

INTRODUCTION

Disaster Awaits

February 28, 2020. The scene that day felt surreal as crowds enjoyed fresh fish, listened to music, and danced in the warm breeze of a Barbados evening. Were they oblivious to the impending disaster? Could they have imagined that within two years, almost six million people would die from a virus that had already begun its deadly march across the globe? Or, aware of the danger, were they just trying to enjoy a few joyous moments before the siege began?

I wanted to feel their mirth. All through my vacation – the last requiring an airplane that my husband and I would take for almost two years – the rumble of impending doom grew louder, the headlines grimmer. More and more cases of a deadly new coronavirus infection were reported. South Korea was facing an epidemic; northern Italy, a catastrophe. On February 25, Dr. Nancy Messonnier, director of the National Center for Immunization and Respiratory Diseases at the Centers for Disease Control and Prevention (CDC), warned Americans that “disruption to everyday life might be severe.”¹

With the inevitable storm approaching, I began spending more time away from the beach, working with brilliant colleagues in public health and law on a letter, eventually signed by more than eight hundred public health experts, to Vice President Mike Pence and other policymakers with recommendations on how the United States should respond to the

¹ Nathaniel Weixel, *Top Health Official Warns Coronavirus Spread Appears Inevitable in US*, HILL (Feb. 25, 2020), <https://thehill.com/policy/healthcare/484530-top-health-official-warns-coronavirus-spread-in-us-inevitable-its-not-a>.

coming catastrophe.² The letter shared our thoughts about what should and should not be done. It was propelled by our recognition that the United States was more vulnerable than many realized. Despite decades of pandemic preparedness planning, our public health system was underfunded. Millions of Americans lacked access to affordable health care. Millions more lacked paid sick leave. Our population had higher rates of chronic disease than people in other wealthy countries. Our letter explained that an effective response to the pandemic would “protect the health and human rights of everyone in the US” and “provide adequate funding and support” to help those who are “most vulnerable because of their economic, social or health status.”³

We wrote the letter knowing that the prospects for an effective response were not propitious. We knew that the United States was led by a president who eschewed facts and embraced misinformation while stirring white racial resentment and xenophobia. The nation was also deeply divided, and entering an election year.

There were also things I did not fully appreciate in February 2020. After years writing about how societies respond to public health crises, I worried that vulnerable populations would be scapegoated. I also feared that Donald Trump would use the crisis to enhance his own powers, perhaps even by calling off the November election.

Much (but not all) of this happened. There was a marked rise in hate crimes during the pandemic, especially against Asian Americans,⁴ and Trump did issue emergency orders targeting immigrants.⁵ Yet his primary mode throughout 2020 was to downplay rather than exaggerate the risks posed by the novel coronavirus. The pattern that he set of COVID-19 denialism and the embrace of misinformation continued

² Gregg S. Gonsalves et al., *Achieving a Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State and Local Leaders from Public Health and Legal Experts in the United States* (Mar. 2, 2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf.

³ *Id.*

⁴ Associated Press, *More than 9,000 Anti-Asian Incidents Have Been Reported since the Pandemic Began*, NPR (Aug. 12, 2021), www.npr.org/2021/08/12/1027236499/anti-asian-hate-crimes-assaults-pandemic-incidents-aapi.

⁵ Wendy E. Parmet, *Immigration Law's Adverse Impact on COVID-19*, in *ASSESSING LEGAL RESPONSES TO COVID-19*, 240, 241 (Scott Burris et al. eds., 2020), https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f4d6578225705285562d0f0/1598908033901/COVID19PolicyPlaybook_Aug2020+Full.pdf.

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throughout the pandemic, helping to explain why counties that voted for Trump in 2020 ended up with higher death rates than those that voted for his opponent.⁶

Even more troubling was the inability or unwillingness of many Americans to recognize the social nature of a pandemic. American individualism has many virtues, but it can mislead when epidemics strike. In order to reduce contagion, we need to understand the risks we pose to others and the risks they pose to us. We also need to accept a type of social compact in which we all take some steps to protect others knowing that they will do the same for us. For a short time in the spring of 2020, it seemed as if most Americans agreed, as people from across the partisan divide reduced social contacts and supported pandemic-mitigation measures.⁷

But the price that individuals and families paid for public health measures was high, the economic and social supports to weather them were inadequate, and the public health messaging was terrible. Although the federal government provided significant financial support, many people lost jobs and businesses. Children lost the opportunity to learn along with the social supports that schools provide. Social isolation took its toll on Americans' mental health and well-being. Meanwhile, some politicians and media personalities were happy to spread misinformation and blame public health measures or those with opposing political beliefs rather than the virus for the calamity. By February 2022, Americans' willingness to accept almost any public health measures had declined.⁸ Many had come to view the public health system rather than COVID-19 as the enemy.

