

THE CONSTITUTION AFTER COVID

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I'll start with a quote from a white paper issued by McKinsey and Company in May 2020:

It is increasingly clear our era will be defined by a fundamental schism: the period before COVID-19 and the new normal that will emerge in the post-viral era: the "next normal." In this unprecedented new reality, we will witness a dramatic restructuring of the economic and social order in which business and society have traditionally operated. And in the near future, we will see the beginning of discussion and debate about what the next normal could entail and how sharply its contours will diverge from those that previously shaped our lives.¹

You probably remember all the talk about the "new normal" back then. The idea that Covid ushered in a new normal was a very stylish way to talk for a while. The phrase was on the lips of all the mainstream opinion-makers in our culture. The media, business leaders, government bureaucracies, the non-profit world, even the commercials on TV all seemed to be singing from the same songbook, as curiously they so often do. Two years later, I don't hear about the new normal as much. And there are a couple of reasons that might be.

It could be that after the initial shock of the early stages of the pandemic, Americans demanded not a new normal but a return to the old normal. And so maybe the reason you don't hear about the new normal anymore is because we rejected it. They pitched the idea as hard as they could, but we didn't buy it—and we're headed back to where we were. But it could also be that you don't hear talk about the new normal these days because we're already living in it. It's already replaced the old normal. Perhaps what was called the new normal in the spring of 2020 has become just plain normal today.

And if it's true, as McKinsey and Company thought, that we will witness or have witnessed "a dramatic restructuring of the economic and social order in which business and society have traditionally operated,"² then you'd expect we'd witness a similarly dramatic restructuring of our legal order. So have we? Have we entered a new era in constitutional law? And more important

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¹ Kevin Sneader & Shubham Singhal, *Beyond coronavirus: The path to the next normal*, MCKINSEY & COMPANY (March 23, 2020), <https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/beyond-coronavirus-the-path-to-the-next-normal>.

² *Id.*

than the descriptive question of the extent to which Covid has already changed our legal culture is the prescriptive question: should it change our legal culture? Should we let it? Do *you* want Covid to bring about a dramatic restructuring of our constitutional order? And if you don't, what are *you* going to do about it? These are the questions I'd like us to think about together today.

We're now almost two years removed from the onset of the coronavirus crisis. The previously unimaginable government interventions that swept the country in the spring of 2020 have subsided. I will say that coming from Texas—where my only daily reminder of Covid is the handful of people who still choose to wear a mask at the grocery store—to Chicago—where many of your civil rights depend on your vaccination status—is a bit of a culture shock. But while government Covid restrictions aren't vanishing at the same rate all over the country, they do seem to be on a downward trend almost everywhere. Life, in much of America, is pretty much back to what you might call “normal.”

And as life seems to get back to the old normal in many ways, it's tempting to think that the law will naturally follow suit, and to think maybe we can just put 2020 in the memory hole and carry on as if nothing has changed, as if everything is, well, normal.

But lest we forget, there was absolutely nothing normal about the government ordering American citizens to stay in their homes unless they had an approved reason for leaving. There was nothing normal about the indefinite elimination of the right to peaceably assemble. There was nothing normal about the government ordering houses of worship to close their doors. And there was nothing normal about all of this being done not by legislation but by executive branch officials using unilateral emergency powers.

Given everything that's happened in our country over the last two years, there has never been a more important time—certainly in my lifetime at least—for us as lawyers and judges to do some serious thinking about our commitment to our Constitution. Among the many concerns motivating our government's response to Covid, preservation of constitutional rights has not seemed to be very high on many people's priority lists. As a legal community—and more broadly as a People—we need to confront the wreckage of the last two years openly and honestly. We need to reckon with what happened, and we need to decide what kind of government we want to pass on to the next generation.

I'd like to focus briefly on the question of religious liberty during Covid because it's one of the starkest examples of previously unthinkable government action that came and went during 2020 and that we as lawyers and judges need to reckon with. It's of course the very first freedom enshrined in our Bill of Rights, and religious liberty is the reason that so many of our ancestors immigrated to America, whether it was the Pilgrims four hundred years ago or many people from all over the world much more recently.

Given the First Amendment, and given our nation's history and traditions, many people I've talked to—and here I think of my parents, who were raised going to church every Sunday and raised me that way—could never have imagined that the forced closure of churches on a mass scale would ever happen in this country. That's the kind of thing that might happen in Russia or China, but not here. Maybe if there was a really bad contagious disease going around, almost everybody would choose to stay home from church, but surely the government in America can't close the churches' doors against their will.

