

NATIONAL LEGAL PARADIGMS FOR PUBLIC HEALTH EMERGENCY RESPONSES

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The COVID-19 pandemic has exposed significant weaknesses of the U.S. federalist system in controlling major infectious disease threats. At the root of American failures to adequately respond is a battle over public health primacy in emergency preparedness and response. Which level of government—federal or state—should actually “call the shots” to quell national emergencies? Constitutional principles of cooperative federalism suggest both levels of government are responsible. Yet real-time applications of these principles, coupled with dubious national leadership, contributed to horrific public health outcomes across America. No one seeks a repeat performance of U.S. COVID-19 response efforts to forthcoming major health threats. Avoiding it entails substantial changes. Expansive interpretations and executions of core federal emergency powers illuminate new paradigms for modern public health emergency preparedness and response where states remain key players, but the feds are primary play-callers.

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INTRODUCTION

A perplexing question arises well over a year since COVID-19 was identified as a pandemic by the World Health Organization (WHO) on March 11, 2020:¹ *why has the United States performed so poorly in preparedness and response compared to other industrialized nations?*

The United States is home to approximately 333 million people,² or about 4.25% of the global population.³ Yet, as of June 15, 2021, 19% (or 33.49 million) of COVID-19 cases, and 16% (or 600,285) of COVID-19 deaths globally, have arisen in the United States⁴ despite enormous domestic expenditures devoted to health care and public health preparedness compared to other countries.⁵ A country like the

1. *Listings of WHO's Response to COVID-19*, WORLD HEALTH ORG., <https://www.who.int/news/item/29-06-2020-covidtimeline> [https://perma.cc/SY2E-6XGF] (describing WHO's early assessment of COVID-19 as one of "deep[] concern[]" over the virus's "alarming levels of spread and severity," which led the organization to characterize the virus as a pandemic that needed to be met with "urgent and aggressive action").

2. Derick Moore, *U.S. Population Clock Hit 330 Million at 8:02 a.m. EDT Today Based on Population Components Measured Since 2010 Census*, U.S. CENSUS BUREAU (July 23, 2020), <https://www.census.gov/library/stories/2020/07/census-bureau-estimates-united-states-population-reached-330-million-today.html> [https://perma.cc/Q3QX-E3VJ].

3. *United States Population (Live)*, WORLDOMETER, <https://www.worldometers.info/world-population/us-population> [https://perma.cc/9AR3-9AYT].

4. *COVID-19 Dashboard: Global Deaths*, CTR. FOR SYS. SCI. & ENG'G AT JOHNS HOPKINS UNIV., <https://coronavirus.jhu.edu/map.html> (last visited Oct. 11, 2021) [hereinafter *Johns Hopkins Dashboard*].

5. *Id.* The United States' per capita spending on health care services comprised \$11,582 in 2019. *National Health Expenditure Data, Historical*, Ctrs. for Medicare and Medicaid Servs., <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics->

United States, which invested \$3.8 trillion for health care expenditures in 2019⁶ (and likely hundreds of billions of dollars more in 2020 due to COVID-19 cases) would presumably achieve considerably lower rates of COVID-19 mortality than other nations.

In reality, if U.S.-related COVID deaths to date reflected its relative percentage of the global population, over 507,000 Americans would be alive today.⁷ Their untimely deaths are a primary reason why average life expectancy in the United States has precipitously dropped by over one year based on mortality data for just the first six months of 2020.⁸ Actual declines in U.S. life expectancy for all of 2020–2021 may be far higher, especially among Black, Hispanic, and Native American populations hardest hit by COVID-19.⁹

Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical [https://perma.cc/THV4-P36G]. This rate far exceeds the equivalent rate in other developed nations. *OECD Health Spending (Indicator) 2019*, ORG. FOR ECON. COOP. & DEV., <https://data.oecd.org/healthres/health-spending.htm> (last visited Oct. 5, 2021). U.S. health care spending is the highest of the world's developed countries, ranking 43% higher than Switzerland, which has a per person spending of \$7,732. *Id.* The Organization for Economic Cooperation and Development (OECD) defines health spending as “the final consumption of health care goods and services (i.e., current health expenditure), including personal health care (curative care, rehabilitative care, long-term care, ancillary services and medical goods) and collective services (prevention and public health services as well as health administration) but excluding spending on investments.” *Id.*

6. See *National Health Expenditure Data, Historical*, *supra* note 5 (noting that health care spending in the United States increased by 4.6% in 2019).

7. See *Johns Hopkins Dashboard*, *supra* note 4. This figure is calculated based on the following formula: total global deaths (4,856,275) multiplied by U.S. percentage of global population (4.25%) equaling 206,392, which is then subtracted from the total number of U.S. deaths (713,948) equaling 507,556 persons). *Id.*

8. ELIZABETH ARIAS ET. AL., CDC, REP. NO. 10, VITAL STATISTICS RAPID RELEASE: PROVISIONAL LIFE EXPECTANCY ESTIMATES FOR JANUARY THROUGH JUNE, 2020 1 (2021), <https://www.cdc.gov/nchs/data/vsrr/VSRR10-508.pdf> [https://perma.cc/2WJ4-WQHB] (concluding that data that the Centers for Disease Control and Prevention (CDC) released in February 2021 suggested in just the first six months of 2020, U.S. life expectancy declined by roughly one year for all Americans to 77.8 years averaged across race, age, and gender). It is the largest decline in U.S. life expectancy since World War II. Adela Suliman, *Covid-19 Cuts U.S. Life Expectancy by a Year in First Half of 2020, Biggest Drop Since WWII*, NBC NEWS (Feb. 18, 2021, 6:29 AM), <https://www.nbcnews.com/news/us-news/covid-19-cuts-u-s-life-expectancy-year-first-half-n1258219> [https://perma.cc/RXN2-YY2M].

9. Suliman, *supra* note 8, at 2–3 (highlighting that the average life expectancy in the United States for Black and Hispanic communities fell by nearly two years or more during the first six months of 2020 due to COVID-19's impact); see also Sabrina Tavernise & Abby Goodnough, *A Grim Measure of Covid's Toll: Life Expectancy Drops*

Explanations underlying these and other moribund figures may take years to unfold given the plethora of inadequacies, gaffes, and botches in U.S. preparedness and response contributing to breakdowns of the public health and health care systems.¹⁰ If COVID-19 was meant to test U.S. emergency public health capabilities, our national systems have scored poorly in multiple ways. Failures to equitably and efficiently allocate scarce resources, test and screen at-risk individuals, trace known contacts, treat infected patients, enforce social distancing, require masks, and remedy economic harms have personified U.S. response efforts at various points during the pandemic.¹¹ Consequently, a nation with substantial resources and public health systems, viewed once as the global “gold standard,” underperformed in controlling an infectious disease due, in part, to political resistance and inconsistent responses across states, territories, tribes, and localities.¹²

Even as Delta variant cases of COVID-19 surge into fall 2021, there is still hope that prior infections and extensive vaccinations may generate sufficient herd immunity among Americans sometime in late 2021.¹³ As emergency declaratory powers among select states and

Sharply in U.S., N.Y. TIMES (Feb. 18, 2021), <https://www.nytimes.com/2021/02/18/us/covid-life-expectancy.html> (contextualizing the drop in life expectancy, which wiped out “[a] fragile recovery over the past two years” due to recent declines “driven largely by a surge in drug overdose deaths”).

10. German Lopez, *How the U.S.’s Covid-19 Death Toll Compares to That of Other Wealthy Countries*, VOX (Jan. 11, 2021, 8:00 AM), <https://www.vox.com/future-perfect/2021/1/11/22220827/covid-19-pandemic-coronavirus-usa-europe-canada-trump> (“Despite Covid-19 surges in Europe, the United States of America’s extraordinary death toll remains among the worst in the developed world . . . with more than twice the death rate of the median developed country.”).

11. James G. Hodge, Jr. et al., *Legal ‘Tug-of-Wars’ During the COVID-19 Pandemic: Public Health v. Economic Prosperity*, 48 J.L. MED. & ETHICS 603, 603–04 (2020) (analyzing the tension between reopening efforts and varied public health precautions during the summer of 2020).

12. EIS Officers, *Open Letter by Epidemic Intelligence Service Officers—Past and Present—in Support of CDC*, MEDIUM (May 30, 2020), <https://eis1984.medium.com/open-letter-by-epidemic-intelligence-service-officers-past-and-present-in-support-of-cdc-759cdc0666c3> (expressing that alumnae or current Epidemic Intelligence Service (EIS) officers are “concern[ed] about the ominous politicization and silencing of the nation’s health protection agency during the ongoing COVID-19 pandemic”).

13. Andis Robeznieks, *Coronavirus Herd Immunity Will Take Team Effort, Says Dr. Fauci*, AM. MED. ASS’N (Feb. 22, 2021), <https://www.ama-assn.org/delivering-care/public-health/coronavirus-herd-immunity-will-take-team-effort-says-dr-fauci> [<https://perma.cc/F442-33C8>] (explaining “how vaccines could bring herd immunity despite

localities are rescinded, pandemic assessments are already emerging on why the United States is a global leader in how *not* to effectively respond to a major public health crisis. Meaningful analyses must extend beyond a “blame game” and political finger-pointing to target underlying sources of America’s pandemic woes to improve responses to future public health threats.¹⁴

Determining which level of government—*federal or state*—should be “calling the shots” during pandemics is vital to the development of a revamped U.S. national response plan for the twenty-first century. Political leaders, jurists, emergency planners, and scholars often suggest that both levels of governments play core roles under principles of cooperative federalism. As a primary structural underpinning of constitutional design, federalism has theoretical appeal in directing public health responses at each level of government. Federal public health authorities provide national guidance, infrastructure, and resources.¹⁵ States’ traditional police powers enable frontline public health responses.¹⁶

Real-time executions of federal and state powers during the COVID-19 pandemic belie these notions. Adherence to cooperative federalism coupled with dubious national leadership: (1) allowed COVID-19 to repeatedly spread like wildfire across wide swaths of the U.S. population;¹⁷ (2) led to extensive political turmoil, costing President

the variants” and that “[t]he ultimate control of pandemics of this type will always rest in the development of a highly effective and safe vaccine”).

14. James G. Hodge, Jr., *Nationalizing Public Health Emergency Legal Responses*, 49 J.L. MED. & ETHICS 315 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3806811.

15. See *infra* Part II.

16. Mark Sherman, *States Largely Have Authority Over When to Shut Down, Reopen*, FED. NEWS NETWORK (Apr. 14, 2020, 12:12 AM), <https://federalnewsnetwork.com/government-news/2020/04/states-largely-have-authority-over-when-to-shut-down-reopen-2> [<https://perma.cc/679A-4UNH>] (“Under our constitutional system, states have the power and responsibility for maintaining public order and safety . . . [S]ince the outbreak began, decisions about limiting social interactions by ordering people to shelter in place, closing businesses and shutting schools are . . . made by governors and local officials.”).

17. See Sam Sutton & Brianna Ehley, *The Summer of Spread Is Here*, POLITICO (Aug. 5, 2020, 7:50 PM), <https://www.politico.com/states/new-jersey/story/2020/08/05/the-summer-of-spread-is-here-1305121> [<https://perma.cc/B8EM-9677>] (noting that during the summer 2020, “daily case counts top[ped] 60,000 [and] federal health officials warn[ed] that the surge is showing little sign of abating”); Peter Sullivan, *Post-Holiday COVID-19 Surge Hits New Deadly Records*, HILL (Jan. 14, 2021, 6:00 AM),

Trump a second term in office¹⁸ and contributing to an inexcusable insurrection riot;¹⁹ (3) gutted the U.S. economy, thrusting millions of Americans into unemployment and threatening their livelihoods;²⁰ (4) exposed gross health inequities across subpopulations;²¹ (5) risked the lives of hundreds of thousands of frontline responders and health care workers;²² (6) contributed to substantial and long-term mental health

<https://thehill.com/policy/healthcare/534139-post-holiday-covid-surge-hits-new-deadly-records> [<https://perma.cc/6SNB-U5U6>] (“The anticipated surge following holiday gatherings has now arrived, leading to a stunning number of cases, hospitalizations and deaths rising every day [T]he seven-day average for deaths rose from about 2,600 per day to about 3,300.”).

18. Jennifer Medina & Giovanni Russonello, *Exit Polls Showed the Vote Came Down to the Pandemic Versus the Economy*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/11/03/us/politics/exit-polls.html> (“[W]hile Mr. Trump had attempted to focus the campaign on anything other than the pandemic, it remained a defining issue: More than four in 10 voters said it was the most important problem facing the country, far more than any other issue.”); Leonardo Baccini et al., *The COVID-19 Pandemic and the 2020 US Presidential Election*, 34 J. POPULATION ETHICS 739 (2021) (finding “that COVID-19 cases negatively affected Trump’s vote share” and “that Trump would likely have won re-election if COVID-19 cases had been 5 percent lower”); Paul Whiteley et al., *Donald Trump: How COVID-19 Killed His Hope of Re-election—New Research*, CONVERSATION (Nov. 30, 2020, 10:34 AM), <https://theconversation.com/donald-trump-how-covid-19-killed-his-hope-of-re-election-new-research-151045> [<https://perma.cc/LFC6-3A4F>] (“The salience of the pandemic as an issue was a major problem for Trump because an overwhelming number of voters judged that he had mishandled the crisis.”).

