

**COVID- 19 ANTI-VAXXERS BEFORE THE COURTS: IS  
THERE A “CULTURE WAR”? A COMPARATIVE STUDY  
BETWEEN THE UNITED STATES AND ITALY**

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## ABSTRACT

The COVID-19 pandemic ignited a heated debate on the mandatory vaccination campaign adopted by different Governments, with anti-vax social movements challenging these measures, especially before the courts. In the United States, relevant cases such as *Does v. Mills* and *Dr. A v. Hochul* have reached the Supreme Court, while in Italy, Decree-Law 44/2021 has been brought before the Italian Constitutional Court. This thesis examines these events in light of the concept of *Culture War* and how anti-vax groups have promoted this *Culture War* through the mobilization of the law. By analyzing social and legal contexts, this thesis provides a critical perspective on the relationship between Law and *Culture War* and the implications of observing the COVID-19 *Culture War* through a legal perspective.

## ACKNOWLEDGMENTS

I may reflect on this thesis in a few years, and several things will have changed: myself, my academic interests, etc. What won't have changed will be the vivid memories of this year spent in Vienna, a city that I didn't particularly love at first but then began to appreciate its beauty, finally understanding that I loved it because of the people I met. I can never forget the "Chill Nights" that allowed me to understand the concept of collective care. I can never forget the walking tour of Vienna at night, by which Vienna understood the "noise" of friendship. I apologize if I do not write down names. That is because the memory is so strong that to add my friends' names to this thesis is to "stop" a time that, for me, must go beyond the limits of these pages. After all, the people I have found here will be the friends I will turn to when darkness knocks on the door again. Thank you to my supervisor, Mathias Möschel. I have realized that a different approach to law, one not focused on legalism, is possible. Finally, thank you to my parents because they believed in me even when I did not believe in myself. They taught me what unconditional love means, and I will never be grateful enough.

# TABLE OF CONTENTS

<b>INTRODUCTION.....</b>	<b>1</b>
<b>CHAPTER 1: THE CONCEPTUAL FRAMEWORK.....</b>	<b>4</b>
1.1. Methodological and terminological clarifications.....	5
1.2. The Definition of Culture War, Its Origin(s) and Its Fallacies .....	8
1.3. Mobilize the People.....	14
1.4. Mobilize the Law: The Start of this Thesis .....	16
1.5. The Research Proposal and The Research Question(s).....	18
<b>CHAPTER 2: A NEW PERSPECTIVE IN THE SCOTUS COVID-19 CASE-LAW? ..</b>	<b>22</b>
2.1. Social Movements During COVID-19: The Children Health Defense and The Informed Consent Network Action.....	22
2.2. Covid-19 Mandatory Vaccination Campaign in the US and.....	25
SCOTUS Decisions Regarding Mandatory Vaccinations.....	25
2.3. An Overview of the Two Cases .....	27
2.3.1. Does v. Mills .....	28
2.3.2. Dr. A v. Hochul.....	30
2.3.3. Besides the arguments and the outcome: A glance at the dissenting opinions .....	31
2.4. Some Concluding Remarks.....	33
<b>CHAPTER 3: THE VACCINATION AS A COROLLARY OF SOLIDARISTIC PRINCIPLE IN THE ITALIAN LEGAL FRAMEWORK.....</b>	<b>35</b>
3.1. The Movimento 3V during COVID-19.....	35
3.2. Compulsory Vaccination in Italy and Italian Constitutional Court decisions.....	37
3.3. The legitimacy of the Decree-Law 44/2021 Before the Constitutional Court .....	40
3.3.1. The Other Side Perspective: The Anti-Vaxxers and the Italian Constitution .....	43
3.4. Some Concluding Remarks.....	45
<b>CONCLUSION.....</b>	<b>47</b>
<b>BIBLIOGRAPHY .....</b>	<b>52</b>

# INTRODUCTION

The COVID-19 Pandemic has been defined as a critical juncture<sup>1</sup> in different fields of study, from sociology to its political and legal implications. In the legal territory, at first, COVID-19 was studied through its effects on the separation of powers and citizens' rights. Subsequently, with the increasing adoption by various governments of the COVID-19 vaccine mandate, legal scholars have questioned the extent to which this can be compatible with sacrificing certain individual rights. However, one element that frequently characterizes the sociological literature on COVID-19 and is still missing in the legal literature is the perspective of looking at COVID-19 vaccination in light of the term Culture War.<sup>2</sup> Specifically, Culture War refers to the clash between different groups that do not share the same ideas and beliefs. Although pockets of society (so-called anti-vaxxers) have also emerged in the past that have sought to oppose mandatory vaccinations, during the COVID-19 pandemic, being an anti-vaxxer has become an identity marker to the extent that it is possible to speak of an anti-vax social identity. This thesis seeks, therefore, to understand how anti-vaxxers have translated this clash with the remaining society into legal territory and what interactions are created between law and Culture War. Indeed, as previously mentioned, the legal scholars have either not looked at the anti-vax phenomenon as a culture war (focusing more on topics such as abortion rights or LGBT rights) or have not reflected on whether normative dimensions can also characterize Culture War. This thesis aims to bridge this gap by attempting to examine both of these perspectives.

The first chapter of this thesis serves as a foundation, offering the methodological tools to understand concepts that are not typically expressed in legal language. It begins by defining the

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<sup>1</sup> See Svea Koch, Niels Keijzer, and Ina Friesen, "COVID-19 as a critical juncture for EU development policy? Assessing the introduction and evolution of "Team Europe" (2024) 46 (4) Journal of European Integration <<https://doi.org/10.1080/07036337.2023.2299928>> accessed 10 March 2024; Arjun Tremblay, "Is the COVID-19 Pandemic a Critical Juncture? Insight from the Study of "New "Multilingual Governance Techniques" (2024) 38 (3) Canadian Journal of Law and Society <10.1017/cls.2023.27> accessed 10 March 2024; John Twigg, "COVID-19 as a Critical Juncture: A Scoping Review" (2020) Global Policy <<https://www.globalpolicyjournal.com/sites/default/files/pdf/Twigg%20-%20COVID%20as%20a%20Critical%20Juncture%20-%20A%20Scoping%20Review.pdf>> accessed 10 March 2024.

<sup>2</sup> See Davison Hunter, *Culture Wars: The Struggle to Define America* (Basic Books, 1991).

so-called Anti-Vax Social Identity and its interaction with the remaining population through the concept of Culture War. Once these two conceptual entities are established, the chapter delves into the modus operandi of the anti-vaxxers, particularly their use of social movements and legal mobilization to wage their culture war.

Then, the second chapter will examine which anti-vax social movements have formed to oppose COVID-19 Vaccination in the United States, focusing on the nonprofit organizations Children Health Defense and Informed Network Action. In addition, the chapter will provide an overview of Supreme Court decisions regarding mandatory vaccination campaigns in the past and the legal framework regarding the COVID-19 mandatory vaccination. Finally, the case of *Does vs Mills* and *Dr A v. Hochul* will be examined, seeking to understand how anti-vaxxers healthcare workers opposed COVID-19 mandatory vaccination before the U.S. Supreme Court and how the latter responded to anti-vaxxers' arguments.

Similarly, the third chapter will focus on the Italian case, first delving into the no-vax social movement Movimento 3V. Secondly, following the methodology of the second chapter, it will examine what principles have guided the decisions of the Italian Constitutional Court in judging vaccine mandates in the past, introducing Decree-Law No. 44/2021, which extended mandatory vaccination to several professional categories. Finally, Judgment No. 14/15/16 of the Italian Constitutional Court, by which the Italian courts responded to the petitions brought forward by anti-vaxxers health care workers, will be examined.

With the analysis of the two case studies concluded, I will try to answer the research questions guiding this thesis:

- i) *How did the anti-vaxxers frame the mandatory vaccination before the Courts?*
- ii) *Did the Courts accept this framing, and what were the reasons for rejecting or accepting the anti-vaxxers?*
- iii) *What role have the courts played in the COVID-19 Culture War?*

However, the answers to these questions will provoke an additional question: Why is COVID-19

vaccination seen in the Culture war framework in the United States, while in Italy, this terminology is absent, even though both countries have similar numbers of non-vaccinated people and (outside the courtrooms) the religious argument was used to oppose COVID-19 vaccination? The response will offer a new perspective on the relationship between the Law and *Culture War*, and in particular, how it is essential to look beyond the religious factor as a catalyst for the *Culture War* and begin to examine how the structure of a legal order can be used to spread a *Culture War*.

## CHAPTER 1: THE CONCEPTUAL FRAMEWORK

The COVID-19 pandemic has significantly changed our lives, with everyday activities turned into state-regulated concessions. Initially, people appeared to have accepted this new reality. However, the situation became more complicated with the introduction of the word "vaccine" in the political and legal discourse, obliging citizens to undergo this medical treatment, with few exceptions for those already suffering from severe illnesses. While some citizens supported mandatory vaccination, a group of people known as "anti-vaxxers" have emerged by *actively opposing widespread immunization efforts*.<sup>3</sup> It is essential to underline that the anti-vax phenomenon is not a product of COVID-19: it often emerged as the rib of the big vaccination moments such as the so-called *Anti-Compulsory Vaccination League* in 1853.<sup>4</sup>

During the COVID-19 pandemic, the anti-vaxxers attempted to legitimize their demands through various forms of dissent. This was evident in the numerous protests across Europe<sup>5</sup> and the 20,000 people rally held in Washington DC, in January 2022.<sup>6</sup> In addition to demonstrations, the anti-vaxxers resorted to legal means to challenge compulsory vaccination before the courts. The number of lawsuits filed in the United States alone was 3,503,<sup>7</sup> while in Europe, the number was 640.<sup>8</sup> It is worth noting that these legal challenges, although not solely characterized by anti-vax sentiment, still provide an idea of how much vaccination was contested in the legal *forum*. Indeed, in addition to Europe and the United States, there were 551 cases in Latin

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<sup>3</sup> Matt Motta and others, "Identifying the prevalence, correlates and policy consequences of anti-vaccine social identity", (2023) 11 (1) Politics Groups, and Identities, 111 <<https://doi.org/10.1080/21565503.2021.1932528>> accessed 18 March 2024.

<sup>4</sup> Dorothy Porter and Roy Porter, "The Politics of Prevention: Anti-Vaccinations and Public Health in Nineteenth England", (1988) 32 Medical History <<https://doi.org/10.1017/S0025727300048225>> accessed 18 March 2024.

<sup>5</sup> Jan D. Walter, "Mandatory COVID vaccines stoke controversy across Europe" (*Health Europe*, 11 June 2021) <<https://www.dw.com/en/mandatory-covid-vaccines-a-controversy-across-europe/a-59742720>> accessed 18 March 2024.

<sup>6</sup> Katie Mettler and others, "Anti-vaccine activism march in D.C. – a city that mandates coronavirus vaccination – to protest mandates" (*The Washington Post*, 24 January 2022) available <<https://www.washingtonpost.com/dc-md-va/2022/01/23/dc-anti-vaccine-rally-mandates-protest/>> accessed 18 March 2024.

<sup>7</sup>These data are from: Jackson Lewis, Vaccine Mandate Litigation <<https://www.jacksonlewis.com/services/vaccine-mandate-litigation>> accessed 20 March 2024.

<sup>8</sup>These data are from: COVID-19 Litigation, Open-Access Case Law Database <<https://www.covid19litigation.org/>> accessed 20 March 2024.



America challenging the measures introduced for the COVID-19 <sup>9</sup>.

Thus, anti-vaccination activism seems to be a social phenomenon that has gained global traction and that, at the same time, can potentially create deep division within societies. In particular, it is precisely because of its unfolding power to destabilize social balances that it is necessary to introduce concepts that do not typically belong to the normative universe but provide a "critical" lens through which examining anti-vax activism in the legal sphere in the following chapters.

## 1.1. Methodological and terminological clarifications

As this thesis deals with literature that is not strictly legalistic in its methodological horizons, this paragraph serves three purposes. First, it introduces the *ubi consistam* of these methodological horizons. Second, it clarifies the vocabulary often used in this work. Finally, it creates this thesis checkpoint since I will return to this chapter when I have to draw my conclusions.

As mentioned previously, pockets of society that have responded negatively to mandatory vaccination have often arisen in significant moments of immunization. During the current COVID-19 pandemic, this trend has continued and has led some scholars to discuss the creation of a new social identity, referred to as the *Anti-Vax Social Identity* (AVSID).<sup>10</sup> This social identity is characterized by a group of individuals who strongly oppose vaccination and reject the notion of mandatory vaccination as a means of safeguarding public health. In a broader sense, social identity refers to *the tendency to define one's sense of self with respect to a broader social group*.<sup>11</sup> Therefore, whether or not to be vaccinated for COVID-19 has become a new

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<sup>9</sup> *ibid.*

<sup>10</sup> Katie Atwell and David T. Smith, "Parenting as Politics: Social Identity Theory and Vaccine Hesitant Communities" (2021) 22 (3) International Journal of Health Governance <10.1108/IJHG-03-2017-0008> accessed 20 March 2024.

<sup>11</sup> Henry Tajfel, "An Integrative Theory of Inter-Group Conflict" in William G. Austin and Stephen Worchel (eds.), *The Social Psychology of Inter-Group Relations*, (CA: Brooks/Cole 2010), 35.

social category to observe the current society.

