear authorization” for an agency’s potential action to address the emerging problem. In practice, this standard will often prevent agencies from addressing new challenges even in areas that Congress has charged them with regulating.

The Supreme Court once said that there is no First Amendment right to yell “Fire!” falsely in a crowded theater. Under its new approach to constitutional interpretation, even this may now be an open question, with the answer dependent not on the risk of a stampede but on whether there were a sufficient number of laws in the 1700s imposing similar restrictions on theatergoers.

Congress and state legislatures can attempt to lessen some of the public health effects of this term's cases, including both where the Supreme Court has eliminated constitutional rights and where it has expanded them. But in each instance, the space for effective action has narrowed. Statutory support for fundamental rights depends on legislative majorities and is inherently less stable than constitutional protection. Meanwhile, the ultimate practical effect of the Supreme Court’s new doctrines is to empower the Supreme Court itself, in unpredictable ways, at the expense of the ability of legislators and agency experts to develop solutions to pressing problems.

The irony of the Supreme Court’s backward-looking jurisprudence is its disregard of a vital tradition in US law: legal pragmatism. This approach’s most famous practitioner, Justice Oliver Wendell Holmes Jr, looked to the present-day health of the nation’s democracy in arguing for, and ultimately persuading his colleagues to adopt, an expansive view of the First Amendment that safeguards free political debate. Holmes believed constitutional interpretation should be responsive to evidence of law’s effect on ordinary individuals and their communities. “[O]ur Constitution, Holmes wrote, “is an experiment, as all life is an experiment.”

There are risks to ignoring the results of experiments, just as there are dangers to casting aside scientific understanding. The Supreme Court’s new direction poses a profound threat to the public’s health.
REFERENCES