19. Adam Gabbatt, *‘Incited by the President’: Politicians Blame Trump for Insurrection on Capitol Hill*, GUARDIAN (Jan. 6, 2021, 8:14 PM), <https://www.theguardian.com/us-news/2021/jan/06/donald-trump-politicians-insurrection-capitol-hill> [<https://perma.cc/DU94-ZA5M>] (asserting that the Capitol riot on January 6, 2021 was the “manifestation and culmination of reckless leadership, a pervasive misuse of power, and anarchy . . . and a coup incited by President Trump”).

20. Avery Koop, *Putting the Cost of COVID-19 in Perspective*, VISUAL CAPITALIST (Jan. 14, 2021), <https://www.visualcapitalist.com/putting-the-cost-of-covid-19-in-perspective> [<https://perma.cc/4LQM-CZZD>] (estimating the economic cost of the COVID-19 crisis to total \$16.2 trillion).

21. Seth A. Berkowitz et al., *Covid-19 and Health Equity—Time to Think Big*, NEW ENG. J. MED. (Sept. 17, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2021209> [<https://perma.cc/HS6V-FZZV>] (noting that “[t]he COVID-19 pandemic has . . . highlighted structural racism—institutions, practices, mores, and policies that differentially allocate resources and opportunities so as to increase inequity among racial groups” and “mortality rates are more than twice as high in Black, Latinx, and Indigenous populations as in White populations”).

22. Thomas D. Kirsch & James G. Hodge, Jr., *Health Care Workers Deserve Better Protections from Coronavirus Disease 2019*, J. AM. MED. ASS’N HEALTH F. (Nov. 16, 2020), <https://jamanetwork.com/channels/health-forum/fullarticle/2773228> [<https://>

consequences for tens of millions of Americans;²³ and (7) resulted in the preventable loss of thousands of American lives.²⁴

COVID-19 may officially be listed as the cause of death for more than 600,000 Americans,²⁵ but inept and insufficient public and private sector responses within our federalist infrastructure are substantial contributing factors. Whether due to flawed planning, preparedness, implementation, leadership, or politics, no rational American seeks a repeat performance in subsequent pandemics. Avoiding it requires determining who is legally going to take charge in the battle for public health primacy in U.S. emergency responses.

Part I examines how state governments initially sought federal guidance and resources in response to COVID-19 prior to undertaking divergent approaches across jurisdictions. Part II centers on federal

perma.cc/4D7T-U9A8] (revealing that as of November 2020, 202,241 health care workers had been infected and “more than 1336 . . . workers” had perished from the virus, but “[t]he actual numbers of health care workers who have died of COVID-19 may be much higher”).

23. Alison Abbott, *COVID’s Mental-Health Toll: How Scientists Are Tracking a Surge in Depression*, NATURE (Feb. 3, 2021), <https://www.nature.com/articles/d41586-021-00175-z> (noting that “[m]ore than 42% of people surveyed by the US Census Bureau in December reported symptoms of anxiety or depression” likely “stem[ming] from people’s limited social interactions, tensions among families in lockdown together and fear of illness”).

24. Jorge L. Ortiz, *‘Blood on His Hands’: As US Surpasses 400,000 COVID-19 Deaths, Experts Blame Trump Administration for a ‘Preventable’ Loss of Life*, USA TODAY (Jan. 17, 2021, 3:11 AM), <https://www.usatoday.com/story/news/nation/2021/01/17/covid-19-us-400-000-deaths-experts-blame-trump-administration/6642685002> [<https://perma.cc/JZT9-RGU7>] (“Many public health experts and historians blame the Trump administration for the extent of the COVID-19 devastation.”).

25. Petula Dvorak, *America’s Covid-19 Death Toll Is About to Surpass Nearly All Our Wartime Deaths*, WASH. POST (July 15, 2021, 7:30 PM), https://www.washingtonpost.com/local/americas-covid-19-death-toll-is-about-to-surpass-nearly-all-our-wartime-deaths/2021/07/15/5e34b362-e56b-11eb-b722-89ea0dde7771_story.html (noting that the COVID-19 death toll currently stands at 607,000 and continues to climb).

responses that shifted from tepid²⁶ to tactless²⁷ to torrential²⁸ as the pandemic worsened and administrations changed hands midstream. President Trump lost the 2020 election due primarily to his pandemic blunders, including false promises that the condition would simply “disappear”²⁹ and that vaccines were far ahead of schedule.³⁰ President

26. Kevin Breuninger, *Trump Admitted Downplaying Coronavirus Dangers in Early Days of Pandemic, New Bob Woodward Book Says*, CNBC (Sept. 9, 2020), <https://www.cnn.com/2020/09/09/trump-admits-downplaying-coronavirus-dangers-new-bob-woodward-book-says.html> [<https://perma.cc/8XU7-NEW4>] (emphasizing that President Trump initially downplayed the virus despite various warnings by advisors that it would be the biggest national security threat he would face during his presidency).

27. Joshua A. Geltzer, *Trump’s ‘Corona-Federalism’ Pits States Against Each Other. It’s a Disaster.*, WASH. POST (Apr. 8, 2020), <https://www.washingtonpost.com/outlook/2020/04/08/trump-corona-federalism> (quoting President Trump’s tweet stating that states are responsible for acting and that the federal government is just “a backup for them [and t]he complainers should have been stocked up and ready long before this crisis hit”); Elizabeth Thomas & Jordyn Phelps, *Trump Claims He, Not Governors, Has Power Over States on Deciding Reopening Country*, ABC NEWS (Apr. 13, 2020, 1:21 PM), <https://abcnews.go.com/Politics/trump-claims-governors-power-states-deciding-reopening-country/story?id=70119115> [<https://perma.cc/5NLK-U3EA>] (maintaining that in April 2020, governors had “final say over their states” while President Trump asserted that the ultimate decision to reopen the economy was up to him); Allan Smith, *Trump Backs Down After Cuomo, Other Governors Unite on Coronavirus Response*, NBC NEWS (Apr. 14, 2020, 8:06 PM), <https://www.nbcnews.com/politics/donald-trump/trump-backs-down-after-cuomo-governors-unite-coronavirusk-response-n1183471> [<https://perma.cc/2Q7P-G4GU>] (noting the patchwork response early in the pandemic as President Trump allowed governors free reign over their own responses and various states launched separate regional pacts to plan for how to open).

28. Domenico Montanaro & Chloe Weiner, *Biden Sets Goal of July 4th to ‘Mark Independence’ from Coronavirus*, NPR (Mar. 11, 2021, 9:34 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/03/11/975420676/biden-to-address-the-nation> [<https://perma.cc/LP7P-NC4Q>] (expressing that President Biden regretted the country was “‘hit with a virus that was met with silence’ and ‘denial’” by the Trump administration in 2020).

29. Dan Goldberg, *‘It’s Going to Disappear’: Trump’s Changing Tone on Coronavirus*, POLITICO (Mar. 17, 2020, 10:52 PM), <https://www.politico.com/news/2020/03/17/how-trump-shifted-his-tone-on-coronavirus-134246> [<https://perma.cc/5VGE-MBGR>] (quoting President Trump’s statement to the press on February 27, 2020, that “[o]ne day, it’s like a miracle, [coronavirus] will disappear”).

30. *Trump Covid: President Downplays Virus on Leaving Hospital*, BBC NEWS (Oct. 6, 2020), <https://www.bbc.com/news/election-us-2020-54427390> [<https://perma.cc/N4R6-8AHL>] (highlighting that after returning to the White House from the hospital, President Trump “promised that vaccines were ‘coming momentarily,’” even though CDC did not expect them until 2021).

Biden pledged to tackle COVID-19³¹ and reopen society through aggressive efforts undergirded by national strategic planning³² instead of political partisanship.³³ His administration immediately rewrote the script for federal emergency management grounded in enhanced scientific knowledge and allocations of efficacious vaccines.³⁴

Part III assesses how federal assertions of emergency powers during both presidential administrations will reshape U.S. public health emergency (PHE) responses for decades to come. Key legal paradigms focused on national security, federal commerce authority, medical countermeasures, tax and spend powers, preemption, and states' roles are essential to obviating future preventable morbidity and mortality.

I. STATE PANDEMIC LEGAL RESPONSES VIA COOPERATIVE FEDERALISM

Foundational constitutional principles of cooperative federalism support the notion that federal and state governments share responsibility for preserving the nation's health through their respective powers.³⁵ States are reserved inherent police and *parens patriae* powers via the Tenth Amendment to generally protect public

31. Joseph R. Biden, Jr., President of the United States, Inaugural Address (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr> [<https://perma.cc/4PCN-7CKA>] (“We are entering what may well be the toughest and deadliest period of the virus. We must set aside the politics and finally face this pandemic as one nation . . . We will get through this, together.”).

32. WHITE HOUSE, NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS 5–6 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf> [<https://perma.cc/E6PH-SEXB>] (explaining that the Biden administration's national strategy for the COVID-19 response sets forth concrete steps for fighting the virus through six domestic strategic goals and one overarching global health goal, as well as the establishment of a federal office responsible for coordinating the pandemic response across all federal departments and agencies).

33. Julie Bosman et al., *As Biden Urges Caution on Covid, Governors Split on How Fast to Reopen*, N.Y. TIMES (Mar. 4, 2021), <https://www.nytimes.com/2021/03/04/us/covid-states-reopening-governors.html> (indicating that several of President Biden's top officials stated that “they see no benefits in waging a culture war against Republican governors while they are fighting to contain the pandemic”).

34. Sheryl Gay Stolberg, *Biden Unveils National Strategy That Trump Resisted*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/us/politics/biden-coronavirus-response.html>.

35. JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL 35 (3d ed. 2018) (“In many cases, principles of cooperative federalism render agreeable compromises.”).

health and safety.³⁶ Over time, the U.S. Supreme Court and lower tribunals have repeatedly affirmed states' primary role in public health promotion, even equating it as a constitutional duty.³⁷ Although the Court has never directly held that the federal government is generally obligated to protect the public's health,³⁸ it has consistently allowed for the constitutional expansion of federal supreme and enumerated powers into public health areas previously set aside to states, including controlling emerging infectious diseases like COVID-19.³⁹

As legal principles continue to evolve over decades in response to advanced public health sciences and emerging challenges, federalism helps assure accountability for population health. Divisions between national and state powers are not carved in stone. They are sufficiently flexible to absorb changing legal norms amid new threats. Federal and state governments tend to work best when they align to respond to national or regional needs in emergencies.

36. Lawrence O. Gostin, *Public Health Law in an Age of Terrorism: Rethinking Individual Rights and Common Goods*, 21 HEALTH AFFS. 79, 86–87 (2002) (“The Supreme Court has made it clear that states have a deep reservoir of public health powers, conceiving of state police powers as ‘an immense mass of legislation . . . [including] health laws of every description’”).

37. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 72 (1824) (accepting that states and localities have a fundamental role in protecting public health); *Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850) (“The suppression of nuisances injurious to public health or morality is among the most important duties of government.”); *Stone v. Mississippi*, 101 U.S. 814, 819 (1880) (“No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.”); *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (referring to states’ “police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons” (quoting *Medtronic v. Lohr*, 518 U.S. 470, 475 (1996))). Manifold lower courts have resounded this same theme. See, e.g., *Herrin v. Reeves*, No. 20cv263, 2020 WL 5748090, at *10 (N.D. Miss. Sept. 25, 2020) (“This court further notes that protecting the health and safety of its citizens is one of the pre-eminent duties of state government”); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 886, 892 (Pa. 2020). “[T]he police power [is] the state’s ‘inherent power . . . to enact and enforce laws for the protection of the general welfare,’ The protection of the lives and health of millions . . . is the *sine qua non* of a proper exercise of police power.” *Id.* (citing *Nat’l Wood Preservers v. Pennsylvania*, 414 A.2d 37, 42–43 (Pa. 1980)).

38. James G. Hodge, Jr. et al., *Constitutional Cohesion and the Right to Public Health*, 53 U. MICH. J. L. REFORM 173, 212 (2019) (“The Court, however, historically refuses to interpret the Constitution as including anything approaching a positive right to health for all.”).

39. See *infra* Part III.

The COVID-19 pandemic, however, has severely tested the theory and gradations of federalism. It has laid bare the substantial drawbacks of a nation of sovereign states attempting to quickly respond to a stealthy, deadly disease that spreads easily across jurisdictional boundaries. Incongruent public health approaches facilitated across states not only weakened national capabilities to respond, but also threatened neighboring jurisdictions.⁴⁰ In a nation of open state borders, lax measures to stymie the spread of COVID-19 in one state carried deleterious impacts on surrounding states and the nation.⁴¹

State governments do not lack the authority, plans, or capacities to respond to significant emerging disease threats.⁴² Extensive legal reforms helped define and enable use of emergency powers.⁴³ Following the terrorist acts on September 11, 2001 and the ensuing anthrax attacks that same fall, states engaged in a series of legislative and regulatory reforms to (1) define PHEs, (2) clarify public and private sector response capabilities, and (3) coordinate efforts across jurisdictions.⁴⁴

Substantial legal reforms were derived from the Model State Emergency Health Powers Act (MSEHPA) drafted by the Centers for Law and the Public's Health at Georgetown and Johns Hopkins Universities in 2001.⁴⁵ MSEHPA provided a modern definition of PHE⁴⁶ coupled with a structured and cohesive series of provisions

40. See Albert Hunt, *Federalism and Fighting Coronavirus*, HILL (May 3, 2020, 11:30 AM), <https://thehill.com/opinion/healthcare/495857-federalism-and-fighting-coronavirus> [<https://perma.cc/L559-KJ7E>] (identifying federalism as the cause of weaknesses among states addressing COVID-19 impacts).