However, once the anti-vax COVID-19 social identity has been ascertained, a further step is necessary: to examine how this category presents itself with other segments of society. This means understanding the quantitative dimension (i.e., the size and reach of the anti-vax social grouping) and the qualitative dimension (i.e., anti-vaxxer activists' impact on the social fabric). These questions are relevant to our analysis because if it is determined that the anti-vaxxer phenomenon has no significant effect on social interactions, then there would be no need to proceed with further analysis.

Regarding the anti-vaxxer's quantitative aspect, although the data collected by different scholars do not consistently overlap (especially about the constituent criteria that form the *anti-vax homo*), an interesting picture concerning the numerical dimension of the anti-vax population still emerges. In particular, according to a study published in April 2022 in the *National Library of Medicine*,<sup>12</sup> vaccine hesitancy (i.e., the choice to delay or refuse the available vaccines) varies significantly within different countries. For example, Spain had the lowest rate of vaccine hesitancy at 6.22%, while Bulgaria had the highest at 67.20%.<sup>13</sup> Other countries, such as the UK, instead “floated” around 10%.<sup>14</sup> A similar pattern can be seen in different regions of the world, as published in a study in the *Journal of Multidisciplinary Healthcare*.<sup>15</sup> Specifically, while Ethiopia was the “good student” of COVID-19 vaccination acceptance in East and Southern Africa, Zimbabwe, on the other hand, was the “bad” one with 50%.<sup>16</sup> Similarly, in Latin America and the Caribbean, Mexico achieved 88% acceptance.<sup>17</sup>

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<sup>12</sup> Janina Steinert and others “COVID-19 vaccine hesitancy in eight European countries: Prevalence, determinants, and heterogeneity” (2022) 8 (17) *Science Advance* <10.1177/14614448241261945> accessed 20 March 2024.

<sup>13</sup> *ibid*, 1

<sup>14</sup> *ibid*, 4.

<sup>15</sup> Malik Sallam, Mariam Al-Sanagi, and Mohammad Sallam, “A Global Map of COVID-19 Vaccine Acceptance Rates per Country: An Updated Concise Narrative Review” (2022) 15 *Journal of Multidisciplinary Healthcare* <10.2147/JMDH.S347669> accessed 20 March 2024.

<sup>16</sup> *ibid*, 21.

<sup>17</sup> *ibid*.

In addition, in September 2021, in a study published by *Istituto per gli studi di politica internazionale* (ISPI),<sup>18</sup> Germany had 22.2 % of non-vaccinated people for COVID-19. It is important to note that this does not necessarily mean that 22.2% of Germans were anti-vaxxers in 2021. However, it should be pointed out that the German government had started its vaccination campaign against COVID-19 on December 27th, 2020 (renamed then *Vaccine Day*), and, already by December 29<sup>th</sup>, 2020, it had purchased an additional 30 million doses of the *Pfizer Biotech* vaccine.<sup>19</sup> For this reason, the percentage of unvaccinated individuals in Germany cannot be solely attributed to governmental inaction but should be read in light of the anti-vaccination sentiment.

Instead, regarding the qualitative dimension, i.e., the effects that the anti-vaxxers cluster produces in social relations, it is necessary to introduce the notion of polarization, which refers to *losing touch with others who are in (now) distant groups*.<sup>20</sup> In this context, polarization does not only apply to anti-vax groups. Instead, it pertains to COVID-19 vaccination as a polarizing force within societies. Just like the quantitative aspect, polarization follows a wave-like pattern across countries. A study published in the *Carnegie Endowment for International Peace*,<sup>21</sup> showed that the vaccination issue has brought unexpected solidarity among the citizens of Chile despite existing social tensions.<sup>22</sup> On the contrary, in Kenya, the government's handling of the COVID-19 vaccination created a deeper divide between the two main ethnic groups, the Kikuyu and Luo.<sup>23</sup> A similar situation occurred in Brazil where President Bolsonaro's actions caused a

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<sup>18</sup>Matteo Villa, "DATAVIRUS: Quanti sono i "no vax" in Europa?" (*ISPI*, 3 September 2021) <<https://www.ispionline.it/it/pubblicazione/datavirus-quant-sono-i-no-vax-europa-31530>> accessed 20 March 2024.

<sup>19</sup> Barbara Fiammeri and Alberto Magnani "La Germania compra 30 milioni di vaccini extra dote UE, l'Italia no" (*Il Sole 24 Ore*, 29 December 2020) <<https://www.ilsole24ore.com/art/la-germania-compra-30-milioni-vaccini-extra-dote-ue-l-italia-no-ADO1jZAB>> accessed 21 March 2024.

<sup>20</sup> Joan Esteban and Gerald Schneider, "Polarization and conflict: Theoretical and empirical issues", (2008) 45 (2) *Journal of Peace Research*, 134 <<https://www.jstor.org/stable/27640646>> accessed 21 March 2024.

<sup>21</sup> Thomas Carothers and Andrew O'Donohue, "Polarization and the Pandemic" (*Carnegie Endowment for International Peace*, 28 April 2020) <<https://carnegieendowment.org/2020/04/28/polarization-and-pandemic-pub-81638>> accessed 21 March 2024.

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

polarization within society as he attacked state and local offices that imposed lockdowns.<sup>24</sup> However, COVID-19 polarization not only crosses the political field but extends to social media sites like Twitter. As described by the sociologist Giovanni De Nicola, Victor Mambou and Göran Kauermann,<sup>25</sup> people's Twitter statements concerning COVID-19 vaccination can be broadly categorized as "generally pro" or "generally against".<sup>26</sup> However, there are also groups that hold varying degrees of opinions between the two poles mentioned.<sup>27</sup>

The data collected so far suggest two main observations. Firstly, the anti-vaccine social group does not always exhibit the same behavior or intensity of polarization in different contexts. Instances like Spain and Chile have shown that compulsory COVID-19 vaccination did not lead to significant societal divides. In certain situations, instead, COVID-19 vaccination can create divisions in society due to political beliefs or the way the media presents information, leading to significant fractures (specifically, the COVID-19 polarization process in this regard is called *radicalization*). Even though there may be some exceptions, the issue of COVID-19 vaccination continues to be controversial. This raises an important question: what are the consequences of this polarization on society?

## 1.2. The Definition of Culture War, Its Origin(s) and Its Fallacies

It is essential to remember one fundamental aspect while defining *Culture War* and its fallacies. This thesis does not aim to provide new elements within the *Culture War* debate or to criticize how the concept of culture has been developed in different sociological and anthropological studies. Such an approach would extend beyond the scope of my legal studies *habitat*. However, the law is not an isolated system that exists independently of the

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<sup>24</sup> *ibid.*

<sup>25</sup> Giacomo De Nicola, Victor H. Tuekam Mambou, and Göran Kauermann, "COVID-19 and social media: Beyond polarization", (2023) 2 (8) PNAS Nexus <<https://doi.org/10.1093/pnasnexus/pgad246>> accessed 21 March 2024.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*, 1.

social context in which it is applied. Therefore, examining the current COVID-19 social context is crucial to understand how the law operates. Additionally, it is worth noting that several authors have mentioned a *Culture War* in the legal debate on COVID-19 and beyond.<sup>28</sup>

After determining the scope of this paragraph, we need to trace the origins of the term *Culture War*. The definition first emerged during the 1870s, when a conflict developed between the Minister-President of Prussia and Reich Chancellor, Otto von Bismarck, and the Catholic Church, represented by Pope Pius IX.<sup>29</sup> The term *Kulturkampf*, coined by the pathologist and anthropologist Rudolf Virchow,<sup>30</sup> resulted from various measures enacted by Otto van Bismarck between 1871 and 1872 that restricted the influence of the Catholic Church in the political life of the Prussian Kingdom, culminating in the so-called *May Laws* of 1873, which removed Prussian ecclesiastical appointments from the Catholic Church.<sup>31</sup> Thus, the *Kulturkampf* coined by Virchow illustrates an element that will later be common in other interpretations of the term: a division between two ways of understanding the world (secular and religious in this instance), which are incompatible with each other and divide society into two.

The idea of a clash or domination between cultures has been a recurring theme in various fields of study. For instance, Antonio Gramsci's concept of cultural hegemony<sup>32</sup> refers to the ability

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<sup>28</sup> In this case I'm referring to: Lawrence Gostin, "Public Health in the Crosshairs of Culture Wars" (2024) 5 (2) JAMA Forum 2 <doi:10.1001/jamahealthforum.2024.0465> accessed 21 March 2024; James A. Morone, "Coronavirus and Culture War: Blunders, Defiance, and Glimmers of Solidarity" (2023) 139 (2) Political Science Quarterly <<https://doi.org/10.1093/psquar/qqad071>> accessed 21 March 2024; John Inazu, "COVID-19, Churches, and Culture Wars" (2022) 18 University of St. Thomas Law Journal <[https://openscholarship.wustl.edu/law\\_scholarship/168](https://openscholarship.wustl.edu/law_scholarship/168)> accessed 21 March 2024; Laura Hermer, "Covid-19, Abortion, and Public Health in the Culture Wars" (2021) 47 (1) Mitchell Hamline Law Review <<https://open.mitchellhamline.edu/mhlr/vol47/iss1/4>> accessed 21 March 2024.

In addition, regarding the use of the term Culture Wars in the Law and Religion field see: Pasquale Annicchino, *Religione e Culture Wars: il Ruolo delle norme giuridiche*, in Pasquale Annicchino, *La Religione in Giudizio. Tra Corte Suprema degli Stati Uniti e Corte Europea dei Diritti Umani* (Il Mulino, 2018).

<sup>29</sup> Douglas Watfield, "Kulturkampf: The Relationship of Church and State and the Failure of German Political Reform" (1981) 23 (3) Journal of Church and State <<https://www.jstor.org/stable/23916757>> accessed 23 March 2024.

<sup>30</sup> *ibid*, 470

<sup>31</sup> *ibid*, 469.

<sup>32</sup> Antonio Gramsci, *L'Egemonia Culturale*, (Historica 2022).

of a group (in this case, the Bourgeois class) *to impose on other groups through everyday practices and shared beliefs, its points of view to the end of internalization, creating the preconditions for a complex system of control.*<sup>33</sup> This creates preconditions for a complex system of control through forced internalization of bourgeois values within the proletarian class. It is also important to mention sociologist Samuel P. Huntington's reworking of the *Kulturkampf*, known as the Clash of Civilizations.<sup>34</sup> According to Huntington, global politics before the collapse of the Berlin Wall was divided into three poles represented by the United States and other wealthy states, the Soviet Union and communist states, and the so-called Third World, composed of generally poor newly independent countries that lacked political stability.<sup>35</sup> After the collapse of the communist world, the poles just enunciated crumbled, and people started asking themselves: "*Who are we?*".<sup>36</sup> The answer was no longer based on ideological, political or economic distinctions but on elements of *ancestry, religion, language, history, values, customs and institutions* <sup>37</sup> which form the so-called cultural identity. Thus, people identify themselves through cultural groups, and politics becomes a tool to advance particular interests and define a specific identity.<sup>38</sup> As a result of this post-ideological era, nation-states' future rivalries will be characterized by cultural conflicts. <sup>39</sup>

However, before Samuel P. Huntington's book in 1996, another American sociologist, Davison Hunter, examined how different ways of understanding reality can collide in society. In the book *Culture Wars: The Struggle to Define America*,<sup>40</sup> Hunter supports that American culture is deeply divided between two competing visions, summarized as the "progressive" and the "orthodox" poles. These two visions constantly battle over issues such as abortion, family,

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<sup>33</sup> Antonio Gramsci, *Quaderni dal Carcere*, (Einaudi 2014), 250.

<sup>34</sup> Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster 1996).

<sup>35</sup> *ibid.*, at. 2

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*, at. 4

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> Davison Hunter, *Culture Wars: The Struggle to Define America* (Basic Books 1991).

feminism or multiculturalism. Since society becomes highly polarized in this binary system, the result is a so-called *Culture War*, i.e., *a cultural conflict between social groups and the struggle for the domination of their values*.<sup>41</sup> The term *Culture War* gained popularity among American scholars and those beyond the American borders, landing on the European scene as well,<sup>42</sup> eventually resurfacing to define the COVID-19 *war* between Vaccinated and Anti-vaxxers. In addition, this expression even entered into the political communication when Patrick Buchanan used it during his speeches at the 1992 Republican National Convention.<sup>43</sup> However, employing the term *Culture War* leads to addressing a fundamental issue, i.e., that culture war is a scientifically contested term. Indeed, studies by various public opinion analysts affirmed that this line dividing society into two poles does not properly exist since it has been found that the people migrate between the “conservative” and “progressive” poles, creating mobile and not rigid clusters, as claimed by Hunter. For example, following Hunter's thesis, those who identify themselves as part of the Religious Right (a US conservative political movement)<sup>44</sup> should neither be voters of the Democratic Party nor approve abortion rights. However, in a study published by the sociologist Christian Smith,<sup>45</sup> 30% of those who identify as part of the Religious Right were Democrats, and even 60% thought that abortion rights should be legal in certain circumstances. It is, therefore, evident how the term *Culture War*, even in academic studies, has become more a matter of captivating the reader rather than an elaborate and factually corroborated proposition.

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<sup>41</sup> *ibid*, 52.

