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## PANDEMICS AND THE CONSTITUTION

*Toni M. Massaro*<sup>\*</sup>

*Justin R. Pidot*<sup>\*\*</sup>

*Marvin J. Slepian*<sup>\*\*\*</sup>

*The COVID-19 pandemic unleashed a torrent of legal and political commentary, and rightly so: the virus touches every corner of life and implicates many areas of law. In response to the virus, governments, civic institutions, and businesses struggled to protect public health, respect individual autonomy, and enable Americans to satisfy their elemental instinct to congregate with one another.*

*Our early pandemic response largely failed. Our dysfunction led to deaths and lost livelihoods, in part because public perceptions about the virus, and interventions designed to address to it, substantially fell along predictable ideological lines. We must take stock of these failures so that we can do better when the next pandemic arrives, as it surely will.*

*We argue that ingredients for broader consensus already exist, even if they remain obscured by political and policy rancor. Americans share the common goal to safely return to families, jobs, schools, places of assembly, pubs, parks, and the myriad of other settings that make up human lives, and also share a fidelity to basic constitutional legal norms that can inform how we respond to pandemics in ways that allow safer returns.*

*This Article identifies four constitutional principles to shape pandemic policies and enable them to garner broader public acceptance: substantive and procedural rationality, respect for fundamental liberties, equal treatment of similarly situated persons and entities, and sufficient government flexibility to enable officials to nimbly and effectively address emergencies that threaten life itself. Recognition of these norms is essential for all institutions, public and private, because reopening safely can occur only through the cooperation of private individuals. They will cooperate only if*

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<sup>\*</sup> Regents' Professor and Milton O. Riepe Chair in Constitutional Law, University of Arizona James E. Rogers College of Law. Warm thanks to our fellow "safe return" planners, Teresa Miguel-Stearns, Bernadette Wilkinson, Vanessa Buch, Andy Coan, Robert Glennon, and Jason Kreag, and to the *Arizona Law* community for thoughtful and collegial input into this challenging process.

<sup>\*\*</sup> Professor & Co-Director of the Environmental Law Program, University of Arizona James E. Rogers College of Law.

<sup>\*\*\*</sup> Regents' Professor in Medicine and Medical Imaging, Biomedical Engineering, Materials Science and Engineering and Chemical and Environmental Engineering; McGuire Scholar - Eller College of Management. Founder and Director of the Arizona Center for Accelerated Biomedical Innovation (ACABI), University of Arizona.

*they have adequate confidence in the ability of institutions to protect their safety, liberty, and equality.*

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#### I. INTRODUCTION

In the winter of 2020, COVID-19 spread like a firestorm through the United States.<sup>1</sup> Before January 20th, no person within American borders had a confirmed case of the disease.<sup>2</sup> In less than three months, it spread to every state, and President Donald Trump declared a national emergency.<sup>3</sup> By the end of 2020, almost 350,000 Americans had died.<sup>4</sup> Although the public health

1. Go Nakamura, *With Covid-19 Cases Surging, the U.S. Is in For a Dark and Deadly Winter*, NBC NEWS (Nov. 8, 2020, 3:30 AM), <https://www.nbcnews.com/health/health-news/covid-19-cases-surging-u-s-dark-deadly-winter-n1246740> [<https://perma.cc/Q32S-VCRJ>].

2. See Roni Caryn Rabin, *First Patient with Wuhan Coronavirus Is Identified in the U.S.*, N.Y. TIMES (Jan. 1, 2020), <https://www.nytimes.com/2020/01/21/health/cdc-coronavirus.html> [<https://perma.cc/4XXL-U34T>].

3. Proclamation No. 9994, 85 Fed. Ref. 15,337 (Mar. 18, 2020); see Siobhán O'Grady et al., *Coronavirus Confirmed in All 50 States and D.C., After West Virginia Reports First Case*, WASH. POST (Mar. 17, 2020), <https://www.washingtonpost.com/world/2020/03/17/coronavirus-latest-news/> [<https://perma.cc/CW4X-53PX>].

4. See Cara Richardson & Jessica Flores, *Coronavirus Live Updates: On First Day of 2021, US Records Its 20 Millionth Case; Turkey Confirms 15 New Cases of New Strain*, USA TODAY (Jan. 1, 2021, 6:22 PM), <https://www.usatoday.com/story/news/nation/2021/01/01/covid-news-times-square-2020-quiet-vaccine-damaged-wisconsin/4106926001/> [<https://perma.cc/V6P8-XQAW>].

community had long warned of the dangers posed by a pandemic like this one,<sup>5</sup> the United States was caught flatfooted.<sup>6</sup>

This response to the COVID-19 pandemic has been widely viewed as a public policy failure.<sup>7</sup> The government failed to respond quickly enough to contain the disease. To blunt the rate of infection, some state, tribal, and local officials imposed the most stringent restrictions on American communal life in the modern era. They ordered people to shelter in place, suspend assemblies, shutter nonessential businesses and services, educate students at home, and self-quarantine when they experienced COVID-19 symptoms.<sup>8</sup> The economy plunged, unemployment surged,<sup>9</sup> and the national mood soured. Meanwhile, Americans across the country, sometimes thousands of them, died every day.<sup>10</sup> Others suffered for weeks or months, with a vast range of symptoms and progressive, unexpected, and often unpredictable organ involvement.<sup>11</sup> This frequently required extensive and heroic medical intervention,<sup>12</sup> with those recovering facing unknown lingering consequences.<sup>13</sup>

5. See, e.g., SONIA SHAH, PANDEMIC: TRACKING CONTAGION, FROM CHOLERA TO EBOLA AND BEYOND 8 (1st ed. 2017) (chronicling past epidemics and warning that future ones are looming that must be anticipated and combatted early); ALI S. KHAN, THE NEXT PANDEMIC: ON THE FRONT LINES AGAINST HUMANKIND'S GRAVEST DANGERS 5 (Christine Marra, 1st ed. 2016) (discussing confrontations with past pandemics and arguing for vigilance to prevent new ones); LAURIE GARRETT, THE COMING PLAGUE: NEWLY EMERGING DISEASES IN A WORLD OUT OF BALANCE xi (1994) (discussing new vulnerabilities to pandemics posed by modern conditions).

6. See David Quammen, *Why Weren't We Ready for the Coronavirus?*, NEW YORKER (May 4, 2020), <https://www.newyorker.com/magazine/2020/05/11/why-werent-we-ready-for-the-coronavirus> [<https://perma.cc/B6KH-ZUKR>] (discussing missed signs and prevention opportunities); Elisabeth Rosenthal, *We Knew the Coronavirus Was Coming, Yet We Failed*, N.Y. TIMES, (May 6, 2020), <https://www.nytimes.com/2020/05/06/opinion/coronavirus-health-care-market.html> [<https://perma.cc/85JR-5QQL>].

7. See German Lopez, *Everyone Failed on Covid-19*, VOX (Jan. 2, 2021), <https://www.vox.com/future-perfect/22176191/covid-19-coronavirus-pandemic-democrats-republicans-trump> [<https://perma.cc/JS7W-CMP4>].

8. See, e.g., Thomas Johnson & Angela Fritz, *You're Under a Stay at Home Order? Here's What that Means in Your State*, WASH. POST (May 5, 2020), <https://www.washingtonpost.com/health/2020/04/06/coronavirus-stay-at-home-by-state/> [<https://perma.cc/3D3D-86RQ>]; Dalton Walker, *Navajo Nation Extends Strict Stay-at-Home Orders*, INDIAN COUNTRY TODAY (Apr. 15, 2020), <https://indiancountrytoday.com/news/navajo-nation-considers-new-curfews> [<https://perma.cc/2HT5-C7PR>].

9. See Nelson D. Schwartz, Ben Casselman & Ella Koeza, *How Bad Is Unemployment? "Literally Off the Charts"*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/interactive/2020/05/08/business/economy/april-jobs-report.html> [<https://perma.cc/BZ9B-KYAX>].

10. See Joe Murphy, Jiachaun Wu, Nigel Chiwaya & Robin Muccari, *Coronavirus Deaths in the U.S., Per Day*, NBC NEWS (Jan. 13, 2021), <https://www.nbcnews.com/health/health-news/coronavirus-deaths-united-states-each-day-2020-n1177936> [<https://perma.cc/8Z98-A2EY>].

11. See, e.g., Shuchang Zhou Yujin Wang, Tingting Zhu & Liming Xia, *CT Features of Coronavirus Disease 2019 (COVID-19) Pneumonia in 62 Patients in Wuhan, China*, 214 AM. J. ROENTGENOLOGY 1287, 1287 (2020); Akbarshakh Akhmerov & Eduardo Marbán, *COVID-19 and the Heart*, 126 CIRCULATION RSCH. 1443, 1448 (2020); James S. Hirsch et al., *Acute Kidney Injury in Patients Hospitalized with Covid-19*, KIDNEY INT'L (May 16, 2020), [https://www.kidney-international.org/article/S0085-2538\(20\)30532-9/pdf](https://www.kidney-international.org/article/S0085-2538(20)30532-9/pdf) [<https://perma.cc/DMF6-FGN6>].

12. See, e.g., KESHAVA RAJAGOPAL ET AL., ADVANCED PULMONARY AND CARDIAC SUPPORT OF COVID-19 PATIENTS: EMERGING RECOMMENDATIONS FROM ASAIO—A LIVING WORKING DOCUMENT (2020).

13. See Carolyn Barber, *Opinion: The Problem of 'Long Haul' COVID*, SCI. AM. (Dec. 29, 2020), <https://www.scientificamerican.com/article/the-problem-of-long-haul-covid/> [<https://perma.cc/WCQ8-S2V6>]; Lois Parshley, *The Emerging Long-Term Complications of Covid-19 Explained*, VOX (June 12, 2020, 3:31 PM),

Then the United States reopened for business in the false hope that the darkest days of the pandemic had passed.<sup>14</sup> The economy experienced a brief recovery as businesses opened their doors and Americans, tired of remaining housebound, began to return to communal life, often in an unsafe fashion.<sup>15</sup> In the fall of 2020 and winter of 2021, the pandemic returned with renewed fierceness, and infection and mortality rates set records day after day.<sup>16</sup> Governments and institutions again struggled to develop interventions that would protect public health but also limit economic damage.<sup>17</sup>

The disease brought out the best in some, giving rise to acts of unparalleled solidarity; people the world over offered support to one another and especially to the most vulnerable.<sup>18</sup> But the virus also intensified underlying ideological tensions and gave rise to divisive, even violent, conflicts over how best to respond.<sup>19</sup> COVID-19 did not create these divides, but it brought them into especially graphic relief.

With widespread deployment of COVID vaccines now under way, it is a good time to take stock of these earlier events in the still-evolving pandemic. Painfully clear is that our ability to confront the pandemic was hamstrung by the politics of the day and the mutual suspicion with which Americans approached one another. Those wearing face coverings feared those who did not.<sup>20</sup> Those

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<https://www.vox.com/2020/5/8/21251899/coronavirus-long-term-effects-symptoms> [https://perma.cc/U897-ARMQ].

14. See Joel Achenbach, William Wan, Karin Brulliard & Chelsea Janes, *The Crisis that Shocked the World: America's Response to the Coronavirus*, WASH. POST (July 19, 2020), <https://www.washingtonpost.com/health/2020/07/19/coronavirus-us-failure> [https://perma.cc/U5W6-UZ68].

15. See *America's Economic Recovery No Longer Looks So Strong: A Difficult Winter Looms*, ECONOMIST (Dec. 3, 2020), <https://www.economist.com/united-states/2020/12/05/americas-economic-recovery-no-longer-looks-so-strong> [https://perma.cc/P5A4-J4W7].

16. See Paulina Firozi, Jacqueline Dupree & Meryl Kornfield, *U.S. Records Its Deadliest Day of the Pandemic Whilst Eyes Are Fixed on Mob Storming Capitol*, WASH. POST (Jan. 7, 2021, 9:12 PM), <https://www.washingtonpost.com/health/2021/01/07/covid-coronavirus-updates/> [https://perma.cc/HQN4-8839].

17. *America's Economic Recovery No Longer Looks So Strong: A Difficult Winter Looms*, *supra* note 15.

18. See, e.g., Dana Hedgpeth, *The Irish Are Repaying a Favor from 173 Years Ago in Native Americans' Fight Against Coronavirus*, WASH. POST (May 13, 2020), <https://www.washingtonpost.com/history/2020/05/13/coronavirus-irish-fundraiser-native-american/> [https://perma.cc/S7FW-NX7P].

19. See Neil MacFarquhar, *Who's Enforcing Mask Rules? Often Retail Workers, and They're Getting Hurt*, BALT. SUN (May 17, 2020, 8:29 AM), <https://www.baltimoresun.com/coronavirus/sns-nyt-coronavirus-masks-enforcement-violence-20200517-5awpaijmrzczdbztani2v77ka-story.html> [https://perma.cc/56CG-LLHE].

20. See Rick Rojas, *Masks Become a Flash Point in the Virus Culture Wars*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-masks-protests.html> [https://perma.cc/JQ3E-TETT]; Toivia Smith, *The Battle Between the Masked and the Masked-Not Unveils Political Rifts*, NPR NEWS (May 29, 2020), <https://www.npr.org/2020/05/29/864515630/the-battle-between-the-masked-and-the-masked-nots-unveils-political-rifts> [https://perma.cc/R2Y7-YEUE]; Julia Marcus, *The Dudes Who Won't Wear Masks*, ATLANTIC (June 23, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/dudes-who-wont-wear-masks/613375/> [https://perma.cc/QD9X-N3CZ]; *Masks Probably Slow the Spread of Covid-19*, ECONOMIST (May 28, 2020), <https://www.economist.com/science-and-technology/2020/05/28/masks-probably-slow-the-spread-of-covid-19> [https://perma.cc/THU4-SQHA]. The controversy also divided some in the scientific community. Compare Trisha Greenhalgh, *Face Coverings for the Public: Laying Straw Men to Rest*, J. EVALUATION IN CLINICAL PRACT. (2020) <https://doi.org/10.1111/jep.13415> [https://perma.cc/NAE2-5XS5] (identifying “various streams of evidence [which] . . . strengthen the argument for recommending face coverings, especially in crowded public places where social distancing is impossible”), and *Masks and Testing are Necessary to Combat Asymptomatic*

who adhered to social distancing recommendations feared those who stood too close, or in too large a number.<sup>21</sup> Some chose to stay home, fearing that public health intervention could not keep them safe.<sup>22</sup> Those who defied safety protocols feared those who insisted on them and accused them of incautiously sacrificing liberty and economic sustainability in response to exaggerated fears.<sup>23</sup>

In other words, the pandemic did not unify the country, as have some emergencies of the past.<sup>24</sup> This disunity endangered American lives and deepened the wounds to the American economy. We thus must do better, both in the months ahead as we continue to confront the pandemic and its mutations, and in the times ahead when we will face other, similarly grave public health threats that will require sacrifice and cooperation.

What might enable the United States to confront pandemics like this one and carefully balance public safety and economic health with a minimum of acrimony? Even if partisanship cannot be swiftly mended, what strokes might allow most of us to swim together as we respond to potentially catastrophic public health events, rather than sink beneath animosity and distrust?

This Article attends to those questions. It argues that the rancor of political discourse obscures substantial consensus from which practical solutions may be derived. At root, most Americans share a common goal: all want a reasonably safe return to their families, jobs, schools, places of assembly, pubs, parks, and the myriad other settings that make up human lives.<sup>25</sup> Our nation was founded on a belief in the importance of the public square.<sup>26</sup> We value congregational sites, and their absence leaves a void in our collective psyche.<sup>27</sup> Identifying mechanisms to enable association while protecting public health therefore is key to forging sound pandemic policy. Policymakers also must take into account the jagged terrain across which current ideological conflicts are waged.

Most Americans also share a second goal: fidelity to basic constitutional norms that should inform sound pandemic policies.<sup>28</sup> We suggest, mindful of the barriers to consensus about how these norms should play out in specific contexts, that due process, liberty, and equality norms provide critical guidance to

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*Spread of COVID-19 in Aerosols and Droplets*, SOC. FOR MUCOSAL IMMUNOLOGY (June 1, 2020), <https://www.socmucimm.org/news-media/masks-and-testing-are-necessary-to-combat-asymptomatic-spread-of-covid-19-in-aerosols-and-droplets/> [<https://perma.cc/2EKV-F34D>], with Graham P. Martin, Esmée Hanna & Robert Dingwall, *Rapid Response to Greenhalgh et al.: Face Masks, the Precautionary Principle, and Evidence Informed Policy*, BMJ (Apr. 22, 2020), <https://www.bmj.com/content/369/bmj.m1435/rr-43> [<https://perma.cc/KQV2-ZWK6>] (contending that the evidence the evidence that “policymakers should encourage the public to wear face masks . . . is sparse”).

21. Rojas, *supra* note 20.

22. *Id.*

23. *See id.*

24. *See e.g.*, Virginia A. Chanley, *Trust in Government in the Aftermath of 9/11: Determinants and Consequences*, 23 POL. PSYCH. 469, 470 (2002).

25. Rojas, *supra* note 20.

26. Leo Casey, Exec. Dir. Emeritus, Albert Shanker Inst., Keynote Address at Georgetown University Conference: In Defense of the Public Square (May 1, 2015).

27. *Id.*

28. *See* Lukas Wolf, Geoffrey Haddock, Antony S. R. Manstead & Gregory R. Maio, *The Importance of (Shared) Human Values for Containing the COVID-19 Pandemic*, 59 BRIT. J. OF SOC. PSYCH. 618, 625 (2020).

policymakers. They offer a shared national vocabulary—a *lingua franca*—that may inspire more *unum* across our *pluribus*.

Tethering policies to these constitutional norms may increase public confidence, which may increase the willingness of some individuals to re-engage with public life and of others to abide by measures designed to protect public health.<sup>29</sup> All institutions, public and private, do well to consider and invoke these norms, because only with public confidence and cooperation can human and economic suffering be minimized.<sup>30</sup>

This Article articulates a framework based on these shared norms that may assist in designing sound policies to allow economic and social life to occur during a pandemic. Part II provides an overview of public health interventions that can be, and have been, deployed during a pandemic. Drawing from experience during the current pandemic, it also addresses the steep costs associated with some of those interventions. Part III provides an overview of a constitutional framework drawn from the Due Process Clauses, Equal Protection Clause, and the Bill of Rights that assert norms of rationality, procedural fairness, liberty, and equality. Part IV applies these norms to pandemic policy, analyzes the constitutional limits likely to be enforced by courts and, perhaps more importantly, discusses the manner in which policymakers may infuse public health interventions with constitutional norms beyond the minimum enforced by courts. Finally, Part V reflects on the present pandemic to draw lessons for the future.

Above all, we argue that successful pandemic policies should emphasize common ground, rather than aggravate partisan division. Recognizing our shared commitments to life, liberty, and equality may lay the groundwork for greater consensus about restrictions. The policymaker goal should be to develop rational, fair approaches that are sensitive to state and local conditions and nimble enough to accommodate evolving scientific understanding. More Americans, we argue, will cooperate with pandemic policies if forged from these shared values in response to community concerns.<sup>31</sup>

We are not so near-sighted to believe that the failings of the United States' approach to COVID-19 flowed singly, or perhaps even predominantly, from insufficient attention to constitutional norms. This pandemic occurred at a moment when some Americans were uniquely willing to disbelieve expert opinion and established facts, goaded by some national, state, and local leaders seemingly uninterested in truth at worst, or deeply resistant to heeding scientific advice at best.<sup>32</sup> Yet we can and must glean lessons from this pandemic thus far to better prepare ourselves for the next and to make our way to the ending of this one.