41. Mike Baker, *Their Crisis' Is 'Our Problem': Washington Grapples with Idaho Covid Cases*, N.Y. Times, Sep. 16, 2021, <https://www.nytimes.com/2021/09/13/us/coronavirus-hospitals-washington-idaho.html> (documenting impacts on Washington State hospitals extending from patients seeking care from neighboring Idaho where lax preventative measures have led to a substantial surge in COVID-19 cases).

42. Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 J. AM. MED. ASS'N. 622, 623 (2002).

43. *Id.*

44. *Id.*

45. *Id.* at 622.

46. A "public health emergency" is defined as:

an occurrence or imminent threat of an illness or health condition that: (1) is believed to be caused by . . . (i) bioterrorism; (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin [*or other causes*]; . . . and (2) poses a high probability of . . . (i) a large number of deaths . . . [or (ii)] serious or long-term disabilities in the affected population;

guiding state responses. Since its development, thirty-nine state legislatures passed bills expressly related to the Act.⁴⁷ Thirty-four states and the District of Columbia crafted explicit definitions of PHEs (or like terms) into their laws.⁴⁸ Even states that did not uptake key provisions of MSEHPA or other proposals feature legislative provisions sufficiently empowering governors or other high-level state health officials to classify and declare specific public health threats as emergencies.⁴⁹

In just over two weeks between February 29 and March 15, 2020, every state declared some sort of emergency, disaster, or PHE—a first in U.S. history.⁵⁰ State alignments over the labeling of COVID-19 as an emergency, however, did not lead to uniformity of responses. To the contrary, state-level executions of emergency public health powers over the duration of the pandemic have been scattershot, inconsistent, and at times directly inapposite to known science and best practices.⁵¹ States (and their localities) have diverged on nearly every facet of PHE

or (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.

MODEL STATE EMERGENCY HEALTH POWERS ACT § 104(M) (CTR. FOR L. & PUB.'S HEALTH AT GEORGETOWN & JOHNS HOPKINS UNIV. Dec. 21, 2001), <https://stacks.cdc.gov/view/cdc/6562> [hereinafter MSEHPA]. Some critics viewed this definition as overly broad and a potential source for unwarranted infringements of individual rights in favor of communal objectives. *See, e.g.*, GEORGE J. ANNAS, WORST CASE BIOETHICS: DEATH, DISASTER, AND PUBLIC HEALTH 213–17 (2010) (criticizing state public health emergency laws because they “gave public health officials broad, unaccountable powers over their citizens in . . . a [PHE]”). In reality, this definition of PHE was far more precise and limiting on governmental powers than existing all-hazards approaches. HODGE, JR., *supra* note 35, at 361–62. MSEHPA declarations are limited in their duration (subject to renewal) and expedited public health powers are framed within constitutional limits (e.g., respect for autonomy, liberty, due process, and equal protection). MSEHPA, *supra*, at Preamble, § 405(b).

47. HODGE, JR., *supra* note 35, at 361.

48. NETWORK FOR PUB. HEALTH L., EMERGENCY DECLARATION AUTHORITIES ACROSS ALL STATES AND D.C. (2015), <https://www.networkforphl.org/wp-content/uploads/2020/01/Emergency-Declaration-Authorities.pdf> [<https://perma.cc/9738-ASCD>].

49. HODGE, JR., *supra* note 35, at 361–63.

50. James G. Hodge, Jr. et al., *COVID's Constitutional Conundrum: Assessing Individual Rights in Public Health Emergencies*, 88 TENN. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802045.

51. Hunt, *supra* note 40 (emphasizing the wide spectrum of state level response to the pandemic).

response. They were fueled in part by the Trump administration which initially encouraged and deferred to their efforts.⁵²

Some jurisdictions implemented extensive social distancing measures (e.g., shelter-in-place orders, travel bans, curfews, border controls, and massive business closures) over long periods that have worked effectively to control for disease spread.⁵³ Yet, these interventions also generated substantial litigation alleging breaches of individual rights and constitutional violations,⁵⁴ resulting in varied court decisions regarding social distancing measures.⁵⁵

By late March 2020, against the backdrop of widespread social distancing, religious fervor over closures, and mounting economic impacts, President Trump fanned pandemic flames by aggressively

52. German Lopez, *America Still Needs More Coronavirus Testing. Trump's New Plan Falls Short.*, VOX (Apr. 28, 2020, 1:50 PM), <https://www.vox.com/2020/4/28/21239729/coronavirus-testing-trump-plan-white-house>. The Trump administration plan developed in April 2020 “call[ed] on states to develop their own plans and identify hurdles on their own [and said] nothing specific about what steps—if any—the federal government [would] take to increase the number of tests, instead passing the buck to others.” *Id.*; see also Stephanie Armour & Sabrina Siddiqui, *Biden's First Month of Covid-19 Response Marked by Larger Federal Role*, WALL ST. J. (Mar. 2, 2021, 10:56 AM), <https://www.wsj.com/articles/bidens-first-month-of-covid-19-response-marked-by-larger-federal-role-11613840400> (comparing the Biden administration’s federally focused response to Trump’s, which “deferred many decisions on how to fight Covid-19 to states”).

53. See, e.g., Hodge, Jr. et al., *supra* note 11, at 604 (highlighting Pennsylvania as one of the states to enact social distancing measures in March 2020).

54. Hodge, Jr. et al., *supra* note 50, at 12–13. Individuals filed thousands of lawsuits across the country challenging public health measures such as social distancing on constitutional grounds including infringement of First Amendment rights, the right to travel, reproductive freedom, equal protection interests, and due process. *Id.*

55. *Id.* Courts took divergent approaches. In *Elim Romanian Pentecostal Church v. Pritzker*, the Seventh Circuit found limits on religious group gatherings did not violate the First Amendment. 962 F.3d 341, 347 (7th Cir. 2020). In *Amato v. Elicker*, a Connecticut federal district court disallowed a freedom of assembly challenge to social distancing orders, noting that “[c]ourts have upheld more extreme measures taken in response to public health needs, including quarantines, which limit a person’s right to assemble with any other person.” 460 F. Supp. 3d 202, 220 (D. Conn. 2020). Other courts, like the Western District of Pennsylvania in *County of Butler v. Wolf*, found that similar state limits on gatherings failed rational basis scrutiny because the Governor’s orders dissimilarly classified business and non-business gatherings. 486 F. Supp. 3d 883, 927 (W.D. Pa. 2020).

calling for states to reopen.⁵⁶ States like Arizona,⁵⁷ Florida,⁵⁸ and Texas⁵⁹ acquiesced. Other states including California,⁶⁰ Michigan,⁶¹

56. Philip Ewing & Barbara Sprunt, *Trump Sets Easter Goal for Reopening American Economy*, NPR (Mar. 24, 2020, 2:12 PM), <https://www.npr.org/2020/03/24/820774378/trump-id-love-for-u-s-to-be-opened-up-by-easter-amidst-pandemic-response> [<https://perma.cc/L9MM-YVEZ>] (quoting President Trump in late March 2020, during a national press conference expressing his desire to get “Americans working again by Easter Sunday”); Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html> (stating that President Trump disseminated a series of tweets encouraging anti-lockdown protests in several states that he believed were reopening too slowly).

57. *President Trump Points at Arizona as Model for Addressing Coronavirus*, AZFAMILY.COM (Aug. 5, 2020), https://www.azfamily.com/news/continuing-coverage/coronavirus_coverage/president-trump-points-at-arizona-as-model-for-addressing-coronavirus/article_e7f4bfd6-d746-11ea-8070-53f12d4522ed.html [<https://perma.cc/V7FZ-X6BL>] (reporting that during summer 2020, “President Donald Trump . . . laud[ed] Arizona Gov. Doug Ducey, pointing to the state as a model for the nation for handling ‘embers’ of the coronavirus” even while the state “began experiencing a severe spike in COVID-19 cases after Memorial Day”).

58. Marc Caputo, *DeSantis Flings Open Florida in Trump’s Campaign for Normalcy*, POLITICO (Sept. 25, 2020, 7:52 PM), <https://www.politico.com/news/2020/09/25/desantis-trump-florida-coronavirus-421987> [<https://perma.cc/BWN9-Q7BS>] (illustrating that Governor DeSantis heeded to President Trump’s calls to “get back to normal life” when the Governor cancelled all state coronavirus restrictions in September 2020 “without warning, catching local governments and epidemiologists off-guard amid their own strategies to keep the coronavirus contained”).

59. Patrick Svitek, *President Donald Trump Applauds Gov. Greg Abbott’s Handling of Texas Reopening During White House Visit*, TEXAS TRIB. (May 7, 2020, 3:00 PM), <https://www.texastribune.org/2020/05/07/texas-reopening-donald-trump-greg-abbott> [<https://perma.cc/G4K6-3QSD>] (discussing the praise Governor Abbott received from President Trump for reopening many Texas businesses in May 2020 while the state was “still responding to flare-ups in certain places”).

60. Francis Wilkinson, *Gavin Newsom Declares California a ‘Nation-State’*, BLOOMBERG (Apr. 9, 2020), <https://www.bnnbloomberg.ca/gavin-newsom-declares-california-a-nation-state-1.1419811> [<https://perma.cc/669R-DVJE>] (exhibiting how California forged its own path in its pandemic response when Governor Newsom “declared [California’s] independence from the federal government’s feeble efforts to fight Covid-19” in April 2020).

61. *Trump Slams Gov. Gretchen ‘Half Whitmer’ in New Tweet Over Medical Supplies*, FOX 2 DETROIT (Mar. 27, 2020), <https://www.fox2detroit.com/news/trump-slams-gov-gretchen-half-whitmer-in-new-tweet-over-medical-supplies> [<https://perma.cc/P6K7-UDNQ>] (indicating that in late March 2020, as Michigan Governor Whitmer pleaded for help from the federal government during a surge of infections, President Trump slammed her response efforts and blamed her for the state’s rising case count); Kevin Liptak, *Trump Tweets Support for Michigan Protesters, Some of Whom Were Armed, as 2020*

and New York⁶² resisted despite threats from the Department of Justice to legally challenge conflicting state actions.⁶³ Deleterious outcomes of premature, state-based reopening strategies quickly followed.⁶⁴ Infection rates skyrocketed in a second wave of cases by June 2020 leading to renewed calls for greater social distancing with authorized vaccines still months away.⁶⁵

State responses invariably reflected not only the political preferences of leaders, which have diverged along party lines in key states like

Stress Mounts, CNN (May 1, 2020, 3:22 PM), <https://www.cnn.com/2020/05/01/politics/donald-trump-michigan-gretchen-whitmer-protests/index.html> [<https://perma.cc/JY6Y-5WBT>] (noting that after Governor Whitmer extended her emergency declaration in May 2020 and many businesses remained closed, President Trump tweeted support for armed protesters, applauding their efforts to reopen parts of the state).

62. Devan Cole, *Cuomo Says He Would Refuse and Challenge an Order from Trump to Reopen New York's Economy if It Put Residents' Health at Risk*, CNN (Apr. 14, 2020), <https://www.cnn.com/2020/04/14/politics/andrew-cuomo-donald-trump-reopen-new-york-economy-coronavirus-cnntv/index.html> [<https://perma.cc/CZN9-3D8T>] (relaying that in April 2020, New York Governor Andrew Cuomo stated he “would refuse and legally challenge a potential order from President Donald Trump to reopen the state’s economy if doing so would put its residents at risk”).

63. Memorandum from William Barr, U.S. Att’y Gen., to the Assistant Att’y Gen. for C.R. & all U.S. Att’y’s (Apr. 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download> [<https://perma.cc/7Y55-4M7X>] (directing the Assistant Attorney General for Civil Rights and the U.S. Attorney for the Eastern District of Michigan “to oversee and coordinate . . . efforts to monitor state and local policies and, if necessary, take action to correct them”); *see, e.g.*, Statement of Interest on Behalf of the United States, Signature Sotheby’s Int’l Realty, Inc. v. Whitmer, No. 20-cv-00360 2, 17 (W.D. Mich. May 29, 2020) (providing, on behalf of the federal government, that the state of Michigan arbitrarily imposed limitations on businesses during the COVID-19 pandemic in violation of the Constitution).

64. Hodge, Jr. et al., *supra* note 11, at 603 (analyzing COVID-19 reopening trends while infections were on the rise during the summer 2020 and concluding that many states pursued “aggressive re-opening efforts” that left their populations vulnerable to the threat of COVID-19).

65. Jeffrey Kluger & Chris Wilson, *America Is Done with COVID-19. COVID-19 Isn't Done with America*, TIME (June 15, 2020, 3:48 PM), <https://time.com/5852913/covid-second-wave> (underscoring experts’ warnings that “more extensive mitigation efforts” harkening back to March 2020 may be required since “the U.S. [was] very much on fire, well into a second phase of the crisis, with the COVID-19 caseload steadily rising to more than 2 million confirmed cases and more than 113,000 deaths”).