But it did. And in terms of the legal rationale for it, a lot of people pointed to the Supreme Court's decision in *Jacobson v. Massachusetts*³ from over one hundred years ago which upheld compulsory smallpox vaccination, and they said, essentially, *Jacobson* means the government can do whatever it thinks is necessary to protect public health in a pandemic. But *Jacobson* involved compulsory vaccination, and as controversial as that topic may be, there's no explicit provision in the text of the Constitution protecting people against compulsory vaccination. Without pre-judging the constitutionality of compulsory vaccination, we can all agree that the text of the Constitution doesn't mention vaccines. There is no anti-vaccination clause. But there is a Free Exercise Clause, and there is a right to peaceably assemble, although you might not have known it from the way our governments have behaved. My own view—which I've expressed in writing⁴—is that courts should very strictly scrutinize pandemic measures that interfere with rights afforded by our state and federal constitutions. If that's not the case—if the rule is instead that courts should defer to governors, mayors, and public health authorities when they decide it's not safe for people to gather to worship, to protest, or to simply be with their families and friends—then it seems to me we don't actually have a right to religious liberty or a right to peaceable assembly. We have only privileges, which we can exercise only when the government thinks it's safe for us to do it. Of course, the whole point of having a right to something is that you get to do it even when the government thinks you shouldn't.

I mentioned the Pilgrims earlier. I'm right now reading out loud an American history book to my children in the evenings, and I've been struck—as I am every time I think about early American history—by the extreme hardships endured by the early settlers: disease, starvation, drowning at sea. And time after time, in the story of each new colony that was carved out of the wilderness, we read that the reason they endured those unspeakable hardships was so they could worship God freely in the New World. Benjamin Franklin famously said, “Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.”⁵ The people who founded this country gave up their safety entirely in the relentless pursuit of liberty. The tension between liberty and safety that we've experienced during Covid is nothing new. It's an intractable question that every generation has to confront. What's new, perhaps, is the overwhelming preference for safety over liberty that so many powerful institutions in our society demonstrated during Covid. But the question itself—should our government prioritize our liberty or our safety—is among the oldest political questions around.

I use the word “political” intentionally. No public health official or scientist can dictate to a self-governing people how to strike the right balance between safety and liberty in the face of a contagious disease. We the People of this country have the right and the responsibility to answer that question, and we do so through politics. Politics shouldn't be a dirty word. Politics is a wonderful thing! It is the way a free people shapes its own destiny. It is a precious heritage we have inherited from people who faced hardships we can't even imagine so that we could rule ourselves through politics, instead of being ruled by unaccountable authorities like kings or so-called experts. What a blessing it is to be able to resolve our disagreements peaceably through

³ 197 U.S. 11 (1905).

⁴ *In re Salon a la Mode*, 629 S.W.3d 860 (Tex. 2020) (Blacklock, J. concurring in the denial of mandamus relief).

⁵ *Pennsylvania Assembly: Reply to the Governor, 11 November 1755*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Franklin/01-06-02-0107> (last visited Mar. 6, 2023).

politics, rather than to be dictated to by unaccountable government power exercised in the name of “science.”

We often hear people bemoaning how Covid quickly became “so political.” I think often they’re really complaining about the distasteful personalities involved—or the rancorous and vindictive way we conduct public debate these days—when they complain about things getting too political. That’s understandable. But sometimes what people seem to be saying—and this is really a dangerous idea—is that our response to Covid shouldn’t be political; it should be scientific. They contrast politics and science; they cast politics as dirty and inefficient, and science as pure, noble, and effective. And they chastise us to “Follow the Science.”

There are at least two enormous assumptions in the “Follow the Science” mantra. First, of course, is the assumption that government scientists are capable of accurately understanding the disease and coming up with effective means of combatting it through government policy. Whether that’s a valid assumption is a big topic I don’t want to get into. But let’s just assume it is valid. Even if we assume the government could stop Covid or any other disease if it wanted to, you have to make another assumption before you’d agree that government policy should just “Follow the Science.” You’d have to assume that reduction of the transmission of the disease is the highest and best value to be pursued and that all government policy should pursue that value at the expense of all other values. You’d have to assume that our government should value our safety far more highly than it values our liberty. But that value judgment is itself political. You’ve assumed away the biggest, most important question, a question that a free society can only answer by politics: How willing are we to give up our ancient liberties for the chance we might reduce the impact of a respiratory virus or of any other threat to our safety?