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29. *Id.* at 624.

30. *Id.*

31. *Id.*

32. Jeff Tollefson, *How Trump Damaged Science – and Why It Could Take Decades to Recover*, NATURE (Oct. 7, 2020) <https://www.nature.com/articles/d41586-020-02800-9> [<https://perma.cc/J75T-FQLD>].

## II. GOVERNANCE IN A TIME OF PANDEMIC

Why are the constraints placed on government decision makers by the Due Process Clauses, Equal Protection Clause, and Bill of Rights a point of departure for pandemic policy makers, rather than an endpoint? As the COVID pandemic demonstrated, the effectiveness of many public health interventions hinges on the cooperation of the relevant population.<sup>33</sup> Lawfulness is insufficient because compliance often requires persuasion, rather than merely enforcement, at least in the absence of a repressive authoritarian enforcement regime unacceptable in the United States.<sup>34</sup>

The degree to which the effectiveness of interventions depends on the cooperation of those who fall within their ambit will vary significantly. A few interventions can rely largely or exclusively on enforcement rather than compliance behavior.<sup>35</sup> For example, barring air travel from a foreign country can largely be accomplished through the federal government's control of federal air space and customs and border entry.<sup>36</sup> Similarly, establishing temperature checks and barring individuals with a fever from entering a building can be accomplished through security measures, rather than depending on individual acts of compliance.<sup>37</sup> Many, and perhaps most, public health interventions, though, require cooperation of the citizenry.

This Part categorizes the suite of public health interventions available to pandemic policy makers and then describes some of the costs associated with those interventions.

## A. Governance Options

Potential pandemic interventions, whether pursued by governments or private institutions like businesses and private universities, fall into three rough, overlapping categories. *Containment policies* are designed to identify and segregate (or exclude) individuals who may be infected.<sup>38</sup> *Restriction policies* are designed to prohibit activities or interactions through which transmission can occur.<sup>39</sup> Lastly, *mitigation policies* are designed to reduce the likelihood of disease transmission during permitted interactions.<sup>40</sup>

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33. *Id.*

34. Neil Cunningham, *Enforcement and Compliance Strategies*, in THE OXFORD HANDBOOK OF REGULATION 1, 3 (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010).

35. *Id.* at 2.

36. See Proclamation 9984, 85 Fed. Reg. 6709 (Feb. 2, 2020) (suspending entry of non-citizens traveling from China).

37. See Mike Juang, *Here's What Employers Can and Can't Do When They Take Your Temperature in Return to Work*, CNBC (May 29, 2020), <https://www.cnbc.com/2020/05/29/what-employers-can-legally-ask-about-coronavirus-in-return-to-work.html> [<https://perma.cc/N8LZ-MUTX>].

38. *Flattening the COVID-19 PEAK: Containment and Mitigation Policies*, OECD <https://www.oecd.org/coronavirus/policy-responses/flattening-the-covid-19-peak-containment-and-mitigation-policies-e96a4226/> (March 24, 2020) [<https://perma.cc/HY76-5PM5>].

39. See *id.*

40. *Id.*

Containment policies include efforts to test, trace, and isolate infected individuals and those who have had contact with them.<sup>41</sup> Testing can involve viral tests to measure the likelihood of infectivity, via detection of either a viral component (an antigen) or its nucleic acid core, which can help identify and isolate those who have evolving symptomatic disease and those infected with the virus though asymptomatic.<sup>42</sup> Testing can also involve serological tests, also called antibody tests, to identify those, ill or not, who have developed antibodies with potentially protective immunity.<sup>43</sup> The presence of antibodies, though, may not mean that an individual has full or partial viral resistance.<sup>44</sup> Other symptom-based tests include temperature checks or wellness questionnaires to identify individuals exhibiting symptoms consistent with the disease.<sup>45</sup> Apart from testing, containment policies may select individuals believed to be a risk for carrying the virus apart from specific medical information.<sup>46</sup> For example, individuals who have recently travelled might be subjected to a quarantine requirement.

As the name suggests, containment interventions often involve a degree of confinement, although they also include policies to exclude individuals.<sup>47</sup> People could be required to “self-quarantine,” meaning that they are directed to isolate themselves in a location of their choosing.<sup>48</sup> These requirements may be largely unenforced and may rely entirely on the cooperation of the individuals subjected to them. Or people could be required to provide information about their location, to be monitored by authorities, and subjected to punishment if they do not comply.<sup>49</sup> For example, Great Britain required travelers arriving to the country to self-quarantine for ten days and provide a passenger locator form to the government and imposed fines for noncompliance of up to £10,000.<sup>50</sup> A government could also administer a quarantine directly and involuntarily confine individuals

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41. See Matt O’Brien & Christina Larson, *Test, Trace, Isolate: Role of Apps in Combating Coronavirus*, CHRISTIAN SCI. MONITOR (May 5, 2020), <https://www.csmonitor.com/Technology/2020/0505/Test-trace-isolate-Role-of-apps-in-combating-coronavirus> [<https://perma.cc/N6XA-JRS8>].

42. See CTRS. FOR DISEASE CONTROL & PREVENTION, OVERVIEW OF TESTING FOR SARS-COV-2 (revised June 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html> [<https://perma.cc/PF5E-RQD4>].

43. See Cynthia Weiss, *Mayo Clinic Q and A: Different Types of COVID-19 Tests*, MAYO CLINIC (Apr. 14, 2020), <https://newsnetwork.mayoclinic.org/discussion/mayo-clinic-q-and-a-the-different-types-of-covid-19-tests/> [<https://perma.cc/7FBB-KNRZ>].

44. See *Interim Guidelines for COVID-19 Antibody Testing*, Ctrs. For Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html> (last visited Oct. 30, 2021) [<https://perma.cc/3XBT-CCR3>] (noting that “the presence of antibodies following natural infection may produce some level of protection from reinfection”).

45. See, e.g., *General Business Frequently Asked Questions*, Ctrs. For Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html> (May 24, 2021) [<https://perma.cc/SE5W-3LFF>] (recommending procedures for temperature checks or wellness screenings).

46. See *id.*

47. See *id.*

48. See Vivien Williams, *What’s the Difference Between Quarantine and Isolation?*, MAYO CLINIC NEWS NETWORK (Dec. 5, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-quarantine-and-isolation/art-20484503> [<https://perma.cc/KW5B-JL44>].

49. See *Covid-19: Up to £10,000 Fine for Failure to Self-Isolate in England*, BBC NEWS (Sept. 28, 2020), <https://www.bbc.com/news/uk-54320482> [<https://perma.cc/UZU5-N75W>].

50. *Id.*

in government facilities.<sup>51</sup> Alternately, individuals could be denied entry into jurisdictions or facilities. For example, a hospital, retail store, or university campus could require those seeking entry to subject themselves to a temperature check, and bar anyone with an elevated temperature.<sup>52</sup>

Restriction interventions prohibit or restrict activities found likely to cause or contribute to the spread of the virus.<sup>53</sup> Such interventions include prohibiting or limiting gatherings, closing playgrounds and government buildings, and ordering businesses to suspend in-person operations. The interventions may be absolute, or they may allow for modified operations.<sup>54</sup> For example, a December 2020 public health order issued by the State of California imposed severe restrictions in regions of the state with less than fifteen percent hospital capacity, including prohibiting “all gatherings with members of other households” and limiting all indoor retail to twenty percent capacity.<sup>55</sup> Nongovernmental institutions can also adopt restriction interventions. Many private universities have shifted some or all classes into virtual, rather than physical, classrooms.<sup>56</sup> Private employers may shutter workplaces and direct employees to work from home. For example, Liberty Mutual Insurance instituted a mandatory work from home policy for all offices in the United States and Canada.<sup>57</sup>

Finally, mitigation interventions reduce the likelihood of transmission for activities that are permitted.<sup>58</sup> Common ones during the pandemic were asking individuals to wear masks and to remain physically separated. For example, in November of 2020, Costco adopted a policy requiring all customers to wear a face covering in its stores nationwide.<sup>59</sup> Interventions also may involve redesigning the spaces in which people will interact, for example, by installing physical plexiglass barriers to allow individuals to interact while protecting them from

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51. Some reports from China indicate that the government confined even healthy individuals at quarantine facilities. See Nectar Gan, Lily Lee & David Culver, *Healthy Wuhan Residents Say They Were Forced into Mass Coronavirus Quarantine, Risking Infection*, CNN NEWS (Feb. 23, 2020, 7:16 PM), <https://www.cnn.com/2020/02/22/asia/china-coronavirus-roundup-intl-hnk/index.html> [<https://perma.cc/GCV2-FJC9>].

52. See, e.g., *Mandatory COVID-19 Screening for Employees to Begin Wednesday*, VAND. UNIV. MED. CTR. (Mar. 23, 2020), <https://www.vumc.org/coronavirus/latest-news/mandatory-covid-19-screening-employees-begin-Wednesday> [<https://perma.cc/455F-N3VW>].

53. See Erica S. Pan, *Regional Stay at Home Order*, CAL. DEP'T OF PUB. HEALTH (Dec. 3, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf> [<https://perma.cc/YA8V-LP3B>].

54. See *id.*

55. *Id.*

56. See Kristen E. Broady, Eliana Buckner, Jennifer Umanzor & Sarah Wheaton, *Higher Education's Re-opening Decisions Affected the Most Vulnerable Students*, BROOKINGS: UP FRONT (Jan. 11, 2021), <https://www.brookings.edu/blog/up-front/2021/01/11/1342345/> [<https://perma.cc/6K36-BMTM>].

57. See *COVID-19*, LIBERTY MUTUAL INS., <https://www.libertymutual.com/covid-19> (last visited Oct. 30, 2021) [<https://perma.cc/75YU-4RCP>] (“[M]andatory work from home across all offices in the US and Canada.”).

58. See *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission*, Ctrs. For Disease Control & Prevention, (May 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/community-mitigation.html> [<https://perma.cc/F97D-W53V>].

59. Kelly Tyko, *Costco Face Mask Policy Update Requires All Shoppers to Wear a Mask or Shield Amid Coronavirus Surges*, USA TODAY (Nov. 16, 2020, 5:24 PM), <https://www.usatoday.com/story/money/shopping/2020/11/16/costco-coronavirus-mask-policy-face-shields-no-medical-exemption/6281884002/> [<https://perma.cc/V67W-46HX>].

each other, or by controlling the flow of people through buildings by making hallways and doorways one way.<sup>60</sup> Workplaces may stagger work schedules to reduce density within buildings and reduce unnecessary interactions.<sup>61</sup>

### B. Governance Costs

The COVID pandemic starkly illustrated the steep costs associated with pandemic governance.<sup>62</sup> As COVID-19 spread in March of 2020, state, local, and tribal governments intervened to reduce the rate at which the infection spread so as to avoid overwhelming the health care system.<sup>63</sup> Stay-at-home orders featured prominently in the strategy, urging at least 316 million Americans to stay in their homes and shuttering nonessential businesses.<sup>64</sup> The strategy proved effective at slowing COVID-19—one study found that after three weeks, stay-at-home orders were associated with an almost fifty percent reduction in new infections and a nearly sixty percent reduction in weekly fatalities.<sup>65</sup> Yet it also resulted in the most rapid rise in unemployment since the Great Depression.<sup>66</sup> Along with the worsening economy, many Americans experienced deteriorating mental health due to profound feelings of social isolation.<sup>67</sup>

These steep costs made it impossible for America to remain in lock-down for the duration of the pandemic.<sup>68</sup> Instead, state, local, and tribal governments and private and public institutions sought to reopen in a manner that would allow a degree of communal activity while minimizing costs.<sup>69</sup>

“Reopening” during a pandemic has many manifestations. Some steps will magnify risk and others will mitigate it.<sup>70</sup> Some involve exercises of government regulatory authority: federal agencies, states and tribal nations, counties, cities, and towns must decide what rules to impose on communal life through assertions

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60. See Emily Vaughn, *Redesigning the Office for the Next 100-Year Flu (Yes, It's Coming)*, NPR NEWS (Sept. 14, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/09/14/909805060/redesigning-the-office-to-maximize-health> [<https://perma.cc/JZS4-B43U>].

61. See OCCUPATIONAL SAFETY & HEALTH ADMIN., GUIDANCE ON PREPARING WORKPLACES FOR COVID-19, at 8 (2020).

62. See Nelson D. Schwartz, *'Nowhere to Hide' as Unemployment Permeates the Economy*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/04/16/business/economy/unemployment-numbers-coronavirus.html?searchResultPosition=1> [<https://perma.cc/U37M-5HZJ>].

63. See, e.g., Pan, *supra* note 53.

64. See Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/TRB2-7JQ3>].

65. See James H. Fowler, Seth J. Hill, Remy Levin & Nick Obradovich, *The Effect of Stay-at-Home Orders on COVID-19 Cases and Fatalities in the United States*, MEDRXIV (May 12, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.13.20063628v3> [<https://perma.cc/Q9QZ-GLNX>].

66. Schwartz, *supra* note 62.

67. See Angus Chen, *As Pandemic Drags on, the Burden of Isolation Takes an Increasing Toll on Mental Health*, WBUR (May 14, 2020), <https://www.wbur.org/commonhealth/2020/05/14/anxiety-depression-coronavirus-isolation> [<https://perma.cc/Y3WH-HMDE>].

68. See, e.g., Schwartz, *supra* note 62.

69. See, e.g., *id.*

70. See, e.g., *id.*

of regulatory authority.<sup>71</sup> Other reopenings involve proprietary decisions of government institutions: schools, city halls, DMV offices, and courts must decide when and how to open their doors to teachers and civil servants and the public that they serve.<sup>72</sup> Yet others involve purely private actors: private schools, retail stores, restaurants, religious institutions, sports venues, concert halls—indeed, every entity with physical premises, from a sole proprietorship to the largest corporation.<sup>73</sup> Even purely personal actors face tough decisions: whether to hold a face-to-face memorial service, family reunion, milestone birthday celebration, or a wedding, or whether to allow elderly or immune-suppressed family members to visit or embrace their loved ones.

All these facets of reopening interact. Decisions of one set of actors affect others in a web of interdependence. The virus does not recognize politically or privately drawn lines. Rather, it simply and doggedly seeks a host. Moreover, the physical premises of every public or private institution often are subject to the regulatory authority of multiple governments at different scales—*i.e.* federal, state, local, tribal and territorial.<sup>74</sup>

Those governments may not agree with each other. In Nebraska, Governor Pete Ricketts threatened to withhold federal relief funding from counties that required the public to wear face coverings in government buildings.<sup>75</sup> Government

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71. For example, in June 2020, Governor Newsom issued an order requiring all Californians to wear a mask after some counties had adopted that requirement. See Emily Hoeven, *Newsom: All Californians Must Wear Masks*, CAL MATTERS (June 24, 2020), <https://calmatters.org/newsletters/whatmatters/2020/06/gavin-newsom-face-masks-california/> [<https://perma.cc/A432-97AH>]; Sophia Bollag, *Gavin Newsom Considering Statewide Mask Order for California, County Officials Say*, SACRAMENTO BEE (June 17, 2020, 9:22 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article243620387.html> [<https://perma.cc/LLK6-4CDG>]. In Arizona, Governor Doug Ducey prohibited local governments from requiring masks, before reversing that decision as cases surged. See Lois Beckett, *Arizona Governor Backtracks on Mask Rules as Covid-19 Cases Surge*, GUARDIAN (June 17, 2020, 9:59 PM), <https://www.theguardian.com/us-news/2020/jun/17/arizona-coronavirus-covid-19-governor-mayors> [<https://perma.cc/2QLP-5QRD>]. Immediately thereafter, Tucson Mayor Regina Romero issued an emergency proclamation requiring masks to be worn in public. See Howard Fischer & Justin Sayers, *Tucson to Require Masks in Public as Ducey Relents; Pima County May Follow*, TUCSON.COM (Oct. 23, 2020), [https://tucson.com/news/local/tucson-to-require-masks-in-public-as-ducey-relents-pima-county-may-follow/article\\_91f67924-cc87-5aa5-b99a-787bb1dd4d27.html](https://tucson.com/news/local/tucson-to-require-masks-in-public-as-ducey-relents-pima-county-may-follow/article_91f67924-cc87-5aa5-b99a-787bb1dd4d27.html) [<https://perma.cc/SP6V-PXKH>].

72. See, e.g., Amy Hollyfield, *Reopening California: 46 DMV Offices Reopen Across State Amid Coronavirus Pandemic*, ABC 7 NEWS (May 28, 2020), <https://abc7news.com/dmv-reopen-california-field-offices-reopening-second-wave/6217399/> [<https://perma.cc/M77R-TU2L>]; Shaq Davis, *University of Arizona Launches Task Force to Plan for Campus Reopening*, TUCSON.COM (Aug. 20, 2021), [https://tucson.com/news/local/university-of-arizona-launches-task-force-to-plan-for-campus-reopening/article\\_19c97b6f-75a3-51fa-a0df-7efdd6d22958.html](https://tucson.com/news/local/university-of-arizona-launches-task-force-to-plan-for-campus-reopening/article_19c97b6f-75a3-51fa-a0df-7efdd6d22958.html) [<https://perma.cc/Z5M2-3NNS>].

73. See, e.g., Letter from Deirdre O'Brien, Vice President, Apple, to Apple Customers (May 17, 2020), <https://www.apple.com/store-opening-letter/> [<https://perma.cc/P25Q-AVT8>]; Sarah Krouse, *To Test or Not to Test: Business Owners Grapple with Covid Testing for Staff*, WALL ST. J. (June 18, 2020, 6:30 AM), <https://www.wsj.com/articles/to-test-or-not-to-test-business-owners-grapple-with-coronavirus-checks-for-staff-11592476201> [<https://perma.cc/CG8R-77MS>].

74. Overlapping government authority is a hallmark of the United States' federal system. See, e.g., Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177, 177 (2018); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 508 (2007).

75. See Jacob Knutson, *Nebraska Governor: Counties that Require Masks in Government Buildings Won't Get Virus Relief*, AXIOS (June 18, 2020), <https://www.axios.com/nebraska-coronavirus-masks-f45cee42-628d->

rules similarly may displace those adopted by private institutions. For example, the popular grocery store chain Trader Joe's established practices at all of its stores to reduce COVID-19 transmission. These included daily health screenings for employees, limiting the number of customers, installing plexiglass barriers to separate cashiers and costumers, restricting use of reusable bags, and posting signs to "strongly encourage customers to wear a mask or face covering while shopping in all our stores."<sup>76</sup> Where a jurisdiction like the City of Tucson, however, mandated face coverings in public places, the city rule supplanted the store's more permissive policy. Trader Joe's said it would advise customers of the more restrictive government mandates but did not say whether it would enforce government rules.<sup>77</sup>

### III. THE CONSTITUTIONAL FRAMEWORK

If American institutions depend on consent and cooperation to successfully implement many pandemic interventions, how can such cooperation be secured? We propose that fairness and liberty norms embedded in the Due Process and Equal Protection Clauses and other provisions of the Bill of Rights can serve as a template, even as applied to nongovernment actors not directly constrained by the Constitution. These norms come in two varieties. First, the Due Process Clauses and the Equal Protection Clause embed principles about what constitutes rational decision-making and procedural fairness—including respect for equality.<sup>78</sup> These norms provide guideposts for reasonable decision making and rule applications, though applications of the guideposts inevitably vary across contexts.<sup>79</sup> Second, those same clauses, the Bill of Rights, and other constitutional provisions embed principles of fundamental liberties that must be respected absent important or compelling reasons to abridge them.<sup>80</sup>

The Due Process Clauses and the Equal Protection Clause serve as the starting point for much of the analysis that follows. The Due Process Clauses are found in the Fifth Amendment, which constrains the federal government, and the Fourteenth Amendment, which constrains state and local governments.<sup>81</sup> Both

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41c3-8c1f-21f8cbc383c8.html [https://perma.cc/KN37-Q2BK]. California Governor Gavin Newsom similarly threatened to withhold disaster funding from counties that defied the state's stay-at-home order. See Taryn Luna, *Newsom Warns Defiant Counties that They Could Lose Coronavirus Cash for Reopening Early*, L.A. TIMES (May 8, 2020, 4:38 PM), <https://www.latimes.com/california/story/2020-05-08/newsom-disaster-funds-yuba-sutter-modoc-counties-california-reopening> [https://perma.cc/P34H-MAP2].