Michigan,⁶⁶ Ohio,⁶⁷ and Pennsylvania,⁶⁸ but also a disdain for federal agency guidance advancing known, efficacious interventions. Two clear examples include mask mandates and vaccination allocation policies. State-based mask mandates have differed extensively across the United States in their application, enforcement, and duration.⁶⁹ Even after President Trump concurred openly with guidance issued by the Centers for Disease Control and Prevention (CDC) on the need to wear masks in public, some state governors like Kristi Noem of South Dakota still flatly refused to mandate them.⁷⁰ When President Biden

66. Lauren Gibbons, *Day of Angry Protests, Political Maneuvers Sets Stage for Likely Legal Battle in Michigan*, MICH. LIVE (May 1, 2020), <https://www.mlive.com/public-interest/2020/05/legal-battle-imminent-after-governor-legislature-part-ways-on-coronavirus-state-of-emergency.html> [<https://perma.cc/DQ8W-YTF6>]. In May 2020, protests broke out at the Michigan Capitol, revealing the heated political battle between the state's democratic Governor, Gretchen Whitmer, and the Republican-majority legislature. "Republicans in both legislative chambers argued Whitmer has gone too far with her emergency authority" after she extended Michigan's state of emergency through a trio of new executive orders. *Id.*

67. Jessie Balmert, *Will Ohio Lawmakers Override Gov. Mike DeWine? A Battle Over the Right COVID-19 Response*, CINCINNATI ENQUIRER (Dec. 9, 2020, 9:55 PM), <https://www.cincinnati.com/story/news/politics/2020/12/09/ohio-lawmakers-override-dewine-battle-over-right-covid-19-action/6506730002> [<https://perma.cc/XAE7-32UH>] ("Since March, Ohioans have debated the right balance of government restrictions and freedom of choice when responding to a once-in-a-century pandemic."). After Governor Mike DeWine vetoed a Senate Bill limiting the Ohio Department of Health's power to quarantine or isolate people, lawmakers in Ohio's GOP-controlled Legislature considered overriding the veto. *Id.* The legislature was eventually successful in overriding the veto, passing Ohio Senate Bill 22. Press Release, Cindy Abrams, *Ohio General Assembly Overrides Veto of Senate Bill 22* (Mar. 24, 2021), <https://ohiohouse.gov/members/cindy-abrams/news/ohio-general-assembly-overrides-veto-of-senate-bill-22-105815> [<https://perma.cc/34VW-ZS7X>].

68. Trip Gabriel, *G.O.P. Defiance of Pennsylvania's Lockdown Has 2020 Implications*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/us/politics/pennsylvania-tom-wolf-coronavirus.html> ("As resistance to lockdown orders flares around the country, often with a partisan overtone, Gov. Tom Wolf of Pennsylvania, a Democrat, . . . accuse[d] [his state's] Republican officials of desertion in the battle against the pandemic.").

69. See Kaia Hubbard, *These States Have COVID-19 Mask Mandates*, U.S. NEWS, <https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates> (July 19, 2021) (monitoring states and territories' different mandates requiring face coverings).

70. Stephen Groves, *South Dakota's Noem Defends Forgoing Masks as Virus Surges*, ASSOC. PRESS (Nov. 18, 2020), <https://apnews.com/article/south-dakota-kristi-noem-coronavirus-pandemic-0d58c61ba20c8bf9ba4ee02ef46b1da0> ("Those who don't wear masks are making a 'personal decision' and deserve respect, the Republican governor said during a news conference. She refused to encourage people to wear masks or

pled with Americans to wear masks in public for the first 100 days in office,⁷¹ several states, like Texas, blatantly dropped their mask requirements in less than half that time.⁷²

As federally supported, free vaccines rolled out of President Trump's successful Operation Warp Speed,⁷³ multiple states crafted variable priorities for their allocation notwithstanding explicit federal guidance.⁷⁴ Florida Governor Ron DeSantis prioritized specific populations (e.g., seniors not living in long-term care facilities) well ahead of schedule and allowed allocations of federal vaccine supplies to largely Republican-centered counties to the exclusion of counties with larger Democratic bases.⁷⁵ Residents in Virginia crossed borders

socially distance, instead saying the best thing people can do to stop the spread of the virus is wash their hands.”).

71. Joe Barrett, *Covid-19 Face Mask Mandates End in Some States, Fueling Tensions*, WALL ST. J. (Feb. 19, 2021, 8:00 AM), https://www.wsj.com/articles/covid-19-mask-mandates-end-in-some-states-fueling-tensions-11613739600?mod=article_inline (explaining that President Biden called “for 100 days of mask wearing to further reduce case numbers” in February 2021 as CDC emphasized the danger of dropping mask requirements and endorsed double-masking).

72. Dan Whitcomb, *Texas Governor Lifts State's Mask Mandate, Business Restrictions*, REUTERS (Mar. 2, 2021, 3:23 PM), <https://www.reuters.com/article/us-health-coronavirus-usa/texas-governor-lifts-states-mask-mandate-business-restrictions-idUSKCN2AU2JB> [<https://perma.cc/6XSS-5J6Z>] (highlighting that in early March 2021, “Texas Governor Greg Abbott issued the most sweeping rollback of coronavirus restrictions of any U.S. state . . . lifting a mask mandate and saying most businesses could open at full capacity”).

73. *Operation Warp Speed*, U.S. DEP'T OF DEF., <https://www.defense.gov/Explore/Spotlight/Coronavirus/Operation-Warp-Speed> [<https://web.archive.org/web/20210720153552/https://www.defense.gov/Explore/Spotlight/Coronavirus/Operation-Warp-Speed/>] (explaining that Operation Warp Speed used the resources of the federal government and the U.S. private sector to “accelerate the testing, supply, development, and distribution of safe and effective vaccines, therapeutics, and diagnostics to counter COVID-19 by January 2021”).

74. Elizabeth Weise & Karen Weintraub, *Amid a Chaotic COVID-19 Vaccine Rollout, States Find Ways to Connect Shots with Arms*, USA TODAY (Mar. 1, 2021), <https://www.usatoday.com/story/news/health/2021/03/01/covid-vaccine-rollout-states-find-different-ways-deliver-shots/6826155002> [<https://perma.cc/GY26-RUBH>] (addressing disparities in state vaccination rates across America “because of the nation's fractured and underfunded health system” and different leadership approaches).

75. Corky Siemaszko, *Florida Governor Accused of Playing Politics with Covid Vaccine*, NBC NEWS (Feb. 18, 2021), <https://www.nbcnews.com/news/us-news/florida-governor-accused-playing-politics-covid-vaccine-n1258240> [<https://perma.cc/4QYM-8AE5>]. As the vaccine rollout began in Florida in early 2021, Governor Ron DeSantis “ignored federal guidelines and prioritized getting senior citizens—one of Florida's

into North Carolina to access vaccines denied to them in their own jurisdiction.⁷⁶ States like Arizona resisted placement of federal vaccine sites⁷⁷ within their borders over concerns they would lose control over vaccine distribution.⁷⁸

State-level legal variations in PHE responses are not necessarily problematic given contrasting impacts of an ever-changing pandemic across populations.⁷⁹ Federalism encourages state-based implementations as a source of innovation.⁸⁰ Initial responses to shutter select businesses, schools, and events in Seattle-King County and Washington State, for example, revealed real-time public health

most potent voting blocs—vaccinated first.” *Id.* Some argued he “us[ed] the Covid-19 vaccine to reward powerful political supporters and developers by setting up pop-up vaccination sites in planned communities they developed and where GOP voters predominate.” *Id.*

76. Sam Turken, *Vaccine Tourism: Virginians Are Crossing State Lines to Get COVID-19 Shots*, N.C. PUB. RADIO (Feb. 9, 2021, 7:17 AM EST), <https://www.wunc.org/health/2021-02-09/vaccine-tourism-virginians-are-crossing-state-lines-to-get-covid-19-shots> [<https://perma.cc/399V-VUVW>]. Vaccine tourism is occurring across the country as many out-of-state residents cross borders to receive shots. *Id.* “Some areas are giving doses out quicker than others, have fewer restrictions or a smoother booking process . . . In Florida, [for example,] more than 57,000 residents from other states have received shots.” *Id.*

77. *Federally Supported Community Vaccination Centers*, FEMA, <https://www.fema.gov/disasters/coronavirus/vaccine-support/vaccine-center> [<https://perma.cc/5U5Y-J56N>] (July 6, 2021).

78. Alison Steinbech, *Arizona Turns Down Offer for Federally Run COVID-19 Vaccine Site, Wants More Doses Instead*, ARIZONA REPUBLIC (Mar. 19, 2021 4:34 PM MT), <https://www.azcentral.com/story/news/local/arizona-health/2021/03/19/arizona-turns-down-federal-offer-covid-19-vaccine-site/4773097001> [<https://perma.cc/AQ7X-EYAH>] (explaining that Arizona turned down an offer from the federal government for a federally run COVID-19 vaccine site in the state because it wanted to “expand capacity at existing state-run sites and to add appointments at pharmacies and in communities,” according to state health officials).

79. Campbell Robertson & Mitch Smith, *Arizona, Roiled by Covid in Summer, Faces Even Worse Outbreak Now*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/05/us/arizona-covid.html> (reporting that Arizona had the highest per capita rate of infection in the country during the “summer surge that raged across the Sun Belt” and “[a]t the peak, more than 3,800 cases were emerging each day”).

80. Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 NYU J. LEG. & PUB. POL’Y 1, 5 (2020) (“[T]he pandemic has underscored both the promise and limits of the Tenth Amendment . . . The reliance on state and local actors has produced many innovative programs and novel attempts at regional coordination, but it has also led to direct competition between and among jurisdictions as they vie for desperately needed resources.”).

benefits that were later mimicked elsewhere.⁸¹ However, when state emergency responses differ for political reasons unrelated to public health science, efficacy, and equity, preventable injuries and deaths predictably follow.⁸²

II. FEDERAL ASSERTIONS OF PUBLIC HEALTH EMERGENCY AUTHORITIES

Even as President Trump inhibited affirmative public health efforts and endorsed contrary state-based responses, his administration embarked on a series of critical legal interventions to combat COVID-19. These efforts flowed from the enormous powers entrusted to the President and national agencies including the (1) Department of Homeland Security (DHS) and its subsidiary, the Federal Emergency Management Agency (FEMA), and (2) Department of Health and Human Services (HHS) and its subsidiaries, the Centers for Medicare and Medicaid Services (CMS), Food and Drug Administration (FDA), and CDC.

Congress vested considerable emergency powers in the President and other federal agencies through the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act),⁸³ National Emergencies Act (NEA),⁸⁴ Public Health Service Act (PHSA),⁸⁵

81. Mike Baker, *Seattle's Virus Success Shows What Could Have Been*, N.Y. TIMES (June 8, 2021), <https://www.nytimes.com/2021/03/11/us/coronavirus-seattle-success.html>. "Washington State's suite of restrictions through the year, all told, were among the most stringent in the nation." *Id.* Other states implemented similarly strict control measures, including Maine and Vermont, and showed low virus numbers. *Id.* "Some smaller metropolitan areas, including other cities in Washington, Portland, Ore., and Raleigh, N.C., have performed better than the Seattle area; they also embraced broad restrictions." *Id.*

82. Tens of thousands of Americans may have died from COVID-19 based on their misfortune of living in a jurisdiction that did not prioritize effective emergency responses. *See, e.g.*, Lauren Leatherby & Rich Harris, *States That Imposed Few Restrictions Now Have the Worst Outbreaks*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/19/world/states-that-imposed-few-restrictions-now-have-the-worst-outbreaks.html>. For example, one year after facing America's first coronavirus outbreak, "the Seattle area has the lowest death rate of the 20 largest metropolitan regions in the country." Baker, *supra* note 81. "If the rest of the United States had kept pace with Seattle, the nation could have avoided more than 300,000 coronavirus deaths." *Id.* Seattle made early adjustments that "may have helped the region avoid some of the havoc" that tore through other areas across the country. *Id.*

83. 42 U.S.C. § 5121.

84. 50 U.S.C. §§ 1601, 1621–22, 1631, 1641, 1651.

85. 42 U.S.C. § 201–02.

Pandemic and All-Hazards Preparedness Act (PAHPA)⁸⁶ (renewed in 2013 and 2019); and the Public Readiness and Emergency Preparedness (PREP) Act.⁸⁷ Collectively, these laws authorize the federal government to declare states of “emergency”⁸⁸ or “disaster”⁸⁹ related to emerging infectious diseases and other, substantial threats.⁹⁰ On March 13, 2020, President Trump issued concurrent national emergency and disaster declarations in response to COVID-19.⁹¹ These dual declarations authorized an immense slate of federal response options through DHS, HHS, and other agencies,⁹² freed up FEMA’s limited emergency funds, and served as a catalyst for massive economic relief legislation forthcoming via Congress.

National emergency or disaster powers, however, are not necessarily well tailored to address direct health threats. Consequently, PHSA authorizes federal declarations of PHE in response to “significant

86. Pub. L. No. 109-417, 120 Stat. 2831 (2006).

87. 42 U.S.C. § 247d-6d (providing liability protections for medical countermeasures).

88. Declarations of emergency are made by the President via the Stafford Act or the NEA. A Stafford Act emergency can be declared generally only after a state governor requests federal assistance “to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe.” 42 U.S.C. §§ 5170, 5122(1).

89. The President declares states of disaster via the Stafford Act usually in response to natural calamities (e.g., tornadoes, earthquakes, snowstorms, or droughts). *Id.* §§ 5170, 5122(2). “All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State Based on the request of a Governor under this section, the President may declare under this [Act] that a major disaster or emergency exists.” *Id.* § 5170. However, these same declarations can also be used to coordinate and mobilize federal powers and responses to public health crises, such as during the COVID-19 pandemic.

90. See JENNIFER K. ELSEA ET AL., CONG. RSCH. SERV., R463789, EMERGENCY AUTHORITIES UNDER THE NATIONAL EMERGENCIES ACT, STAFFORD ACT, AND PUBLIC HEALTH SERVICE ACT 1–2 (2020) (explaining situations where these acts have been used, particularly during the COVID-19 pandemic).

