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Justice Neil Gorsuch Speaks Out Against Lockdowns and Mandates

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In a statement made today on a case concerning Title 42, Supreme Court Justice Neil Gorsuch breaks the painful silence on the topic of lockdowns and mandates, and presents the truth with startling clarity. Importantly, this statement from the Supreme Court comes as so many other agencies, intellectuals, and journalists are in flat-out denial of what happened to the country.

> *[T]he history of this case illustrates the disruption we have experienced over the last three years in how our laws are made and our freedoms observed.*
>
> *Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain in their homes.*
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> *They shuttered businesses and schools public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too.*
>
> *They surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-coded schemes when defeat in court seemed imminent.*

Federal executive officials entered the act too. Not just with emergency immigration decrees. They deployed a public-health agency to regulate landlord-tenant relations nationwide.They used a workplace-safety agency to issue a vaccination mandate for most working Americans.

They threatened to fire noncompliant employees, and warned that service members who refused to vaccinate might face dishonorable discharge and confinement. Along the way, it seems federal officials may have pressured social-media companies to suppress information about pandemic policies with which they disagreed.

While executive officials issued new emergency decrees at a furious pace, state legislatures and Congress—the bodies normally responsible for adopting our laws—too often fell silent. Courts bound to protect our liberties addressed a few—but hardly all—of the intrusions upon them. In some cases, like this one, courts even allowed themselves to be used to perpetuate emergency public-health decrees for collateral purposes, itself a form of emergency-lawmaking-by-litigation.

Doubtless, many lessons can be learned from this chapter in our history, and hopefully serious efforts will be made to study it. One lesson might be this: Fear and the desire for safety are powerful forces. They can lead to a clamor for action—almost any action—as long as someone does something to address a perceived threat.

A leader or an expert who claims he can fix everything, if only we do exactly as he says, can prove an irresistible force. We do not need to confront a bayonet, we need only a nudge, before we willingly abandon the nicety of requiring laws to be adopted by our legislative representatives and accept rule by decree. Along the way, we will accede to the loss of many cherished civil liberties—the right to worship freely, to debate public policy without censorship, to gather with friends and family, or simply to leave our homes.

We may even cheer on those who ask us to disregard our normal lawmaking processes and forfeit our personal freedoms. Of course, this is no new story. Even the ancients warned that democracies can degenerate toward autocracy in the face of fear.

But maybe we have learned another lesson too. The concentration of power in the hands of so few may be efficient and sometimes popular. But it does not tend toward sound government. However wise one person or his advisors may be, that is no substitute for the wisdom of the whole of the American people that can be tapped in the legislative process.

Decisions produced by those who indulge no criticism are rarely as good as those produced after robust and uncensored debate. Decisions announced on the fly are rarely as wise as those that come after careful deliberation. Decisions made by a few often yield

> *unintended consequences that may be avoided when more are consulted. Autocracies have always suffered these defects. Maybe, hopefully, we have relearned these lessons too.*
>
> *In the 1970s, Congress studied the use of emergency decrees. It observed that they can allow executive authorities to tap into extraordinary powers. Congress also observed that emergency decrees have a habit of long outliving the crises that generate them; some federal emergency proclamations, Congress noted, had remained in effect for years or decades after the emergency in question had passed.*
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> *At the same time, Congress recognized that quick unilateral executive action is sometimes necessary and permitted in our constitutional order. In an effort to balance these considerations and ensure a more normal operation of our laws and a firmer protection of our liberties, Congress adopted a number of new guardrails in the National Emergencies Act.*
>
> *Despite that law, the number of declared emergencies has only grown in the ensuing years. And it is hard not to wonder whether, after nearly a half-century and in light of our Nation's recent experience, another look is warranted. It is hard not to wonder, too, whether state legislatures might profitably reexamine the proper scope of emergency executive powers at the state level.*
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> *At the very least, one can hope that the Judiciary will not soon again allow itself to be part of the problem by permitting litigants to manipulate our docket to perpetuate a decree designed for one emergency to address another. Make no mistake—decisive executive action is sometimes necessary and appropriate. But if emergency decrees promise to solve some problems, they threaten to generate others. And rule by indefinite emergency edict risks leaving all of us with a shell of a democracy and civil liberties just as hollow.*

Justice Neil Gorsuch's opinion in *Arizona v. Mayorkas* marks the culmination of his three-year effort to oppose the Covid regime's eradication of civil liberties, unequal application of law, and political favoritism. From the outset, Gorsuch remained vigilant as public officials used the pretext of Covid to augment their power and strip the citizenry of its rights in defiance of long standing constitutional principles.

While other justices (even some purported constitutionalists) absconded their responsibility to uphold the Bill of Rights, Gorsuch diligently defended the Constitution. This became most apparent in the Supreme Court's cases involving religious liberty in the Covid era.