76. *Coronavirus Update: How Trader Joe's is Caring for Crew Members and Customers*, TRADER JOE'S, <https://www.traderjoes.com/announcement/coronavirus-update-how-trader-joes-is-caring-for-crew-members-and-customers> (May 28, 2020) [https://perma.cc/94YH-JR9H].

77. *Id.* ("Where face coverings are required by state or local authorities, we communicate that to our customers as well.")

78. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

79. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992)).

80. U.S. CONST. amends. I–X, XIV; see also Toni M. Massaro, *Substantive Due Process, Black Swans, and Innovation*, 2011 UTAH L. REV. 987, 995 (2011) ("A revolutionary spirit animated the higher promises of the Fourteenth Amendment, perhaps especially its protection of liberty.")

81. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

provide that no person shall be deprived of “life, liberty, or property, without due process of law.”<sup>82</sup> The Fourteenth Amendment also includes the Equal Protection Clause, which provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>83</sup> The equal protection mandate likewise constrains the federal government, but as a matter of due process.<sup>84</sup> From the shared artery of due process and equal protection, then, federal, state, and local governments have a common set of constitutional constraints when they adopt pandemic policies. Tribal governments, too, have limits on the public health restrictions they can impose on tribal members that are based on liberty and equality concerns.<sup>85</sup>

The remainder of this Part provides an overview of the doctrinal building blocks upon which the rest of this Article draws. We draw illustrations from the context of pandemic policy, although we will fully engage the intersection in Part IV.

### A. *Substantive Due Process*

The first constitutional norm relevant for pandemic policy is the requirement of rationality, which is born from the substantive aspect of due process and from related equal protection doctrine.<sup>86</sup> In constitutional terms, rationality requires examination of both the ends that governments pursue and the means they select to pursue the ends.<sup>87</sup> Articulating both means and ends serves legitimating as well as legal purposes.<sup>88</sup> People, including judges, are more likely to accept an intervention, including a policy governing interpersonal interactions during a pandemic, if it has a sensible and articulable goal and utilizes sensible tools to help to achieve that goal.<sup>89</sup>

Courts apply rational basis review to test the means and ends of governments in the absence of a basis for invoking stricter judicial scrutiny.<sup>90</sup> While often very deferential, rational basis review should not be mistaken for no review

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82. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

83. U.S. CONST. amend. XIV, § 1.

84. See *United States v. Windsor*, 570 U.S. 744, 774 (2013); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

85. Tribal governments face these obligations both as a matter of federal law under the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(8) (providing that a tribal government may not “deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law”), and often as a matter of tribal law, *see, e.g.*, Constitution of the Tohono O’odham Nation art. III, § 1 (“The government of the Tohono O’odham Nation . . . shall not deny to any member of the Tohono O’odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law.”).

86. See Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICHMOND L. REV. 491, 493–94 (2011).

87. See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review and Constitutional Remedies*, 93 COLUM. L. REV. 309, 362 (1993) (noting that due process imposes a “general duty on government officials to behave ‘rationally’ in their selection of both ends and means.”).

88. *Id.* at 361–62.

89. See, *e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

90. See Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 282 (2015).

at all.<sup>91</sup> Courts will intercede if they view the government as pursuing an illegitimate goal—for example, where government action is motivated by animus or orchestrated to create purely private benefits.<sup>92</sup> A court thus might intervene if a mayor who had a financial interest in a local golf course issued an order to prohibit outdoor recreation, but exempted golf.

The government also must rely on rational means to pursue its legitimate ends.<sup>93</sup> That is, the government must reasonably believe the means will actually advance the ends, and the means must be reasonably tailored to advance them.<sup>94</sup> For example, requiring employees to subject themselves to a painful test for a pathogen every fifteen minutes—like the COVID test involving a notoriously invasive-feeling nasal swab<sup>95</sup>—might marginally improve public safety as compared to a more humane testing regime; but the burdens such a system imposed would be plainly disproportionate to the benefits. As a more extreme example, prohibiting the use of 5G cellular technology would create no public health benefit, despite Internet conspiracy theories linking the technology to COVID.<sup>96</sup>

These principles bind governments, although governments often enjoy multiple doctrinal advantages in litigation, including the opportunity to provide *post hoc* justifications for their decisions.<sup>97</sup> The outer bounds of judicial deference to policymakers' judgment calls may vary,<sup>98</sup> but when their reasoning is based on constitutional norms this may serve a powerful legitimating function beyond assuring legality. Individuals from across the political spectrum

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91. See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 370 (1999) (reporting that plaintiffs prevailed in 9% of 110 rational basis cases).

92. Cf. *Kelo v. City of New London*, 545 U.S. 469, 478 (2005) (explaining that city could not use a “pretext of a public purpose” to justify use of eminent domain).

93. See Fallon, *supra* note 87, at 362.

94. See *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976) (stating that laws will be upheld unless government action is “clearly wrong, a display of arbitrary power, not an exercise of judgment.”) (quoting *Helvering v. Davis*, 301 U.S. 619, 640 (1937)); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (stating that the relation between the end and means not be one that eliminates “all evils of the same genus . . . or none at all.”).

95. See Craig Lockwood & Lucy Crawford, *Goodbye, Brain Scrapers. COVID-19 Tests Now Use Gentler Nose Swabs*, CONVERSATION (Aug. 19, 2020, 4:12 PM), <https://theconversation.com/goodbye-brain-scrappers-covid-19-tests-now-use-gentler-nose-swabs-144416> (last visited Oct. 30, 2021) [<https://perma.cc/6MP4-X6MR>].

96. See Travis M. Andrews, *Why Dangerous Conspiracy Theories About the Virus Spread So Fast—And How They Can Be Stopped*, WASH. POST (May 1, 2020), <https://www.washingtonpost.com/technology/2020/05/01/5g-conspiracy-theory-coronavirus-misinformation/> (last visited Oct. 30, 2021) [<https://perma.cc/47MR-UMR5>].

97. See, e.g., *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020).

98. For example, one district court judge ruled that Michigan Governor Gretchen Whitmer's order directing gyms to remain closed was unlikely to pass rational basis review because the judge was unpersuaded that gyms posed a greater public health danger than other institutions that had been allowed to reopen. *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 468 F. Supp. 3d 940, 949–51 (W.D. Mich. 2020) (granting preliminary injunction). The Court of Appeals for the Sixth Circuit quickly granted Governor Whitmer's motion for an emergency stay, however, noting that the standard of judicial review was rational basis and this bar was very modest in cases of executive actions. *Whitmer*, 814 F. App'x at 128–30 (6th Cir. 2020).

recognize and generally embrace the principles embedded in the frameworks established by the Due Process and Equal Protection Clauses.<sup>99</sup> Consequently, respecting the norms drawn from those frameworks can serve a persuasive function that may help convince members of the public that a course of conduct is sensible.<sup>100</sup> Attending to rationality norms also will result in substantively better decisions because irrational government acts are unlikely to produce promised benefits.<sup>101</sup> Again, a jurisdiction that banned 5G cell service would not improve public health outcomes at all, which could lead instead to increased distrust of government intervention.

These obvious benefits of public reasoning based on the constitutional norm of rationality apply equally to public and private actors.<sup>102</sup> A private corporation, like a government, will make better decisions and bolster public perceptions that its decisions are legitimate, and concomitantly enhance compliance with them, if it adheres to this norm. Moreover, many members of the public are unaware that the Constitution largely does not constrain private conduct, as evidenced by recurrent protests that private corporations have violated the First Amendment.<sup>103</sup> As a result, some corporations commit themselves to respect First Amendment values, even if they are not required to do so.<sup>104</sup> To use a high-profile example, Facebook may have no legal obligation to respect freedom of

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99. See Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 743 (2014) (“Numerous commentators have cited the importance of agencies offering public explanations for their decisions as a way of promoting substantive rationality as well as public accountability and transparency.”); Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 401–03 (2016) (arguing the rational basis test is a necessary way of reviewing much government action but should require that the government have an actual legitimate purpose and that there should be an adequate link between the government’s means and ends); Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 285–86, 350 (2012) (arguing substantive due process properly requires that governments act lawfully, nonarbitrarily, and with normatively sound reasons); Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 117–18 (2007) (“[I]n a polity where the individual is the basic unit of social value, the fundamental reason for accepting law, or any official decisionmaking, as legitimate, is that reasons can be given why those subject to the law would affirm its content as serving recognizable collective purposes.”).

100. Cf. Lawrence O. Gostin, *When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105, 1166 (2003) (“Procedural due process also is important to public acceptance of the legitimacy of the governmental action.”).

101. Cf. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (noting procedures requiring agencies to consider and publicly disclose environmental impacts “are almost certain to affect the agency’s substantive decision.”).

102. See Amber Phillips, *No, Twitter Is Not Violating Trump’s Freedom of Speech*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/politics/2020/05/29/no-twitter-did-not-violate-trumps-freedom-speech/> (last visited Oct. 30, 2021) [<https://perma.cc/V7ZM-T3J4>].

103. This confusion is understandable, since political leaders sometimes accuse companies of violating the First Amendment. See *id.*

104. See Derek E. Bambauer, *Foxes and Hedgehogs in Transition*, 13 COLO. TECH. L.J. 1, 13–14 (2015). But see Tal Kopan, *Palin Defends ‘Duck Dynasty’ Star*, POLITICO (Dec. 20, 2013, 6:54 AM), <https://www.politico.com/story/2013/12/sarah-palin-duck-dynasty-defense-101319> (last visited Oct. 30, 2021) [<https://perma.cc/25KT-BCGA>] (describing Facebook post from Vice Presidential candidate Sarah Palin reacting to suspension of Duck Dynasty star by stating that “[f]ree speech is an endangered species”).

speech, but it recognizes that appearing to do so is crucial to public confidence in the platform.<sup>105</sup>

### B. Procedural Due Process

The second constitutional norm is procedural fairness, a requirement that arises from the procedural aspect of due process.<sup>106</sup> Procedural due process provides that life, liberty, and property may not be deprived without proper respect for the affected parties' right to fair notice and opportunity to be heard.<sup>107</sup> At its core, the commitment is to a fair process, although the contexts in which due process rights apply are limited by doctrines that serve as gatekeeping functions to these constitutional claims.<sup>108</sup>

The first of these is that due process rights typically are triggered when individualized and concrete burdens are placed on individuals or entities rather than when merely prospective burdens are imposed more generally.<sup>109</sup> For example, if a public university adopted a rule that any students who crossed state lines must quarantine for two weeks before attending class, the due process clause may not be triggered. Even if a student could demonstrate that she would be affected by the rule, the university has not yet made an individualized determination about her, but rather it has prescribed a generally applicable, prospective rule. If the university later determined that the student violated the quarantine rule, then that decision would be an individualized determination potentially subject to due process requirements.

Second, interests that do not fall under the constitutional umbrella of life, liberty, or property do not trigger due process rights, although those terms are defined somewhat more broadly than their colloquial usage.<sup>110</sup> "Property" includes interests to which an individual has a legitimate claim of entitlement, and could therefore encompass enrollment at a university or employment if a student or employee can be dismissed only for cause.<sup>111</sup> Thus, expelling a student or terminating an employee for violating public health rules could implicate a property interest, while requiring a student to attend class virtually rather than in

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105. See *Mark Zuckerberg Stands for Voice and Free Expression*, FACEBOOK (Oct. 17, 2019), <https://about.fb.com/news/2019/10/mark-zuckerberg-stands-for-voice-and-free-expression/> (last visited Oct. 30, 2021) [<https://perma.cc/E8T2-DPPJ>]. That others have criticized Facebook's vision of Freedom of Speech does not change the fact that the corporation is framing its actions in terms of constitutional values. See Masha Gessen, *Mark Zuckerberg Doesn't Know What the First Amendment Is for*, NEW YORKER (Oct. 22, 2019), <https://www.newyorker.com/news/our-columnists/mark-zuckerberg-doesnt-know-what-the-first-amendment-is-for> (last visited Oct. 30, 2021) [<https://perma.cc/ZMR4-KQ92>].

106. See Fallon, *supra* note 87, at 371.

107. See, e.g., Compl. for Injunctive and Declaratory Relief at 3–4, *Tesla, Inc. v. Alameda Cnty.*, No. 20-cv-03186, (N.D. Cal. May 9, 2020) (arguing, *inter alia*, that County stay-at-home order violated the Due Process Clause of the Fourteenth Amendment because it failed to give reasonable notice to persons of ordinary intelligence of what was forbidden under the law).

108. See, e.g., *Londoner v. Denver*, 210 U.S. 373, 386 (1908).

109. *Id.* at 378, 386.

110. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting "[w]ithout doubt" that liberty "denotes not merely freedom from bodily restraint.").

111. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

person likely would not. Liberty interests encompass the fundamental rights that will be discussed in the next section, but also sometimes extend to stigmatic harms if the stigma is connected to other concrete injuries.<sup>112</sup> Thus, a town that chose to publish a list of individuals suspected of being infected with a disease might implicate liberty interests if inclusion on the list triggered other consequences, like exclusion from public buildings.

When the preconditions for procedural due process protections exist, courts apply a balancing test derived from *Mathews v. Eldridge* to determine if the government has provided sufficient process.<sup>113</sup> This test balances (1) the importance of the interest at stake; (2) the risk of an erroneous deprivation of the interest because of the procedures used, and the probable value of additional procedural safeguards; and (3) the government's interest.<sup>114</sup> The result of balancing those factors is fact dependent and somewhat indeterminant,<sup>115</sup> although the test generally requires that an individual receive notice and have some opportunity to present facts and arguments to a neutral decision maker.<sup>116</sup>

### C. Fundamental Liberties

The third norm is that of liberty in its array of manifestations. The Due Process Clauses and the Bill of Rights enshrine liberty within the Constitution and provide protection against government interference with what are deemed fundamental liberties.<sup>117</sup> When fundamental liberties are implicated, then the government must meet a higher standard than mere rationality.<sup>118</sup> Individuals who object to government action that arguably intrudes on these rights may file lawsuits seeking an exemption for themselves, or they may challenge the measures as facially invalid.<sup>119</sup>

Examples of fundamental liberties include the following: bodily integrity and right to refuse medical interventions,<sup>120</sup> freedom of religion,<sup>121</sup> right of

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112. See *Paul v. Davis*, 424 U.S. 693, 709–10 (1976).

113. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

114. *Id.*

115. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (considering balancing as a component of constitutional law).

116. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that due process required detained citizen classified as an enemy combatant “receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”).

117. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); Sandefur, *supra* note 99, at 286.

118. See Bambauer & Massaro, *supra* note 90, at 311.

119. See *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)) (“[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’”).

120. See E. THOMAS SULLIVAN & TONI M. MASSARO, *THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW* 41, 78–79, 148–51 (2013).

121. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1297–98 (2021); *Gateway City Church v. Newsom* 141 S. Ct. 1460, 1460 (2021) (per curiam) (granting preliminary injunctive relief to religious institution seeking relief from restrictions on gatherings); *Gish v. Newsom*, 141 S. Ct. 1290, 1290 (2021) (per curiam) (citing *S. Bay*

speech and assembly,<sup>122</sup> reproductive liberties,<sup>123</sup> freedom of movement,<sup>124</sup> right to bear arms,<sup>125</sup> right to privacy,<sup>126</sup> protection from unreasonable searches and seizures,<sup>127</sup> and more.

Each of the so-called fundamental rights has its own doctrinal test. Yet all share three characteristics: (1) the government has the burden of proving that the end in question is more than rational—it must be important or compelling; (2) the end must be substantially and directly advanced by the means; and (3) the means chosen must be narrowly tailored to the end so that infringements on the liberty are minimized as much as possible. That is, courts do not simply defer to government claims that a measure is justified, or that the means will advance the stated ends better than other alternatives might.<sup>128</sup>

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United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021)); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (per curiam) (granting preliminary injunctive relief in part to religious actors seeking relief from California prohibitions on indoor worship services); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–69 (2020) (per curiam) (enjoining restrictions imposed on religious services during pandemic on grounds of discrimination against religious entities); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (per curiam) (denying preliminary injunctive relief in case challenging restrictions on religious gatherings); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020) (same); Spell v. Edwards, 460 F. Supp. 3d 671, 677 (M.D. La. 2020); Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 283 (D. Me. 2020); Colleen Long, Michael Balsamo & Emily Wagster Pettus, *Justice Department Takes Church's Side in First Amendment COVID-19 Suit*, ASSOCIATED PRESS (Apr. 14, 2020), <https://apnews.com/93201a33ee3f73017f02d273f868bfba> (last visited Oct. 30, 2021) [<https://perma.cc/MDY3-K5YS>].

122. See e.g., Legacy Church, Inc. v. Kunkel, 455 F. Supp. 3d 1100, 1165 (D. N.M. 2020); Floyd Abrams & John Langford, *The Right of the People to Protest Lockdown*, N.Y. TIMES (May 19, 2020), <https://www.nytimes.com/2020/05/19/opinion/coronavirus-first-amendment-protests.html> (last visited Oct. 30, 2021) [<https://perma.cc/Z2PZ-5W63>]; Long et al., *supra* note 121.

123. See e.g., *In re Abbott*, 954 F.3d at 796–97; *In re Rutledge*, 956 F.3d 1018, 1025 (8th Cir. 2020); *Robinson v. Att'y Gen.*, 957 F.3d 1171, 1183–84 (11th Cir. 2020); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 924–27 (6th Cir. 2020); Greer Donley, Beatrice Chen & Sonya Borrero, *The Legal and Medical Necessity of Abortion Care Amid the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES 1, 10 (2020).

124. See Saenz v. Roe, 526 U.S. 489, 500 (1999) (discussing three aspects of so-called “freedom of travel” under the United States Constitution). The right also often implicates other rights, including freedom of association and privacy. See Anthony Michael Kreis, *Contagion and the Right to Travel*, HARV. L. REV. BLOG (Mar. 27, 2020), <https://blog.harvardlawreview.org/contagion-and-the-right-to-travel/> [<https://perma.cc/Q2CH-F9T5>].

125. Connecticut Citizens Def. League v. Lamont, 465 F. Supp. 3d 56, 61 (D. Conn. 2020) (issuing preliminary injunction against policy that effectively banned many gun purchases); Altman v. Cty. of Santa Clara, 464 F. Supp. 3d 1106, 1111 (N.D. Cal. 2020) (lockdown of non-essential businesses, which included gun shops, was essentially just a waiting period and thus constitutional); McCarthy v. Baker, No. 20-0041, 2020 WL 2297278, at \*1 (D. Mass. May 7, 2020) (granting preliminary injunction prohibiting licensed firearms dealers from selling guns and ammunition during COVID-19, subject to list of public-health related conditions to their ability to do so); Lynchburg Range & Training, LLC v. Northam, 455 F. Supp. 3d 238, 248 (W.D. Va. 2020).