<sup>42</sup> See: Luca Ozzano and Alberta Giorgi (eds.) *European Culture Wars and the Italian Case* (Routledge 2015); Christopher Clark and Wolfram Kaiser, *Culture Wars: Secular-Catholic Conflict in Nineteenth-Century Europe* (Cambridge University Press, 2009). In addition, the King's College London Foreign Policy Institute has opened a research cluster on this issue, available at: <https://www.kcl.ac.uk/policy-institute/research-analysis/culture-wars-in-the-uk>. Beyond Europe see: Daryle Williams, *Culture Wars in Brazil: The First Vargas Regime, 1930-1945* (Duke University Press, 2001).

<sup>43</sup> European Center for Populism Studies, “Culture War” <<https://www.populismstudies.org/Vocabulary/culture-war/>> accessed 23 March 2024.

<sup>44</sup> For more information in this regard, See: Michael J. McVicar, “The Religious Right in America”, in John Corrigan (ed.), *The Oxford Encyclopedia of Religion in America* (Oxford University Press, 2018).

<sup>45</sup> Christian Smith, *American Evangelicalism. Embattled and Thriving* (Chicago University Press 1998), 42.

Before describing the extent to which the term *Culture War* is relevant for this thesis, it is important to understand what the word "culture" means. As mentioned previously, this work does not intend to enrich sociological studies by introducing substantial changes. At the same time, however, if I write about the *Culture War*, it is necessary to have a clear reference for what culture means in this thesis, although the definition of culture has always been a challenge in sociological studies. Indeed, already in 1952, the American anthropologists Kriber and Kluckhohn provided a list of 164 different definitions of culture.<sup>46</sup> Despite these challenges, Matthew Arnolds,<sup>47</sup> Edward Tylor<sup>48</sup> and Franz Boas<sup>49</sup> can be described as some of the sociologists who have had the greatest influence on the definition of culture. In particular, Arnold believed that culture was limited to intellectual or artistic dimensions<sup>50</sup> whereas Taylor believed it was a common quality among people.<sup>51</sup> Taylor's definition of culture was a complex whole that included *knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society*.<sup>52</sup> If the idea of culture as a complex system is still supported in the field of sociology, the criticism addressed to Taylor regarded the distinction between a "civilized" culture and a "savage" one.<sup>53</sup> This criticism saw Franz Boas as the primary representative.<sup>54</sup> Indeed, for Boas, culture couldn't be judged through qualitative standards that produce certain dichotomies (high/low culture or savage/civilized culture).

In the *mare magnum* of culture's definitions that have been examined, the one that seems most adaptable to this contest is that of Helen Spencer-Oatey, who describes it as a *fuzzy set of basic*

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<sup>46</sup> Helen Spencer-Oatey, "What is culture? A compilation of quotations", (2012) GlobalPAD Core Concepts, University of Warwick, 2, <[https://warwick.ac.uk/fac/soc/al/globalpad-rip/openhouse/interculturalskills\\_old/core\\_concept\\_compilations/global\\_pad\\_-\\_what\\_is\\_culture.pdf](https://warwick.ac.uk/fac/soc/al/globalpad-rip/openhouse/interculturalskills_old/core_concept_compilations/global_pad_-_what_is_culture.pdf)> accessed 23 March 2024.

<sup>47</sup> Matthew Arnolds, *Culture and Anarchy*, (New Heaven, Yale University Press 1994)

<sup>48</sup> Edward Burnett Taylor, *Primitive Culture*, (Cambridge University Press 2012).

<sup>49</sup> Franz Boas, *Race, Language and Culture*, (University of Chicago Press, 1982).

<sup>50</sup> Spencer-Oatey (n 44) 2.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*, 4.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*



*assumptions and values, orientations to life, beliefs, political procedures and behavioral conventions that are shared by a group of people, and that influence (but do not determine) each member's behavior and his/her interpretations of the "meaning" of other people's behavior.*<sup>55</sup> I chose this definition because it simultaneously creates points of contact and detachment to Hunter's theory. The disconnection with the *Culture War* is that there is no rigid system of values as Hunter defines it. At the same time, there is a shared *mentalité* with Hunter's theory, albeit with a lower intensity than the *Culture War* dominance dimension, that is, culture as a factor that influences the way of understanding the surrounding reality. Applying this to the anti-vaxxers, the anti-vax "culture", through the sharing of certain beliefs, understands vaccination as something "wrong".

Once we have defined the term *Culture War* (and what the word culture means in this context), we may ask why we include it in this thesis, given its obvious flaws. There are two main reasons: to describe this thesis *pars destruens* and *pars costruens*. Specifically, the *pars destruens* is intended to remove a scaremongering that has become a "trademark" in describing the COVID-19 situation in the light of the Anti-vaxxers groups. Indeed, despite the divisiveness of the COVID-19 argument, today's societies do not tend to be polarized solely in a binary manner through a "No-vax" and "Yes-Vax" group since there may be intermediate groups that, as mentioned in the Religious Rights case, are "mobile". Thus, the COVID-19 *Culture War* does not produce a definite *limen* in describing people's stances regarding COVID-19. At the same time, examining this weakness of the term *Culture War* does not automatically mean that we should reject it altogether. Indeed, is precisely through the process of non-denying the *Cultural War* that the *pars costruens* of this thesis emerges. In particular, although there may be a spectrum of attitudes towards COVID-19, this does not mean that there is not one extreme

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<sup>55</sup> Helen Spencer-Oatey, *Culturally Speaking. Culture, Communication and Politeness Theory* (Continuum 2008), 3.

of this spectrum, namely the Anti-Vax group. Furthermore, as described in the previous paragraph, the COVID-19 argument has a coagulating power within society when it is situated into the political sphere or manipulated through communication. Therefore, although Anti-Vaxxer groups do not engage in cultural war in terms of domination, as Hunter theorized, they still attempt to *entrench a specific value in one segment of society, hoping that it will spread to the rest of society*.<sup>56</sup> The question then becomes how this entrenchment takes place.

### 1.3. Mobilize the People

Studying how anti-vax groups have carried out their demands in society becomes a challenging task, mainly for two reasons. Firstly, there is no shared blueprint that anti-vax groups have followed in different countries. Secondly, the intensity of these demands can vary. Despite these differences, it is possible to identify a certain *repertoire of action* among anti-vax groups. In particular, protests have been a common practice, although the frequency and severity of protests differs across countries. For example, protests in Italy became more frequent in the autumn of 2021 but in a more localized manner, while in Germany, protests became more nationwide and began earlier, with the beginning of the first Lockdown.<sup>57</sup> In contrast, protests have been rare and minor in Greece.<sup>58</sup> On a general level, protests have often involved obstructing access to healthcare facilities or harassing doctors and politicians.<sup>59</sup> In the United States, protesters have carried semi-automatic weapons to emphasize the oppression suffered by the government.<sup>60</sup> However, it is important to emphasize that I am not interested in describing who was part of the anti-vax group in this work. In other words, it is not useful for this thesis to define who might be the anti-vax *homo* (e.g., Trumpist or otherwise) nor which

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<sup>56</sup> James Breckwold, "Who cares about the culture war" (*UK in a Changing Europe*, 10 January 2024) <<https://ukandeu.ac.uk/who-cares-about-the-culture-war/>> accessed 25 March 2024.

<sup>57</sup> Donatella Della Porta, *Regressive Movements in Times of Emergency*, (Oxford University Press 2023) 152.

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.* 154.

<sup>60</sup> *ibid.* 155.

political forces supported the anti-vax demonstrations. As I've stated several times, what is essential for this work, is the existence of the anti-vax culture and their *modus operandi* to emerge in the *Culture Struggle*.

In addition to protesting, anti-vax groups also use social media to spread their message. Indeed, social media accounts held by anti-vaxxers have increased their channels by at least seven or eight million since 2020.<sup>61</sup> In particular, Facebook and YouTube have been essential in spreading the anti-vax message, with results showing that 31 million people followed anti-vax groups on Facebook.<sup>62</sup> At the same time, 17 million people subscribed to similar channels on YouTube.<sup>63</sup> Moreover, the impact of these channels was relevant since individuals who searched for reliable information about the COVID-19 on social media were much more likely to accept the anti-vax narrative.<sup>64</sup>

Another common characteristic among the anti-vax groups was certainly dictated by the language they used in the real and digital worlds. In particular, according to a study conducted by sociologist David Snow and Colin Bernatzky, there were six ways of framing the vaccine issue:<sup>65</sup> 1) *vaccines are unsafe*; 2) *vaccines are ineffective*; 3) *mandatory vaccination is a violation of personal freedom and parental and medical rights*; 4) *vaccines are fundamentally compromised by pharmaceutical interest and governmental corruption*; 5) *the science surrounding vaccines is either theoretically misguided, tainted or not yet good enough*; and 6) *vaccines are rendered unnecessary in the face of natural immunity and a commitment to holistic living*. Similarly, on Twitter, the word “mercury” was the one most frequently term to oppose

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<sup>61</sup> Talha Burki, “The online anti-vaccine movement in the Age of Covid-19”, 2 The Lancet Digital Health, e505 <10.1016/S2589-7500(20)30227-2> accessed 25 March 2024.

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

<sup>65</sup> David Snow and Colin Bernatzky, “Anti-Vaccine Movement” in Donatella Della Porta and others, *The Wiley Blackwell Encyclopedia of Political and Social Movements* (Blackwell 2023), 188.

the COVID-19 vaccine.<sup>66</sup>

Finally, some clarifications are due since I have written about the anti-vax groups as individual atoms. Indeed, the more accurate term would be anti-vax *social movements*. In particular, according to Charles Tilly and Sidney Tarrow, social movement combine:<sup>67</sup> 1) *sustained campaigns of claim making*; 2) *an array of public performances including marches, rallies, demonstrations, creation of specialized association, public meeting, public statements, petitions, letter writing and lobbying*; 3) *repeated public displays of worthiness, unity, numbers, and commitment by such means as waring colors, marching in disciplined ranks, sporting badges that advertise the cause, displaying signs, chanting slogans, and picketing public buildings*; 4) *the organizations, networks, traditions and solidarities that sustain these activities*. If the first three criteria have been mentioned above, the last one (i.e., no. 4) is present in the anti vax social movements since the networks between anti-vax groups are becoming a recurring event. That is the example of the anti-vax movement *Children Health Defense* presided over by Robert J. Kennedy, which is not only expanding in Europe but is also actively participating in anti-vax demonstrations in other countries, as happened at the demonstrations in Berlin on 29 August 2022 and also in Italy, where Kennedy spoke.<sup>68</sup>

## 1.4. Mobilize the Law: The Start of this Thesis

In the beginning of this chapter, I mentioned that anti-vax activists have sought other avenues to assert their demands, including those in the legal field. Indeed, *a latere* of protests and social activism, the anti-vaxxers are challenging the legitimacy of the COVID-19 mandatory vaccination before the courts. This is evident from the COVID-19 litigation website, where the

<sup>66</sup> Elvira Ortiz-Sanchez and others, “Analysis of the Anti-Vaccine Movement in Social Networks: A Systematic Review” (2020) 17 (15) <Int. J Environ Res Public Health, 10.3390/ijerph17155394> accessed 25 March 2024.

<sup>67</sup> Charles Tilly and Sidney Tarrow, *Contentious Politics* (Oxford University Press 2015), 138.

<sup>68</sup> Della Porta (n 55) 158.

issue of vaccination as illegitimate has been promoted before the tribunals of several countries. As solidarity between the different social movements is becoming more robust, there have been (and still are) attempts to create a legal network between them.<sup>69</sup> For instance, the American *Children's Health Defense*, which was involved in several cases regarding the constitutionality of the COVID-19 vaccination in the United States of America, has appealed to the Court of Justice of the European Union through its European office, supported by other anti-vax movements (*European Forum for Vaccine Vigilance* and *Ligue nationale pour la liberté des vaccinations*).<sup>70</sup> Since I have discussed social movements and how the anti-vax movements are creating a legal network, it is appropriate to introduce the concept of legal mobilization and strategic litigation. However, it is worth immediately emphasizing two necessary profiles for this thesis, one concerning a content dimension and the other a methodological one.

Regarding the first dimension, the definition of legal mobilization (and the relationship it establishes with strategic litigation) is still a motive for discussion within the socio-legal academic debate. Indeed, looking at the definition of legal mobilization and strategic litigation, these overlap many times, and often, in academic articles themselves, the two terms are not clearly differentiated. In particular, if in the *mare magnum* of legal mobilization theory, one defining constant has been that of a *process by which individual or collective actors invoke legal norms, discourse, or symbols to influence policy, culture or behavior*,<sup>71</sup> the purpose of strategic litigation (understood as *legal action through a judicial mechanism to secure a judgment*)<sup>72</sup> is also to *creating change/impact beyond the individual interest or individual case*

<sup>69</sup> See Lisa Hagen, “As the pandemic winds down, anti-vaccine activists are building a legal network”, (*NPR*, 4 May 2023) <<https://www.npr.org/2023/05/04/1173697394/as-the-pandemic-winds-down-anti-vaccine-activists-are-building-a-legal-network>> accessed 25 March 2024.

<sup>70</sup> See Official Journal of the European Union, C 482/2, Case C-749/21 P, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62021CN0749%20P>> accessed 25 March 2024.

<sup>71</sup> Lisa Vanhala, “Legal Mobilization” (*Oxford Bibliographies*, 23 November 2021) <<https://www.oxfordbibliographies.com/display/document/obo-9780199756223/obo-9780199756223-0031.xml>> accessed 25 March 2024.