Beginning in May 2020, the Supreme Court heard cases challenging Covid restrictions on religious attendance across the country. The Court was divided along familiar political lines: the liberal bloc of Justices Ginsburg, Breyer, Sotomayor, and Kagan voted to uphold deprivations of liberty as a valid exercise of states' police power; Justice Gorsuch led conservatives Alito, Kavanaugh, and Thomas in challenging the irrationality of the edicts; Chief Justice Roberts sided with the liberal bloc, justifying his decision by deferring to public health experts.

"Unelected judiciary lacks the background, competence, and expertise to assess public health and is not accountable to the people," Roberts wrote in *South Bay v. Newsom*, the first Covid case to reach the Court.

And so the Court repeatedly upheld executive orders attacking religious liberty. In *South Bay*, the Court denied a California church's request to block state restrictions on church attendance in a five to four decision. Roberts sided with the liberal bloc, urging deference to the public health apparatus as constitutional freedoms disappeared from American life.

In July 2020, the Court again split 5-4 and denied a church's emergency motion for injunctive relief against Nevada's Covid restrictions. Governor Steve Sisolak capped religious gatherings at 50 people, regardless of the precautions taken or the size of the establishment. The same order allowed for other groups, including casinos, to hold up to 500 people. The Court, with Chief Justice Roberts joining the liberal justices again, denied the motion in an unsigned motion without explanation.

Justice Gorsuch issued a one paragraph dissent that exposed the hypocrisy and irrationality of the Covid regime. "Under the Governor's edict, a 10-screen 'multiplex' may host 500 moviegoers at any time. A casino, too, may cater to hundreds at once, with perhaps six people huddled at each craps table here and a similar number gathered around every roulette wheel there," he wrote. But the Governor's lockdown order imposed a 50-worshiper limit for religious gatherings, no matter the buildings' capacities.

"The First Amendment prohibits such obvious discrimination against the exercise of religion," Gorsuch wrote. "But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."

Gorsuch understood the threat to Americans' liberties, but he was powerless with Chief Justice Roberts cowing to the interests of the public health bureaucracy. That changed when Justice Ginsburg died in September 2020.

The following month, Justice Barrett joined the Court and reversed the Court's 5-4 split on religious freedom in the Covid era. The following month, the Court granted an emergency injunction to block Governor Cuomo's executive order that limited attendance at religious services to 10 to 25 people.

Gorsuch was now in the majority, protecting Americans from the tyranny of unconstitutional edicts. In a concurring opinion in the New York case, he again compared restrictions on secular activities and religious gatherings; "according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians... Who knew public health would so perfectly align with secular convenience?"

In February 2021, California religious organizations appealed for an emergency injunction against Governor Newsom's Covid restriction. At the time, Newsom prohibited indoor worship in certain areas and banned singing. Chief Justice Roberts, joined by Kavanaugh and Barrett, upheld the ban on singing but overturned the capacity limits.

Gorsuch wrote a separate opinion, joined by Thomas and Alito, that continued his critique of the authoritarian and irrational deprivations of America's liberty as Covid entered its second year. He wrote, "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner."

Like his opinions in New York and Nevada, he focused on the disparate treatment and political favoritism behind the edicts; "if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry."

Thursday's opinion allowed Gorsuch to review the devastating loss of liberty Americans suffered over the 1,141 days it took to flatten the curve."

lumbia Circuit and would instead dismiss the writ of certiorari as improvidently granted.

Statement of JUSTICE GORSUCH.

This case concerns the "Title 42 orders." Those emergency decrees severely restricted immigration to this country for the ostensible purpose of preventing the spread of COVID–19. The federal government began issuing the orders in March 2020 and continued issuing them until April 2022, when officials decided they were no longer necessary.[1]

If that seems reasonable enough, events soon took a turn. In a federal district court in Louisiana, a number of States argued that the government's decision to end the Title 42 orders violated the Administrative Procedure Act (APA), 5 U. S. C. §551 *et seq.*, because agency officials had not provided advance notice of their decision or invited public comment.[2] The States did not seriously dispute that the public-

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[1] 87 Fed. Reg. 19944–19946, 19956 (2022).

[2] *Louisiana* v. *Centers for Disease Control & Prevention*, 603 F. Supp. 3d 406, 412 (WD La. 2022).

health justification for the orders had lapsed. The States also understood that their lawsuit would only require the government to take certain additional procedural steps before ending the Title 42 orders. But the States apparently calculated that even a short, court-ordered extension of those decrees was worth the fight. Worth it because, in their judgment, a new and different crisis had emerged at the border and the federal government had done too little to address it.[3] Keeping the Title 42 orders in place even temporarily was better than the alternative. In the end, the district court agreed with the States' APA arguments and entered a nationwide injunction that effectively required the government to enforce the Title 42 orders until and unless it complied with the statute's notice-and-comment procedures.[4]

Meanwhile, a thousand miles away, a group of asylum

Author

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The Brownstone Institute for Social and Economic Research is a nonprofit organization conceived of in May 2021 in support of a society that minimizes the role of violence in public life.

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