126. See Jane Bambauer, Berin Szóka, Adam Marcus, Daniel Barth-Jones & James Cooper, *It's Time to Get Real About COVID Apps*, MEDIUM (May 14, 2020), <https://medium.com/@DataVersusCovid/its-time-to-get-real-about-covid-apps-dd82e08895f2> [<https://perma.cc/B9RE-XVK5>] (discussing tension between privacy and contact tracing apps); Mark Surman, *Privacy Norms and the Pandemic*, MOZILLA BLOG (Apr. 22, 2020), <https://blog.mozilla.org/blog/2020/04/22/privacy-norms-and-the-pandemic/> [<https://perma.cc/J6RG-4GAC>].

127. See Alan Z. Rozenshtein, *No One Should Have the Right to Opt Out of Coronavirus Surveillance*, LAWFARE (May 19, 2020, 9:00 AM), <https://www.lawfareblog.com/no-one-should-have-right-opt-out-coronavirus-surveillance> [<https://perma.cc/97C5-B8HK>].

128. See Landmark United States Supreme Court Cases, AM. BAR ASS'N, [https://www.americanbar.org/groups/public\\_education/programs/constitution\\_day/landmark-cases/](https://www.americanbar.org/groups/public_education/programs/constitution_day/landmark-cases/) (last visited Oct. 30, 2021) [<https://perma.cc/WPE6-G4P4>] (discussing cases where the Supreme Court has challenged certain government claims and matters).

#### D. Equal Protection

Last, but surely not least, is equality, which is rooted in the Equal Protection Clause.<sup>129</sup> The jurisprudence of equal protection has two important manifestations. Facially neutral and uniform rules inevitably impact different people differently, and sometimes these uneven burdens give rise to disparate impact claims.<sup>130</sup> Other times, the rules facially distinguish among classes of people, which may give rise to disparate treatment claims.<sup>131</sup>

The Supreme Court has largely closed the door on disparate *impact* claims absent a showing that the disparate impact is a product of intentional discrimination.<sup>132</sup> Nonetheless, disparate impacts can precipitate strong social response and resistance. Disparate *treatment* claims, in contrast, find more receptivity in the courts, although the strength of such claims as a litigation matter depends on the category involved.<sup>133</sup> Only certain types of classifications trigger elevated judicial scrutiny. A government policy that facially distinguishes based on race, sex, religion, or another doctrinally defined suspect classification faces searching judicial review; one that differentiates along other lines—for instance, subjecting individuals who recently returned from overseas to additional testing, or treating older individuals differently from children—is subject to a less stringent standard of review.

### IV. CONSTITUTIONAL NORMS AND PANDEMICS

With the basic architecture of the Due Process Clauses, Equal Protection Clause, and Bill of Rights in view, this Part examines the formal legal constraints placed on pandemic planners and, just as importantly, discusses how policymakers can infuse creation, design, and implementation of public health interventions with those norms. Public health policies, whether adopted by governments or by private actors, should account for those substantive commitments.<sup>134</sup>

Attention to these norms will serve policymakers well, although they are not the exclusive constitutional principles that matter here.<sup>135</sup> For example, policymakers also should consider principles of federalism that affect how duties are assigned among federal, state and local officials.<sup>136</sup> In a pandemic,

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129. See U.S. CONST. amend. XIV.

130. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1081–82 (2011) (discussing disparate impact and disparate treatment claims).

131. *Id.*

132. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (establishing that equal protection violations that trigger elevated scrutiny require a showing of intent to discriminate).

133. See Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 L. & CONTEMP. PROBS. 109, 127 (2009) (contrasting classifications related to class and race).

134. *Due Process and Public Health*, NETWORK FOR PUB. HEALTH, 1, 3 [https://www.apha.org/-/media/Files/PDF/factsheets/Due\\_Process\\_and\\_Public\\_Health\\_factsheet.ashx](https://www.apha.org/-/media/Files/PDF/factsheets/Due_Process_and_Public_Health_factsheet.ashx) [<https://perma.cc/65WJ-EEHD>].

135. *Id.*

136. See Toni M. Massaro & Shefali Milezarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 8 (2018) (“Structural limits include basic federalism principles, which curb some forms of federal authority.”).

cooperation among these government actors is critical; attention to the legal boundaries of government control over public health policy thus is key to intelligent design of national/state/local strategies for disease management.<sup>137</sup> Where tribes are involved, the intersection of these governments and tribal government likewise matters.<sup>138</sup> Thus, the constitutional principles we identify are core, but not exhaustive.

As we unpack principles of rationality, procedural fairness, liberty, and equality in the sections that follow, we will see that sometimes formal legal limits play an important role, other times less so. This Part relies on the constitutional norms we have discussed to draw lessons for pandemic planners, both to guard against legal risk and to serve as a template for persuasion. Again, even lawful public health measures will founder if they are met with defiance rather than cooperation, and the latter requires public respect.<sup>139</sup>

Constitutional principles bind governments, although as we have seen, governments often enjoy doctrinal advantages in litigation.<sup>140</sup> Pandemic policies thus often withstand judicial review. But courts can and do intervene when they believe governments have overstepped.<sup>141</sup> Moreover, when policies respect constitutional norms and policymakers defend them in these terms, this may serve a powerful legitimating function beyond assuring strict legality or that courts will uphold the policies.<sup>142</sup> Respect for the constitutional norms also may result in substantively better decisions.<sup>143</sup> Policies regulating collective life during a pandemic will benefit if decisionmakers respect constitutional process norms and communicate publicly about them, even if the decisionmakers are not directly bound by the Constitution.<sup>144</sup> That is, both governments and private actors like Google should understand, consider and respect these norms.

For evidence of the potency of constitutional norms one need look no further than the fact that many private entities already do adhere to, or profess to adhere to them.<sup>145</sup> Individuals from across the political spectrum also recognize and generally embrace the principles embedded in the frameworks established

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137. See Jennifer Selin, *How the Constitution's Federalist Framework Is Being Tested by COVID-19*, BROOKINGS (June 8, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/08/how-the-constitutions-federalist-framework-is-being-tested-by-covid-19/> [https://perma.cc/MD5V-HTJ3].

138. See Anagha Srikath, *Navajo Nation Under Strictest Lockdown with Highest Coronavirus Infection Rate in the Country*, HILL: CHANGING AMERICA (May 19, 2020), <https://thehill.com/changing-america/respect/diversity-inclusion/498517-navajo-nation-under-strict-lockdown-with-highest> [https://perma.cc/DXV9-JBGW] (reporting 2,000 cases per 100,000 people).

139. *Two Centuries of Law Guide Legal Approach to Modern Pandemic*, AM. BAR ASS'N (Apr. 2020), <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/> [https://perma.cc/Q2QP-SNH7].

140. See *supra* Part III.

141. See Marlene Lenthag, *How COVID-19 Vaccine Policies Have Triggered Lawsuits and Workplace Showdowns*, ABC NEWS (June 20, 2021, 9:16 AM), <https://abcnews.go.com/Business/covid-19-vaccine-policies-triggered-lawsuits-workplace-showdowns/story?id=78204107> [https://perma.cc/C3AT-G3PJ].

142. See Virelli III, *supra* note 99, at 743; Mashaw, *supra* note 99, at 117–18.

143. See *supra* note 101 and accompanying text.

144. See AM. BAR ASS'N, *supra* note 139.

145. See, e.g., Mark Zuckerberg *Stands for Voice and Free Expression*, *supra* note 105.

by the Due Process and Equal Protection Clauses.<sup>146</sup> Respecting the norms emanating from those frameworks thus can serve a powerful persuasive and unifying function, and may help convince members of the public to follow a recommended course of conduct.<sup>147</sup> Again, many members of the public are unaware that the Constitution largely does not constrain private conduct.<sup>148</sup> Thus all policymakers ignore these expectations at their peril.

#### A. Rationality

Policymakers cannot insulate their decisions from the requirements of rationality by the artifice of invoking a pandemic.<sup>149</sup> Public health interventions, like all government action, must survive rational basis review, although that mode of judicial review is very government friendly.<sup>150</sup> Interventions that would likely fail are easy to envision: imagine a city allowing businesses with green storefronts, but not blue ones, to be open for business.

Governments rarely adopt such obviously irrational policies, and courts may be particularly disinclined to second-guess public health measures adopted during a pandemic.<sup>151</sup> With respect to the ends pursued by public health measures, protecting public health is indisputably a legitimate—even compelling—government interest,<sup>152</sup> and judges tend to give policymakers broad, but not infinite, latitude to develop means to pursue that end.

But legal pitfalls still exist, particularly for the most sweeping public health measures.<sup>153</sup> Rights-minded judges may find a public health measure violates substantive due process because it goes too far. The COVID pandemic produced one such ruling: a Pennsylvania district court struck down a county order closing all non-life-sustaining businesses on substantive due process grounds because the order “was so arbitrary in its creation, scope and administration.”<sup>154</sup> The

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146. See, e.g., Chemerinsky, *supra* note 99, at 403; Sandefur, *supra* note 99, at 311.

147. Cf. Lawrence O. Gostin, *When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105, 1166 (2003) (“Procedural due process also is important to public acceptance of the legitimacy of the governmental action.”).

148. See Phillips, *supra* note 102.

149. Margaret Reiney & John C. O’Quinn, *Is Rational Basis the Appropriate Test to Apply in Reviewing Emergency COVID-19 Orders?*, FEDERALIST SOC’Y (Feb. 3, 2021), <https://fedsoc.org/commentary/fedsoc-blog/is-rational-basis-the-appropriate-test-to-apply-in-reviewing-emergency-covid-19-orders> [<https://perma.cc/RS25-3NMW>].

150. See Bambauer & Massaro, *supra* note 90, at 302.

151. See Farrell, *supra* note 91, at 370. This tendency, though, has limits as the religious freedom Supreme Court pandemic cases prove. See cases cited *supra* note 121.

152. See *Heffner v. Murphy*, 745 F.3d 56, 85–86 (3d Cir. 2014) (“The first prong of the rational basis test is easily satisfied by the [government’s] asserted interest in public health.”); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (concluding that state’s interest in citizens’ health “is not only legitimate, but also compelling”).

153. Lisa Soronen, *Supreme Court Strikes Down Another COVID Restriction Affecting Religion*, NCSL BLOG (Apr. 12, 2021), <https://www.ncsl.org/blog/2021/04/12/supreme-court-strikes-down-another-covid-restriction-affecting-religion.aspx> [<https://perma.cc/K564-LW37>].

154. *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 922 (W.D. Pa. 2020), *stayed pending appeal* No. 20-2936, 2020 U.S. App. LEXIS 31632 (3d Cir. Oct. 1, 2020).

decision, though, is an outlier. Other courts have declined to adopt similar reasoning,<sup>155</sup> and it was remanded and dismissed as moot by the Third Circuit.<sup>156</sup>

Litigants may contend that public health orders arbitrarily distinguish among businesses. A district court judge in Michigan entered a preliminary injunction against an order allowing some business, like restaurants and bars, to reopen, while requiring gyms to remain closed, because the judge found that the government had presented no factual basis for treating gyms differently.<sup>157</sup> In a matter of days, the Sixth Circuit stayed the ruling, concluding that the order survived lenient rational basis review.<sup>158</sup> District court judges typically reject these rational basis due process arguments.<sup>159</sup> Yet one surely could imagine a scenario where a sympathetic judge might find a distinction unconstitutionally arbitrary. For example, on December 2, 2020, the Los Angeles Mayor issued a stay-at-home order that prohibited “[a]ll travel, including, without limitation, travel on foot, bicycle, scooter, motorcycle, automobile or public transit,” unless travel was for the purpose of engaging in a permitted activity, which included playing “[g]olf, [t]ennis, and [p]ickleball.”<sup>160</sup> The order was revised thereafter, and the prohibition on walking outside was lifted,<sup>161</sup> but if a lawsuit had been brought, a judge likely would have questioned the rationality of barring people from walking outside, unless they were walking while playing golf or to arrive at a golf course. We do not suggest that such an argument necessarily would have succeeded, but a judge surely would have scrutinized the justification offered in support of this distinction. Again, policymakers who ignore the rationality norm do so at their peril.

Moreover, the public may be a harsher judge of the rationality of public health measures than are the courts.<sup>162</sup> That means that policymakers—whether a governor, school administrator, or business executive—must be able to articulate a persuasive factual basis for policies adopted to combat or contain the pandemic even if they are confident of prevailing in the courts.<sup>163</sup> We use the term *persuasive* because the facts relied upon not only must be of sufficient validity

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155. *E.g.* *Disbar Corp. v. Newsom*, 508 F. Supp. 3d 747, 754 (E.D. Cal. 2020); *Herrin v. Reeves*, 2020 WL 5748090, at \*1 (N.D. Miss. Sept. 25, 2020) (interlocutory order).

156. *See Cty. of Butler*, 2020 WL 5868393, at \*2; Judgment at 2, *Cnty. of Butler v. Wolf*, No. 20-2936 (3d Cir. Aug. 11, 2021).

157. *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 468 F. Supp. 3d 940, 949–50 (W.D. Mich. 2020); *rev'd* 814 Fed. Appx 125 (6th Cir. 2020).

158. *Id.* at 130.

159. *910 E Main LLC v. Edwards*, 481 F. Supp. 3d 607, 615 (W.D. La. 2020) (upholding order distinguishing between bars and restaurants).

160. *See* Eric Garcetti, Public Health Order Under City of Los Angeles Emergency Authority (Dec. 2, 2020), [https://www.lamayor.org/sites/g/files/wph446/f/page/file/20201202%20Mayor%20Public%20Order%20Targeted%20SAH%20Order\\_1.pdf](https://www.lamayor.org/sites/g/files/wph446/f/page/file/20201202%20Mayor%20Public%20Order%20Targeted%20SAH%20Order_1.pdf) [<https://perma.cc/JK3S-HAGC>].

161. Eric Garcetti, Public Order Under City of Los Angeles Emergency Authority (Dec. 31, 2020), <https://www.lamayor.org/sites/g/files/wph446/f/page/file/20201231%20Mayor%20Public%20Order%20Targeted%20SAH%20Order.pdf> [<https://perma.cc/Z8N2-85MB>].

162. *See* Claudia Deane, Kim Parker & John Gramlich, *A Year of U.S. Public Opinion on the Coronavirus Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), <https://www.pewresearch.org/2021/03/05/a-year-of-u-s-public-opinion-on-the-coronavirus-pandemic/> [<https://perma.cc/MS39-72Y5>].

163. Loïc Bergera et al., *Rational Policymaking During a Pandemic*, 118 PNAS 2012704118 at 4 (2021), <https://www.pnas.org/content/pnas/118/4/e2012704118.full.pdf> [<https://perma.cc/9T2C-YHJ9>].

to withstand scrutiny from experts and courts, but of sufficient intelligibility to satisfy most members of the public.<sup>164</sup>

We recognize that not everyone will be persuaded by facts, no matter how compelling.<sup>165</sup> The factual predicate for action is a core component of rationality and nevertheless should be of the sort that most critical thinkers across the ideological spectrum will accept.

Pandemic policy therefore must consider the current state of scientific consensus and dissensus.<sup>166</sup> Ideally, this will mean that policymaking bodies will include individuals with medical expertise who both understand and can communicate effectively about emerging information.<sup>167</sup> Depending on the scale at which policy is being set, that may not always be possible: the mayor of a small town may not have easy access to an infectious disease expert. Nonetheless, public acceptance of public health interventions will depend on policymakers' ability to explain how that intervention is justified by the public health circumstances to the best of the relevant experts' judgment.<sup>168</sup>

This task is a weighty and difficult one. Policymakers must recognize and account for the many unknowns about the virus and keep pace with evolving comprehension of viral mode of spread, pathogenesis, clinical sequelae, and potential containment modalities.<sup>169</sup> So, too, must institutions account for unknowns about mitigation measures themselves: how effective will they be? Will they be followed? Will they cause unforeseen problems? And the plan must be nimble enough to respond to emerging information about the specific institution and people to which it applies. Even the most sensible plan may tumble into the zone of irrationality if it cannot keep pace with emerging information.<sup>170</sup> And sensible plans may be of little practical value if those governed by it are not trained to pivot as new facts emerge and conditions dictate policy adjustments.<sup>171</sup>

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164. *See id.*

165. *See* Steve Rathje, *Why People Ignore Facts: When It Comes to Reasoning, Identity Trumps Truth*, PSYCH. TODAY (Oct. 25, 2018), <https://www.psychologytoday.com/us/blog/words-matter/201810/why-people-ignore-facts> [<https://perma.cc/97KN-8E6D>].

166. Keeping abreast of the science is challenging given the flurry of activity regarding the virus. *See Scientific Research on the Coronavirus Is Being Released in a Torrent*, ECONOMIST (May 7, 2020), <https://www.economist.com/science-and-technology/2020/05/07/scientific-research-on-the-coronavirus-is-being-released-in-a-torrent> [<https://perma.cc/4U2D-NAXL>].

167. On the national stage, Dr. Anthony Fauci, the Director of the National Institute of Allergy and Infectious Diseases served this role effectively. *See* Michael Specter, *How Anthony Fauci Became America's Doctor*, NEW YORKER (Apr. 10, 2020), <https://www.newyorker.com/magazine/2020/04/20/how-anthony-fauci-became-americas-doctor> [<https://perma.cc/E7LB-PVDL>].

168. Greg Jericho, *Heavy-Handed Interventions from Governments Aren't the Answer to Hesitancy, Building Trust Is*, GUARDIAN (Aug. 26, 2021), <https://www.theguardian.com/commentisfree/2021/aug/26/heavy-handed-interventions-from-governments-arent-the-answer-to-hesitancy-building-trust-is> [<https://perma.cc/V7X6-SBNX>].

169. *See* Justin R. Pidot, *Governance and Uncertainty*, 37 CARDOZO L. REV. 113, 121–22 (2015) (“[L]aw is often made with little thought about the eventuality of new information emerging or about social conditions changing.”).

170. *Id.*

171. *See id.* at 122.

The challenge of acting in the face of uncertainty, though, is not a unique challenge for pandemic policy. It is endemic in any effort at governance.<sup>172</sup> A range of tools exists to make rules nimble.<sup>173</sup> Contingency planning to address foreseeable eventualities thus is an important mechanism whenever policymakers must respond to on-the-ground realities; so too are establishing processes through which they respond.<sup>174</sup>

Policymakers also must carefully evaluate the tools at their disposal—*i.e.*, the “means” in the language of constitutional rationality review.<sup>175</sup> Ensuring rational means provides an important “stop and think” guide to policy design.<sup>176</sup> Attending to means involves asking questions like: What are the relative costs and benefits of a chosen mitigation intervention compared to rejected alternatives? Are there ways to adjust the means over time to make them more effective and less costly? What monitoring protocols can be implemented to determine actual, as opposed to hypothesized, consequences? Might mitigation protocols sunset? Are there means of limiting life, liberty, or property costs during the pre-vaccine period? What have been the results in other contexts where similar or different means have been deployed? How can the institution communicate most effectively to the affected populations about how and why they chose particular means as part of the overall strategy? These are all tough questions, and rightly so. Pandemic policies should not be adopted lightly, because they have significant consequences for the individuals and entities that operate under them.<sup>177</sup> Asking these questions will lead to variable answers depending on institutional context, and those answers invariably will be shaped by ideological and other values commitments.<sup>178</sup>

That the project of adopting rational means is indeterminant and complex does not undermine its importance. Individuals may be willing to give mitigation measures the benefit of the doubt if they trust that they were carefully considered, even if the measures are not the ones that the individuals would have chosen.<sup>179</sup> Measures that are perceived to be arbitrary will face greater noncooperation and protest.<sup>180</sup>

Consider this: on May 20, 2020, a Costco customer refusing to wear a mask recorded an interaction in which an employee asked him to leave and posted the

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172. *See, e.g., id.* at 121–22 (“Lawmakers never act with perfect information.”).