There’s a lot more to this wonderful life than just staying alive. How do we put a value on that? A free people, a sovereign people, would answer these questions of competing values for themselves and then instruct their government to behave accordingly. An unfree people, a subject people, must accept the answer dictated to them by those in power and then helplessly endure whatever hardships the government imposes on them. Which of those descriptions—the sovereign people or the subject people—better describes us over the last two years? It’s a mixed result, I’d say. But there are signs of the sovereign people reasserting themselves.

Last fall, in November of 2021, the People of Texas decided to dictate to their government, rather than the other way around. They chose not to leave it up to scientists or judges to decide whether they can worship as they choose the next time the WHO or the CDC declares a pandemic. They took matters into their own hands by exercising their sovereign right to amend their state constitution. They’ve now added the following provision to their Bill of Rights:

Sec. 6-a. This state or a political subdivision of this state may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship, in this state by a religious organization established to support and serve the propagation of a sincerely held religious belief.⁶

⁶ TEX. CONST. art. I, § 6-a (2021).

The adoption of this amendment—this direct rejection by the People of Texas of a pandemic measure they never want to see again—reflects something very healthy, which is that the people are still very much in charge, when they decide to be.

So—before I close, let’s return to where we started—are we already in a new normal? The People of Texas have certainly said the answer is no, at least when it comes to government restriction of religious services. But of course, there are many other ways the world around us seems to have changed over the last few years and continues to change, and now I’m not talking just about Covid. We need to ask ourselves: will we accept these things as the new normal, or will we—as our forefathers did—boldly pursue liberty even in the face of danger? That’s a question each of us has to answer for ourselves. And depending on your answer, there may be a price to pay for standing up for what you believe to be true. Some of you have probably already experienced that. I want to assure you that, at forty-one years old, I have no regrets about any of the times I have stuck my neck out and stood for the truth. My regrets are the times I had the chance to take that risk but chose the safety of silence instead.

You are a group of brilliant young people, with boundless possibilities in front of you. You’re here at this university because you have the raw materials required to be the kind of person who doesn’t just float through life seeking money and pleasure but who helps shape the destiny of your country.

I want to share with you a quote from Abigail Shrier, who was a classmate of mine at Yale Law School. This is from a speech she gave to students at Princeton, which you can find online:

You who are studying at one of the greatest academic institutions in the country only to be told that after graduation, you must think as we tell you and recite from this script—why were you born? What’s the point of being alive? Computers are vastly better at number crunching. They’ll soon be better at all kinds of more complex tasks. What they cannot do is stand on principle. . . . What the computer cannot know is the glorious exertion of the human will when it refuses to truckle in the face of lies and instead publicly speaks the truth.⁷

There’s a different kind of wilderness out there today than the physical one the Pilgrims faced. It’s a wilderness of lies, and it can be just as unforgiving, in its own way, as the physical wilderness our ancestors confronted. In the face of that danger, will you seek the safety of silence? Or will you confront the darkness of the wilderness with the light of truth? Will you accommodate yourself to the new normal? Will your lips repeat things your heart knows are false—things about what is good and true and beautiful in this world, things about the history of this extraordinary country of ours, things about our human nature as men and women—things the world wants you to say but that your conscience tells you are lies? Again, the old conflict between safety and liberty shows itself. There is great safety in accommodating yourself to fashionable opinion. The people at McKinsey who wrote the paper I started with want to hear you say certain things—things that are easy to say but that just aren’t true. You may make more money that way. You may be held in higher esteem by those whose opinions appear to matter most in our society. You may avoid the risks of social conflict and even ostracism that come from standing for the truth in

⁷ Abigail Shrier, *What I told the students of Princeton*, THE TRUTH FAIRY, (Dec. 8, 2021), <https://abigailshrier.substack.com/p/what-i-told-the-students-of-princeton>.

a wilderness of lies. But at what cost? What kind of a life is that? A life spent suppressing the divine spark that lights the fire of truth within you?

No. We are the inheritors of a glorious tradition of liberty and limited government, passed down to us by people who faced dangers beyond our wildest dreams so that we could live today in this beautiful land of abundance and freedom. As with every generation, it is our responsibility to do what needs to be done now—whatever the cost to ourselves—to ensure that our children and our children’s children will enjoy those same blessings. So what will we do? What will *you* do? Whatever it is for each of us—writing, speaking, working in government, or just raising a family or being a good friend—let us speak the truth. Let us do it boldly. Let us be worthy of the generations who came before us. And let us, with God’s help, pass the test that our Founding Fathers laid down as the measure of each generation. Let us “secure the Blessings of Liberty to ourselves and our Posterity.”⁸

That’s all I have. Thank you.

⁸ U.S. CONST., pmb1.