<sup>72</sup> Kris van der Pas, “Conceptualising Strategic Litigation” (2021) 11 (6) *Onati Socio-Legal Series*, S126 <<https://doi.org/10.35295/osls.iisl/0000-0000-0000-1226>> accessed 25 March 2024.

concerned.<sup>73</sup> Regarding the axiological value of social change, although legal mobilization and strategic litigation have been used for years by social movements to change racist policies or to improve gender conditions, this is not a constant feature of legal mobilization, since there is an evolving body of strategic litigations aimed at promoting anti-LGBT or anti-abortion policies.<sup>74</sup> Finally, in the field of legal mobilization, even today, different schools of thought are divided along two lines, namely a first group that recognizes that legal mobilization can be composed of *individual disputing behavior* and others, on the other hand, that looks at legal mobilization as *group campaigns for social reform*.<sup>75</sup> Notwithstanding the dilemmas that still take place in the field of legal mobilization (and strategic litigation), I will define legal mobilization as *a social movement tactic, i.e., the pursuit of movement goals through proper channels*.<sup>76</sup>

As for the methodological dimension, legal mobilization and strategic litigation will not be the protagonists of the following chapters. In fact, I have introduced these two elements now mainly because they will help me draw my conclusions. Indeed, in the cases I have chosen for this thesis, legal mobilization and strategic litigation are elements present in only some contexts.

## 1.5. The Research Proposal and The Research Question(s)

I've waited until now to include my research proposal because it relies heavily on definitions that are either scientifically contested (e.g., *Culture War*) or conceal multiple meanings that require clarification (as culture, social movements or legal mobilization). Therefore, without prior explanation, my research proposal and questions would have lacked clarity. Indeed, for organizational purposes, it was better to define the cardinal point of this thesis first so the reader

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<sup>73</sup> *ibid.*

<sup>74</sup> In this regard, Emilio Lehoucq, "Legal Threats and the emergence of legal mobilization: conservative mobilization in Colombia" (2021) 46 (2) Law and Social Inquiry <<https://doi.org/10.1017/lsi.2020.28>> accessed 25 March 2024.

<sup>75</sup> Vanhala (n 69) 1.

<sup>76</sup> Paul Burstain, "Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity" (1991) 96 (5) AJS, 1202 <<https://www.jstor.org/stable/2781340>> accessed 25 March 2024.

will already have the necessary tools to understand better what this thesis aims to accomplish.

Now that I have clarified the reasons behind this atypical systematization of my research proposal, I will introduce my case studies, which are the United States of America and Italy. As previously mentioned, my thesis will focus on how anti-vax activists have tried to challenge the COVID-19 vaccination before the courts. Each chapter will briefly introduce the anti-vax social movements present in that context and the COVID-19 regulation. However, it is important to emphasize that the cases do not directly concern the legal mobilization of social movements. Instead, including these in each chapter is mainly dictated by the need to stress the existence of anti-vax enclaves in that particular social context.

The second chapter will examine anti-vax activism in the United States of America through two cases, namely *Doe 1-6 v. Mills*<sup>77</sup> and *Dr A et al. v. Hochul*.<sup>78</sup> In the first case, a group of healthcare workers challenged Maine's 2021 vaccine mandate, which included the COVID-19 vaccine on the list of mandatory vaccinations. Similarly, in the second case, a healthcare group challenged a New York State regulation establishing COVID-19 compulsory vaccination of healthcare workers. Interestingly, religious freedom arguments became the main exception presented before the Supreme Court in both cases.

Then, the third chapter will be devoted to Judgments No. 14, 15, and 16 of the Italian Constitutional Court.<sup>79</sup> Both Judgement No. 14 and Judgement No. 15 deal with the constitutional legitimacy of the compulsory vaccination against COVID-19, albeit in different aspects. If the Judgment no. 14 concerns the legislator's decision to introduce the vaccination obligation for some professional categories, Judgement No. 15 examines the consequences of a person's choice to not vaccinate. Finally, Judgment No. 16 deals with suspending a

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<sup>77</sup> *DR. A, ET AL., Applicants v. Kathy Hochul, Governor of New York*, 597 U. S. (2022)

<sup>78</sup> Supreme Court of the United States, *John Does 1-3, ET AL. V. Janet T. Mills, Governor of Maine, ET AL. On Application for Injunctive Relief*, 595 U. S. (2021).

<sup>79</sup> Italian Constitutional Court, Judgment n. 14/2023; Italian Constitutional Court, Judgment n. 15/2023; Italian Constitutional Court, Judgment n. 16/2023.

psychologist from her profession for failing to comply with the vaccination obligation.

I chose to study these two cases because they all start with a similar number of unvaccinated persons. In the United States of America, the number of those who are not vaccinated varies between 15 and 16% of the population,<sup>80</sup> while in Italy, eight million Italians<sup>81</sup> are not vaccinated (i.e., 13.6% of the population). This does not imply that the percentages just listed are composed only of the unvaccinated (e.g., the percentages may include children under twelve). At the same time, it is clear that if there is still a substantial number of unvaccinated people, a widespread anti-vax sentiment is present. Moreover, this shared starting point between the countries is especially important in the *Culture Struggle* framework. For example, it would be self-contradictory to include a country like Ireland which has the highest rate of vaccinated people in Europe. Finally, it is interesting to note that in both cases, the religious factor (although in different degrees) contributed somewhat to the anti-vax attitude.<sup>82</sup>

The research to be conducted will shed light on three primary questions. Firstly, i) *How did the anti-vaxxers framed the mandatory vaccination before the Courts*. Secondly, ii) *Did the Courts accept this framing, and what were the reasons for rejecting or accepting the anti-vaxxer's arguments?* Lastly, iii) *What role have the courts played in the COVID-19 Culture War?* However, once these questions have been answered, the real question of this thesis revolves around the relationship between *Culture War* and Law. Indeed, although the anti-vax percentages mentioned above are similar, the term *Culture War* to describe the Italian situation

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<sup>80</sup> Israel Agaku and others, “Segmentation analysis of the unvaccinated US adult population 2 years into the COVID-19 pandemic, 1 December 2021 to 7 February 2022”(2023) 11 (1) Family Medicine and Community Health, 2 <10.1136/fmch-2022-001769> accessed 28 March 2024.

<sup>81</sup> Quotidiano Online di Informazione e Sanità, “Covid. Gimbe: “Sono oltre 8 milioni gli italiani che non hanno mai ricevuto una dose di vaccino”. Ogni giorno contraggono il virus quasi 4mila persone” (*Quotidiano Online di Informazione e Sanità*, 6 March 2023) <[https://www.quotidianosanita.it/studi-e-analisi/articolo.php?articolo\\_id=111684](https://www.quotidianosanita.it/studi-e-analisi/articolo.php?articolo_id=111684)> accessed 28 March 2024.

<sup>82</sup> For the United States of America, see: Katie Corcoran, Christopher Scheitler, and Bernand Di Gregorio “Christian Nationalism and COVID-19 vaccine hesitancy and uptake” (2021) 39 (45) National Center for Biotechnology Information <<https://doi.org/10.1016/j.vaccine.2021.09.074> 0264-410X/> accessed 28 March 2024. For Italy, see: Arana Barazzetti, Stefano Milesi, Attà Negri “Exploring Factors Influencing COVID-19 Vaccine Hesitancy and Refusal: A Study in Italy during the Vaccine Rollout” (2024) 21 (3) Int J Environ Res Public Health <10.3390/ijerph21030331> accessed 28 March 2024.



regarding COVID-19 is frequently less used than in the US experience. Is this circumstance solely due to the American origin and heritage of the term *Culture War* (and its misuse), or can there be a legal element that differentiates the American and European case? The answer to this question will unite the puzzle pieces examined separately in this chapter (i.e., Culture War and Legal Mobilization). Finally, the main contribution of this research would be to highlight the relationship between Law and *Culture War* in the legal academic debate, going beyond the usual captivating use of the *Culture War* and its typical applications in the context of abortion or LGBT rights'.

## ***CHAPTER 2: A NEW PERSPECTIVE IN THE SCOTUS***

### ***COVID-19 CASE-LAW?***

In this chapter, I will discuss the ongoing *Culture War* surrounding the COVID-19 vaccine in the United States of America. Firstly, I will examine the emerging social movements, highlighting their organization and economic power. Secondly, I will provide a brief overview of how federal and state governments have approached mandatory vaccination in the past and what measures have been taken to introduce the COVID-19 mandate vaccine. I will also examine the responses of the US Constitutional Court since the landmark case of *Jacobson v. Commonwealth of Massachusetts* regarding mandatory vaccination campaigns. The primary goal of this chapter is to determine whether religious exceptions proposed before the SCOTUS in the past have gained more significant support from judges in the context of the COVID-19.

### **2.1. Social Movements During COVID-19: The Children Health Defense and The Informed Consent Network Action**

Two of the most successful and influential social movements that have challenged COVID-19 measures are the Children's Health Defense (CHD) and the Informed Consent Action Network (ICAN). The CHD is led by Robert F. Kennedy Jr, an environmental lawyer committed to promoting vaccine skepticism and conspiracy.<sup>83</sup> In light of the methodological fragilities that characterize the term *Culture War* previously examined, although R. Kennedy may be perceived to operate within the Republican political cluster, his political affiliation, on the other hand, lies in the Democratic area, to the extent that he has presented himself as a presidential

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<sup>83</sup> Anjali Huynh, "Noteworthy Falsehoods Robert F. Kennedy Jr. Has Promoted" (*The New York Times* 6 July 2023) <<https://www.nytimes.com/2023/07/06/us/politics/rfk-conspiracy-theories-fact-check.html>> accessed 29 March 2024.

candidate for the Democratic Party.<sup>84</sup>

Initially, the CHD was known as the World Mercury Project (WMP), an organization that campaigned to prove the relationship between vaccines and autism since, according to the organization, there was a large concentration of mercury (in particular, thimerosal).<sup>85</sup> However, in 2017, the CHD emerged from the WMP project as a non-profit organization. Like its predecessor, it continues to champion the cause of establishing a connection between vaccines and autism, with a particular focus on vulnerable individuals such as children. Beyond this, the CHD also advocates for various other health-related issues, including the potential link between chemicals in water and transgender identity.<sup>86</sup>

Regarding the influence of the CHD on the American people and beyond, it has been observed that the organization's following on Twitter has more than doubled since January 2021.<sup>87</sup> Moreover, while the website had 119,000 views in November 2019, it now has 4.7 million views.<sup>88</sup> To give an idea of the CHD's Twitter narrative, here are the top three articles that received the most views in the second half of 2021:<sup>89</sup>

- *Exclusive: Forced to Get Vaccine to Remain on Lung Transplant list, 49-Year-Old who survived COVID dies after Second Moderna Shot*
- *Pfizer Says COVID Vaccine Safe for Kids- but Pfizer has lied About Kids and Drugs Before*
- *Fauci, Gates Admit COVID vaccines Don't Work as Advertised*

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<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> Adrienne Goldstein, "Daily Wire, Children's Health Defense Capitalize on Vaccine-Hesitant Message to Boost Social Media Engagement, German Marshall Fund of the United States" (*GMF*, 24 February 2023) <<https://www.gmfus.org/news/daily-wire-childrens-health-defense-capitalize-vaccine-hesitant-messaging-boost-social-media> > accessed 29 March 2024.

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

It is important to emphasize that the Children's Health Defense (CHD) is not an unorganized and impromptu social movement but a well-structured organization with a broad portfolio. In 2020, revenue more than doubled reaching \$6.8 million through individual donations alone.<sup>90</sup> In addition, the CHD is opening new venues in the US and establishing new branches in Canada, Europe, Australia, and Africa. However, the CHD is not just promoting the cause against vaccines in the digital sphere but also in the legal one. Indeed, the CHD website has a section renamed *Legal Justice*, which includes *Litigation Overview* and *Legal Actions* sub-sections.<sup>91</sup> Within the *Legal Actions* sub-section, the CHD stated that “*its legal team intends to hold public health agencies responsible by taking legal action to stop children from receiving illegal, unethical and dangerous vaccines that lack adequate long-term safety and efficacy testing. We seek to protect individual liberties, including the right to bodily autonomy, informed consent and parental rights*”.<sup>92</sup> The litigation section of the CHD boasts a significant number of successful cases, including one led by lawyer Sujata Gibson. In this case, the NY State Supreme Court ruled that the COVID-19 vaccine mandate for healthcare workers was “*null, void and of no effect*”.<sup>93</sup> The Court's decision was based on the argument that the New York Department of Health did not have the authority to impose such a mandate, a power reserved for the state legislature.<sup>94</sup>

Similarly, the ICAN is a non-profit organization that was established in 2016 to provide scientifically researched health information to the public and promote transparency in the

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<sup>90</sup> Michelle R. Smith, “How a Kennedy built an anti-vaccine juggernaut COVID-19” (*AP News*, 15 October 2021) <<https://apnews.com/article/coronavirus-pandemic-business-health-pandemics-race-and-ethnicity-d140be878b1ef0c5a5cce3cfde71e69c> > accessed 29 March 2024.

<sup>91</sup> See Children’s Health Defense, “Law and Resources”, <<https://childrenshealthdefense.org/legal-justice/>> accessed 29 March 2024.

<sup>92</sup> *ibid.*

<sup>93</sup> Brenda Paletti, “Victory! New York State Supreme Court Upholds Ruling That Struck Down COVID Vaccine Mandate for Health Workers”, (*Children’s Health Defense*, 11 October 2023) <<https://childrenshealthdefense.org/defender/new-york-supreme-court-upholds-ruling-struck-down-covid-mandate-healthcare/> > accessed 30 March 2024.