173. *Id.* at 130.

174. *Id.* at 151–72 (describing adaptive regulation and contingent regulation as strategies to make law responsive to new information); *see also* Justin R. Pidot, *Contingent Delisting*, 91 U. COLO. L. REV. 649, 652 (2020) (proposing a contingency approach to removing species from the list of threatened and endangered species to account for uncertainty).

175. Pidot, *supra* note 169, at 173.

176. *Id.*

177. *See id.* at 176.

178. *See id.* at 174–75.

179. Anton Pak, Emma McBryde & Oyelola A. Adegboye, *Does High Public Trust Amplify Compliance with Stringent COVID-19 Government Health Guidelines? A Multi-Country Analysis Using Data from 102,627 Individuals*, 14 RISK MGMT. & HEALTHCARE POL’Y 293, 294 (2021).

180. *Id.*

video on Twitter.<sup>181</sup> As a private company, Costco is not subject to the Due Process Clause's rationality requirement and is free to require its customers to wear masks without explanation.<sup>182</sup> The company, however, took care to publicly explain its decision.<sup>183</sup> If the public did not perceive the mask wearing requirement as a rational mitigation measure, the response to the Twitter video, which was overwhelmingly positive for Costco,<sup>184</sup> could have been quite different, and may have prompted more customers to violate the policy or boycott the store entirely.

Convincing the public that means are rational is no easy task, because information about the pandemic is vulnerable to hyper-partisan interpretations and even manipulation by some media (including social media) outlets.<sup>185</sup> Where, however, the scientific community is largely in agreement—say, in urging frequent hand-washing, the usefulness of face coverings in some contexts, and the importance of self-quarantining for symptomatic persons—interventions consistent with those recommendations will have the greatest likelihood for wider public acceptance, which in turn, may result in greater compliance.<sup>186</sup> Moreover, even where policymakers fail to persuade all constituencies, investing in rational decision making will not be a wasted effort; carefully articulating means and ends may lead to their refinement and improvement.<sup>187</sup>

### B. Procedural Fairness

Regulating communal life during a pandemic may implicate procedural fairness at multiple points. At every stage, a regulation must appear fair and include reasonable procedural protections.<sup>188</sup> Imagine a rule requiring anyone suspected of being infected with COVID to subject themselves to fourteen days of

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181. Janelle Griffith, *Video Shows Costco Worker Calmly Handle Customer Berating Him Over Mask Policy*, NBC NEWS (May 20, 2020, 11:40 AM), <https://www.nbcnews.com/news/us-news/video-shows-costco-worker-calmly-handling-customer-berating-him-over-n1211186> [<https://perma.cc/AX36-4UUB>].

182. See John E. Finn, *Commentary: No, Mask Mandates Are Not Unconstitutional*, CHI. TRIB. (July 23, 2020, 3:43 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-coronavirus-mask-mandates-constitutional-20200723-53dpqip7lff55o5fp444mq16cm-story.html> [<https://perma.cc/43JF-C2G7>].

183. Letter from Craig Jelinek, President & CEO, Costco Wholesale, <https://www.costco.com/coronavirus.html> (last visited Aug. 29, 2021) [<https://web.archive.org/web/20200617031529/https://www.costco.com/coronavirus.html>].

184. See Only In Las Vegas (@OnlyInLVNV), TWITTER (May 18, 2020), <https://twitter.com/only-inlvnv/status/1262335074516692992?lang=en> [<https://perma.cc/U38E-LJ99>].

185. See Jeremy W. Peters, *Alarm, Denial, Blame: The Pro-Trump Media's Coronavirus Distortion*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/us/politics/hannity-limbaugh-trump-coronavirus.html> [<https://perma.cc/79VG-SF3Q>]; Beatrice Dupuy, Arijeta Laika & Amanda Seitz, *Not Real News: False Coronavirus Claims and Phony Remedies*, ASSOCIATED PRESS (Apr. 3, 2020), <https://apnews.com/13cae931dd47b912a5baff14de85b4e8> [<https://perma.cc/SX5G-PVFJ>].

186. Cristina Bicchieri et al., *In Science We (Should) Trust: Expectations and Compliance Across Nine Countries During the COVID-19 Pandemic*, 16 PLOS ONE e052892, at 13 (2021).

187. See *id.*

188. See Kevin S. Burke & Steve Leben, *Procedural Fairness in a Pandemic: It's Still Critical to Public Trust*, 68 DRAKE L. REV. 685, 686 (2020).

confinement at a hospital. At a minimum, individuals subject to confinement would have a right to contest the factual predicate for their confinement.<sup>189</sup>

Public health interventions are more likely to implicate procedural due process when they impose differential burdens on individuals based on an assessment of the individualized risks they pose to the community.<sup>190</sup> The legal question will be somewhat clear-cut with respect to an exercise of regulatory authority to constrain the activities of individuals or confine them altogether.<sup>191</sup> Think, for example, about a state government ordering an individual to quarantine who has been determined to pose a risk of transmitting COVID. The government end would be plainly rational: prevent spread of the disease. The means also would be rational: quarantine prevents transmission.<sup>192</sup> But an involuntary quarantine order involves an individualized determination to assure that it is warranted in the particular case of the quarantined person,<sup>193</sup> and it involves a quintessential deprivation of “liberty.”<sup>194</sup> Those ingredients trigger the requirements of procedural due process that would entitle affected individuals to adequate notice of the quarantine policy’s content, and a process by which to contest facts about the risk they actually pose to others.<sup>195</sup>

Reopening physical institutions may be less likely to trigger procedural due process as a matter of constitutional doctrine, because individuals prevented from entering based on a determination that they pose a risk to the community first would need to demonstrate that they face deprivation of a constitutionally protected liberty or property interest.<sup>196</sup> Identifying liberty and property interests that trigger due process rights is a context-dependent inquiry.<sup>197</sup> It may turn on whether an individual has a “legitimate claim of entitlement” to entry,<sup>198</sup> or whether being denied entry imposes stigmatic harm of the kind that can serve as the basis for a due process claim.<sup>199</sup> Failing to provide individuals with a means to contest the factual basis for a decision to exclude them from physical presence at an institution, though, may risk depriving them of procedural due process.<sup>200</sup> This risk could be magnified if the institution fails to provide alternatives for excluded individuals.<sup>201</sup> For example, a university could bar a student from entering a classroom based on a temperature reading without allowing for virtual

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189. Andres F. Quintana & Mikayla R. Quintana, *Surviving the COVID-19 Pandemic of 2020: A Constitutional and Policy Review of Involuntary Medical Quarantine*, 11 WAKE FOREST J.L. & POL’Y. 327, 381 (2021).

190. *Id.* at 376.

191. *Id.* at 382.

192. *Id.* at 329.

193. *See Londoner v. Denver*, 210 U.S. 373, 385 (1908).

194. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting “[w]ithout doubt” that liberty “denotes not merely freedom from bodily restraint.”).

195. Quintana & Quintana, *supra* note 189, at 376.

196. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (noting that procedural due process does not protect against deprivation of “a benefit . . . if government officials may grant or deny it in their discretion”).

197. *See SULLIVAN & MASSARO, supra* note 120, at 40–46.

198. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

199. *Paul v. Davis*, 424 U.S. 693, 706–11 (1976).

200. Quintana & Quintana, *supra* note 189, at 381.

201. *See id.*

participation. Or a Department of Motor Vehicles could deny a driver entry and provide no alternative means for renewing a driver's license. The driver may have a protectable interest in the driver's license, as may the student in receiving the education for which they have paid, even if those individuals may not have a protectable interest in physical presence if a virtual alternative exists.<sup>202</sup>

If a public health intervention involves an individualized determination and affects a protected interest, then a judge would apply the balancing test set forth in *Mathews v. Eldridge* to evaluate the procedural protections afforded to the individual.<sup>203</sup> The *Mathews* inquiry is highly context dependent and the outcome is difficult to predict.<sup>204</sup>

As an example, consider a government that imposed a compulsory quarantine on individuals who receive a positive test indicating infection. While compulsory quarantines have not been implemented during the COVID pandemic, they have been used at other times in United States history, and provide a good illustration of the application of procedural due process.<sup>205</sup> A judge reviewing a compulsory quarantine policy would consider the three *Mathews* factors: first, the weightiness of the government's interest in involuntarily segregating infected individuals—for example, a judge might consider medical information about the infectivity and lethality of the disease, or information about the effectiveness of alternative, less-restrictive interventions. Second, the risk of misidentifying a person as infected using planned procedures would be examined—for example, a judge might consider the error rate of the governments' testing protocol, the availability of alternative testing to confirm diagnosis, and procedural mechanisms through which individuals might challenge determinations that they are infected. Third, the judge would review the potential for additional procedural protections to enhance the accuracy of that determination—for example, requiring the government to evaluate alternative testing information if that is not currently contemplated.<sup>206</sup>

Many of these considerations will be technical in nature. Courts will give considerable deference to the government's evaluation of public health information and also to the government's good faith assessment of the costs of affording additional process. But again, judges do not defer uncritically to the government's view that the individual interests at stake should not outweigh those process costs.<sup>207</sup> The balancing process also must take seriously the gravity of the liberty interference for the individual, which would be quite weighty if an individual is involuntarily detained.<sup>208</sup> So, for example, if a state decided to

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202. See Norma C. Izzo, *How Litigators Are Confronting COVID in the Courtroom*, AM. BAR ASS'N (Aug. 31, 2020), <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2020/covid-19-video-testimony-courtrooms/> [https://perma.cc/8C6D-KDCV].

203. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

204. Quintana & Quintana, *supra* note 189, at 377.

205. See Adam Klein & Benjamin Wittes, *Preventative Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 170–78 (2011).

206. *Id.*

207. Quintana & Quintana, *supra* note 189, at 382.

208. *Id.* at 376.

provide only a post-deprivation, non-expedited hearing to an individual required to quarantine because he or she was determined to pose a risk to public health, then the government may lose a court challenge of that process.

The outcome of *Mathews*'s multifactor balancing test may not be obvious at the outset, and many public health interventions will not involve individualized determinations or protected interests.<sup>209</sup> For example, an order directing all restaurants to close, or to operate at reduced capacity, would not involve individualized determinations about specific businesses. And requiring a student who has traveled across state lines to attend class online, rather than in person, would involve an individualized determination, but may not implicate a protected liberty or property interest.

Yet regardless of whether policymakers could resist procedural obligations as a technical legal matter, procedural due process directs them to the right question to ask: are individuals adversely affected by interventions being treated fairly?<sup>210</sup> Moreover, public perceptions of procedural fairness matter. As Tom Tyler explains: "people's reactions to legal authorities are based to a striking degree on their assessments of the fairness of the processes by which legal authorities make decisions and treat members of the public."<sup>211</sup> In other words, procedural fairness in fact and in peoples' perceptions may enhance compliance.

The connection between perceptions of procedural fairness and compliance suggests that policymakers must attend to process even where they need not do so as a formal constitutional matter.<sup>212</sup> Legitimacy will be enhanced if policymakers seek public input on interventions, ensure community members have adequate notice of intervention requirements, and provide procedural safeguards even if constitutionally protected interests are not involved.<sup>213</sup> When privileges are denied, even if those privileges do not constitute protected property or liberty interests, legitimacy also will be enhanced if community members have a meaningful opportunity to be heard.<sup>214</sup>

Similarly, legitimacy will be enhanced if community members have an opportunity to review and provide feedback on the policies to which they will be subject.<sup>215</sup> Soliciting input on plans is particularly important because few institutions have experience implementing pandemic policies, and mitigation measures may implicate a broad array of activities, locations, and contexts.<sup>216</sup> We can personally attest to these participation and input benefits. The pandemic plans we have been involved with drafting at our own public university have

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209. See Aleinikoff, *supra* note 115, at 948, 951, 978.

210. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 298 (2003).

211. *Id.* at 284.

212. *Id.* at 296–97.

213. *Id.* at 286.

214. *Id.*

215. Where governments exercise regulatory authority, they may have a legal obligation to provide the public with an opportunity to participate in decision-making processes. See 5 U.S.C. § 553(c). All institutions will benefit from doing so, even in the absence of formal legal obligations.

216. Alejandro E. Camacho & Robert L. Glicksman, *Structured to Fail: Lessons from the Trump Administration's Faulty Pandemic Planning and Response*, 100 MICH. J. ENV'T & ADMIN. L. 327, 353 (2021).

been significantly improved as they have been vetted regularly with students and colleagues.

As with the other facets of due process, attending to procedural fairness also will enhance community confidence in mitigation measures.<sup>217</sup> For example, if an institution requires individuals physically present within it to wear masks, individuals will be more likely to comply if they feel heard and are told in advance of this requirement.

To provide a concrete example of how procedural fairness could inform pandemic policies even where formal due process protections would not apply, consider a university policy that governs physical access to campus. The university might solicit feedback from students and faculty on a proposed plan developed by administrators in consultation with public health experts. The plan might be modified based on that feedback. The university might also establish a mechanism through which individuals could petition for an exception to enter a closed campus if, for example, they lacked access to broad-band internet at home needed to take classes virtually. The university might also provide procedural protections for individuals subjected to heightened requirements because they were flagged as an infection risk. For example, the University of Arizona adopted an electronic daily public health screening survey for members of the community that asks about symptomatology.<sup>218</sup> Individuals who indicate they are experiencing symptoms of COVID are not permitted to physically enter campus.<sup>219</sup> However, a system is in place for individuals to correct answers entered in error, a modest procedure to improve the accuracy of the instrument and avoid excluding individuals from physical presence on campus based on erroneous information.<sup>220</sup>

### C. Liberty

Americans exercise many of their fundamental liberties in concert with others and, therefore, some pandemic policies inevitably burden liberty interests.<sup>221</sup> Orders closing businesses will affect bookstores and gun ranges; limitations on the size of public gatherings will affect religious services; the closure of government offices may burden the right to marry or adopt children. Some of these liberty interests serve as political flashpoints and may spawn significant litigation, as has occurred during the COVID pandemic.<sup>222</sup> As with other constitutional norms, policymakers would do well to affirmatively account for liberty interests up front in establishing pandemic policies. They should view the

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217. *Id.*; Tyler, *supra* note 210, at 292.

218. See *COVID-19 Response*, UNIV. OF ARIZ., <https://covid19.arizona.edu/> (last visited Oct. 30, 2021) [<https://perma.cc/PH26-9UXF>].

219. *Id.*

220. *COVID-19 Positive Case Notification Protocol for Students*, UNIV. OF ARIZ., <https://covid19.arizona.edu/test-trace-treat/positive-case-protocol-students> (last visited Oct. 30, 2021) [<https://perma.cc/7Y5F-ANJH>].

221. Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 188 (2020).

222. *Id.* at 179, 183.

protection and enhancement of liberty to the extent consonant with sound public health policies as a goal, rather than as a hindrance.<sup>223</sup>

Fundamental liberties are more likely to be infringed when governments exercise regulatory power, rather than when they exercise proprietary control over institutions and facilities.<sup>224</sup> For example, if a city issues an order to prohibit gatherings of more than ten people within the city limits, this may infringe the fundamental right of assembly.<sup>225</sup> If it orders people to shelter in place, this infringes the right to travel.<sup>226</sup> If it defines essential services during a pandemic not to include abortion, this infringes reproductive rights.<sup>227</sup> If it determines that the restrictions on assemblies apply to religious services, but not the operation of “essential businesses” like grocery stores, this implicates the free exercise of religion and protection from discrimination.<sup>228</sup> All of these are protected from government undue interference by the Constitution.<sup>229</sup>

Perhaps less intuitively, institutions may face legal scrutiny when they establish a process through which individuals can be exempted from mitigation measures.<sup>230</sup> For example, an institution might allow individuals to opt out of testing or face covering requirements for health reasons but decline to accommodate individuals with religious objections. By accommodating health interests, but not religious interests, an institution may burden a fundamental liberty, and if it cannot justify that burden, it will be vulnerable to a legal challenge.<sup>231</sup> Pandemic policy therefore must carefully attend to the liberty burdens it imposes on some, and the relation of those limits to others on whom it imposes different limits. Such differential burdens may be permissible, but only if policymakers can provide a robust justification for the interests they do accommodate and the interests that they do not.<sup>232</sup>

In an emergency, of course, the courts typically defer more readily to judgment calls about which interests can be accommodated than they do in normal times.<sup>233</sup> But even emergencies that threaten life itself do not *suspend* the

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223. Daniel Farber, *The Long Shadow of Jacobson v. Massachusetts: Public Health, Fundamental Rights, and the Courts*, at 846 (draft on file with authors).

224. Compare Hoeven, *supra* note 71 (reviewing California’s imposition of a state-wide mask mandate), with Hollyfield, *supra* note 72 (describing California’s decision to reopen its own DMV locations).

225. Victoria L. Killion, *Freedom of Association in the Wake of Coronavirus*, CONG. RSCH. SERV. (Apr. 16, 2020) <https://crsreports.congress.gov/product/pdf/LSB/LSB10451> (last visited Oct. 30, 2021) [<https://perma.cc/B22L-6TJW>].

226. Mitchell F. Crusto & Henry F. Bonura, *Stay-at-Home: Coronavirus and Its Impact on the Right to Intrastate Travel*, 68 LA. B.J. 16, 18 (2020).

227. See Donley et al., *supra* note 123, at 1.

228. See *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1110, 1159–60 (D.N.M. 2020); see also *Soos v. Cuomo*, 470 F. Supp. 3d 268, 282 (N.D.N.Y. June 26, 2020) (granting preliminary injunction against executive orders that restricted religious gatherings).

229. U.S. CONST. amend. 1.

230. See *Soos v. Cuomo*, 470 F. Supp. 3d at 282.

231. See *supra* Section III.C.

232. *Constitutional Constraints on Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1787 (2021).

233. As Justice Harlan noted in *Jacobson v. Massachusetts*, “in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as

Constitution; they shape the manner in which it applies.<sup>234</sup> The test historically has been one of reasonableness, although the degree of deference owed to the government hinges on the nature and evenness of the burdens imposed.<sup>235</sup> As Justice Robert Jackson cautioned in his dissent in *Terminiello v. City of Chicago*: “[t]he choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”<sup>236</sup>

Justice Jackson penned his warning when he believed the Court applied an overly strict interpretation of the First Amendment in a manner that endangered public safety, but it warrants careful consideration by those who craft pandemic policies.<sup>237</sup> None of us is alone in our liberty; the safety and well-being of others matter.<sup>238</sup>

The legal parameters that apply when governments must balance liberty and other compelling interests such as public safety are fairly intuitive.<sup>239</sup> Most people recognize the difference between circumstances where a minor intrusion into personal liberty is necessary to achieve a greater good and those where the intrusion is more direct and profound.<sup>240</sup> They understand that a person’s right to swing her arms ends before she connects with another’s nose; they appreciate that the right to free speech does not extend to yelling “fire” falsely in a crowded theatre, and that a virus bludgeons just as surely as a fist—particularly one that has resulted in so many lost or compromised lives. Put another way, it is one thing for a civil libertarian to argue that individuals should be free to play Russian

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the safety of the general public may demand.” 197 U.S. 11, 29 (1905); see also *Zucht v. King*, 260 U.S. 74, 77 (1922) (upholding law that excluded unvaccinated students from public and private schools).

234. For a detailed defense of the proposition that emergencies should not suspend the Constitution, see Wiley & Vladeck, *supra* note 221, at 188–89, 198. The Roberts Court emphatically embraced this notion in its post-RBG COVID cases. See *supra* note 121 (collecting cases on religious freedom decided by the Supreme Court during COVID); see also *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 63, 66 (2020) (per curiam) (Gorsuch, J., concurring) (“Government is not free to disregard the First Amendment in times of crisis.”).