91. Press Release, FEMA, COVID-19 Emergency Declaration (Mar. 14, 2020), <https://www.fema.gov/press-release/20210121/covid-19-emergency-declaration> [<https://perma.cc/JJ8C-JWTU>]. President Trump also issued a series of state-specific disaster declarations via the Stafford Act related to this national declaration. See *Current Disaster Responses*, FEMA (Mar. 24, 2021), <https://www.fema.gov/disaster/current> [<https://perma.cc/9EHG-ANCW>] (listing current Stafford Act disasters and major disasters).

92. See ELSEA ET AL., *supra* note 90, at 7–20 tbl.1, 21–33 tbl.2, 37–39 tbl.3 (providing a comprehensive listing and assessment of hundreds of specific presidential and other federal emergency powers and authorities pursuant to declarations of emergency, disaster, or PHE via the Stafford Act, NEA, and PHSA).

outbreaks of infectious diseases or bioterrorist attacks.”⁹³ HHS’s Secretary Alex Azar issued a PHE declaration in response to COVID-19 on January 31, 2020,⁹⁴ predating President Trump’s declarations by six weeks.⁹⁵ Pursuant to Secretary Azar’s declaration (renewed on multiple occasions for ninety days), HHS rapidly executed specific grants and contracts, conducted and supported disease investigation and response efforts,⁹⁶ and waived specific health laws inhibiting emergency response efforts.⁹⁷

On the same day of his initial PHE declaration, Secretary Azar also issued an emergency declaration via the PREP Act.⁹⁸ This distinct emergency invocation had three primary purposes. First, it authorized rapid development, distribution, and implementation of federally

93. 42 U.S.C. § 247d(a). Over the last 2 decades, federal PHE declarations have been issued in response to manifold events, including Hurricane Katrina (2005), the H1N1 pandemic (2009–2010), the opioid epidemic (2017), and the Marburg virus (2020). *E.g.*, Notice of Declaration Under the Public Readiness and Emergency Preparedness Act for Countermeasures Against Marburgvirus and/or Marburg Disease, 85 Fed. Reg. 79,198 (Dec. 9, 2020).

94. Press Release, Alex Azar, Sec’y of Dep’t of Health & Hum. Servs., Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus (Jan. 31, 2020), <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html> [<https://web.archive.org/web/20210814142045/https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>].

95. Donald Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak> [<https://perma.cc/E6PF-AALB>].

96. *Public Health Emergency Declaration*, U.S. DEP’T. OF HEALTH & HUM. SERVS. (Nov. 26, 2019), <https://www.phe.gov/Preparedness/legal/Pages/phdeclaration.aspx> [<https://perma.cc/4Z2L-NHZJ>] (explaining that, pursuant to PHSA § 319, if HHS’s Secretary determines that a disease or disorder presents a PHE, he or she may, inter alia, “[t]ake appropriate actions in response to the emergency consistent with other authorities” such as entering contracts, accessing funds to rapidly respond, and making temporary personnel appointments to positions that respond to the PHE).

97. 42 U.S.C. § 1320b-5. The statute allows HHS’s Secretary “to waive or modify certain requirements of Medicare, Medicaid, the State Children’s Health Insurance Program, and the Health Insurance Portability and Accountability Act, and other provisions related to certification or licensing of health care providers, sanctions related to physician referrals, patient transfers, deadlines and other penalties.” ELSEA ET AL., *supra* note 90, at 28, 38.

98. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198 (Mar. 17, 2020).

approved medical countermeasures (MCMs) (including medicines, tests, supplies, and vaccines).⁹⁹ Second, it provided a level of immunity from liability claims grounded in negligence for manifold persons or entities involved in MCM development and administration.¹⁰⁰

Third, the declaration supported broad preemption of state or local actions contravening federal directives related to MCMs.¹⁰¹ In October 2020, for example, Nevada health authorities restricted use of a federally approved MCM, specifically a COVID-19 test they deemed inaccurate for use in nursing facilities.¹⁰² HHS retorted that the PREP Act declaration authorizing use of the COVID-19 test negated Nevada's objections.¹⁰³ Admiral Brett Giroir, HHS Assistant Secretary for Preparedness and Response, clarified that under federal law, "PREP Act coverage preempts any state or local provision of law or legal requirement that prohibits or effectively prohibits . . . licensed health-care practitioners from administering or prescribing FDA-authorized

99. PHSA, 42 U.S.C. § 247d-6a. "[Q]ualified countermeasure' means a drug . . . , biological product . . . , or device . . . that the Secretary determines to be a priority . . . to diagnose, mitigate, prevent, or treat harm from any biological agent (including organisms that cause an infectious disease) . . . that may cause a [PHE] affecting national security." *Id.*

100. *Id.* § 247d-6d(a)(1) (explaining the liability protections for MCMs).

101. *Id.* § 247d-6d(a)(8); Robert P. Charrow, U.S. Dep't. Health & Hum. Servs. Advisory Opinion 21-01 on the Public Readiness and Emergency Preparedness Act Scope of Preemption Provision 2 (Jan. 8, 2021) <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/2101081078-jo-advisory-opinion-prep-act-complete-preemption-01-08-2021-final-hhs-web.pdf> [<https://perma.cc/3B59-BYKH>] (reinforcing the complete preemptive federal jurisdiction of the PREP Act for cases in which it is a defense). "The *sine qua non* of a statute that completely preempts is that it establishes either a federal cause of action, administrative or judicial, as the only viable claim or vests exclusive jurisdiction in a federal court. The PREP Act does both." *Id.*

102. Katherine J. Wu, *Nevada Halts Use of Rapid Coronavirus Tests in Nursing Homes, Citing Inaccuracies*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/10/07/health/nevada-covid-testing-nursing-homes.html> (explaining that rapid tests manufactured by Quidel and Becton, Dickinson and Company showed a spate of false-positive results, triggering a statewide order to discontinue use of the products).

103. Barbara J. Evans & Ellen Wright-Clayton, *Federal COVID-19 Response Unlawfully Blocks State Public Health Efforts*, PETRIE-FLOM CENTER AT HARVARD L. (Oct. 22, 2020), <https://blog.petrieflom.law.harvard.edu/2020/10/22/federal-covid19-response-nevada-preemption> [<https://perma.cc/3ANU-H6AR>] (explaining that in October 2020, HHS sent a letter to Nevada officials threatening that the discontinued use of the rapid test action was "inconsistent with and preempted by federal law and, as such, must cease immediately or appropriate action will be taken against those involved," prompting Nevada to comply and remove its directive one day later).

COVID-19 tests.”¹⁰⁴ The federal position was clear: state officials had to allow use of the test despite their reservations over its accuracy and utility. Later, HHS’s PREP Act declaration was amended to preempt contrary state laws related to medical licensure and personnel needed to distribute and administer vaccinations,¹⁰⁵ despite clear federal intrusions on the domain of state-based professional regulatory boards.

Federal emergency powers extended even further. CMS waived a litany of regulations to enable wider uses of telehealth across publicly funded health services.¹⁰⁶ FDA issued multiple emergency use authorizations (EUAs) to usher yet-to-be-approved medical tests, treatments, devices, and vaccines to market¹⁰⁷ (including some products proven later to be ineffective).¹⁰⁸ CDC flexed its regulatory

104. Letter from Brett P. Giroir, Assistant Sec’y for Preparedness & Response, to Nevada Dep’t of Health, HHS Response to Nevada Bulletin on POC Antigen Testing (Oct. 8, 2020), <https://skillednursingnews.com/wp-content/uploads/sites/4/2020/10/Final-Letter-and-Attachment-Responding-to-Nevada-Bulletin-SIGNED-10.8.20.pdf> [<https://perma.cc/G5CL-EXRW>].

105. U.S. Dep’t. Health & Hum. Servs., Advisory Opinion 20-02 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration Under the Act, (May 19, 2020), <https://www.hhs.gov/sites/default/files/advisory-opinion-20-02-hhs-ogc-prep-act.pdf> [<https://perma.cc/DV9F-SDUC>]; *see also* Fifth Amendment to Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 86 Fed. Reg. 7872 (Feb. 2, 2021), (“[A]ny State law that would otherwise prohibit the healthcare professionals who are a ‘qualified person’ from prescribing, dispensing, or administering COVID-19 vaccines is preempted.”).

106. CMS, COVID-19 EMERGENCY DECLARATION BLANKET WAIVERS FOR HEALTH CARE PROVIDERS 1 (2021), <https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf> [<https://perma.cc/P9PP-DXJE>]. Pursuant to the HHS Secretary’s authorization of telehealth waivers, “CMS is waiving the requirements of section 1834(m)(4)(E) of the Act and 42 CFR § 410.78 (b)(2) The waiver of these requirements expands the types of health care professionals that can furnish distant site telehealth services to include all those that are eligible to bill Medicare for their professional services.” *Id.*

107. *Emergency Use Authorization*, FDA, <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#vaccines> [<https://perma.cc/Y55W-U55A>] (“The HHS Secretary declared that circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic, pursuant to section 564 of the FD&C Act, effective March 27, 2020.”); FDA, Emergency Use Authorization of Medical Products & Related Authorities, Guidance for Industry & Other Stakeholders; Availability, 82 Fed. Reg. 4362 (U.S. Dep’t of Health & Hum. Servs., Jan. 13, 2017).

108. Press Release, FDA, Coronavirus (COVID-19) Update: FDA Revokes Emergency Use Authorization for Chloroquine and Hydroxychloroquine (June 15,

interstate disease control powers to quarantine entire planeloads of Americans early in the pandemic.¹⁰⁹

An extensive series of real-time legislative enactments approved by President Trump in 2020 supplemented existing federal emergency authorities. These include the Families First Coronavirus Response Act¹¹⁰ (passed on March 18), CARES Act¹¹¹ (March 27), the Paycheck Protection Program and Healthcare Enhancement Act¹¹² (April 24),

2020), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-revokes-emergency-use-authorization-chloroquine-and> [<https://perma.cc/X9WN-NYLL>] (explaining that the FDA revoked its EUA for hydroxychloroquine and chloroquine because the drugs are “unlikely to be effective in treating COVID-19 for the authorized uses in the EUA,” and that the “known and potential benefits” of the drugs “no longer outweigh” the risks—which can include “serious cardiac adverse events and other potential serious side effects”).

109. Media Statement, CDC, HHS and CDC Receive Flight Carrying Repatriated US Citizens (Jan. 29, 2020), <https://www.cdc.gov/media/releases/2020/s0129-repatriated-US-citizens.html> [<https://perma.cc/2N65-DYZ5>] (reporting that on January 29, 2020, “HHS [and the CDC] in collaboration with the Department of State received the flight carrying approximately 210 U.S. citizens from Wuhan at March Air Reserve Base in California”). Multiple additional flights of Americans seeking to return to the United States from affected regions were similarly handled in the weeks ahead by CDC and other federal authorities. Confrontations in California and Texas arose leading to litigation over how best to handle the re-introduction of quarantined Americans into society. Minyvonne Burke, *Couple on Grand Princess Cruise Ship Carrying Coronavirus Patients Sues for \$1 Million*, NBC NEWS (Mar. 10, 2020, 1:33 PM), <https://www.nbcnews.com/news/us-news/couple-grand-princess-cruise-ship-carrying-coronavirus-patients-sues-1-n1154291> [<https://perma.cc/2BRQ-7NXU>].

110. Pub. L. No. 116-127, 134 Stat. 178, 182, 204 (2020) (assuring, among other objectives, private health plans that provide \$0 cost coverage for COVID-19 tests, temporarily increasing federal portion of Medicaid expenditures to states, and requiring 14 days of paid sick leave for certain employees).

111. Pub. L. No. 116-136, 134 Stat. 281 (2020) (requiring insurance providers to cover COVID-19 testing, vaccines, and preventative services, protecting volunteer health care workers from liability, initiating a limited duration eviction moratorium impacting residential properties, and crafting substantial economic relief for Americans); see also *Fact Sheet: The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. DEP’T TREASURY (Mar. 18, 2021), <https://home.treasury.gov/policy-issues/cares/assistance-for-american-workers-and-families> [<https://perma.cc/3YPV-TKUW>] (“Through this third round of Economic Impact Payments, the [Treasury Department] and [IRS] are ensuring that Americans will receive fast and direct relief during the final phase of the COVID-19 crisis.”).

112. Pub. L. No. 116-139, 134 Stat. 620, 622 (2020) (providing additional funding for hospitals and providers, supporting testing and contact tracing efforts, requiring states to submit COVID-19 testing plans, and instructing HHS’s Secretary to report on testing, cases, and deaths).

and the Consolidated Appropriations Act¹¹³ (December 27). Collectively, these acts directly authorized federal public health interventions and provided unprecedented economic relief to individuals and businesses, alleviating some correlated risks to physical and mental health.

From the onset of his inauguration, President Biden sought considerably more aggressive, “wartime” strategic responses framed around national security and global prioritization¹¹⁴ and enhanced federal roles and responsibilities toward:

1. implementing a comprehensive, domestic vaccination program;¹¹⁵
2. prioritizing CDC’s national standards for disease control;¹¹⁶
3. supporting CDC’s mask policy across all transportation hubs nationally;¹¹⁷

113. Pub. L. No. 116-260, 134 Stat. 1056 (2020) (providing \$900 billion in stimulus relief for COVID-19 and \$1.4 trillion omnibus spending bill for 2021’s federal fiscal year, supplementing the CARES Act Paycheck Protection Program, expanding Medicare access to telemedicine mental health services, mitigating cuts to physician payments, providing \$3 billion in increased physician services, establishing new Rural Emergency Hospital Medicare designations, and providing a one-month extension of the CDC’s eviction moratorium which lapsed on December 31, 2020).