<sup>94</sup> *ibid.*

medical industry.<sup>95</sup> Their objective is to empower individuals to make informed decisions about their health based on reliable evidence rather than medial coercion.<sup>96</sup> The organization was founded by Del Bigtree, a producer who has previously worked on TV shows such as *Dr. Phil* and *The Doctors*.<sup>97</sup> In 2016, he produced a documentary named *Vaxxed*, which features an alleged whistle-blower claiming that MMR vaccines can cause autism in children.<sup>98</sup> Del Bigtree also hosts a weekly online show on the ICAN website called *The Highwire with Del Bigtree*.<sup>99</sup> ICAN, just like CHD, is an organization with significant funds: in 2017, ICAN received a \$1 million fund; in 2019,<sup>100</sup> they allocated over \$1 million in funding towards advocacy.<sup>101</sup> Finally, the financing for advocacy increased to \$2 million in 2020.<sup>102</sup> ICAN claims to “*have won lawsuits against Health and Human Services, the Center for Disease Control, the National Institutes of Health and the Food and Drug Administration, using an unprecedented legal strategy*”.<sup>103</sup> One of the most notable lawsuits sponsored by ICAN aimed to strike down the Countermeasures Injury Compensation Program (CICP) provisions of the PREP Act since they violate the constitutional rights of those injured or killed by the COVID-19 vaccine.<sup>104</sup>

## 2.2. Covid-19 Mandatory Vaccination Campaign in the US and SCOTUS Decisions Regarding Mandatory Vaccinations

In the US, each state has the power to mandate vaccinations for its citizens, and the federal government is usually not involved in such decisions. For instance, before COVID-19, all 50

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<sup>95</sup> See ICAN, “Our Mission”, <<https://icandecide.org/>> accessed 30 March 2024.

<sup>96</sup> *ibid.*

<sup>97</sup> Dorit Reiss and Viridiana Ordonez, “Law in the Service of Misinformation: How Anti-Vaccine Groups Use the Law to Help Spin False Narrative” (2022) 18 (1) *Northwestern Journal of Law and Social Policy*, 63 <<https://scholarlycommons.law.northwestern.edu/njls/vol18/iss1/2>> accessed 30 March 2024.

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*, 64.

<sup>101</sup> *ibid.*, 65.

<sup>102</sup> See ICAN, “Legal Updates”, <<https://icandecide.org/press/>> accessed 30 March 2024.

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.*

states had laws requiring certain vaccinations to be mandatory for children attending public schools, with exceptions allowed only on religious grounds.<sup>105</sup> However, in 2015, California eliminated the religious exception for mandatory vaccinations for children following a measles outbreak at Disneyland,<sup>106</sup> with the result that parents can no longer cite religious or personal beliefs as reasons for not vaccinating their children.<sup>107</sup> Similarly, Oregon required meningococcal B disease vaccinations for students up to the age of 25.<sup>108</sup>

Concerning federal perspective on COVID-19, White House Coronavirus Task Force Director Dr. Antony Fauci reiterated that COVID-19 mandate vaccine was a state domain.<sup>109</sup> As a result, by November 2021, 22 states had implemented mandatory COVID-19 vaccination, impacting the employment of healthcare workers, public employees, school volunteers, and some government contracts.<sup>110</sup>

However, in 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued federal guidelines for employers who may require vaccination against COVID-19 as a condition of employment.<sup>111</sup> In addition, in November 2021, the Occupational Safety and Health Administration (OSHA) introduced the "*COVID-19 Vaccination and Testing Emergency Temporary Standard*,"<sup>112</sup> which required private companies with 100 or more employees to ensure that all staff are vaccinated against COVID-19 or, if unvaccinated, to *wear a face mask in the workplace and submit a negative test result every week*.<sup>113</sup> However, the Supreme Court,

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<sup>105</sup> Arthur L. Caplan, "The Battle Over Compulsory Vaccination in the United States" (2018) 108 (4) AJPH, 425 <10.2105/AJPH.2018.304315 > accessed 30 March 2024.

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

<sup>109</sup> Valerie Gutmann Kock, "A New Weapon in the Anti-Vaccine Arsenal: Claiming the Unvaccinated as a Protected Class", (*Baker Institute*, 3 October 2022) <<https://www.bakerinstitute.org/research/new-weapon-anti-vaccine-arsenal-claiming-unvaccinated-protected-class>> accessed 1 April 2024.

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> See Federal Register, *Covid-19 Vaccination and Testing; Emergency Temporary Standard*, <<https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>> accessed 1 April 2024.

<sup>113</sup> Paul J. Larkin, "Constitutional Challenges to the OSHA COVID-19 Vaccination Mandate" (2022) 20 The Georgetown Journal of Law and Policy 367, 368.

in 2022,<sup>114</sup> annulled OSHA's provision, stating that the agency had exceeded its authority.<sup>115</sup>

Since the 1905 landmark case of *Jacobson v. Commonwealth of Massachusetts*<sup>116</sup>, the US Supreme Court's jurisprudence on vaccination mandates has consistently held that religious exemptions are not valid reasons to oppose compulsory vaccination laws.<sup>117</sup> This reasoning continued in 1944 *Prince v. Massachusetts*,<sup>118</sup> where the Court declared that the *free exercise of religion does not include the right to practice religion freely and does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death*.<sup>119</sup> In the more recent 1990 case of *Employment Div. Dept. of Human Resources of Oregon v. Smith*<sup>120</sup>, the Court held that laws regarding compulsory vaccinations are not subject to strict scrutiny under the Free Exercise Clause.<sup>121</sup>

Thus, after establishing that the Supreme Court has a long history of rejecting arguments based on religious exemptions, it is now essential to determine whether and how COVID-19 cases have altered this jurisprudence. In particular, the cases concerning the relationship between COVID-19 vaccination and religious freedom *Does v. Mills*<sup>122</sup> and *Dr. A v. Hochul*.<sup>123</sup>

## 2.3. An Overview of the Two Cases

Briefly, both cases involved a group of healthcare workers who filed injunctive relief to the US Supreme Court since the Governor of Maine (in *Does v. Mills*) and the Governor of New York

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<sup>114</sup> *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 595 U.S. (2022)

<sup>115</sup> Larkin (n 114) 367.

<sup>116</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)

<sup>117</sup> James Beck, "Vaccine Mandates and Religion at the Supreme Court" (*Drug and Device Law*, 29 July 2022) <<https://www.druganddevicelawblog.com/2022/07/vaccine-mandates-and-religion-at-the-supreme-court.html#:~:text=Then%2C%20in%20Prince%20v.,166%2D67%20>> accessed 3 April 2024.

<sup>118</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944)

<sup>119</sup> *ibid*, 166-167

<sup>120</sup> *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

<sup>121</sup> James Beck (n 118)

<sup>122</sup> *John Does 1-3, ET AL. V. Janet T. Mills, Governor of Maine, ET AL. On Application for Injunctive Relief*, 595 U. S. (2021)

<sup>123</sup> *DR. A, ET AL., Applicants v. Kathy Hochul, Governor of New York, ET AL.*, 595 U. S. \_\_\_\_ (2021)

(in *A. v. Hochul*) had adopted regulations requiring healthcare workers to receive COVID-19 vaccines if they wished to keep their jobs. The petitioners argued that the regulations violated the Free Exercise Clause because they did not include religious exemptions but only secular ones. These secular exemptions only applied to healthcare workers who could have compromised their health by receiving the vaccine (such as if it could worsen pre-existing medical conditions). Although the Supreme Court denied injunctive relief in both cases, it is crucial to examine the arguments advanced by the petitioners and how the Supreme Court judges reacted (especially in the dissenting opinions).

### **2.3.1. *Does v. Mills***

As previously mentioned, in *Does. V. Mills*, a group of healthcare workers challenged the State of Maine emergency declaration of August 1, 2021, that required all healthcare workers to receive the COVID-19 vaccine by October 29, 2021, without offering any religious exemption.<sup>124</sup> The petitioners, in their argument, claimed that the lack of religious exceptions within the Vaccination Mandate violated the Free Exercise Clause, as they argued that the COVID-19 vaccine was developed using fetal cell lines from elective abortions.<sup>125</sup> They further maintained that COVID-19 mandate vaccine was neither generally nor neutrally applicable since the Maine regulation only provided for “secular” exceptions. In particular, regarding the neutrality test, they affirmed that the law had removed only religious exceptions “*while favoring and accommodating employees declining vaccination for secular, medical reasons*”.<sup>126</sup> Instead, as to the generally applicable test, they contended that the risk of outbreaks was the same regardless of whether a healthcare worker invoked a religious or medical exemption,<sup>127</sup>

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<sup>124</sup> Donna M. Gitter, “First Amendment Challenges to State Vaccine Mandates: Why the U.S. Supreme Court Should Hold that the Free Exercise Clause Does Not Require Religious Exemptions” (2022) 71 American University Law Review, 2247 <<http://dx.doi.org/10.2139/ssrn.4057371>> accessed 4 April 2024.

<sup>125</sup> *ibid*, 2245.

<sup>126</sup> *Does v. Mills*, Emergency Application for Writ of Injunction Relief Requested by Oct. 26, 2021, at. 17-18.

<sup>127</sup> Gitter, (n 125) 2248.



emphasizing that “*COVID-19 virus does not know whether a health care worker has declined vaccination based on medical or religious ground*”.<sup>128</sup>

Before the healthcare workers appealed to the Supreme Court, the District Court and the First Circuit dismissed the claim.<sup>129</sup> The Maine District Court ruled that religious freedom was sufficiently guaranteed since the vaccination requirement was not coercive.<sup>130</sup> Therefore, the healthcare workers could still decide not to undergo this health treatment (even if they could lose their jobs).<sup>131</sup> The District Court judges deemed the Maine regulation to be neutral and general. Subsequently, the First Circuit clarified that the exemptions granted to healthcare workers for medical reasons were legitimate since they depended on a practitioner's statement assessing the risk of vaccination-related side effects.<sup>132</sup> In other words, the exemption stemmed from an objective assessment by a third-party health authority, and thus did not grant any government discretion.<sup>133</sup>

When the issue reached the Supreme Court, the State of Maine responded that the purpose of vaccination was not to infringe or restrict any particular religious practice since they were not “*specifically directed at Applicants religious practice but instead aim to control and prevent communicable diseases*”.<sup>134</sup> The State of Maine stated that a medical exemption could not be equated with a religious exemption because the former exemption pursues an objective similar to that of the vaccine mandate, namely to protect the health of healthcare workers and citizens of Maine.<sup>135</sup> In addition, the State of Maine argued that it could not rely on alternative means

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<sup>128</sup> *Does v. Mills*, Emergency Application for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari Relief Requested by Oct. 26, 2021, at. 22.

<sup>129</sup> Adelaide Madera, “Mandatory Vaccination v. Conscientious Objection: A Comparative Analysis Between The US and The European Approach” (2023) 39 *Anuario de Derecho Eclesiastico del Estado*, 157 <10.55104/ADEE\_00005> accessed 4 April 2024.

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*, 160

<sup>132</sup> *ibid.*, 161.

<sup>133</sup> *ibid.*

<sup>134</sup> *Does v. Mills*, Emergency Application for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari Relief Requested by Oct. 26, 2021, 16.

<sup>135</sup> Gitter, (n 125), 29.

of dealing with COVID-19 such as tests or masks since these were not scientifically proven to be as effective as vaccines, while pointing out that “*what other States may choose to do does not answer the question of what is constitutionally required*”.<sup>136</sup> Finally, in October 2021, the application for injunctive relief was denied by the Court.

### **2.3.2. *Dr. A v. Hochul***

In December 2021, just two months after the *Does. v. Mills* case, the Supreme Court ruled again on an injunctive relief regarding COVID-19's vaccination mandate. In this case, the main issue was New York State's emergency measures, which required healthcare workers to be vaccinated by September 27 2021, with exceptions only for medical reasons.<sup>137</sup> Similar to what the plaintiffs argued in *Does v. Mills*, the healthcare workers claimed that since the COVID-19 vaccines were developed through fetal cell lines from elective abortions, they were against their Christian religious values. In addition, as in *Does*, the healthcare workers again argued that the COVID-19 vaccination mandate did not meet the neutral and generally applicable test.<sup>138</sup>

However, unlike the case examined above, the federal district court judge granted the motion for a temporary restraining order and preliminary injunction, holding that this type of situation was subject to heightened scrutiny.<sup>139</sup> Instead, the US Court of Appeals for the Second Circuit decided that the New York Vaccine Mandate met the neutral and general applicable test requirements.<sup>140</sup>

As the matter reached the Supreme Court, it is important to note that the petitioners used certain statements of New York State Governor Kathy Hochul to demonstrate how the Governor

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<sup>136</sup> *Does v. Mills*, Opposition of State Respondents to Emergency Application for Writ of Injunction, at.31.

<sup>137</sup> Madera, (n 130) 157.

<sup>138</sup> *ibid.*

<sup>139</sup> Gitter (n 125) 35.