Increasingly, the courts accepted that conclusion. As the pandemic progressed, courts – led by an energized conservative majority on the Supreme Court – began giving more weight to the costs that public health measures imposed on freedom than to the lives the measures were designed to save. Many courts also cabined executive authority, making

⁶ David Leonhardt, *U.S. Covid Deaths Get Even Redder*, N.Y. TIMES (Nov. 24, 2021), www.nytimes.com/2021/11/08/briefing/covid-death-toll-red-america.html.

⁷ David Lazer et al., *Report #1, COVID-19 National and State Data*, COVID STATES PROJECT (Apr. 20, 2020), www.covidstates.org/reports/covid-19-national-and-state-data.

⁸ Nate Cohn, *Americans Are Frustrated with the Pandemic. These Polls Show How Much*, N.Y. TIMES (Feb. 8, 2022), www.nytimes.com/2022/02/08/us/politics/covid-restrictions-americans.html.

it harder for health officials at all levels of government to implement measures that were grounded on the best available science. Indeed, in some cases it appeared that the courts cared neither about what the science said nor about the cost of their decisions on the public's health.

Early in the pandemic, my hope was that the courts would prevent overreaches, even as they accepted reasonable public health measures that were needed to save lives. But as I watched the pattern of judicial decisions unfold over the next two years, I was struck by the fact that in many instances, courts were impeding our ability to save lives, while deepening the distrust and division that undermined our pandemic response. Looking deeper, I realized that courts had also helped create the conditions that had left us so vulnerable to the pandemic.

These developments should not have been surprising. Commentators have long noted that courts, especially the Supreme Court, play an outsized role in shaping public policy. Think about the role of the courts in debates over segregation, abortion, gun policy, and the Affordable Care Act (ACA). In all these cases (and many more), judicial decisions – particularly those relying on constitutional law – helped to determine the policies that affect our lives. It shouldn't be shocking, therefore, to suggest that courts might bear some responsibility for the fact that the US response to COVID-19 was bumbling at best, and that more Americans died from the coronavirus in the first two years of the pandemic than residents of any other high-income nation.⁹

This book explores the courts' role in that disaster. More specifically, it examines how judicial decisions – especially constitutional law decisions – that privileged a particularly thin and one-sided conception of liberty helped to undermine our response to the pandemic and amplify the forces that tear at our social fabric. The book also discusses how courts in an earlier era, when epidemics were more common, understood the relationship between public health and liberty. Although deeply flawed in many ways, this older view, represented by the ancient legal maxim *salus populi suprema lex* – the health (or welfare) of the people is the highest law – serves as a reminder that our Constitution does not condemn us to accepting uncontrolled

⁹ Benjamin Mueller & Eleanor Lutz, *U.S. Has Far Higher Covid Death Rate than Other Wealthy Countries*, N.Y. TIMES (Feb. 1, 2022), www.nytimes.com/interactive/2022/02/01/science/covid-deaths-united-states.html.

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contagion. Nor does it deny the possibility of a social compact.¹⁰ The protection of the public's health is one part of that compact. If we are to be a healthy people, we need to reclaim it.

The story that follows begins in November 2020, as Amy Coney Barrett joins the Supreme Court and a strengthened conservative majority – in the midst of the worst pandemic in over a century – upends long-settled understandings of how courts should review public health measures. Chapter 2 then explores the era of *salus populi*, showing how courts attempted to reconcile individual liberty with public health protection prior to the New Deal. Chapter 3 reviews the rejection of that jurisprudence during the New Deal and the development in the mid-twentieth century of an approach that grants greater protection to some, but not all, individual rights.

The next chapters look at how the courts applied and remade those protections during the COVID-19 pandemic. Chapter 4 focuses on decisions relating to laws mandating social distancing. Chapter 5 considers the courts' response to vaccine and mask mandates. In both chapters, we see how far the courts traveled from the jurisprudence of *salus populi* and the many ways in which they tied public health's hands. We also observe how some judges became players in the increasingly strident culture war that erupted over COVID-19 policies. If the courts did not sow the discord in the United States, they did not temper it either.

Chapters 6 through 9 widen the lens, looking beyond the COVID cases to the role that constitutional law has played in generating the vulnerabilities that the pandemic exploited. Chapter 6 discusses how American law rejected the right to health, as well as constitutional rights for any of the many social benefits – from education to housing – that could have buffered people during the pandemic. Chapter 7 looks at how the courts' narrow conception of equal protection permitted structural racism, xenophobia, and other deep-seated social infirmities to generate inequities that disproportionately killed people of color early in the pandemic.