114. Meg Wagner et al., *Biden’s First Full Day in Office*, CNN POL. (Jan. 21, 2021, 9:48 PM), https://www.cnn.com/politics/live-news/president-joe-biden-news-01-21-20/h_1122c1996b539ee2bf80006978126494 [<https://perma.cc/F434-5X3X>] (“President Biden called his plan to tackle the coronavirus pandemic ‘a wartime undertaking,’ [stating.] ‘Our national plan launches a full-scale wartime effort to address the supply shortages by ramping up production and protective equipment, syringes, needles, you name it.’”).

115. Alice Park, *Biden’s First Three Steps to Getting COVID-19 Vaccines to Every American*, TIME (Jan. 27, 2021), <https://time.com/5933825/biden-new-vaccine-plan> (reporting that the Biden administration’s first step in tackling the pandemic would be to “increase minimum weekly shipments of vaccines to states to 10 million doses, from the current 8.6 million”).

116. Brian J. Gerber & Melanie Gall, *One Month in, How Biden Has Changed Disaster Management and the U.S. COVID-19 Response*, CONVERSATION (Feb. 18, 2021), <https://theconversation.com/one-month-in-how-biden-has-changed-disaster-management-and-the-us-covid-19-response-155440> [<https://perma.cc/9WKV-PW8M>] (noting the distinct approach the Biden administration has taken in response to the coronavirus as compared to the Trump administration and applauding its early efforts to return to established disaster management practice and increase the involvement of experienced federal agencies).

117. Press Release, CDC, CDC Requires Wearing of Face Masks While on Public Transportation and at Transportation Hubs (Jan. 30, 2021), <https://www.cdc.gov/media/releases/2021/p0130-requires-face-masks.html> [<https://perma.cc/6K27-BL5U>]; see also Exec. Order No. 139,898, 86 Fed. Reg. 7205–06 (Jan. 26, 2021)

4. hiring 100,000 new public health workers;¹¹⁸
5. increasing access to testing, including a new FDA-authorized at-home test;¹¹⁹
6. expediting the manufacture of vaccines and other essential products through the Defense Production Act¹²⁰ (DPA);¹²¹
7. overhauling public health data surveillance and reporting;¹²²
8. reopening schools and businesses safely,¹²³
9. expanding access to health care services via the Affordable Care Act;¹²⁴ and

(stating that agency leaders may not preempt “[s]tate, local, Tribal, and territorial laws” that provide greater public health protection”).

118. Berkeley Lovelace, *Biden on Ambitious Covid Rescue Plans: ‘I Will Always Be Honest with You’*, CNBC (Jan. 14, 2021), <https://www.cnn.com/2021/01/14/biden-unveils-sweeping-plan-to-combat-the-covid-pandemic-in-the-us.html> [https://perma.cc/2U MX-XPS5] (explaining that the rescue plan calls for 100,000 new health-care jobs and additional National Guard assistance to frontline workers).

119. Armour & Siddiqui, *supra* note 52 (explaining that the Biden plan includes a large deal with an Australian manufacturer to produce millions of “at-home, over-the-counter Covid-19 tests that had previously been authorized by [FDA]”).

120. 50 U.S.C. § 4511(a).

121. See Sydney Lupkin, *Defense Production Act Speeds Up Vaccine Production*, NPR (Mar. 13, 2021), <https://www.npr.org/sections/health-shots/2021/03/13/976531488/defense-production-act-speeds-up-vaccine-production> [https://perma.cc/58EX-CL8X] (explaining the DPA increased vaccine manufacture by equipping two vaccine production centers with updated supplies, machines, and safety equipment).

122. Amy Maxmen & Nidhi Subbaraman, *Biden’s Ambitious COVID Plan: What Scientists Think*, NATURE (Jan. 26, 2021), <https://www.nature.com/articles/d41586-021-00220-x> (stating that the Biden plan “calls for a better online dashboard for tracking the prevalence of the virus in cities and towns across the United States . . . [and] pledges to enhance data analysis at hospitals and health departments, and to modernize data systems used within the US healthcare system”).

123. Lauren Camera, *Biden Details Plan for Reopening Schools*, U.S. NEWS (Jan. 21, 2021), <https://www.usnews.com/news/education-news/articles/2021-01-21/biden-details-plan-for-reopening-schools> (explaining that on its first day in office, the Biden administration laid out detailed plans to open the country’s public school system for in-person learning “nearly 10 months after the coronavirus pandemic shuttered classrooms for 50 million children”).

124. Sheryl Gay Stolberg, *Pandemic Relief Bill Fulfills Biden’s Promise to Expand Obamacare, for Two Years*, N.Y. TIMES, <https://www.nytimes.com/2021/03/08/us/politics/obamacare-biden.html> (June 17, 2021) (stating that President Biden ordered Affordable Care Act’s health insurance marketplaces to reopen in January 2021 and “restore coverage mandates that had been undermined by his predecessor, including protecting those with pre-existing medical conditions”).

10. assuring equity across racial, ethnic, socio-economic, and other bases.¹²⁵

President Biden's ascension marked a turning point in the nationalization of COVID-19 responses. States retained key roles in executing the administrations' national strategy, but core objectives and plans to combat COVID-19 were indubitably recast as federal in nature.¹²⁶

On March 11, 2021, President Biden signed the American Rescue Plan Act¹²⁷ (ARPA), infusing billions of dollars into COVID-19 response efforts based on expanded federal priorities consistent with the national strategic plan.¹²⁸ ARPA provided desperately needed infusions of federal resources to state and local governments to combat COVID-19, including direct funds to detect and trace infections, expand the public health workforce, support existing community health centers (including mental health services), and purchase, distribute, and administer COVID-19 vaccinations and other therapeutics.¹²⁹ States' receipt of \$350 billion in federal relief funds

125. Candice Norwood, *Biden Has a Plan to Address COVID-19 Disparities. Here's What Experts Recommend*, PBS (Feb. 5, 2021), <https://www.pbs.org/newshour/politics/biden-has-a-plan-to-address-covid-19-disparities-heres-what-experts-recommend> [<https://perma.cc/H9ZD-JSQT>] (explaining that the Biden plan committed to making equity a key focus of the nation's COVID-19 response, with specific goals to "improve data collection on high-risk groups; provide equitable access to vaccines, tests and personal protective equipment; expand the public health workforce and fund assistance for social services like child care and paid sick leave" as well as create a health equity task force).

126. See Armour & Siddiqui, *supra* note 52 (noting "[i]n his first month in office, President Biden has positioned the federal government squarely at the front of the battle against Covid-19" while continuing regular communication with state leaders); German Lopez, *Biden's New National Plan to Fight Covid-19, Explained*, VOX (Jan. 21, 2021), <https://www.vox.com/future-perfect/22241060/biden-covid-19-coronavirus-executive-actions-orders-mask-mandate> (explaining that the general idea of the Biden plan "is that the federal government should take a more hands-on strategy," entrusting CDC, FEMA and various federal agencies to lead the effort).

127. Pub. L. No. 117-2, 135 Stat. 2 (2021).

128. Emily Cochrane, *Congress Clears \$1.9 Trillion Aid Bill, Sending It to Biden*, N.Y. TIMES, <https://www.nytimes.com/2021/03/10/us/politics/covid-stimulus-bill.html> (Mar. 30, 2021) (explaining that President Biden's relief plan provides multiple benefits to assist Americans with financial hardships during the pandemic).

129. Molly Ramsdell et al., *What It Means for States: The American Rescue Plan Act Provisions*, NAT'L CONF. STATE LEGISLATURES (Mar. 10, 2021), https://www.ncsl.org/Portals/1/Documents/statefed/The-American-Rescue-Plan-Act-Provisions_v01.pdf [<https://perma.cc/KN7K-QX9N>].

also included a unique, “clawback” condition.¹³⁰ In essence, any federal relief funds used to offset state tax cuts during the ensuing three years of receipt must be returned to the federal Department of the Treasury.¹³¹ On March 16, 2021, twenty-one state attorneys general¹³² jointly objected to ARPA’s refund provision, arguing unconstitutional interference with state tax authorities.¹³³

III. PARADIGMS FOR NATIONAL EMERGENCY LEGAL RESPONSE

Despite ongoing state resistance to national legal maneuvers on constitutional, political, and other grounds, an enhanced federal presence in pandemic response efforts immediately impacted public health outcomes. Since the commencement of the Biden administration through early summer 2021, rates of COVID-19 infections plateaued¹³⁴ along with related hospitalizations.¹³⁵

130. Amanda Albright, *U.S. Offers States \$350 Billion in Aid, with Conditions*, BLOOMBERG (May 10, 2021, 2:54 PM), <https://www.bloomberg.com/news/articles/2021-05-10/u-s-offers-states-350-billion-in-virus-aid-with-conditions> [<https://perma.cc/N2B8-PQT5>].

131. Stephen Kranz, Mary Kay McCalla Maritire & Richard C. Call, *Federal COVID-19 Relief Bill Brings State Tax Policy to a Grinding Halt*, NAT’L L. REV. (Mar. 16, 2021), <https://www.natlawreview.com/article/federal-covid-19-relief-bill-brings-state-tax-policy-to-grinding-halt> [<https://perma.cc/5LPT-DWK8>].

132. Letter from State Attorneys General to Secretary Janet L. Yellen, Treasury Action to Prevent Unconstitutional Restriction on State’s Fiscal Policy through American Rescue Plan Act of 2021 (Mar. 16, 2021), <https://law.georgia.gov/press-releases/2021-03-16/carr-urges-feds-respect-states-ability-cut-taxes> [<https://perma.cc/QA2J-FCRE>] (reporting that attorneys general signing the letter include representatives from Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming).

133. *Id.* (summarizing Georgia Attorney General Chris Carr by saying “[a]s it is written, the [ARPA] could be used to deny Georgia the ability to cut taxes in any manner for years to come . . . [and] it would amount to an unprecedented federal takeover of state tax policy and would represent the greatest attempted invasion of state sovereignty by Congress ever”).

134. Brandon Dupré et al., *More Than 40 States Say They Will Meet or Beat Biden’s May 1 Deadline for Vaccine Eligibility for All Adults*, N.Y. TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/24/us/covid-vaccine-eligibility.html> (“With new cases plateauing, ‘I don’t think you can declare ‘victory’ and say you’ve turned the corner,’ said Dr. Fauci . . . ‘You’ve got to continue to do what we’re doing: more vaccinations and continue to do public health measures until we actually do turn the corner.’”).

135. Derek Thompson, *COVID-19 Cases Are Dropping Fast. Why?*, ATLANTIC (Feb. 17, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/why-covid-19-cases-are-falling-so-fast/618041> [<https://perma.cc/XT2W-REDV>] (explaining that in late

Vaccinations have escalated weekly.¹³⁶ Over ninety-two million Americans were vaccinated (at least partially) in the first sixty-six days of the new administration¹³⁷ well ahead of President Biden's initial target of 100 million vaccines in 100 days.¹³⁸ Viable plans to safely reopen schools¹³⁹ and businesses¹⁴⁰ emerged. Rapid economic recoveries were projected in some sectors.¹⁴¹ While the emergence of the virulent Delta strain of COVID-19 in mid-summer 2021

February 2021, data showed new daily COVID infections were dropping and hospitalization rates decreasing, due not only to increased vaccination rates but also possibly due to decreased travel and cautious behavior amongst Americans).

136. See, e.g., Pien Huang & Audrey Carlson, *How Is the COVID-19 Vaccination Going in Your State?*, NPR (Mar. 30, 2021), <https://www.npr.org/sections/health-shots/2021/01/28/960901166/how-is-the-covid-19-vaccination-campaign-going-in-your-state> [<https://perma.cc/U6S7-DBJE>] (noting that although the launch of the vaccine campaign was initially slow, the United States began administering two million shots per day by early March).

137. *COVID-19 Vaccinations in the United States*, CDC (Mar. 28, 2021), <https://covid.cdc.gov/covid-data-tracker/#vaccinations> [<https://perma.cc/JZ3M-B8CT>].

138. Justine Coleman & Aime Pares, *Biden's New Goal Is 200 Million COVID-19 Vaccinations in First 100 Days*, HILL (Mar. 25, 2021), <https://thehill.com/policy/healthcare/544917-biden-to-announce-updated-goal-of-200-million-covid-19-vaccinations-in> [<https://perma.cc/24UL-BLRM>]. In late March 2021, President Biden announced a new goal of 200 million COVID-19 vaccinations in his first 100 days in office. *Id.*

139. *Operational Strategy for K-12 Schools Through Phased Prevention*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html> [<https://perma.cc/T3GW-X3VE>] (“CDC’s K-12 operational strategy presents a pathway for schools to provide in-person instruction safely through consistent use of prevention strategies, including universal and correct use of masks and physical distancing.”). As of March 19, 2021, CDC set forth revised physical distancing recommendations “to reflect at least 3 feet between students in classrooms and provide clearer guidance when a greater distance (such as 6 feet) is recommended.” *Id.*

140. U.S. OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA 3990-03, GUIDANCE ON PREPARING WORKPLACES FOR COVID-19 (2020), <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf> [<https://perma.cc/HF7H-QNUL>] (noting that OSHA developed COVID-19 planning guidance “based on traditional infection prevention and industrial hygiene practices [that] . . . focuses on the need for employers to implement engineering, administrative, and work practice controls and personal protective equipment (PPE), as well as considerations for doing so”).