<sup>140</sup> *ibid.*

pursued a discriminatory policy against people who followed certain religious beliefs.<sup>141</sup> Among the various statements gathered, the petitioners focused on the following one: "*How can you believe that God would give a vaccine that would cause you harm? That is not true. Everybody from the Pope on down is encouraging people to get vaccinated*".<sup>142</sup> Again, like the healthcare workers in *Does*, the petitioners in *Dr A* sustained that regardless of religious or medical exemption, the non-vaccinated always posed the same risk of infecting more people. Consequently, for the petitioners, the state of New York rendered a value judgment which required higher scrutiny than the rational basis approach established in *Smith*.<sup>143</sup>

In response to the petitioners, the State of New York sustained that Governor Hochul's statements should not be interpreted as discriminatory but as an expression of her own religious principles.<sup>144</sup> The respondents, similar to the State of Maine, also argued that the medical exemptions served a purpose similar to that of vaccinations, namely to protect the health of citizens. Finally, on December 13, 2021, the Court denied the application for injunctive relief.

### ***2.3.3. Besides the arguments and the outcome: A glance at the dissenting opinions***

As can be seen from the analysis just concluded, there are apparent similarities between the two cases. Indeed, it is not only the result that the two cases have in common but also the arguments that the petitioners put forward to prove the violation of the Free Exercise Clause. First, the development of the vaccine, which, according to the healthcare workers, was articulated through fetal cell lines from elective abortions. Then, the belief that medical exceptions are 'secular' exceptions, a perspective that broadens the construction of religious meaning since the

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<sup>141</sup> *ibid*, 40.

<sup>142</sup> Marina Villeneuve, "NY governor vows to fight lawsuit over vaccine mandate" (*Associated Press News*, 17 September 2021) <<https://apnews.com/article/kathy-hochul-religion-new-york-courts-health-0b2e0eada2c6b416250bc7c881892538> > accessed 5 April 2024.

<sup>143</sup> Madera (n 130) 158.

<sup>144</sup> *ibid*.

worsening of a person's health condition due to the vaccine is framed through the secular/religious dichotomy. Finally, another common dimension concerns the dissenting opinions.

Indeed, in both cases, Justices Gorsuch, Alito, and Thomas supported the argument that the Maine and New York statutes failed to meet the neutrality and generality test. In *Does*, the dissenting justices ruled that "*it seems Maine will respect even mere trepidation over vaccination as sufficient, but only so long as it is phrased in medical and not religious terms.*"<sup>145</sup> They continued that "*such a double standard is enough to trigger at least a more searching (strict scrutiny) review.*"<sup>146</sup> The judges concluded that the case revealed an issue of fundamental constitutional importance, which the Court must remedy.<sup>147</sup> Similarly, in *Dr. A v. Hochul*, the dissenting judges found that the vaccine mandate was not neutral and generally applicable, requiring the application of strict scrutiny review.<sup>148</sup> In particular, Justice Gorsuch found that the New York statute "*practically supports suspicion of those who hold unpopular religious beliefs.*"<sup>149</sup>

Even more alarming is Justice Gorsuch's reference to *West Virginia State Bd. Of Education v. Barnette* <sup>150</sup> in *Dr. A. v. Hochul*, in which the Supreme Court upheld the right of a religious group to refuse to salute the flag during World War II, creating an erroneous analogy between WWII and Covid-19. However, the most worrying element concerns how the dissenting Justices endorsed the idea of reformulating the concept of health in light of the religious factor, promoting the "religiousization" of health, as argued by healthcare workers.

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<sup>145</sup> *Does v. Mills*, 142 S.Ct. at 18 (Gorsuch, J., dissenting).

<sup>146</sup> *ibid.*

<sup>147</sup> Gitter (n 125) 28.

<sup>148</sup> *ibid.*

<sup>149</sup> *Does v. Mills*, 142 S.Ct. 555 (Gorsuch, J., dissenting)

<sup>150</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)

## 2.4. Some Concluding Remarks

*Prima facie*, *Does* and *Dr. A* convey the idea that compulsory vaccination may not be challenged by religious beliefs, upholding the principle established in *Smith*, namely that *"generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest"*,<sup>151</sup> implying how a certain religious animus should be demonstrated by the discriminatory nature of the effects of a particular law.<sup>152</sup>

However, the dissenting opinions of Justice Alito, Gorsuch and Kavanaugh mainly insisted that Governor Gorsuch's religious animus is evident from her statements, as written in the decision *Dr. A. v. Hochul*: *"This record gives rise to more than a 'slight suspicion' that New York acted out of 'animosity [toward] or distrust of' unorthodox religious beliefs and practices. This record practically exudes suspicion of those who hold unpopular religious beliefs. That alone is sufficient to render the mandate unconstitutional as applied to these applicants."*<sup>153</sup>

However, this reasoning presents two main problems. Firstly, it assumes bad faith on the part of any government actor, which, at best, is inferred from circumstantial evidence.<sup>154</sup> Secondly, it shows the different reasoning that occurred in the case of *Trump v. Hawaii*,<sup>155</sup> when President Donald Trump signed Executive Order No. 13, 769, suspending entry into the United States for 90 days for citizens from seven countries with a high risk of terrorism.<sup>156</sup> Indeed, in arguing before the Supreme Court, the plaintiffs sustained that the ban was motivated by Trump's

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<sup>151</sup> Carol Kaplan, "The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from *Smith*" (2000) 75 (4) New York Law Journal, 1065 <<https://www.nyulawreview.org/issues/volume-75-number-4/the-devil-is-in-the-details-neutral-generally-applicable-laws-and-exceptions-from-smith/>> accessed 4 April 2024.

<sup>152</sup> *ibid*, 1077

<sup>153</sup> *ibid*, 555.

<sup>154</sup> Stephen L. Vladeck, "The Most-Favored Right: COVID, The Supreme Court, and The (New) Free Exercise" (2022) 15 New York University Journal of Law and Liberty, 749 <<http://dx.doi.org/10.2139/ssrn.3987461>> accessed 4 April 2024.

<sup>155</sup> *Trump v. Hawaii*, No. 17-965, 585 U.S. \_\_\_\_ (2018)

<sup>156</sup> Vladeck (n 155) 750.

hostility towards Muslims since the majority of the countries chosen were Muslim-majority countries, citing several controversial statements by Trump.

However, in that case, the Court replied: “*The issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility*”.<sup>157</sup>

The dissenting opinions raise a crucial question about animus religiosity, which is closely tied to the idea proposed by Justices Alito, Gorsuch and Kavanaugh of abandoning the rational basis review established in *Smith*. This shift, increasingly supported by several organizations<sup>158</sup> in their *amici curiae* in *Does and Dr. A* could have significant implications for future cases. Indeed, while vaccination mandate remains safe, it is clear that the idea of overturning *Smith* is gaining traction.

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<sup>157</sup> *ibid*, 2418.

<sup>158</sup> In this case, I’m referring to organizations such as the *Catholic Medical Association*, *New Civil Liberties*, and *First Liberty Institute*, which aim to protect constitutional freedoms.

## ***CHAPTER 3: THE VACCINATION AS A COROLLARY OF SOLIDARISTIC PRINCIPLE IN THE ITALIAN LEGAL FRAMEWORK***

In this chapter, I will provide a brief overview of the Italian social movement *Movimento 3V*, which aims to protect citizens' “constitutional rights” against mandatory vaccination campaigns. Then, I will examine how mandatory vaccination was framed in the Italian legal order, highlighting the Constitutional Court's approaches in accepting the legitimacy of this health treatment, especially in light of the solidaristic principle contained in Art. 2 of the Constitution. In addition, I will analyze Constitutional Court judgments n.14, n.15, and 16 regarding Decree Law no. 44/2021, through which the Draghi government rendered COVID-19 vaccination compulsory for specific professional categories. Finally, the conclusion of this chapter will be devoted to understanding how the anti-vaxxers opposed the COVID-19 vaccination obligation before the Italian Constitutional Court.

### **3.1. The Movimento 3V during COVID-19**

Although other Italian social movements tried to oppose the COVID-19 mandatory vaccination campaign, such as the cultural association<sup>159</sup> renamed *La Biolca*,<sup>160</sup> which claims that vaccines contain cells from aborted fetuses and from bovine blood, I have chosen to focus only on the 3V Movement since it is the one that emerged as the leading anti-vax social actor and, above all, the one most organized among the COVID-19 social movements.

In particular, the Italian *Movimento 3V* (3V Movement in English), was founded in January 2019, aiming to *bring together activists from associations fighting for freedom of choice in*

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<sup>159</sup> Maria Luisa Lo Giacco, Il rifiuto delle vaccinazioni obbligatorie per motivi di coscienza. Spunti di comparazione (2020) 7 Stato, Chiese e Pluralismo Confessionale, 45 <<https://doi.org/10.13130/1971-8543/13253>> accessed 8 April 2024.

<sup>160</sup> See La Biolca, “Vaccinegate”, (*La Biolca*, 22 July 2023) <<https://www.labiolca.it/rubriche/vaccini-e-salute/vaccinegate/>> accessed 8 April 2024.

*vaccination and against the pediatric vaccine mandates approved by the Italian government in 2017.*<sup>161</sup> Since the end of the 2020 lockdown, the 3V Movement has intensified the protests in central and northern Italy<sup>162</sup> and evolved into a political party to the extent that two members were elected as municipal councilors in Trieste and Rimini in 2021.<sup>163</sup>

According to the 3V Movement, the pandemic was a pretext to create a strategy to control and restrict central freedoms,<sup>164</sup> supported by various governments that have disregarded the Italian Constitution and violated human rights.<sup>165</sup> In addition, the 3V Movement argued that treatments such as ozone therapy or supplements of vitamins C and D can replace the COVID-19 vaccine.<sup>166</sup> To spread their information, *Movimento 3V* mainly uses YouTube through the channel renamed *100 Days Like Lions*, which hosted Fabio Franchi,<sup>167</sup> a former doctor and author of an AIDS denialist book.<sup>168</sup>

Finally, it is interesting to examine the 3V Movement's Manifesto. In particular, on their website, the Manifesto promotes “*giving back dignity to politics and institutions. Replace the current political class, guilty of having betrayed the Italian people, with citizens who are resistant to the system, capable and honest, that is, coherent, who live politics as a service for the common good*”.<sup>169</sup> Moreover, among the various provisions of their Manifesto, there is one that aims at the “*application of constitutional rights according to the inalienable values of truth and freedom (personal and individual freedoms, collective freedoms, freedom of expression,*

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<sup>161</sup> Elisa Lello and others, “Vaccine Hesitancy and refusal during COVID-19 pandemic in Italy: Individualistic claims or repoliticisation?” (2023)15 *Partecipazione e conflitto*, 684 <10.1285/i20356609v15i3p672> accessed 12 April 2024.

<sup>162</sup> *ibid.*

<sup>163</sup> *ibid.*

<sup>164</sup> *ibid.*

<sup>165</sup> *ibid.*

<sup>166</sup> David Puente, Juanne Pili, “Bufale, campagne online e presunte terapie: cos’è il Movimento 3V, partito politico di riferimento dei No Vax” (*Open*, 22 September 2022) <<https://www.open.online/2021/09/22/cosa-e-il-movimento-3v/>> accessed 12 April 2024.

<sup>167</sup> *ibid.*

<sup>168</sup> *ibid.*

<sup>169</sup> See Partito 3V, “Manifesto” <<https://www.movimento3v.it/manifesto-programma-3v/>> accessed 12 April 2024.



*teaching, economic initiative, art and science) that constitute the very spirit of the Italian Constitution and represent the noblest expressions of humanity”,*<sup>170</sup> closely linked to point no. Seven of the Manifesto, which supports the “*total abrogation of vaccination obligations and health passport.*”<sup>171</sup>

This brief reconstruction of the 3V Manifesto is crucial because it allows us to understand how it is increasingly necessary for anti-vaxxers to use a legal language capable of attaching their motives to the constitutional fabric for consecrating their cause further.

### **3.2. Compulsory Vaccination in Italy and Italian Constitutional Court decisions**

In 1888, twenty-seven years after the unification, compulsory vaccination was already present in Italy, expanding in 1934,<sup>172</sup> with the obligation to vaccinate infants against smallpox within six months of birth.<sup>173</sup> Subsequently, in 1939, a new legal framework regarding vaccination came into force, which is still (although in different shapes) in use today. In particular, it provided that children needed to be vaccinated (e.g., against polio) to access primary schools.<sup>174</sup> However, it is essential to note that despite the compulsory nature of these medical treatments, Italian laws never introduced coercive measures concerning those who didn’t comply with mandatory vaccination.<sup>175</sup> Indeed, one of the most severe measures, which established that children could not be admitted to school without vaccination certification, lasted until 1999; however, this sanction was repealed the following year.<sup>176</sup> Currently, the parents who don’t

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<sup>170</sup> *ibid.*

<sup>171</sup> *ibid.*

<sup>172</sup> Stefania Flore, “Obbligo vaccinale e obiezione di coscienza nel caso del COVID-19” (2021) 3 Diritti Fondamentali, 30 <<https://dirittifondamentali.it/wp-content/uploads/2021/09/Flore-Obbligo-vaccinale-e-obiezione-di-coscienza-nel-caso-del-covid-19.pdf>> accessed 12 April 2024.

<sup>173</sup> *ibid.*

<sup>174</sup> *ibid.*

<sup>175</sup> Lo Giacco, (n 160) 58.