235. See *Jacobson*, 197 U.S. at 28–29 (upholding mandatory vaccinations during a smallpox outbreak); see also Farber, *supra* note 223, at 836; Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 124–25 (2020).

236. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

237. *Id.* at 27–28.

238. As such, the constitutional liberty mandate in operation echoes the notion expressed in *Roe v. Wade* that cautions a woman “cannot be isolated in her privacy.” 410 U.S. 113, 153–54, 159 (1973) (concluding that the privacy right of a pregnant woman is not absolute because there are countervailing interests). Yet in a real sense, none of us is alone in our privacy. Moreover, the “privacy” to which *Roe* referred to is better captured by the more encompassing, and explicitly textual protection of “liberty.” *Id.*

239. See Aleinikoff, *supra* note 115, at 976.

240. Cf. Louis Menand, *Why Do We Care So Much About Privacy?*, NEW YORKER (June 11, 2018), <https://www.newyorker.com/magazine/2018/06/18/why-do-we-care-so-much-about-privacy> [https://perma.cc/BDJ4-LGRG]

roulette with a revolver in their homes; it is quite another to claim they can discharge a shotgun at a crowded roulette table in a public setting.<sup>241</sup>

Courts during the COVID pandemic have reaffirmed the common understanding that the government must sometimes constrain liberty to protect life.<sup>242</sup> Nevertheless, they also have insisted that the government respect the liberty interests at stake and not unduly intrude upon them.

This judicial insistence on respect for liberty even in a pandemic was particularly evident after the death of Justice Ruth Bader Ginsburg, when the Supreme Court entered a more interventionist mode in a series of *per curiam* decisions that addressed government restrictions that applied to religious gatherings.<sup>243</sup> Before Justice Ginsburg's death, in *South Bay United Pentecostal Church v. Newsom*, the Court denied preliminary injunctive relief to a religious group that claimed that it was subjected to more severe restrictions than comparable secular groups.<sup>244</sup> California had imposed a rule temporarily limiting attendance at places of worship to 25% of building capacity or a maximum of one hundred attendees.<sup>245</sup> In his concurring opinion, Chief Justice Roberts noted that those same restrictions applied to an array of secular gatherings, "including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."<sup>246</sup> Roberts explained:

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected

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241. See, e.g., CATO INST., COVID-19 RESPONSE: CRITICAL GUIDELINES FOR POLICYMAKERS (2020), <https://www.cato.org/publications/commentary/covid-19-response-critical-guidelines-policymakers> [<https://perma.cc/QP6S-SWQZ>] ("Although federal and state officials can claim special powers in emergencies, that is not a blank check to expand their authority.").

242. E.g., *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603 (2020) (denying the application for injunctive relief brought by church that wished to operate services at fifty percent of capacity while taking precautions of social distancing and wearing masks).

243. See case cited *supra* note 121 (collecting cases on religious freedom decided by the Supreme Court during the COVID-19 pandemic).

244. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

245. *Id.* (Roberts, C.J., concurring); see also *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2603–04 (denying application for injunctive relief, again on 5-4 vote, in case involving challenge to Nevada gubernatorial directive that restricted religious gatherings, over three dissents written by Justices Alito, Kavanaugh and Gorsuch). In his dissent, joined by Justices Thomas and Kavanaugh, Justice Alito argued that the selective application of closing conditions constituted discriminatory treatment of houses of worship and impermissible viewpoint discrimination, noted that even under the deferential 1905 *Jacobson v. Massachusetts* test the directive was unconstitutional, and argued that *Jacobson* in any event may not be controlling given that it was a substantive due process case that upheld a local ordinance, and applied to a smallpox outbreak rather than to a case in which laws triggered First Amendment concerns and were statewide measures of indefinite duration. *Id.* at 2608 (Alito, J., dissenting); see *Jacobson*, 197 U.S. 11, 14.

246. *South Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people.<sup>247</sup>

Roberts recognized that public health restrictions in a liberal society may be justified *even if* they burden an individual’s fundamental rights.<sup>248</sup> Yet that did not mean those burdens are unimportant and beneath consideration. Rather, when liberty must be restricted, burdens must be sensible and fall as evenly as possible on similarly situated individuals.<sup>249</sup>

Following the death of Justice Ruth Bader Ginsburg and the appointment of Justice Amy Coney Barrett, however, the Court changed course in *Roman Catholic Diocese of New York v. Cuomo*.<sup>250</sup> By a five to four vote, the Court enjoined an order issued by the Governor of New York pending appeal, because the majority believed it imposed uneven restrictions and “singled out a particular religion for blame and retribution for an uptick in a society-wide pandemic.”<sup>251</sup> In a concurring opinion, Justice Gorsuch contended that the Chief Justice’s opinion in *South Bay United Pentecostal Church* had improperly relied upon rational basis review, rather than strict scrutiny, and contended that the desire to stay “out of the way in times of crisis”<sup>252</sup> did not justify judicial deference to public health decisions that burdened religious liberty.

The degree to which these *per curiam* decisions, issued only months apart, represented a fundamental change in the law was at first unclear.<sup>253</sup> The *Roman Catholic Diocese* decision was grounded, in part, on a differing and contested

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247. *Id.* at 1613–14 (Roberts, C.J., concurring) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

248. *See, e.g.*, *Order Den. Prelim. Inj., Bayley’s Campground, Inc., v. Mills*, 463 F. Supp. 3d 22, 38 (D. Me. 2020) (denying injunctive relief to a group of in-state businesses and out-of-state individuals who wanted to provide and/or access Maine lodging and campground facilities and argued that the Governor could not impose restrictions that deprived non-Mainers of their fundamental right to travel and participate in the commerce that currently is available to Mainers).

249. *See Vill. of Willowbrook v. Olech*, 582 U.S. 562, 564 (2000) (*per curiam*) (recognizing a “‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment”).

250. *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63 (2020) (*per curiam*). The restrictions in question required that in so-called “red zones” there could not be gatherings of more than ten people at religious gatherings, and in “orange zones” attendance was capped at twenty-five people. *Id.* at 66. The restrictions applied regardless of the size of the houses of worship, some of which could seat more than 1,000 people. *Id.* at 68. The regulations covered all houses of worship, though revisions to the rules effective at the time of the Court’s decision made clear that none of the diocese’s churches were affected by the regulation and the two affected synagogues likewise no longer were subject to the restrictions. *Id.* at 75 (Roberts, C.J., dissenting).

251. *Id.* at 66; *Br. For Pet’r* at 22, *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63 (2020) (No. 20A87). Subsequently, the Second Circuit resolved the appeal and granted a preliminary injunction. *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. Dec. 2020).

252. *Roman Cath. Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring). His argument included the claim that *Jacobson* had been overtaken by subsequent doctrinal developments that called for closer judicial scrutiny when fundamental rights are burdened. *Id.* at 70. Whether a majority of the current Court agrees with this view is unclear. In August of 2021, Justice Coney Barrett denied an emergency application for an injunction blocking Indiana University’s vaccine mandate pending the outcome of appeals. No justice dissented. *Klassen v. Trustees of Indiana University, Dock*. No. 21A15 (Aug. 12, 2021).

253. *See Roman Cath. Diocese*, 141 S. Ct. at 71 (“What could justify so radical a departure from the First Amendment’s terms and long-settled rules about its application?”).

view of the facts.<sup>254</sup> The majority accepted that religious institutions had been singled out for harsher restrictions than similarly situated secular institutions.<sup>255</sup> That finding, however, gave little weight to evidence that the state had regulated based on the exposure risks associated with different settings.<sup>256</sup> Liquor stores, to take one example, would not entail gatherings for extended periods of time associated with temples and churches, and therefore they create different public health risks.<sup>257</sup> Moreover, the New York order was drafted after documented COVID-19 super-spreader religious gatherings.<sup>258</sup> Indeed, careful review of New York's order indicates that other secular institutions were treated less favorably than comparably-situated religious institutions: "in both red and orange zones, casinos, bowling alleys, arcades, movie theaters and fitness centers [were] closed completely."<sup>259</sup> In other words, secular institutions that posed the same kind of public health risks as religious gatherings arguably were subjected to more stringent regulation.

Then, in February of 2021, another *per curiam* opinion granted injunctive relief in a new phase of *South Bay United Pentecostal Church v. Newsom*.<sup>260</sup> This time, a majority of the Court enjoined the state from enforcing a ban on indoor worship services, although the Court permitted enforcement of a 25% capacity limitation and a prohibition on singing and chanting during indoor services.<sup>261</sup>

The Court followed with a capstone case to this series of *per curiam* decisions—all of which involved requests for preliminary relief and were decided without full briefing or oral arguments—*Tandon v. Newsom*.<sup>262</sup> The Court doubled down on curtailing the authority of the state to restrict in-person religious gatherings and practice in a pandemic for public health purposes, and applied strict scrutiny to regulations that it deemed to be non-neutral insofar as they treated comparable secular gatherings more favorably than religious exercises.<sup>263</sup> It did not matter, the Court emphasized, that other comparable secular activities were treated as poorly or even less favorably than religious activities.<sup>264</sup>

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254. Compare *id.* at 65–66, and *id.* at 69 (Gorsuch, J., concurring), with *id.* at 75 (Roberts, C.J., dissenting), *id.* at 77 (Breyer, J., dissenting), and *id.* at 79–80 (Sotomayor, J., dissenting).

255. *Id.* at 66 (majority opinion).

256. *Id.* at 79 (Sotomayor, J., dissenting) (explaining that New York concluded that "attending religious services poses greater risks than, for instance, shopping at big box stores.").

257. See *Guidance for Organizing Large Events and Gatherings*, CDC (May 20, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html#Gatherings> [<https://perma.cc/AP4H-HLVA>] (explaining that risks of contracting COVID-19 are higher when with larger groups of people for extended periods of time).

258. Brief for Respondent at 31, *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63 (2020) (No. 20A87).

259. Adam Liptak, *Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo's Virus Shutdown Order*, N.Y. TIMES (Nov. 26, 2020), <https://www.nytimes.com/2020/11/26/us/supreme-court-coronavirus-religion-new-york.html> [<https://perma.cc/Y4HZ-23BV>] (quoting Barbara D. Underwood, New York's solicitor general).

260. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (*per curiam*).

261. *Id.*

262. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (*per curiam*).

263. *Id.*

264. *Id.*

Going forward, these cases mean at the very least that special care must be applied to regulations that affect religious activities when the regulations specifically call out such gatherings facially.<sup>265</sup> Less clear is whether such solicitude for religious exercise also is constitutionally required when the regulations are facially neutral and of general applicability, but have a disparate impact on religious actors.<sup>266</sup> Answers to these questions may emerge when challenges to vaccine and mask mandates raised in the lower courts make their way to the current Court. In any event, government actors must be mindful of the impact of restrictions on religious practices and prepare to defend them based on well-documented public health risks posed by these practices, especially if the restrictions are not imposed on similarly situated secular activities.

Lower courts in general followed the Supreme Court's lead, striking down public health orders perceived to distinguish between religious and secular activities through the prism of strict scrutiny.<sup>267</sup> While the lion's share of successful litigation has related to religious liberties, lower courts have also faced a broad array of lawsuits alleging that public health measures unconstitutionally infringe other liberty interests.<sup>268</sup> Most courts in these cases have sided with the government.<sup>269</sup> For example, several courts rejected lawsuits brought by gun owners contending that orders to close nonessential businesses violated the Second

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265. See Michael Helfand, *Religious Liberty and Religious Discrimination: Where Is the Supreme Court Headed?*, 2021 U. ILL. L. REV. 98, 103 (2021).

266. Such cases must deal with *Employment Division v. Smith*, which held that neutral laws of general applicability ordinarily do not trigger strict scrutiny even if they have a disparate impact on religious exercise. The standard of review of such measures is the rational basis test, absent evidence of a motive to burden religion or that it singled out religious conduct for adverse treatment. 494 U.S. 872, 873 (1990). Dissatisfaction with the test, though, persists, and efforts to obtain religious exemptions from even neutral and generally applicable laws also persist. See generally Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211 (2021) (discussing how third-party harms that flow from religious exemptions might be seen through the lens of economic theory and how dignity incommensurables make it difficult to weigh the competing concerns); *Reframing the Harm: Religious Exemptions and Third-Party Harm After Little Sisters*, 134 HARV. L. REV. 2186 (2021) (discussing shift in Court's approach to third-party harms of religious exemptions that now treats these harms more narrowly and permits more room for, and at times requirements for, religious exemptions); Stephanie H. Barclay, *First Amendment 'Harms'*, 95 IND. L.J. 331 (2020) (discussing complexities of what constitutes a third-party harm); Toni M. Massaro, *Nuts and Seeds: Mitigating Third-Party Harms of Religious Exemptions, Post-Hobby Lobby*, 92 DENV. L. REV. 325 (2015) (discussing statutory accommodations of religious conduct and concerns about impact on third parties, and suggesting ways in which exemptions granted to religious actors engaged in public businesses might be fashioned to mitigate dignity and other third-party harms to people adversely affected by the exemptions); Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 709–10 (2005) (arguing that *Smith* under-protects religious minorities).

The Court is internally divided about whether *Smith* should be overruled versus narrowly construed. In *Fulton v. City of Philadelphia*, several of the justices criticized *Smith*, but a majority of the Court concluded that overruling it was unnecessary and ruled in favor of the religious actor's claim that its free exercise of religion was violated under the facts of the case. 2021 WL 2459253, at \*1888 (2021) (Alito, J., concurring in the judgment but arguing for *Smith* to be overruled); *id.* at \*1883 (Barrett, J., concurring in the judgment and raising concerns about *Smith*, but concluding it was unnecessary to overrule the case under the facts).

267. *E.g.*, *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1234 (9th Cir. 2020).

268. See, e.g., *Parker v. Wolf*, 506 F. Supp. 3d 271, 277 (M.D. Pa. 2020) ("Plaintiffs object to the Contract [sic] Tracing Program and Mask Mandate as overbroad and unnecessary impingements on their constitutional rights.").

269. See, e.g., *Oakes v. Collier Cnty.*, 515 F. Supp. 3d 1202, 1217 (M.D. Fla. 2021) (holding that a mask mandate does not violate the First Amendment).

Amendment.<sup>270</sup> Not all such lawsuits have failed, however. In November of 2020, a California superior court judge granted a preliminary injunction to strip-club owners, finding that a county order barring live entertainment but permitting restaurants and comedy clubs to operate likely violated the First Amendment.<sup>271</sup>

Despite the Supreme Court's decisions in the latest cases involving applications for injunctive relief by religious actors, it appears that public health interventions will generally withstand judicial scrutiny so long as a judge does not perceive them to place greater restrictions on liberty interests than on other comparable interests. What constitutes a "comparable" interest, though, may be a hotly contested—and highly malleable—issue.<sup>272</sup> This suggests that policymakers may stand on firmer constitutional footing when they impose more stringent restrictions that are applied evenly.<sup>273</sup> If, for example, the order considered in *Roman Catholic Diocese* had closed businesses that presented little public health danger along with religious institutions, its policy arguably would have survived. Put differently—and perhaps ironically—an institution will be more likely to withstand constitutional scrutiny if it provides no exemptions from its policies. If it grants exemptions for some activities, even for health reasons, but not for religious activities, it will be susceptible to constitutional challenge.<sup>274</sup> And again, the Court has indicated that no comparable secular institution or activity can be treated more favorably than a religious institution or activity with respect to the burdens imposed by pandemic public health regulations.<sup>275</sup> It also has taken a broad view of what constitute comparable institutions or activities.

Pandemic policymakers must, of course, respect the legal limits imposed by courts. But they also should recognize that liberty interests interact in a manner that was given very little attention by the Court in the post-Ginsburg pandemic policy cases.<sup>276</sup> Again, the exercise of liberty by one person may impinge on the liberty of another, and these third-party liberty harms are potentially profound.<sup>277</sup> Lower courts are likely to address these complexities more thoroughly than the Court did in the cases decided without oral arguments or full briefing.

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270. See, e.g., *Conn. Citizens Def. League, Inc. v. Lamont*, 465 F. Supp. 3d 56, 61 (D. Conn. June 8, 2020) (issuing preliminary injunction against policy that effectively banned many gun purchases); *Altman v. Cnty. of Santa Clara*, 464 F. Supp. 3d 1106, 1111 (N.D. Cal. June 2, 2020) (lockdown of non-essential businesses, which included gun shops, was essentially just a waiting period and thus constitutional); *McCarthy v. Baker*, No. 20-10701, 2020 WL 2297278, at \*1 (D. Mass. May 7, 2020) (granting preliminary injunction prohibiting licensed firearms dealers from selling guns and ammunition during COVID-19, unless they comply with list of public-health related conditions to their ability to do so).

271. Paul Sisson & Deborah Sullivan Brennan, *Judge Overrules County, Allows San Diego Strip Clubs to Reopen*, L.A. TIMES (Nov. 6, 2020), <https://www.latimes.com/california/story/2020-11-06/judge-overrules-county-allows-strip-clubs-to-reopen> [<https://perma.cc/PSE2-NNHP>].

272. Compare *id.* (explaining that a judge granted preliminary injunction to strip club owners to prevent law enforcement officers from enforcing the provisions of a cease-and-desist order), with *Oakes*, 515 F. Supp. at 1217 (holding that a mask mandate does not violate the First Amendment).

273. See, e.g., *Stewart v. Justice*, 502 F. Supp. 3d 1057, 1065–66 (S.D. W. Va. 2020) (holding that a broad mask mandate does not violate Constitutional rights).

274. See *supra* Section III.D (regarding the overlapping equality concerns that must be considered when designing policies).

275. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam).

276. See *supra* notes 268–74 and accompanying text.

277. See *supra* notes 232–41 and accompanying text.

For example, the liberty of one religious individual to exit a church or temple gathering during a pandemic and then travel through the public square, head to a grocery store, or invite a caregiver or other service person or nonobservant family member into his or her home may endanger these others' lives. Even the freedom to take a jog unencumbered by a face covering may burden the liberty of other persons if it heightens their prospects of infection. Moreover, if the risk of that impact on others is scientifically unclear or hotly debated, then the many unknowns about a virus may prompt more cautious others to shelter in place, forgoing all freedom of movement.<sup>278</sup> Social distancing, avoiding religious gatherings, and wearing a face covering during this pandemic, therefore, may be liberty-enhancing for some individuals, even as they constrain the liberty of others.

All of these abridgements of liberty—yours and mine—must be considered, justified, and calibrated.<sup>279</sup> When the abridgements are imposed by governments, they must satisfy the relevant constitutional tests specific to each, which share the three characteristics we identified above.<sup>280</sup> Moreover, respecting these liberty interests will matter to public perceptions of the fairness, proportionality, and rationality of mitigation measures.<sup>281</sup> Restrictions that appear disproportional are more likely to engender resistance, including lawsuits.<sup>282</sup> Whether or not these lawsuits succeed, and as we have shown some already have,<sup>283</sup> the policymakers must be prepared to explain and defend the constitutional balance they have struck.

Policymakers that develop a liberty-forward pandemic policy thus must carefully consider these judicial constraints and demonstrate that they have not restricted liberty carelessly.<sup>284</sup> They also should seek to offset burdens imposed

278. See B. Blocken, F. Malizia, T. van Druenen & T. Marchal, *Towards Aerodynamically Equivalent COVID19 1.5 m Social Distancing for Walking and Running*, URBAN PHYSICS 1 (2020), [http://www.urbanphysics.net/Social%20Distancing%20v20\\_White\\_Paper.pdf](http://www.urbanphysics.net/Social%20Distancing%20v20_White_Paper.pdf) [https://perma.cc/WKA4-3UEF]. The authors note:

The results indicate that the largest exposure of the trailing person to droplets of the leading person for walking and running is obtained when this trailing person is in line behind the leading person, i.e. positioned in the slipstream. The exposure increases as the distance between leading and trailing person decreases. This suggests that avoiding substantial droplet exposure in the conditions of this study and in a way equivalent to the 1.5 m for people standing still can be achieved by one of two actions: either by avoiding to walk or run in the slipstream of the leading person and keeping the 1.5 m distance in staggered or side by side arrangement, or by keeping larger social distances, where the distances increase with the walking or running speed.