141. Jim Tankersley, *The Economy Is Improving Faster Than Expected, the U.S. Budget Office Says*, N.Y. TIMES, <https://www.nytimes.com/2021/02/01/business/economy/cbo-economy-estimate.html> (Apr. 6, 2021) (projecting that “[t]he American economy will return to its pre-pandemic size by the middle of this year . . . [as] a result of large sectors of the economy adapting better and more rapidly to the pandemic than originally expected”).

contributed to a new wave of cases largely among the unvaccinated,¹⁴² returns to some level of normalcy in many parts of the country remained in sight.

Whether execution of President Biden's COVID-19 strategic plan is a primary contributing factor to initial, positive health trends is inconclusive. The prior administration's generation of vaccines is a primary catalyst.¹⁴³ So are natural immunities among Americans previously infected with COVID-19 at rates likely far higher than known through confirmed test results.¹⁴⁴ Continued applications of social distancing measures, donning of masks in public, and wider access to COVID-19 tests insulate significant portions of the population from disease spread.

Even less certain is the extent to which the new national strategy provides a definitive blueprint to quell future PHEs. The next major infectious disease threat may not assimilate COVID-19. Pandemic diseases are defined by their unique factors including (1) the source of spread (e.g., whether natural or via bioterrorism); (2) mode and ease of transmission (e.g., airborne, blood-borne, sexual, or other routes); (3) affected populations (e.g., infants, adolescents, adults, elderly); (4) timing (e.g., specific seasons, economic downturns); and (5) actual morbidity and mortality (e.g., rates of short- and long-term

142. HEATHER M. SCOBIE ET AL., CDC, MOBILITY & MORTALITY WEEKLY REPORT: MONITORING INCIDENCE OF COVID-19 CASES, HOSPITALIZATIONS, AND DEATHS, BY VACCINATION STATUS — 13 U.S. JURISDICTIONS, APRIL 4–JULY 17, 2021 1248 (Sept. 10, 2021) (reporting substantially higher rates of COVID-19 cases, hospitalizations, and deaths in unvaccinated persons due largely to the emergence of the Delta strain).

143. MARK W. TENFORDE ET AL., CDC, MORBIDITY & MORTALITY WEEKLY REPORT: EFFECTIVENESS OF PFIZER-BIONTECH AND MODERNA VACCINES AGAINST COVID-19 AMONG HOSPITALIZED ADULTS AGED ≥65 YEARS — UNITED STATES, JANUARY–MARCH 2021 674 (May 7, 2021) (indicating the Pfizer and Moderna COVID-19 vaccines were 94% effective at preventing hospitalization against fully vaccinated adults sixty-five years of age and younger).

144. *COVID-19 Infections in the U.S. Nearly Three Times Greater Than Reported, Model Estimates*, U.T. SW. MED. CTR. (Feb. 8, 2021), <https://www.utsouthwestern.edu/newsroom/articles/year-2021/covid-19-infections-in-the-us-nearly-three-times-greater-than-reported.html> [<https://perma.cc/T445-U2LM>] (estimating that the number of COVID-19 cases in the United States since the pandemic began could be nearly three times that of confirmed cases); Dylan Walsh, *COVID-19 Cases Are 12 Times Higher Than Reported*, MIT MGMT. SLOAN SCH., (July 2, 2020), <https://mitsloan.mit.edu/ideas-made-to-matter/covid-19-cases-are-12-times-higher-reported> [<https://perma.cc/SJ8S-AZ8J>] (estimating COVID infections are twelve times higher than previously reported and “the magnitude of the epidemic is widely underreported”).

injuries and deaths).¹⁴⁵ Public health interventions proven to stymie one disease may not be effective in response to future menaces.

What is known, however, is the drastic need to improve on America's national and regional public health response efforts to quash the current pandemic and prepare for the next threat.¹⁴⁶ Public health preparedness relies heavily on emergency laws and policies to authorize response efforts. To this end, the national game plan for emergency legal preparedness and response in the twenty-first century is changing. As discussed below, new paradigms for U.S. domestic responses are arising from the COVID-19 pandemic in several key themes including national security, interstate commerce authority, MCMs, conditional spending, preemption, and states' roles.

A. National Security

Presidents Trump¹⁴⁷ and Biden¹⁴⁸ both characterized the COVID-19 pandemic as a national security threat. These are not idle

145. David M. Morens & Anthony S. Fauci, *Emerging Infectious Diseases: Threats to Human Health and Global Stability*, PLOS PATHOGENS (July 4, 2013), <https://journals.plos.org/plospathogens/article?id=10.1371/journal.ppat.1003467> [<https://perma.cc/TBR5-ZZH3>] (defining emerging and reemerging infectious diseases and the distinct means of transmission, death rates, spread and progression of each, as well as the “dynamic relationships between microorganisms, human hosts, and the environment”); *see also* Jean Maguire van Seventer & Natasha S. Hochberg, *Principles of Infectious Diseases: Transmission, Diagnosis, Prevention, and Control*, in 6 INT'L ENCYCLOPEDIA PUB. HEALTH 22 (2d ed. 2017) (highlighting the combination of agent, host, and environmental factors that cause infectious disease).

146. *See, e.g.*, J. Edwin Benton, *Challenges to Federalism and Intergovernmental Relations and Takeaways Amid the COVID-19 Experience*, 50 AM. REV. PUB. ADMIN. 536, 537–40 (2020) (examining how federal-state relations broke down during the COVID-19 pandemic).

147. Exec. Order No. 13,944, 85 Fed. Reg. 49,929 (Aug. 6, 2020). President Trump issued this executive order during the summer of 2020 to protect “against outbreaks of emerging infectious diseases . . . [with] domestic supply chains [that are] capable of meeting national security requirements for responding to threats arising from [chemical, biological, radiological, and nuclear (CBRN)] threats and [PHEs], including emerging infectious diseases such as COVID-19.” *Id.* The Order calls upon DHS and FDA, among other federal agencies, to assist in the COVID-19 response by accelerating the development of essential medicines and medical countermeasures. *Id.*

148. National Security Memorandum on United States Global Leadership to Strengthen the International COVID-19 Response and to Advance Global Health Security and Biological Preparedness (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/21/national-security-directive-united-states-global-leadership-to-strengthen-the-international-covid-19-response-and-to->

pronouncements. Invoking the cloak of national security around an infectious disease or other public health condition follows prior classifications¹⁴⁹ enabling greater responses internationally¹⁵⁰ and preeminent control over domestic responses to conditions impacting the nation's health.¹⁵¹

Exclusive federal authority to address national security is grounded in multiple constitutional provisions¹⁵² and statutes. In addition to extensive powers emanating from national emergency declarations,¹⁵³ the President can coordinate effective plans and responses on issues

advance-global-health-security-and-biological-preparedness [<https://perma.cc/K3MP-JSY5>].

149. Public health threats like infectious diseases or bioterrorism were not historically perceived as national security interests. *See, e.g.*, David P. Fidler, *Public Health and National Security in the Global Age: Infectious Diseases, Bioterrorism, and Realpolitik*, 35 GEO. WASH. INT'L L. REV. 787, 791–92 (2003). In the late 1980s, the scope of national security began to expand. In January 2000, CIA issued a report detailing specific impacts on national security of infectious diseases resulting in a high number of deaths, delaying economic or political developments, causing travel restrictions, or increasing the probability of an attack against the United States. *See* NAT'L INTEL. COUNCIL, NIE 99-17D, *The Global Infectious Disease Threat and Its Implications for the United States* 10–11 (2000), https://www.dni.gov/files/documents/infectiousdiseases_2000.pdf [<https://perma.cc/93PS-VD72>] (discussing the implications of infectious diseases for U.S. national security). Consequently, multiple public health threats have garnered increasing interest in Presidential and NSC reports, statements, and press releases. JENNIFER BROWER & PETER CHALK, RAND CORP., *THE GLOBAL THREAT OF NEW AND REEMERGING INFECTIOUS DISEASES: RECONCILING U.S. NATIONAL SECURITY AND PUBLIC HEALTH POLICY*, 75–76 (2003). For a listing of infectious diseases or bioterrorism threats previously classified as national security threats or priorities, see James G. Hodge, Jr. & Kim Weidenaar, *Public Health Emergencies as Threats to National Security*, 9 J. NAT'L SEC. L. & POL'Y 81, 87 (2017).

150. Foreign Assistance Act, 22 U.S.C. § 2151 (authorizing coordinated efforts to provide humanitarian aid and relief abroad); *see, e.g.*, Exec. Order No. 13,155, 3 C.F.R. 1059 (May 10, 2000) (specifying the United States should work with countries in sub-Saharan Africa to assist them in preventing HIV/AIDS transmission and infection).

151. Hodge & Weidenaar, *supra* note 149, at 82–83 (analyzing the benefits of a re-conceptualization of PHEs in terms of national security and noting that “[t]o the extent characterizing emerging diseases or acts of bioterrorism as emergencies (despite sometimes specious risks) results in response efforts that greatly limit negative public health impacts, such classifications may be warranted”).

152. U.S. CONST. art. 1, § 8; *id.* art. 2 § 2; *id.* art. 4 § 4. Article 1, section 8 establishes national defense as an exclusive federal role and authorizes Congress to declare war and provide for the common defense. Article 2, section 2 establishes the President as Commander in Chief. Article 4, section 4 guarantees a republican form of government and State protection from invasion.

153. *See supra* Part II.

implicating national security¹⁵⁴ and allocate materials, services, and facilities to promote national defense and control market forces.¹⁵⁵ Congress passed the Project BioShield Act¹⁵⁶ in 2004, for example, to improve public health infrastructure and MCMs related to chemical, biological, radiological, or nuclear threats and increase biosurveillance of harmful pathogens.¹⁵⁷ Project BioShield authorizes DHS's Secretary to issue material threat determinations and fund essential MCMs,¹⁵⁸ such as Operation Warp Speed, which helped produce COVID-19 vaccines.¹⁵⁹

Juxtaposition of national security powers in a federalist infrastructure does not displace the role of states in protecting the public's health, but the supremacy of corresponding federal interests may negate their conflicting responses.¹⁶⁰ Wielded to their fullest potential, these constitutionally grounded, federal powers signal a new age of national public health response efforts when the health and economy of the United States are at direct risk.

B. Interstate Commerce Authority

One of the unpredictable facets of the Trump administration's pandemic response efforts was its yo-yo-like policies related to the use

154. The National Security Act of 1947 established the National Security Council (NSC) and Central Intelligence Agency (CIA) and restructured military forces to gather data and contribute to executive responses. NSC advises the President on foreign and domestic matters of national security to appropriately coordinate effective plans and responses. 50 U.S.C. § 3021–35.

155. Defense Production Act of 1950, 50 U.S.C. §§ 4501–68.

156. 42 U.S.C. § 247d-6b.

157. *Id.*; HARLEY FELDBAUM, U.S. GLOBAL HEALTH AND NATIONAL SECURITY POLICY: A REPORT OF THE CSIS GLOBAL HEALTH POLICY CENTER 9 (2009), http://csis.org/files/media/csis/pubs/090420_feldbaum_usglobalhealth.pdf [<https://perma.cc/Z8U5-Y2HF>].

158. § 247d-6b(c)(2).

159. Dylan Scott, *Trump's Operation Warp Speed Could Be a Success. The Problem Is Trump*, VOX (Oct. 7, 2020), <https://www.vox.com/coronavirus-covid19/2020/10/7/21504134/trump-covid-19-vaccine-operation-warp-speed-debate> (explaining that the Project Bioshield Act, originally set up “to encourage drug makers to develop vaccines that would be used in the event of a bioterrorist attack,” has never been used in a PHE but would be put to good use with Operation Warp Speed).

160. Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1732, 1735–36 (2011), (confirming public health risks have “become folded into the national security framework” and the expansive role of the federal government in national security efforts in its “ability to respond to both biological weapons and naturally occurring disease”).

of federal interstate commerce authority. President Trump oscillated on the capacity of the federal government to dictate or influence specific social distancing measures across states and limit state interventions impacting national economic issues.¹⁶¹ In deference to states' sovereignty, the federal administration largely allowed states to impose divergent border and travel restrictions during the pandemic despite clear intrusions on national commerce.¹⁶²

At the same time, federal authorities seemed to underutilize their own powers to regulate the channels and instrumentalities of commerce, as well as factors substantially affecting commerce.¹⁶³ Federal authority to regulate national commerce is supreme but not plenary. Under principles of federalism, the President's authority is at its zenith when it is consistent with clear delegations of congressional power even during declared emergencies, disasters, or PHEs. While emergency powers of the President, HHS Secretary, and other federal officials are extensive, they do not include *carte blanche* authority to regulate in the interests of interstate commerce, notwithstanding occasional, contrary assertions by President Trump.¹⁶⁴

161. Morgan Chalfant & Brett Samuels, *Trump Eases Back on Asserting Power Over Governors on Reopening*, HILL (Apr. 14, 2020) (noting that President Trump did not answer when “[a]sked whether he would suspend funding to states if governors didn’t agree [with] him,” but stated instead that “[t]he president of the United States has the authority to do what the president has the authority to do, which is very powerful”).