<sup>176</sup> *ibid.*

vaccinate their children, will face only a fine, as can be seen from Decree-Law no. 73 of 7 June 2017.<sup>177</sup>

As regards, instead, the case law of the Italian Constitutional Court, it is of fundamental importance to recall Art. 32, paragraphs 1 and 2 of the Constitution ("*No one can be compelled to undergo any medical treatment except as a specific provision of the law*" and "*The Italian Republic safeguards health as a fundamental right of the individual and as a collective interest*") that have become the primary lens through which reviewing the legitimacy of compulsory vaccination campaigns. Generally, to declare the legitimacy of a vaccination mandate, the Italian Constitutional Court has established three main conditions in light of Art. 32 of the Constitution.<sup>178</sup>

The first condition is rooted in the solidaristic dimension of Art. 32. In particular, as established by sentence no. 307/1990,<sup>179</sup> Art. 32 also protects a “collective” right to health, which can, therefore, justify a compression of individual self-determination.<sup>180</sup> This means that the individual's right to self-determination has to be balanced against society's interests. From this balancing exercise, the second condition arises, namely that on the other hand the solidaristic dimension should not lead to a total sacrifice of the individual's right, especially when vaccination can have adverse effects on the person's state of health.<sup>181</sup> Through this reasoning, the so-called principle of tolerability emerges, i.e. the idea that any negative consequences on the health of the person undergoing mandatory health treatment should be tolerable.<sup>182</sup> Lastly,

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<sup>177</sup> Decree Law n.73/2017.

<sup>178</sup> Ginevra Cerrina Feroni, “Obblighi vaccinali, conseguenze del mancato assolvimento e Costituzione. Una lettera critica delle sentenze della Corte Costituzionale n. 14 e 15 del 2023” (2023) 2 Diritti Fondamentali, 260 <<https://dirittifondamentali.it/wp-content/uploads/2023/06/G.-C.-Feroni-Obblighi-vaccinali-conseguenze-del-mancato-assolvimento-e-Costituzione.pdf>> accessed 12 April 2024.

<sup>179</sup> Italian Constitutional Court, Judgment n. 307/1990

<sup>180</sup> Feroni (n 179) 262.

<sup>181</sup> *ibid.*

<sup>182</sup> Lucia Busatta, “Giustizia Costituzionale e obblighi vaccinali: alla Corte l’occasione in cinque tempi, per consolidare il proprio orientamento” (2023) 4 Osservatorio Costituzionale, 119 <[https://www.osservatorioaic.it/images/rivista/pdf/2023\\_4\\_06\\_Busatta.pdf](https://www.osservatorioaic.it/images/rivista/pdf/2023_4_06_Busatta.pdf)> accessed 12 April 2024

the third condition, developed mainly through Judgment no. 107 of 2012,<sup>183</sup> concerned the obligation to provide compensation not only in the case of damage caused by undergoing compulsory but also recommended vaccination.<sup>184</sup> Therefore, from this brief review of case law in this regard, it can be observed how the solidaristic *humus* of Art. 32 creates a “social pact” for health between citizens<sup>185</sup> that can be avoided only when there is an intolerable sacrifice of individual rights.

This “pact” has also influenced cases involving refusal to undergo vaccination on personal and religious grounds. Concerning personal beliefs, in the decision n. 143/1988,<sup>186</sup> the plaintiff's demand (based on his personal beliefs on the harmful nature of the vaccine) that the polio mandatory vaccine campaign be declared unconstitutional was considered inadmissible<sup>187</sup> by the Italian Constitutional Court. Similarly, the Court, in the judgment n. 142/1983<sup>188</sup> declared inadmissible the request regarding the legitimacy of the laws on mandated polio and tetanus vaccinations since there were no conscientious objection provisions.<sup>189</sup> Lastly, with regard to the possibility of parents not having their children vaccinated on the grounds of personal or religious convictions, the Constitutional Court has always reiterated that the conflict between the freedom of conscience of adults and the protection of the health of minors cannot be resolved in favor of the former.<sup>190</sup>

Finally, before examining the Constitutional Court judgments concerning COVID-19, it is necessary to examine briefly how Italy has dealt with the COVID-19 mandatory vaccination

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<sup>183</sup> Italian Constitutional Court, Judgment n. 107/2012

<sup>184</sup> Francesca Minni, Andrea Morrone, “Il Diritto alla Salute Nella Giurisprudenza della Corte Costituzionale Italiana” (2013) 3 AIC, 4 <[https://www.rivistaaic.it/images/rivista/pdf/3\\_2013\\_Minni\\_Morrone.pdf](https://www.rivistaaic.it/images/rivista/pdf/3_2013_Minni_Morrone.pdf)> accessed 12 April 24.

<sup>185</sup> Feroni (n 179) 263.

<sup>186</sup> Italian Constitutional Court, Judgment n. 134/1988

<sup>187</sup> Italian Constitutional Court, Judgment n. 134/1988

<sup>188</sup> Italian Constitutional Court, Judgment n. 142/1983

<sup>189</sup> Flore, (n 173) 42.

<sup>190</sup> *ibid.*

campaign, which was introduced in April 2021.<sup>191</sup> In particular, only public and private healthcare workers (including pharmacies), had to undergo the vaccination.<sup>192</sup> Then, the Government gradually expanded the obligation to include different professional categories. For example, after health care workers, in December 2021,<sup>193</sup> it was extended to school staff and all those working in public safety, reaching university staff with Decree - Law No 1/2022.<sup>194</sup> Finally, it was this Decree - Law that considerably broadened the vaccination mandate, requiring anyone over the age of 50 to undergo COVID-19 vaccination. Following the European Union, the Italian Government adopted a “soft” vaccination mandate for the remainder of the population. This was in the form of the so-called Green COVID-19 Certificate<sup>195</sup>, a crucial requirement for access to public places (from means of transport to pubs), which could be obtained either by vaccination, by a negative test or by proving the recovery from COVID-19.

### **3.3. The legitimacy of the Decree-Law 44/2021 Before the Constitutional Court**

There are three Constitutional Court decisions concerning the legitimacy of the COVID-19 vaccination mandate: Decisions No. 14/15/16 of 2023. All three rulings concern the constitutionality of Decree-Law No. 44/2021, which, as mentioned above, introduced compulsory vaccination for specific professional categories such as healthcare workers. In particular, the Decree-Law stipulated that health organizations should suspend only those workers who had not been vaccinated by choice, guaranteeing instead the so-called *repêchage*, i.e., the reassignment of workers to tasks characterized by a limitation of interpersonal contacts,

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<sup>191</sup> Decree Law n. 44/2021.

<sup>192</sup> Stefano Civitarese, Micol Pignataro, “Mandatory Vaccination Requirements and the Green COVID-19 Certificate: A Fundamental Rights Perspective in Italy” (2022) 23 Joavaba, 341 <10.18593/ejil.30736> accessed 12 April 2024.

<sup>193</sup> Decree Law n. 172/2021.

<sup>194</sup> Decree Law n. 1/2022.

<sup>195</sup> Decree-Law n. 52/2021.

only to those workers who refused the vaccination for medical reason.<sup>196</sup> However, it is important to stress that the *Repêchage* was introduced for workers who were not vaccinated by choice in the school sector since the work suspension was only provided if the school staff could not perform a task with less interpersonal contact.<sup>197</sup> Finally, neither pay nor alimentary allowance was granted to anti-vaxxers who were suspended.<sup>198</sup>

Going in chronological order, Judgment No. 14 stems from the order of the Administrative Justice Council for the Region of Sicily, which raised two questions of constitutional legitimacy regarding the Decree Law N. 44/2021. However, the most critical dimension that will be examined here concerns the part of the Decree Law n. 44/2021 that established the COVID-19 vaccine mandate for healthcare personnel. Indeed, the Administrative Justice Council, starting from the scientific data on which COVID-19 vaccinations lead to adverse events, had concluded that those vaccinations did not respect the principle of tolerability.<sup>199</sup> In responding to the Council of Administrative Justice, the Constitutional Court stated that the risk of an occurrence of an adverse event, even if severe, did not imply the constitutional illegitimacy of the vaccine mandate, constituting, instead, only grounds for compensation.<sup>200</sup> In particular, according to the constitutional judges, the distribution of the COVID-19 vaccine, in the light of scientific data, has produced a clear benefit to the community. Indeed, in this decision, the Constitutional Court recalled the pact of solidarity contained in Art. 32, emphasizing how it is still the leading paradigm in interpreting the legitimacy of mandatory vaccination campaigns.<sup>201</sup>

Turning to Judgment No. 15, it pertained to the provision of Decree-Law No. 44/2021 that

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<sup>196</sup> Carlo Pisani, “Il vaccino per gli operatori sanitario obbligatorio per la legge è requisito essenziale per la prestazione” (2021) 2 Lavoro Diritti Europa, 9  
<[https://www.lavorodirittieuropa.it/images/Il\\_vaccino\\_per\\_gli\\_operatori\\_sanitari\\_obbligatorio\\_per\\_legge\\_e\\_requisito\\_essenziale\\_per\\_la\\_prestazione\\_4.pdf](https://www.lavorodirittieuropa.it/images/Il_vaccino_per_gli_operatori_sanitari_obbligatorio_per_legge_e_requisito_essenziale_per_la_prestazione_4.pdf)> accessed 12 April 2024.

<sup>197</sup> *ibid.*

<sup>198</sup> *ibid.*

<sup>199</sup> Italian Constitutional Court, Judgment n. 14/2023, para. 1.2.1

<sup>200</sup> *ibid.*, para 5.3

<sup>201</sup> *ibid.*, at. para 5.1.

mandated the suspension of anti-vaxxers workers without pay and alimentary allowance. The Courts of Brescia, Catania, and Padova presented three main arguments. First, they highlighted the unequal treatment between workers not vaccinated due to medical conditions and those not vaccinated for personal beliefs, as well as between anti-vaxxers medical workers and school staff anti-vaxxers, who had the option of *repêchage*.<sup>202</sup> Second, they pointed out the lack of pay and alimentary allowance for workers who refused the vaccine for personal beliefs (compared to the allowance granted to the unvaccinated workers for medical reasons). Lastly, they inquired to what extent compulsory vaccination could be legitimate since there were other methods to protect from COVID-19, such as masks or COVID-19 test.<sup>203</sup>

Concerning the first point, and in particular, the different treatment between non-vaccinated healthcare personnel and non-vaccinated school personnel, the Constitutional Court considered the question to be unfounded since the need to protect the guests of healthcare and hospital facilities and their fragile condition requires healthcare personnel to be vaccinated, unlike in the school environment, where individuals are less vulnerable.<sup>204</sup> On the other hand, about the difference between healthcare personnel who are not vaccinated due to medical conditions and the anti-vaxxers, the Court established that the provision was legitimate in light of the solidaristic principle.<sup>205</sup>

The Court then also declared the issues concerning the pay and the lack of an alternative to the mandatory vaccine test unfounded. In the latter case, the Court reiterated that the COVID-19 vaccine, in the light of the scientific data, appeared to provide more significant guarantees than

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<sup>202</sup> Giulia Alessi, “Corte Costituzionale – sent 15/2023: legittimità dell’obbligo vaccinale, sospensione dall’attività lavorative e dalla retribuzione per i lavoratori non vaccinati” (Biodiritto, 9 February 2023) <<https://www.biodiritto.org/Biolaw-pedia/Giurisprudenza/Corte-costituzionale-sent.-15-2023-legittimita-dell-obbligo-vaccinale-sospensione-dall-attivita-lavorativa-e-dalla-retribuzione-per-i-lavoratori-non-vaccinati> > accessed 15 April 2024.

<sup>203</sup> *ibid.*

<sup>204</sup> Italian Constitutional Court, Judgment n. 15/2023, at. para 10.2

<sup>205</sup> *ibid.*, para. 10.3.2.

the performance of a test to ascertain a person's actual non-contagiousness.<sup>206</sup> On the other hand, the lack of the alimentary allowance for the worker not vaccinated for personal beliefs was justified because the loss of the *synallagmatic nature of the performance of the contract of employment is not objective but subjective*,<sup>207</sup> being the worker's free choice not to undergo the vaccination.<sup>208</sup>

Finally, regarding judgment No. 16, the Lombardy Regional Administrative Tribunal raised concerns about the reasonableness and proportionality of the exclusion of the possibility for the worker (in this case, a psychologist) who voluntarily refused the COVID-19 vaccine to organize their work in alternative and safe ways (such as therapeutic sessions by video call).<sup>209</sup> However, the Court referred the matter to the *Avvocatura dello Stato* for lack of jurisdiction.

### ***3.3.1. The Other Side Perspective: The Anti-Vaxxers and the Italian Constitution***

As can be perceived in the analysis of the abovementioned judgments, the focus has mainly been on how the constitutional judges responded to the issues raised by the different courts. However, this examination still needs to be completed, as it lacks what arguments the anti-vaxxers have advanced to seek the illegitimacy of the COVID-19 vaccination mandate. In particular, the various constitutional provisions that healthcare workers have invoked can be divided into two groups, which migrate from a labour dimension to one concerning the personalistic profile and, more specifically, that core of rights that gives rise to self-determination.

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<sup>206</sup> *ibid.*

<sup>207</sup> *ibid.*, para 3.4.

<sup>208</sup> *ibid.*

<sup>209</sup> Busatta (n 183) 1.

The first group is composed of Art. 4<sup>210</sup> and Art. 35<sup>211</sup> of the Constitution, which recall the centrality of the right to work and its corollaries, such as the protection of work in all *its forms and practices*.<sup>212</sup> Thus, with reference to these two articles, the health workers emphasize how the consequences of not undergoing the COVID-19 vaccine erode the ensemble of protections that the Constitution recognizes in the asymmetrical relationship established between employer and employee.