*Id.*

279. See *Roman Cath. Diocese*, 141 S. Ct. at 78 (Breyer, J., dissenting) (“The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants’ First Amendment challenges.”).

280. See *supra* note 128 and accompanying text.

281. See *supra* notes 273–76 and accompanying text.

282. See, e.g., *Oakes v. Collier Cnty.*, 515 F. Supp. 3d 1202, 1212 (M.D. Fla. 2021) (explaining that plaintiffs brought lawsuit because they believed mask mandate affected their stores disproportionately).

283. See *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1081 (D. Kan. 2020); *Berean Baptist Church v. Cooper*, 460 F. Supp. 3d 651, 654 (E.D. N.C. 2020); *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 904 (W.D. Ky. 2020); *S. Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at \*6 (W.D. Okla. Apr. 6, 2020), appeal dismissed, No. 20-6045 (10th Cir. Apr. 13, 2020). *But see In re Rutledge*, 956 F.3d 1018, 1032 (8th Cir. 2020); *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1183 (11th Cir. 2020).

284. See *supra* notes 277–83 and accompanying text.

on liberty interests through creative means, if possible. Such gestures, even if small, may help to assure the public that policymakers take liberty interests seriously.<sup>285</sup> Here are a few examples. First, assume that a city has closed government buildings, shifting services online and sending government employees home. The transition in providing government services is challenging and wait times are delayed. The government could prioritize processing requests related to liberty interests—such as processing marriage certificates or adoption papers. Second, assume that a city has prohibited indoor assemblies of more than ten people but allows outdoor assemblies of fifty people so long as social distancing measures are implemented. The city could establish a mechanism for religious institutions to use public parks or closed streets for services. Third, assume that a university requires all employees and students to submit to testing to gain entrance to campus. Even if not constitutionally required, the university might develop an alternative testing regime (perhaps a survey and temperature check, rather than blood test) for religious objectors.

These solutions would not be appropriate or practicable in every context.<sup>286</sup> Our point is that policymakers should strive to carefully consider, and where possible protect, the liberty interests of those subject to their policies.<sup>287</sup> They should view protecting liberty as a goal, not an encumbrance. Thoughtless action in either direction will shake public confidence.<sup>288</sup> We may tolerate infringements of liberty for public health purposes, but not if they are done callously or thoughtlessly.

In sum, a liberty-forward pandemic policy requires both a genuine commitment to constitutional principles and an ability to effectively communicate about them.<sup>289</sup> Pandemic policymakers should consider up front the fundamental liberty consequences of the protocols they adopt, and design measures that respect liberty interests to the extent possible.

#### D. Equality

Equal protection jurisprudence distinguishes between circumstances of disparate treatment and disparate impact, and pandemic policies may involve both.<sup>290</sup> Even uniform rules may create disproportionate burdens, like requiring everyone to wear face coverings.<sup>291</sup> Face coverings cause those with severe

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285. See Jake Laperruque, *How to Preserve Civil Liberties in a Pandemic*, POGO (May 27, 2020), <https://www.pogo.org/analysis/2020/05/how-to-preserve-civil-liberties-in-a-pandemic/> [https://perma.cc/V4UD-EKSH].

286. See Massaro & Milczarek-Desai, *supra* note 136, at 114.

287. See *id.* at 115.

288. See *id.* at 65–66.

289. See CATO INST., *supra* note 241.

290. See Brian C., *Understanding Disparate Impact, Adverse Impact, vs Disparate Treatment*, DIVERSITY FOR SOC. IMPACT (May 1, 2021, 9:36 PM), <https://diversity.social/disperate-adverse-impact-treatment/> [https://perma.cc/ZW2B-P5QC].

291. See Manfred Spitzer, *Masked Education? The Benefits and Burdens of Wearing Face Masks in Schools During the Current Corona Pandemic*, 20 TRENDS IN NEUROSCIENCE & EDUC. 100138, 100139 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7417296/> [https://perma.cc/G56M-RTZV].

asthma to suffer more than those who breathe easily.<sup>292</sup> In the current economic climate with millions out of work, even the few dollars needed to purchase a high quality mask may come at the expense of other basic needs for those facing dire economic circumstances.<sup>293</sup> Some others with vastly greater means, in stark contrast, may pay \$600 for a limited-edition designer mask.<sup>294</sup>

Rules rarely apply to every person and activity in precisely the same fashion; mitigation measures typically require line drawing. Those adversely affected by the lines may call “foul.” Indeed, among the fiercest disputes about stay-at-home orders focused on which businesses and activities were designated as essential and could therefore remain open.<sup>295</sup> Perhaps we can all agree that grocery stores are essential, but many do not agree about gun stores and places of worship.<sup>296</sup> If, as the state of Florida decided, professional wrestling is an essential service, what isn’t?<sup>297</sup> Depending on who raises concerns about the lines selected, these equality concerns may also entangle fundamental liberty concerns, as the cases involving restrictions on religious gatherings show. The religious actors objected to the burdens on their free exercise of religion in part because they believed the restrictions imposed on their activities were not imposed on comparable secular gatherings.<sup>298</sup>

Where policies involve explicit disparate treatment, they may face more exacting judicial review and must be strongly supported.<sup>299</sup> They may still be permissible; indeed, they may be closely tied to known differential risks of the disease. But this explicitly different treatment must be well-reasoned and defended.<sup>300</sup> For example, public health measures could distinguish among individuals based on their health risk, imposing fewer restrictions on the young and

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292. See *Asthma and Face Coverings—The Latest*, ASTHMA UK, <https://www.asthma.org.uk/about/media/news/face-covering-advice-for-people-with-asthma/> (last visited Oct. 30, 2021) [<https://perma.cc/DRB7-692R>].

293. See Alfred Lubrano & Jason Laughlin, *Money Can Buy Some Protection from Coronavirus. But the Poor Can't Afford It, Leaving Them More Vulnerable*, PHILA. INQUIRER (Mar. 14, 2020), <https://www.inquirer.com/health/coronavirus/coronavirus-philadelphia-poverty-food-homeless-food-stamps-20200314.html> [<https://perma.cc/BCX3-V8BM>]; ‘Buy a Mask or Food?’: South Asia’s Poor Face Stark Choice, AL JAZEERA (Apr. 28, 2020), <https://www.aljazeera.com/news/2020/4/28/buy-a-mask-or-food-south-asias-poor-face-stark-choice> [<https://perma.cc/YTF7-8WMB>].

294. See Milo, *Hundreds Line up for \$600 Supreme Face Mask*, AVOCADO (Apr. 3, 2020), <https://theavocadola.com/hundreds-expected-to-line-up-for-600-supreme-face-mask/> [<https://perma.cc/AH8J-GGEZ>].

295. See Zusha Elinson, *Gun Stores Ruled Essential Business During Coronavirus Shutdowns: Trump Administration Adds Guns to List of Industries Like Food and Energy After Lobbying by Firearms Industry*, WALL ST. J. (Mar. 30, 2020, 4:46 PM), <https://www.wsj.com/articles/gun-stores-ruled-essential-businesses-during-coronavirus-shutdowns-11585601189> [<https://perma.cc/4PYF-GLA3>].

296. See *id.*; Peter Baker, *Firing a Salvo in Culture Wars, Trump Pushes for Churches to Reopen*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/2020/05/22/us/politics/trump-churches-coronavirus.html> [<https://perma.cc/4ZXH-GDF4>].

297. See Aaron Rugar, *Florida Gov. DeSantis Declared WWE an “Essential Service.” His Explanation Doesn’t Make Much Sense*, VOX (Apr. 15, 2020, 11:20 AM), <https://www.vox.com/2020/4/15/21221948/florida-wwe-essential-service-ron-desantis-vince-mcmahon-coronavirus> [<https://perma.cc/Q5AN-6J8P>].

298. See *supra* notes 243–62 and accompanying text.

299. See *Washington v. Davis*, 426 U.S. 229, 244, 247 (1976) (establishing that equal protection violations that trigger elevated scrutiny require a showing of intent to discriminate).

300. See *id.* at 247.

the healthy, than on the elderly or those with pre-existing conditions.<sup>301</sup> An institution could welcome the physical presence of the former group but discourage or exclude the latter group.

In evaluating disparate treatment concerns, courts again strike a balance between requiring the government to draw lines perfectly—which is impossible—and allowing room for imprecision and error. The balance often will favor government attempts to protect public health and rightly so. Policymakers act in the context of a rapidly unfolding pandemic involving a novel, mysterious, and differentially deadly disease. They must consider a multigenerational, plural population with competing desires, divergent appetites for risk, and vastly different potential health vulnerabilities. They must decide whether to adopt policies that maximally protect the most vulnerable members of the community—requiring quarantine, testing, and other restrictions—which may be over-inclusive in terms of restricting access; or whether to adopt policies that are minimally intrusive, leaving individuals to fend for themselves; or somewhere in between. Equality concerns pervade these choices.

Even pandemic policies that are facially neutral, rational, and treat all actors the same (e.g., “all must wear facial coverings in public,” or “all must observe a curfew,” or “all must shelter in home”) may cause disparate effects.<sup>302</sup> Interventions that are facially neutral and generally applicable will face less exacting judicial review, even if they have predictable adverse impacts to particular groups of people and even if the harmed groups are defined by constitutionally sensitive categories such as race, sex, or ethnicity.<sup>303</sup> Such policies typically survive judicial review so long as the measure was adopted to pursue rational ends unrelated to the disparate impact, rather than to produce the unequal effect.<sup>304</sup> Good faith and proper intentions matter.

Like other constitutional principles, developing a pandemic policy that accounts for equality considerations by attending to disparate effects will enhance legitimacy.<sup>305</sup> These disparate effects may arise partially from pre-existing inequalities; individuals with more resources may be less burdened by pandemic policies than those with greater means.<sup>306</sup> For example, those with high-speed internet at home are better able to participate at a distance where institutions

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301. See *Different Groups of People*, Ctrs. for Disease Control & Prevention (Apr. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html> [<https://perma.cc/XWJ5-CXRQ>].

302. See, e.g., *Vill. of Arlington Heights v. Metro. Dev. Housing Corp.*, 429 U.S. 252, 266 (1977).

303. *Id.* (discriminatory purpose must be a motivating purpose for a policy that has a disparate impact, or it will not violate equal protection, if rational); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 257, 275 (1979) (veteran preference law that had foreseeable disparate impact on female employees did not violate equal protection because it was not adopted to produce that impact and was otherwise rational).

304. See *Pers. Adm'r*, 442 U.S. at 272.

305. There is nothing unusual about policymakers accounting for disparate effects even if they are not constitutionally compelled to do so. For example, medical research funding decisions account for things like the differential likelihood that men and women will suffer from breast cancer. See Melissa Conrad Stöppler, *Why is Breast Cancer More Common in Females than Males?*, MEDICINET (William C. Shiel Jr. ed., Oct. 5, 2017), [https://www.medicinenet.com/breast\\_cancer\\_in\\_males\\_and\\_females/ask.htm](https://www.medicinenet.com/breast_cancer_in_males_and_females/ask.htm) [<https://perma.cc/EWP5-FUW8>] (noting that approximately 440 men and 40,000 women die each year of breast cancer).

306. See *id.*

anticipate ongoing reliance on virtual participation in work, learning, or other activities.<sup>307</sup> In some circumstances, compliance with public health-driven, rational mitigation measures may simply be infeasible for lower income or otherwise vulnerable populations.<sup>308</sup>

Disparate effects may also occur if public health measures fail to be culturally appropriate.<sup>309</sup> Moreover, ham-fisted communication about COVID-19 and measures used to address it could exacerbate or even inspire hate crimes or other discrimination. Asian-Americans already face an uptick in hate crimes and harassment due to the association of the outbreak of COVID-19 with China.<sup>310</sup>

Strategies for virus containment may implicate equality in other ways that relate to privacy and policing. Take, for example, contact tracing.<sup>311</sup> Tracking the movements of infected individuals and identifying those with whom they come into contact triggers liberty concerns, because it implicates information about an individual's whereabouts that many would regard as private.<sup>312</sup> Any discussion of contact tracing thus should begin with its efficacy, because the liberty burdens and expense of contact tracing could only be justified if doing so has real public health benefits.<sup>313</sup> But focusing purely on the privacy implications of contact tracing neglects its many looming and related equality concerns.<sup>314</sup>

Technology-based contact tracing also may have a disparate impact on people insofar as it leaves out many affected persons who cannot afford the contact-tracing device.<sup>315</sup> If participation in communal life is tied to participation in such a contact-tracing scheme, then lower income people will be effectively excluded.<sup>316</sup> As importantly, contact tracing is a form of surveillance. People may have variable willingness to participate in tracing based on their group-sensitive experiences.<sup>317</sup> People of color and others who have substantial, historically-based skepticism of government surveillance thus may exclude themselves from

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307. See, e.g., Josephine Peterson, *Staying at Home More Difficult for Pierce County Residents with Substandard or No Internet*, NEWS TRIBUNE (Mar. 31, 2020, 5:05 AM), <https://www.thenewstribune.com/news/coronavirus/article241636776.html> [https://perma.cc/6XRH-Z75P].

308. See Lubrano & Laughlin, *supra* note 293.

309. See Ana Lugo, Commentary, *We Need a Culturally Responsive Approach to COVID-19*, N. CAL. PUB. MEDIA (May 25, 2020), <https://norcalpublicmedia.org/2020052544712/news-feed/we-need-a-culturally-responsive-approach-to-covid-19> [https://perma.cc/5PHG-ZQVM].

310. See Tracy Jan, *Asian American Doctors and Nurses Are Fighting Racism and the Coronavirus*, WASH. POST (May 19, 2020), <https://www.washingtonpost.com/business/2020/05/19/asian-american-discrimination/> [https://perma.cc/DJ2Z-XNC3].

311. See *COVID-19 Case Investigations and Contact Tracing: CDC's Role and Approach*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/contact-tracing-CDC-role-and-approach.pdf> (last visited Oct. 30, 2021) [https://perma.cc/TDA4-T6N6].

312. See Bambauer, *supra* note 104, at 16.

313. See Caroline Chen, *You Don't Need Invasive Tech for Successful Contact Tracing. Here's How It Works*, PROPUBLICA (May 19, 2020, 7:00 AM), <https://www.propublica.org/article/you-dont-need-invasive-tech-for-successful-contact-tracing-heres-how-it-works> [https://perma.cc/LDT6-UVBS].

314. See *id.*

315. See *id.*

316. See *id.*

317. See *id.*

communal life if the cost of participation is allowing the government to monitor their movements.<sup>318</sup>

That contact tracing has equality implications does not mean it should be off-limits. Rather, it needs to consider the rationality, liberty, and equality principles and adopt approaches that can minimize undesired impacts. For example, a technology-based program could include a means-tested program to provide free technology by low-income individuals; surveillance concerns could be ameliorated by data anonymity, restricted use of data, and a provision to sunset the program and delete all data it has collected.<sup>319</sup> How best to tailor a contact tracing program to address these concerns must be decided before the program is rolled out, because it will be much harder to do so once fears over an overly-broad program have mounted.<sup>320</sup> Finally, these questions about design must be carefully calibrated, because creating a program with a profusion of exceptions comes with its own costs and may undermine the effectiveness of the tool.<sup>321</sup> Indeed, too many exceptions may render contact tracing impractical, and even irrational—not worth the liberty and equality candles.

Like liberty interests, equality considerations exist on both sides of the ledger, both impelling intervention and cautioning against it.<sup>322</sup> As restrictions on communal life ease, the health risks faced by workers who lack the ability to voluntarily sequester themselves mount.<sup>323</sup> This will be true of essential workers who have performed their duties throughout the pandemic and who will now face the prospect of interacting with a larger number of people. It will also be true of workers whose places of employment were shuttered but have now reopened. Workers who lack choices because of the nature of their jobs or their personal financial circumstances will face disproportionate risks of exposure to coronavirus as compared to those with more flexible jobs and greater financial reserves.<sup>324</sup>

The COVID pandemic starkly illustrated how pandemic policies implicate equality.<sup>325</sup> The virus metastasized across America, in a manner that led one

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318. See Ana Ibarra, *For Black and Latino Communities, Trust Is an Issue for Coronavirus Testing, Contact Tracing*, KQED (June 1, 2020), <https://www.kqed.org/science/1965269/for-black-and-latino-communities-trust-is-an-issue-for-coronavirus-testing-contact-tracing> [<https://perma.cc/77T7-AQKL>].

319. See Robert Chesney, *COVID-19 Contact Tracing We Can Live With: A Roadmap and Recommendations*, LAWFARE (Apr. 14, 2020, 12:29 PM), <https://www.lawfareblog.com/covid-19-contact-tracing-we-can-live-roadmap-and-recommendations> [<https://perma.cc/W5GP-WVHF>].

320. See *id.*

321. See *id.*

322. See *supra* notes 194–97 and accompanying text.

323. See David J. Lynch & Abha Bhattarai, *Push to Reopen Economy Runs Up Against Workers and Consumers Worried About Risk*, WASH. POST (Apr. 28, 2020), <https://www.washingtonpost.com/business/2020/04/28/trump-coronavirus-economy-reopen-meat/> [<https://perma.cc/Y549-94NX>].

324. See Kenya Slaughter, *I Never Planned to be a Front-Line Worker at Dollar General*, N.Y. TIMES (Apr. 26, 2020), <https://www.nytimes.com/2020/04/26/opinion/covid-workers-dollar-general.html> [<https://perma.cc/4NUA-L7FP>] (expressing concern about the Louisiana governor's decision to lift the stay-at-home order).

325. See *id.*

commentator to describe COVID-19 as a “patchwork pandemic.”<sup>326</sup> At the beginning, urban areas bore its brunt to a greater degree than rural areas.<sup>327</sup> But that changed over time.<sup>328</sup> The experience of neighboring states and adjacent communities differed, as did their responses. The different paths the virus took demonstrated that one size does not fit all. Failure to consider the unequal fallout thus is relevant to equality norms, as well as to rationality and liberty norms described above.

Grappling with the unequal fallout of COVID-19 and other life-threatening diseases affects the clarity and unity of a national response. On the one hand, speaking in one clear voice may shore up a shared sense of sacrifice and purpose as well as assure that modern travel and other ways in which a disease can spread will be regulated in ways that protect all.<sup>329</sup> One region’s response should not be permitted to have disastrous spillover effects in another’s.<sup>330</sup> At the same time, this disease has been especially cruel to some people and communities in ways that indisputably require different policies for different populations, based on the relative risks.<sup>331</sup> Failure to take these disparate impacts into account itself may inflict greater equality harms. All of this makes unifying Americans to fight COVID-19 much harder.

In the face of these conflicting considerations, policymakers again must articulate science-based justifications for their policies that are clearly stated and fairly and rationally enforced.<sup>332</sup> They must remind Americans of the shared values at stake and reinforce the differential vulnerability of those who require greater protection.<sup>333</sup> For us to sink or swim together may require lifeboats that are selectively deployed according to need.