Chapter 8 considers the impact of misinformation during the pandemic, and how the Supreme Court's increasingly strong protections

¹⁰ Adrian Vermeule, *Supreme Court Justices Have Forgotten What the Law Is For*, N.Y. TIMES (Feb. 3, 2022), www.nytimes.com/2022/02/03/opinion/us-supreme-court-nomination.html.

for freedom of speech – especially commercial speech – helped to unleash a toxic informational environment. As a result, deaths continued to climb even after lifesaving vaccines became widely available. Chapter 9 explores the relationship between health and democracy, suggesting that in a very deep and fundamental way, our health is imperiled because our democracy is impaired. Here, too, the courts have played a deleterious role, privileging the rights of campaign donors over those of voters while reducing the public’s influence over health policy.

The conclusion notes the dangers ahead but reminds us that the worst-case scenario is not inevitable. The pandemic could not have been stopped, but much of its toll was preventable. So, too, we can remedy the diseases that plague our democracy. While our constitutional system will always make public health prevention messy and imperfect, it does not condemn us to the level of disease and despair we have experienced. That required judicial interpretation, along with a legal mindset that had lost sight of liberty’s fuller meaning.

Along the way, the book explores what makes a population healthy or ill. It also considers the tension between the need to protect individuals from government overreach and the need to provide them with protections that only governments can offer. The problem is less that the Court has protected some rights than that it has protected a few too fully while neglecting others altogether. More so, it has forgotten *salus populi* and the public’s right to have their elected officials take scientifically grounded steps to protect their health. It has also lost sight of contagion’s most compelling lesson: Our own health depends on the health of others.

Before turning to the story, two caveats are in order. First, this is not a book about methods of constitutional interpretation. Indeed, the book purposefully eschews long-standing debates about originalism versus living constitutionalism. Many brilliant scholars have entered that fray. My aim is different: to explore how judicial decisions relying on very different modes of interpretation have shaped our capacity to be healthy – biologically and politically – and to remind us that the Constitution has and can be understood differently.

Second, I offer no endorsement of any particular public health policy, either during or before the pandemic. Indeed, I recognize that many of the policies that public health officials and experts recommended during

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the pandemic were, in hindsight, problematic. In part that is because the science changes quickly during a pandemic. Advice given based on Monday's data may no longer be valid by Tuesday. It is also because public health, like any field, is imperfect. The people who practice it have varied strengths and perspectives. Throughout the pandemic, they disagreed with one another. Some may have underestimated and others likely overestimated the economic, social, and political costs of mitigation measures. Others mangled their messaging. Many were challenged by political interference and misinformation spread by their political bosses.¹¹

Yet if the book does not take a position on any particular public health policy intervention, it does accept the perhaps contestable view that the public's health (*salus populi*) is part of the common good – and, as such, an important legal and political goal.¹² That does not mean that any particular policy put forth in the name of public health is well conceived or worth the costs (in terms of liberty, social pain, or dollars). It does mean that health should *matter*, and that because it does, we need to recognize the interdependence that contagion creates and accept that our health is not only in our hands. We also need a legal system that allows people, acting through their elected representatives and appointed officials, to take reasonable, scientifically grounded steps to safeguard health. As the preamble to the Constitution states, our nation was founded to “provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty.” The Constitution was not designed to and does not demand that we disregard the general welfare. Nor does it command the courts to do so.

More than two years into the pandemic, there are many reasons to worry. While deaths from COVID-19 have fallen significantly from their peak, many Americans are still dying from the disease. In addition, new variants keep emerging. We may be on the road to endemicity or just experiencing the downside of one of many waves. We also remain a deeply fractured nation, one in which the threat of authoritarianism and political violence feels palpable. The future of our democracy seems as imperiled as the future of our health.

¹¹ Claudia E. Haupt & Wendy E. Parmet, *Lethal Lies: Government Speech, Distorted Science, and the First Amendment*, 2022 U. ILL. L. REV. 1809, 1813–1814. 1809.

¹² WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 62–68(2009).

The two are inextricably related, and our constitutional law has played a dramatic role in magnifying the precarity of both.

One could be forgiven for wanting to act as if the pandemic was over and carry on as if it were February 2020, but the dangers to our collective health and our democracy are too grave. We need to understand and engage. We need also to remember that our Constitution has not always demanded acquiescence to contagion. We should not permit it to do so now.