As for the second group, this is composed of Art. 2,<sup>213</sup> Art. 3<sup>214</sup> and Art. 21.<sup>215</sup> More specifically, Art. 3 recognizes that all citizens have equal social dignity before the law without distinction of sex, race, language, religion, political opinion, personal and social conditions, entrusting the Italian Republic with the task of removing economic and social obstacles that interfere in creating this equality. Art. 2 and Art. 21, on the other hand, are linked by a common thread that led the Italian Constituent to enshrine the inviolability of the citizen's personal development (both as an individual and in social formations), thus also protecting the right to freely express their thought, as established by Art. 21. It is crucial, therefore, to emphasize how these two normative groups are not only characterized by a purely religious connotation but also enucleate a more general set of rights connected to guarantee that individuals are fully realized in their self-determination, both in the field of work and as a person *in fieri*.

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<sup>210</sup> Constitution of the Italian Republic, (Senato della Repubblica, Trans.) Art. 4: *The Republic recognizes the right of all citizens to work and promotes those conditions which render this right effective. Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society.*

<sup>211</sup> *ibid.*, Art. 35, para 1: *The Republic protects work in all its forms and practices.*

<sup>212</sup> *ibid.*

<sup>213</sup> *ibid.*, Art. 2: *The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.*

<sup>214</sup> *Ibid.*, Art. 3: *All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.*

<sup>215</sup> *ibid.*, Art. 21, para 1: *Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.*



As an indication of this situation, if we examine decision No. 14/15/16, we cannot find any religious arguments by the plaintiffs, as argued by the healthcare workers in *Does* and *Dr A*. Therefore, even though the main objective of the Italian anti-vaxxers is to obtain a ruling on the illegitimacy of the COVID-19 vaccine, the plaintiffs perceive this compulsory vaccination as illegitimate mainly because they see it as an obstacle to their human development *tout court*, expanding the religious argument.

### 3.4. Some Concluding Remarks

The three decisions of the Constitutional Court on the legitimacy of the COVID-19 vaccination mandate seem to retrace the path of that previous case-law *corpus*, which, since the early 1990s, has established the solidaristic principle as a cornerstone in reviewing the vaccination mandate. However, it is worth remembering that the Italian legal system does not allow constitutional judges to express dissenting opinions. Therefore, there can be no certainty that behind the consistent approach adopted by the Court are not, on the contrary, opinions that go in the opposite direction, as demonstrated also by the book of Nicolò Zanon,<sup>216</sup> a former constitutional judge who participated in the judgments examined here and who demonstrates strong reservations about the reasoning of the Court, especially concerning the decision on the possibility of the non-vaccinated psychologist to continue her work in a telematic manner. However, it is not my intention to discuss this topic in depth.

Indeed, the most interesting element that stands out from the judgments is the relationship of trust that the Constitutional Court establishes with the legislator since the Constitutional Judge's control is limited only to verifying that the legislator has acted within "*an area of scientific reliability, in the light of the best knowledge as defined by the institutionally appointed medical-*

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<sup>216</sup> See Nicolò Zanon, *Le Opinioni dissenzienti in Corte Costituzionale* (Bologna 2024), 2024.

*scientific authorities*"<sup>217</sup> in exercising the political discretion. Thus, with these parameters, the constitutional judge emancipates himself from more rigorous criteria for reviewing limits to fundamental rights, promoting tenuous limits in judging legislative discretion.<sup>218</sup> In conclusion, mainly because of the final findings of this thesis, it is essential to emphasize how the Constitutional Court does not distrust the legislator; on the contrary, it supports the adopted decisions regarding the COVID-19.

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<sup>217</sup> Italian Constitutional Court, Judgment n. 14/2023, para. 8.2.

<sup>218</sup> V. Baldini, "L'emergenza sanitaria: tra stato di eccezione, trasformazione della costituzione e garanzie del pluralismo democratico. Aspetti problematici (e poco convincenti) della più recente giurisprudenza costituzionale" (2023) 4 Osservatorio Costituzionale, 394 <[https://www.osservatorioaic.it/images/rivista/pdf/2023\\_4\\_06\\_Busatta.pdf](https://www.osservatorioaic.it/images/rivista/pdf/2023_4_06_Busatta.pdf)> accessed 12 April 2024.

## *CONCLUSION*

After thoroughly examining the American and Italian contexts and considering the various actors involved in the COVID-19 *Culture War*, it is time to address the research questions of this thesis. Firstly, it is evident that there is a substantial difference between how American and Italian anti-vaxxers opposed the COVID-19 mandatory vaccination campaign. In particular, for the American anti-vaxxers, the religious argument (expressed by the Free Exercise Clause) was a recurring element before the Supreme Court. Indeed, in *Does v. Mills* and *Dr. A v. Hochul*, the plaintiffs considered their Christianity to be of paramount importance, transforming, as mentioned above, the exceptions provided by the Maine and New York state regulations for those who might suffer adverse health effects in the case of COVID-19 vaccination into a "secular" dimension, which no longer pertain to the medical field. Moreover, the American anti-vaxxers have also tried to demonstrate how the lack of a religious exception within these regulations is dictated by a particular religious animus (as contested by the anti-vaxxers about New York Governor Kathy Hochul's statements). Instead, the religious exceptions have not entered the courtroom in the Italian context. Indeed, even though the Italian anti-vaxxers also opposed the COVID-19 vaccination (and in particular Decree-Law 44/2021) in the light of a principle of non-discrimination, this is sustained through the lens of the right to work and the more general right to self-determination, which do not necessarily arise from religious *humus*.

Secondly, although both Courts didn't accept the anti-vaxxer's arguments, there is still a difference between the U.S. Supreme Court and the Italian Constitutional Court. The U.S. Supreme Court's main reasoning was based on a procedural matrix derived from the *Smith* case, the so-called *valid secular policy test* requiring neutral and generally applicable laws,<sup>219</sup> and

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<sup>219</sup> Jake Greenblum, "Should Employment Division v Smith Be Overturned?" (2021) 23 (11)AMA Journal of Ethics, 865 <[https://journalofethics.ama-assn.org/sites/joedb/files/2021-10/hlaw1-peer-2111\\_0.pdf](https://journalofethics.ama-assn.org/sites/joedb/files/2021-10/hlaw1-peer-2111_0.pdf)> accessed 14 April 2024.

first articulated in *Reynold v. United States* <sup>220</sup> in 1879. On the contrary, the Italian Constitution Court rejected the anti-vaxxers' claims in light of the solidaristic dimension of Art. 32. Therefore, while both Courts maintained the legitimacy of the COVID-19 vaccine mandate, the Supreme Court mainly assessed it through a procedural perspective. In contrast, the Italian Constitutional Court regarded it as a reflection of a more general "pact of solidarity" created between citizens.

From this difference in how the courts evaluated the COVID-19 vaccination campaign, it is possible to understand the role of the courts during COVID-19. Indeed, the U.S. Supreme Court (primarily through dissenting opinions), in evaluating the COVID-19 vaccine mandate in a procedural sphere, looked with suspicion at the legislator, pointing out how the valid secular policy test can be transformed into a strict scrutiny review, precisely in light of the statements of the governor of New York Hochul, who, according to Justices Thomas, Alito, and Gorsuch demonstrate a religious animus. Instead, in defending the right to health in the solidaristic paradigm, the Italian Constitutional Court started from a relationship of trust established with the legislator. In other words, the Italian constitutional judge in the anti-vax climate assumed that the legislator has always acted in good faith in preventing the spread of Covid-19, unlike the dissenting opinion of the U.S. Supreme Court which looks with distrust on its legislator. Thus, the U.S. Supreme Court increased the degree of intensity of the *Culture War* unlike the Italian one.

These considerations forced us to reflect on why, in the U.S., the COVID-19 vaccination is seen in the *Culture War* framework, while in Italy, this framework is absent. As mentioned in Chapter 1, the percentage of unvaccinated in the U.S. and Italy is similar. Furthermore, even if the religious argument by Italian anti-vaxxers has not entered the courtroom, it is undeniable that outside of this, the opposition to COVID-19 vaccination has also been brought forward

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<sup>220</sup> *Reynolds v. United States*, 98 U.S. 145 (1879)

through the religious perspective, just as has happened in the United States, with studies that have shown how the US Christian nationalism is one of the strong preachers of anti-vaccines attitudes.<sup>221</sup> For example, Adriano Crepaldi, president of Italian Evangelical Christian Action, stated: "*Christians must not compromise. Let them avoid vaccines which lack the necessary guarantees*".<sup>222</sup> Indeed, similar to the U.S., also in the Italian anti-vax social movements, there is a component of traditionalist Catholics.<sup>223</sup> In addition, COVID-19 was also an issue which polarized Italian politics, as shown by Giorgia Meloni, who said: "*I do not vaccinate my daughter because it is not a religion*".<sup>224</sup> Therefore, the religious factor (although there may be different degrees of how this affects the anti-vax attitude) present in Italy and America, and always considered as a catalyst of the *Culture War*, is a weak element in explaining the US COVID-19 Culture War and its absence in Italy. And it is precisely for this reason that it might be useful to look at the legal components of the COVID-19 *Culture War*.

In particular, an element introduced in the first chapter, legal mobilization, may help understand the substantial difference between the American and Italian cases. As mentioned at the beginning of this thesis, there have been 3503 lawsuits against COVID-19 in the United States, whereas in Europe, there have been 640. This repeated mobilization of the law and the courts can be seen as essential to promoting and spreading *Culture War*. In addition, the U.S. Supreme Court is highly regarded in American society, as demonstrated by the fact that 91% of the American population believes that the U.S. Supreme Court's decisions have an effect on society, supported by 68% of the American population who follow news stories about the Court,<sup>225</sup>

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<sup>221</sup> Corcoran (n 80)

<sup>222</sup> Carlo Marroni, "Vaccini, nel fronte no-vax anche i cattolici tradizionalisti" (*Il Sole 24 Ore*, 9 August 2021) <<https://www.ilsole24ore.com/art/vaccini-fronte-no-vax-cattolici-tradizionalisti-micro-universo-salvini-e-trump-AEvJJyb>> accessed 28 April 2024.

<sup>223</sup> *ibid*

<sup>224</sup> Emanuele Lauria, "Covid, Meloni: "Non vaccino mia figlia perché non è una religione" (*La Repubblica*, 8 February 2022) <[https://www.repubblica.it/politica/2022/02/08/news/covid\\_meloni\\_no\\_vaccino\\_mia\\_figlia-336948922/](https://www.repubblica.it/politica/2022/02/08/news/covid_meloni_no_vaccino_mia_figlia-336948922/)> accessed 28 April 2024.

<sup>225</sup> Angioletta Sperti, "Constitutional Courts Speak Their Voice" (2021) 1 *The Italian Review of International and Comparative Law*, 225 <<https://doi.org/10.1163/27725650-01020002/>> accessed 28 April 2024.

unlike in Italy where only 15% know about the Italian Constitutional Court and its powers.<sup>226</sup> That means the U.S. Court occupies an essential space in the institutional framework and societal mechanisms. As a result, society follows legal mobilization in the United States more closely and can contribute to polarizing the U.S. society more than the Italian case.

Moreover, another difference concerns that legal mobilization in America is supported by much more structured social movements than in Italy. As we have seen, the Children's Health Defense and the Informed Consent Network Action are endowed with more significant economic power and organization than the *Movimento 3V*, which allows them to resort to the courts continuously despite not having a high success rate. This second element, namely the low success rate of cases in Italy and the U.S., is also essential in looking at the legal dimensions of the COVID-19 *Culture War*. Indeed, the possibility of dissenting opinions in the American legal system produces a fundamental consequence for Anti-Vax social movements: showing the anti-vaxxers how successful their arguments were in the Supreme Court in light of how many judges they supported or not, and whether or not to proceed with their legal mobilization. On the contrary, in the Italian case, despite the possible tensions between the Constitutional Judges, the Constitutional Court always appears "united", not showing how successful the argument against vaccines may have been, thus also demotivating the continued recourse to the Court.

Another difference between the American judicial system and the Italian regards the influence of the amicus curiae briefs. It was not until 2020 that the Italian Constitutional Court provided for the possibility of amicus curiae briefs with more stringent criteria than in the U.S. In contrast, in the US, as described by Allison Orr Larsen,<sup>227</sup> the amicus brief has evolved significantly from its origin as an impartial friend of the Court “to a mechanism that inundates

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<sup>226</sup> *ibid.*

<sup>227</sup> Allison Orr Larsen, “The Trouble with Amicus Facts” (2014) 100 Virginia Law Review <<https://scholarship.law.wm.edu/facpubs/1730>> accessed 30 April 2024.

*the Court with eleventh-hour, untested, advocacy-motivated claims.*<sup>228</sup> Thus, the *amicus curie machine*<sup>229</sup> can "infect" the Supreme Court's decision to the extent that the Supreme Court not only reuses the amicus curiae arguments in its own opinions, strengthening the position of Anti-vax social movements (precisely because of that centrality that the Supreme Court has in American society).

Finally, if the religious factor and its polarizing charge is undoubtedly an essential element in *Culture Wars*, at the same time, the relationship between law and *Culture Wars* and how the legal system structure can help support and fuel the *Culture Wars* should not be underestimated, as this thesis has attempted to demonstrate, highlighting how differences in legal systems can also be of fundamental importance for the propagation of *Culture Wars*.

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<sup>228</sup> *ibid*, 1758.

<sup>229</sup> *ibid*

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