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326. Ed Yong, *America’s Patchwork Pandemic Is Fraying Even Further*, ATLANTIC (May 20, 2020), <https://www.theatlantic.com/health/archive/2020/05/patchwork-pandemic-states-reopening-inequalities/611866/> [<https://perma.cc/CZP9-WR8X>] (discussing features of the disease that make outbreaks more visible and ruinous in some areas, and among some populations, than others); see also Lindsay Huth, *States Don’t Agree on How to Determine When It Is Safe to Reopen*, WALL ST. J. (May 21, 2020), <https://www.wsj.com/articles/states-dont-agree-on-how-to-determine-when-it-is-safe-to-reopen-11590075635> [<https://perma.cc/H2RE-UGNQ>] (noting that policy differences also have produced divides regarding metrics used to measure the impact of the virus).

327. See Reis Thebault & Abigail Hauslohner, *A Deadly “Checkerboard”: Covid-19’s New Surge Across Rural America*, WASH. POST (May 24, 2020), <https://www.washingtonpost.com/nation/2020/05/24/coronavirus-rural-america-outbreaks/> [<https://perma.cc/TU3J-JEA7>].

328. *Id.*

329. Francis Rooney, *The Need for a Coordinated National Response to COVID-19*, HILL (Apr. 16, 2020, 3:30 PM), <https://thehill.com/blogs/congress-blog/politics/493199-the-need-for-a-coordinated-national-response-to-covid-19> [<https://perma.cc/6PQV-VF9H>].

330. See Mark Guarino, *As Illinois Stays Mostly Closed, Its Neighbors Have Abolished Coronavirus Restrictions*, WASH. POST (May 22, 2020, 3:30 PM), [https://www.washingtonpost.com/national/as-illinois-stays-mostly-closed-its-neighbors-have-abolished-coronavirus-restrictions/2020/05/22/3b32bb06-9acc-11ea-a282-386f56d579e6\\_story.html](https://www.washingtonpost.com/national/as-illinois-stays-mostly-closed-its-neighbors-have-abolished-coronavirus-restrictions/2020/05/22/3b32bb06-9acc-11ea-a282-386f56d579e6_story.html) [<https://perma.cc/V42A-T3KV>].

331. Serena Gordon, *Why Are Minorities Hardest Hit by COVID-19?*, WEBMD (May 6, 2020), <https://www.webmd.com/lung/news/20200506/why-are--minorities-hardest-hit-by-covid-19#1> [<https://perma.cc/NSW9-5AQ8>].

332. See Rooney, *supra* note 329.

333. See Gordon, *supra* note 331.

In sum, mitigation strategies may fail or be significantly hampered if they do not account for equality considerations and differential impacts.<sup>334</sup> A strategy dependent on individuals frequently washing their hands, for example, will falter in regions that lack dependable running water.<sup>335</sup> Likewise, disregarding the greater vulnerability of people in confined living situations—assisted living centers, prisons, or other such spaces—presents serious equality concerns even if none of the affected populations are expressly defined by a so-called “suspect class” that triggers elevated equal protection scrutiny.<sup>336</sup> In extreme cases, ignoring these disparities could even become a constitutionally irrational denial of equal rights, especially when the foreseeable effect is death.<sup>337</sup>

## V. LESSONS FROM THE COVID PANDEMIC

The United States was an imperfect union before COVID-19 and it will be so when this crisis has passed. We would do well to examine the fault lines in our social and government foundation that have been cast into stark relief. Never waste a good crisis, as the saying goes.<sup>338</sup>

What can we learn from this pandemic to better prepare for ones that follow? To begin with, we must confront our systemic failure of preparedness even though public health officials had long-warned of a pandemic of precisely this sort.<sup>339</sup> George Packer attributes this systemic failure of preparedness to structural and political rot.<sup>340</sup> This dysfunction could have numerous sources: group think,<sup>341</sup> or conversely group and member disconnects—*i.e.*, unpreparedness due to disconnected factional elements; dated insight, behind-the-times science and

334. Stacy Weiner, *The New Coronavirus Affects Us All. But Some Groups May Suffer More.*, AAMC (Mar. 16, 2020), <https://www.aamc.org/news-insights/new-coronavirus-affects-us-all-some-groups-may-suffer-more> [<https://perma.cc/MTZ6-6PYH>].

335. See Arlyssa Becenti, *Pipe Dreams: Could Coronavirus Finally Bring Water to Rez?*, NAVAJO TIMES (May 14, 2020), <https://navajotimes.com/reznews/pipe-dreams-could-coronavirus-finally-bring-water-to-rez/> [<https://perma.cc/J9MD-D8CN>].

336. See Alisa Reznick, *Advocates Plead with Arizona to Release Vulnerable Inmates Amid COVID-19*, ARIZ. PUB. MEDIA (Apr. 29, 2020, 7:29 PM), <https://www.azpm.org/p/home-articles-news/2020/4/29/171303-advocates-plead-with-arizona-to-release-vulnerable-inmates-amid-covid-19/> [<https://perma.cc/Y9HD-GK4V>].

337. Cf. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (recognizing a “‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment”).

338. See David Marchese, *Madeline Albright Thinks It’s Good When America Gets Involved*, N.Y. TIMES MAG. (Apr. 25, 2020), <https://www.nytimes.com/interactive/2020/04/20/magazine/madeline-albright-interview.html> [<https://perma.cc/94D4-WFFY>] (quoting Madeleine Albright invoking the old adage and urging that the United States link arms with global partners in response to the pandemic).

339. See Dan Diamond, *Inside America’s 2-Decade Failure to Prepare for Coronavirus*, POLITICO (Apr. 11, 2020, 7:04 AM), <https://www.politico.com/news/magazine/2020/04/11/america-two-decade-failure-prepare-coronavirus-179574> [<https://perma.cc/9RXB-7XKC>]; see also *The World Should Think Better About Catastrophic and Existential Risks*, ECONOMIST, (June 25, 2020), <https://www.economist.com/briefing/2020/06/25/the-world-should-think-better-about-catastrophic-and-existential-risks> [<https://perma.cc/JAK2-ZP5D>].

340. George Packer, *We Are Living in a Failed State*, ATLANTIC (June 2020), <https://www.theatlantic.com/magazine/archive/2020/06/underlying-conditions/610261/> [<https://perma.cc/83BT-CSAR>] (discussing the scope of political dysfunction that undermined the ability of the U.S. to respond effectively to the pandemic).

341. See Michael B. Dorf, *Confident Uncertainty, Excessive Compensation & the Obama Plan*, 85 IND. L.J. 491, 525 (2010).

lack of mechanisms of continued science education for decision makers;<sup>342</sup> bounded rationality distorting assessment of low-probability, high-severity events;<sup>343</sup> and misaligned incentives faced by politicians to spend resources today to address problems that will arise after their time in office.<sup>344</sup>

Perhaps all of those are in play. We face a complex and urgent diagnostic task to identify all of these potential sources of systemic failure and develop and implement responsive reforms, or else America will remain unprepared when the next pandemic arrives. Our failure to anticipate COVID-19 also may reflect the “anachronous asynchrony” of governments and agencies, *i.e.*, an operative, slow to react, state of being out of date, out of touch, and out of step and un-anticipatory in developing policies and procedures that evolve as the state of science and technology changes, and largely without serious efforts at contingency planning to address foreseeable threats. These structural and policy flaws too must be diagnosed and confronted.

Most fundamentally, though, the suffering caused by COVID-19 illuminated fractures in America’s foundation beyond government institutions. This has led some to argue that we must forge a new social contract that includes minimum social baselines for all Americans.<sup>345</sup> Calls for such radical transformation only magnified as the nation was swept up by protests of police brutality even as it continued to struggle with the pandemic.<sup>346</sup> Embracing such a bolder vision for American renewal is not beyond the realm of possibility, and in some respects is long overdue.<sup>347</sup> Recognizing positive constitutional rights would help to complete the unfinished business of the Civil War and the Progressive Era.<sup>348</sup> The pandemic made painfully obvious that without basic necessities—

342. See Joseph Guzman, *Fauci Says Americans Are Ignoring Science Amid Coronavirus Pandemic*, HILL (June 19, 2020), <https://thehill.com/changing-america/well-being/longevity/503590-fauci-says-americans-are-ignoring-science-amid> [<https://perma.cc/2Q3J-FBVS>].

343. See Justin Pidot, *Deconstructing Disaster*, 2013 BYU L. REV. 213, 236–37 (2013).

344. See *id.* at 253.

345. See Kim Stanley Robinson, *The Coronavirus Is Rewriting Our Imaginations*, NEW YORKER (May 1, 2020), <https://www.newyorker.com/culture/annals-of-inquiry/the-coronavirus-and-our-future> [<https://perma.cc/H645-GAJ7>]; David A. Kessler, *We Need a New Social Contract for the Coronavirus*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/20/opinion/coronavirus-social-contract.html> [<https://perma.cc/37AN-DCDG>].

346. See Ryu Spaeth, *America’s Social Contract Is Broken: The Protests Across the Country Are About More than Police Violence*, NEW REPUBLIC (May 31, 2020), <https://newrepublic.com/article/157941/george-floyd-protests-police-violence-coronavirus-la-riots> [<https://perma.cc/8TPN-FHQE>].

347. Growing popular support for a universal basic income suggests the real possibility of establishing basic rights. See Tess Bonn, *Voter Support for Universal Basic Income Grows: Poll*, HILL (Sept. 25, 2019), <https://thehill.com/hilltv/rising/463055-more-voters-support-universal-basic-income> [<https://perma.cc/K69N-VSE5>].

348. Positive constitutional rights would require the government to provide certain resources to individuals, such as an adequate education, health care, housing, etc. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2274 (1990). Calls for recognition of positive constitutional rights have begun to emerge in the wake of the pandemic. For example, Steve Winston has written in his call for “transcending incrementalism” that “[p]andemics are an immediately obvious issue that warrant concerted effort. But so do the underlying environmental issues that contribute to their evolution and increasing intensity—namely hyper-urbanization, climate change, resource extraction, and a gargantuan global appetite for energy. COVID-19 is far more than a temporary diversion, but it is also far from the only existential issue looming ahead. In fact, it is but one of the perils that attend climate change and abuse of the environment for gains that benefit a limited few for

food, clean water, housing, health care, education, work—people have substantially constrained abilities to self-actualize or exercise liberties, and few options to protect their lives.<sup>349</sup>

The impact of COVID on the Navajo Nation was an especially powerful, albeit not the only, illustration of this failure of positive rights and distributive justice.<sup>350</sup> For many Navajo families, the virus exacerbated pre-existing stark and life-threatening inequalities that compounded their disparate vulnerability to the pandemic.<sup>351</sup> The Navajo Nation, though, was not alone in experiencing the crippling consequences of America's failure to ensure that all have enough resources to be secure. Members of other tribes, African Americans, Latinos and Latinas, the elderly (particularly those in assisted living settings),<sup>352</sup> individuals with certain pre-existing conditions, meatpackers,<sup>353</sup> and people in other institutional

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no more than part of a century at most. Addressing these global threats goes well beyond a single institution or a single solution. It also extends beyond the reach of any single nation or continent. Against the backdrop of the fractiously poisonous political climate, academic and scientific cooperation and collaboration is only slightly less fractious. Instinctive pursuit of singular recognition is a luxury that can no longer be afforded." Steve Winston, *Transcending Incrementalism: Aspirational Strategy to Address Current and Future Pandemics* (Apr. 2020) (unpublished manuscript) (on file with author); see also Richard Horton, *Offline: A Global Health Crisis? No, Something Far Worse*, 395 LANCET 1410, 1410 (2020) ("It is our task to understand what this disease means to the lives of those it has afflicted and to use that understanding not only to change our perspective on the world but also to change the world itself.").

349. See Horton, *supra* note 348.

350. Megan Marples, *Navajo Nation Faces Devastating Loss from Covid-19 Pandemic*, CNN (Nov. 24, 2020, 3:22 AM), <https://www.cnn.com/2020/11/24/health/navajo-nation-coronavirus-losses-wellness/index.html> [<https://perma.cc/C9AX-SG9M>].

351. See *id.*; see also Rashawn Ray, *Why Are Blacks Dying at Higher Rates From Covid-19?*, BROOKINGS (Apr. 9, 2020), <https://www.brookings.edu/blog/fixgov/2020/04/09/why-are-blacks-dying-at-higher-rates-from-covid-19/> [<https://perma.cc/UN6C-YPAX>] (describing the disparate impact of coronavirus deaths, which in some areas of the nation are stark); Ibram X. Kendi, *What the Racial Data Show*, ATLANTIC (Apr. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-exposing-our-racial-divides/609526/> [<https://perma.cc/QRM7-5UTT>] ("Black people, at 46 percent, and Latinos, at 39 percent, are about twice as likely as white people, at 21 percent, to view the coronavirus as a major threat to their health."); Adam Serwer, *The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying*, ATLANTIC (May 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389/> [<https://perma.cc/QX88-EHFC>] (noting that the disparate impact of the virus may have promoted indifference to its fatal consequences in ways that reinforce racial injustice); Packer, *supra* note 340 (discussing scope of political dysfunction that undermined U.S. ability to respond effectively to the pandemic); Shawn Hubler, Thomas Fuller, Anjali Singhvi & Juliette Love, *Many Latinos Couldn't Stay Home. Now Virus Cases Are Soaring in Their Communities*, N.Y. TIMES (June 28, 2020), <https://www.nytimes.com/2020/06/26/us/corona-virus-latinos.html> [<https://perma.cc/B9RJ-WBES>].

352. See Elaine Godfrey, *"We're Literally Killing Elders Now"*, ATLANTIC (Apr. 29, 2020), <https://www.theatlantic.com/politics/archive/2020/04/coronavirus-especially-deadly-nursing-homes/610855/> [<https://perma.cc/XYS9-Z7N2>].

353. See Eric Schlosser, *America's Slaughterhouses Aren't Just Killing Animals*, ATLANTIC (May 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/> [<https://perma.cc/F7E2-ASHL>]; Ana Swanson & David Yaffe-Bellany, *Trump Declares Meat Supply "Critical," Aiming to Reopen Plants*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/28/business/economy/coronavirus-trump-meat-food-supply.html> [<https://perma.cc/RNV2-S6TL>]; Michael Corkery, David Yaffe-Bellany & Derek Kravitz, *As Meatpacking Plants Reopen, Data About Worker Illness Remains Elusive*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/business/coronavirus-meatpacking-plants-cases.html> [<https://perma.cc/9WFZ-AFHS>].

settings (e.g., prisons, immigration detention)<sup>354</sup> all suffered disproportionately from the coronavirus. Each of these populations, of course, has its own history and conditions that give rise to their greater vulnerability to the virus; not all of these disparate impacts stem from problems that a positive-rights Constitution might address.<sup>355</sup> But where they implicate the need to assure that all have access to clean water, electricity, internet and health-related infrastructure, decent health care, pensions and other resources needed to pay living expenses or engage in basic life functions at a time when entering communal places is dangerous, or receive decent health protection when incarcerated or institutionalized, then the need for a common, positive baseline of protection is clear.<sup>356</sup> Also clear is that the pre-COVID gross disparities and lack of readiness, as well as poorly coordinated government mechanisms to cope with emergencies, had foreseeably different adverse and fatal consequences.<sup>357</sup> Moreover, nobody familiar with COVID etiology doubts we will face other, perhaps worse, public health crises ahead.<sup>358</sup> Unless steps are taken now, many of these especially vulnerable populations will again suffer foreseeable disparate and adverse, even fatal, consequences.<sup>359</sup>

We thus should consider whether a foundational political and constitutional overhaul—not just better use of existing tools—is needed to better secure the blessings of liberty and equality for all.<sup>360</sup> This could be a positive upside to the pandemic: it might force us to “think anew,” as Lincoln admonished the nation to do well over a century ago.<sup>361</sup> Thus, although here we offer only a template for building on what is already in place that can be deployed effectively without structural reform, we recognize that structural reforms may be required. Responding to the COVID pandemic, and preparing adequately for the next one, requires a combination of old and new thinking. We can and should rely upon the structures available to us now, even as we diagnose their faults. But we should simultaneously consider new scaffolding from which we can build sounder ones for the future. Attending to the imperfections made manifest by this

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354. See Dara Lind, *ICE Detainee Says Migrants Are Going on a Hunger Strike for Soap*, PROPUBLICA (Mar. 23, 2020, 5:57 PM), <https://www.propublica.org/article/ice-detainee-says-migrants-are-going-on-a-hunger-strike-for-soap> [<https://perma.cc/6W6D-HGZD>].

355. See, e.g., Marples, *supra* note 350.

356. Dainius Pūras, Judith Bueno de Mesquita, Luisa Cabal, Allan Maleche & Benjamin Mason Meier, *The Right to Health Must Guide Responses to COVID-19*, 395 LANCET 1888, 1888 (2020).

357. See William M. Rodgers III, *Black Americans Are Bearing the Brunt of Coronavirus Recession—This Should Come As No Surprise*, CONVERSATION (May 6, 2020, 8:20 AM), <https://theconversation.com/black-americans-are-bearing-the-brunt-of-coronavirus-recession-this-should-come-as-no-surprise-137587> [<https://perma.cc/E2JH-YSG8>]; George McGraw, *How Do You Fight the Coronavirus Without Running Water?*, N.Y. TIMES (May 2, 2020), <https://www.nytimes.com/2020/05/02/opinion/coronavirus-water.html> [<https://perma.cc/9WDA-37KU>].

358. See McGraw, *supra* note 357.

359. See *id.*

360. See, e.g., Packer, *supra* note 340.

361. See Abraham Lincoln, *Annual Message to Congress* (Dec. 1, 1862), in ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 537 (Roy P. Basler, Marion Dolores Pratt & Lloyd A. Dunlap eds., 1953).

pandemic may enable us to forge a more perfect, more just, and safer union for all.

## VI. CONCLUSION

This Article proposed a framework to guide public health policymaking in a time of pandemic based on existing, albeit imperfect but still useful, constitutional tools. It emphasized hallmarks of American constitutionalism: due process, liberty, and equality. These principles have guided our nation in stormy seas before and can evolve to meet the waves and even the tsunamis ahead; indeed, our nation's conception of due process has always been "headed for parts unknown."<sup>362</sup>

The Constitution is flexible enough to allow us to manage the pandemic in a liberty and equality-sensitive fashion.<sup>363</sup> Existing due process and liberty norms can inform pandemic policy, and the structural components of the Constitution—federalism, the separation of powers—have enough play in the joints for immediate and reasonably well-coordinated action. The pressing public health problems presented by COVID and future pandemics can be managed best if all of the relevant government actors—executive, legislative, judicial, federal, state, and local—pursue the common goals we identify here in a rational, liberty- and equality-sensitive manner that emphasizes that the well-being of all is at stake when the life of any among us is imperiled.<sup>364</sup> Private actors too should respect these principles even when not bound by them as a matter of constitutional law.

The enduring and ever-evolving constitutional norms afford insight, guidance, and opportunities for correction. Yet by themselves, they cannot guarantee that sound policy will emerge. For this, we will also need thoughtful leadership, private cooperation, and civic engagement. All Americans, not just those formally charged with addressing present and future public health emergencies, will need to ask the right questions, accept responsibility, consider relevant emerging scientific information, and attend to the needs of others.

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362. The judicial construction of liberty is best seen as an evolving doctrine that is ever "headed for parts unknown." Bambauer & Massaro, *supra* note 90, at 340 n.279 (quoting Walton H. Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269, 270 (1938)).

363. Bambauer & Massaro, *supra* note 90, at 340.

364. See Rooney, *supra* note 329; Clea Simon, *International Forum Cites Strong Government Response as Key in Battle Against COVID*, HARV. GAZETTE (Oct. 7, 2020), <https://news.harvard.edu/gazette/story/2020/10/strong-government-response-needed-in-covid-battle/> [<https://perma.cc/MS8B-FY6X>].