162. See Kathleen Hamann & Andrea Cianchette Maker, *Crossing State Lines During the COVID-19 Pandemic: Self-Quarantine Requirements*, NAT’L L. REV. (Apr. 7, 2020), <https://www.natlawreview.com/article/crossing-state-lines-during-covid-19-pandemic-self-quarantine-requirements> [<https://perma.cc/A8D2-65J2>] (noting that “[b]oth the federal government and the states have the authority to impose quarantines and travel restrictions to protect the health, safety, and welfare of residents”). “As of April 3, 2020, Maine, Massachusetts, Rhode Island, and Vermont have issued orders requiring travelers from outside their respective states to self-quarantine for 14 days upon arrival, unless they are traveling for essential reasons. Ten other states across the country have similar, although generally less restrictive, orders.” *Id.*

163. *Cf.* *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (outlining how the interstate commerce power allows regulation of three major categories of activity: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 546–58 (2012) (emphasizing that the Supreme Court’s cases “uniformly describe the power [to regulate commerce] as reaching ‘activity’”).

164. Daniel Dale, *Fact Check: Trump Falsely Claims the President Has ‘Total’ Authority Over Coronavirus Restrictions*, CNN POL. (Apr. 14, 2020), <https://www.cnn.com/>

Still, formidable federal commerce powers can be used to respond directly to various impacts of pandemics. Take, for example, CDC's expansive use of its disease control regulations to impose an eviction moratorium affecting non-commercial renters on September 4, 2020.¹⁶⁵ CDC's order was framed as a public health protectionary measure.¹⁶⁶ Millions of Americans faced loss of housing after months of unemployment and business losses.¹⁶⁷ Widespread dispersal of renters from their properties by landlords threatened to spread COVID-19 to new households or areas of the country, with arguably substantial effects on interstate commerce.¹⁶⁸

CDC's use of its regulatory authorities to limit commercial activity related to housing was atypical. Never before had the agency applied

2020/04/14/politics/fact-check-trump-president-total-authority-coronavirus-states/index.html [https://perma.cc/2RY6-UH65]. On April 13, 2020, President Trump claimed that “[w]hen somebody’s the President of the United States, the authority is total, and that’s the way it’s got to be.” *Id.*

165. David Bizar & J. Patrick Kennedy, *Is the CDC's Nationwide COVID-19 Eviction Moratorium Down for the Count?*, JD SUPRA (Mar. 19, 2021), <https://www.jdsupra.com/legalnews/is-the-cdc-s-nationwide-covid-19-7768527> [https://perma.cc/AYW8-WYG8] (“In short, the CDC Moratorium subjects landlords to possible criminal and civil penalties if they proceed with actions to evict certain ‘covered’ residential tenants affected by COVID-19 for nonpayment of rent.”).

166. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020) (describing COVID-19 as “a historic threat to public health”). An additional CDC order extended the eviction moratorium through March 31, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020, 8021 (Feb. 3, 2021). CDC's dual orders generally criminalize any landlord or property owner for evicting a “covered person” from their residence. Covered persons are those persons who declare to the landlord or property owner that: (1) they have used best efforts to obtain available government assistance for rent or housing; (2) they meet certain low income thresholds; (3) they cannot pay the full rent due to “substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses,” (4) they are trying to make timely partial payments; and (5) they have no other place to go at the same or less cost and, if evicted, would either be homeless or required to live in congregate or shared-living settings. *Id.* at 8020–21. CDC's order does allow evictions if covered persons are engaged in illegal activities among other reasons. *Id.* at 8021.

167. See Heather Long, *Millions of Americans Are Heading into the Holidays Unemployed and Over \$5,000 Behind on Rent*, WASH. POST (Dec. 7, 2020, 3:10 PM), <https://www.washingtonpost.com/business/2020/12/07/unemployed-debt-rent-utilities> (noting nearly 9 million renters indicated they were behind on rent in November 2020).

168. Bizar & Kennedy, *supra* note 165.

its infectious disease control measures so broadly.¹⁶⁹ Opposing litigation among landlords, realtors, and others challenged the federal commerce authority as the basis for CDC's eviction moratorium.¹⁷⁰ On February 25, 2021, in *Terkel v. CDC*,¹⁷¹ Judge J. Campbell Barker nullified CDC's order as outside the bounds of interstate commerce powers.¹⁷² His decision, appealed to the Fifth Circuit,¹⁷³ relied on a federalism argument popularized in prior Supreme Court jurisprudence to suggest CDC failed to meet the substantial-effects test of interstate commerce authority.¹⁷⁴ At least one court ruled inapposite to the *Terkel* court.¹⁷⁵

CDC renewed its moratorium on August 3, 2021 (after it had briefly expired on July 31) to apply only to evictions in COVID-19 high-transmission areas through October 3.¹⁷⁶ Similar litigants sought an emergency ruling before the U.S. Supreme Court. In *Alabama Ass'n of Realtors v. U.S. Department of Health & Human Services*,¹⁷⁷ the Court blocked CDC's renewal of the moratorium on August 26, 2021 on the

169. WEN W. SHEN, CONG. RSCH. SERV., R46758, SCOPE OF CDC AUTHORITY UNDER SECTION 361 OF THE PUBLIC HEALTH SERVICE ACT (PHSA) 3 (2021).

170. David Pendered, *CDC Eviction Ban Struck Down in Tenn. as Legal Challenge Renewed in Atlanta*, SAPORTA REP. (Mar. 21, 2021), <https://saportareport.com/cdc-eviction-ban-struck-down-in-tenn-as-legal-challenge-renewed-in-atlanta/sections/reports/david> [<https://perma.cc/N2TY-2RK3>] (noting a Tennessee federal judge's ruling striking down the CDC's eviction moratorium in March 2021, adding to two prior rulings against the moratorium in Ohio and Texas).

171. No. 20-CV-00564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021).

172. *Id.* at *10 (holding the CDC order "exceeds the power granted to the federal government" to regulate commerce).

173. Notice of Appeal at 1, *Terkel v. CDC*, No. 20-cv-564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021).

174. *Terkel*, 2021 WL 742877, at *6 ("The order at issue here criminalizes the possession of one's property when inhabited by a covered person . . . [The] regulated activity is [not] economic in material respect. Although public health and safety are important goals on which the government may act pursuant to its commerce power, neither alone makes a law economic in character." (citation omitted)).

175. *See, e.g.*, *Brown v. Azar*, 497 F. Supp. 3d 1270, 1299 (N.D. Ga. 2020) (denying plaintiffs' petition for a preliminary injunction and noting that plaintiffs' demonstrated economic harm paled in comparison to projected loss of life if the court blocked the order, prioritizing the public interest in mitigating the pandemic), *aff'd*, No. 20-14210, 2021 WL 2944379 (11th Cir. 2021).

176. *CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission*, CDC (Aug. 3, 2021), <https://www.cdc.gov/media/releases/2021/s0803-cdc-eviction-order.html>.

177. *Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs.*, No. 21A23, 2021 WL 3783142 (U.S. 2021).

basis CDC exceeded its delegated federal authority under the PHSA.¹⁷⁸ Despite this setback months after CDC originally issued its eviction moratorium, future innovative uses of federal interstate commerce powers in multifarious facets of infectious disease control are predictable. Presidential- and HHS-declared national emergencies evoke an array of federal powers built on the premise that regulation of interstate commerce is an exclusive—and critical—facet of response efforts.¹⁷⁹

C. Medical Countermeasures

Initial reticence of federal authorities to fully immerse in pandemic response efforts led to immediate and controversial supply shortages. States and localities were thrust into direct competition with each other. Bidding wars erupted over personnel protective equipment (PPE), ventilators, and other essential goods.¹⁸⁰ Some jurisdictions lost out on available supplies for lack of financial resources;¹⁸¹ others lost out for lack of political connections.¹⁸² Federal acquisitions and

178. *Id.* at *3–4. The PHSA authorizes the Surgeon General to regulate as necessary to “prevent the introduction, transmission, or spread of communicable diseases” from foreign or domestic sources. This includes the powers of “inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected . . . , and other measures, as in his judgment may be necessary.” 42 U.S.C. § 264(a); *see also* 42 C.F.R. § 70.2 (2020) (delegating authority to CDC).

179. *See* ELSEA ET AL., *supra* note 90, at 1, 16 (noting that the emergency powers are numerous and varied).

180. Andrew Soergel, *States Competing in ‘Global Jungle’ for PPE*, U.S. NEWS (Apr. 7, 2020), <https://www.usnews.com/news/best-states/articles/2020-04-07/states-compete-in-global-jungle-for-personal-protective-equipment-amid-coronavirus>.

181. Paul Egan, *Auditor Faults Michigan for Lack of Emergency Protocols to Buy PPE, Supplies for COVID-19*, DETROIT FREE PRESS (Jan. 26, 2021), <https://www.freep.com/story/news/local/michigan/2021/01/26/auditor-state-lacked-financial-controls-coronavirus-emergency-purchases/4257349001> [<https://perma.cc/6VQ4-GEKN>] (“A new audit faults the state of Michigan’s purchasing agency for a lack of financial controls in the way it spent tens of millions of dollars to purchase personal protective equipment and other supplies to fight the coronavirus pandemic.”).

182. *See* Amy Goldstein, Lena H. Sun & Beth Reinhard, *Desperate for Medical Equipment, States Encounter a Beleaguered National Stockpile*, WASH. POST (Mar. 28 2020), https://www.washingtonpost.com/national/health-science/desperate-for-medical-equipment-states-encounter-a-beleaguered-national-stockpile/2020/03/28/1f4f9a0a-6f82-11ea-aa80-c2470c6b2034_story.html (noting how pro-Trump states like Florida were granted far more federal aid than Maine and Massachusetts, whose leaders openly criticized President Trump’s tactics); Jonathan Allen et al., *Want a Mask Contract or Some Ventilators? A White House Connection Helps*, NBC NEWS (Apr. 24, 2020), <https://www.nbcnews.com/politics/white-house/political-influence-skews-trump-s->

allocations of resources were later facilitated through presidential declarations of emergency.¹⁸³ In combination with HHS's PHE declaration, federal powers of the purse were mobilized.¹⁸⁴ Major investments in vaccine development and production were doled out through Operation Warp Speed to multiple pharmaceutical companies aiming to develop and test a safe and effective vaccine.¹⁸⁵ Two pharmaceutical companies, Moderna and Janssen, a division of Johnson & Johnson, brought efficacious COVID-19 vaccines to market through FDA's EUAs.¹⁸⁶ Another company, Pfizer, reached the same objective without direct federal assistance.¹⁸⁷

Corresponding presidential executive orders vaulted federal contracts for essential goods to the "top of the list" over competing state deals.¹⁸⁸ During declared emergencies, federal contracts take

coronavirus-response-n1191236 [<https://perma.cc/WHQ9-7YY3>] (discussing how President Trump's coronavirus task force was willing to "cut through red tape to reward domestic manufacturer[s]" and "played favorites in awarding contracts and allocating scarce resources").

183. See *supra* notes 79–82 and accompanying text (noting that while differences in state-based responses to public health emergencies are not necessarily problematic, variations stemming from political differences unrelated to public health science predictably leads to preventable injuries and deaths).

184. Press Release, FEMA, *supra* note 91.

185. See *supra* notes 73, 159 and accompanying text.

186. *COVID-19 Vaccines*, FDA, <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines#authorized-vaccines> [<https://perma.cc/9UME-K3W4>] (Mar. 24, 2021) (indicating the COVID-19 vaccines currently authorized for emergency use include Pfizer-BioNTech, Moderna, and Johnson & Johnson/Janssen).

187. Riley Griffin & Drew Armstrong, *Pfizer Vaccine's Funding Came From Berlin, Not Washington*, BLOOMBERG (Nov. 9, 2020), <https://www.bloomberg.com/news/articles/2020-11-09/pfizer-vaccine-s-funding-came-from-berlin-not-washington> [<https://perma.cc/NZT9-V4M7>] ("The truth is that Pfizer didn't receive any funding from Operation Warp Speed for the development, clinical trial and manufacturing of the vaccine. Rather, its partner, BioNTech SE, has received money—from the German government.").

188. James E. Baker, *From Shortages to Stockpiles: How the Defense Production Act Can Be Used to Save Lives, Make America the Global Arsenal of Public Health, and Address the Security Challenges Ahead*, J. NAT'L SEC. L. & POL'Y 157, 167 (2020) (explaining that the federal government "prioritize[d] its own contracts over state and private contracts to restock the [Strategic National Stockpile]" and then "allocate[d] supplies from the Stockpile to states and private entities as needed or requested"); see also David Smith, *Trump Invokes Defense Production Act Law to Compel GM to Supply Ventilators*, GUARDIAN (Mar. 27, 2020), <https://www.theguardian.com/us-news/2020/mar/27/trump-defense-production-act-coronavirus-gm> [<https://perma.cc/QY9B-4QJT>] ("Donald Trump has bowed to overwhelming

precedence by law over conflicting state contracts.¹⁸⁹ Even wealthy states like California cannot fully compete for essential items when federal deals have to be met first by suppliers.¹⁹⁰ Invocation of the DPA authorized federal control over the market for goods by directing private industries to produce what was needed to respond effectively.¹⁹¹ General Motors, Ford, and other companies manufactured ventilators and PPE at the request of federal authorities to meet national demands in mid-2020.¹⁹² In March 2021, Merck agreed with federal authorities to help mass produce COVID-19 vaccines developed by its competitor, Johnson & Johnson.¹⁹³

The capacity of the federal government to initiate, acquire, or control production, distribution, and allocation of MCMs was pivotal to emergency response efforts to the COVID-19 pandemic. Real-time alliances of states through advance agreements such as the Emergency Management Assistance Compact¹⁹⁴ or other brokered arrangements may help facilitate sharing of essential goods or services, but they cannot generate MCMs directly like the national government.

pressure and invoked [the DPA] compelling General Motors to mass produce breathing equipment as the US becomes the first country to top 100,000 confirmed coronavirus cases.”).

189. See 50 U.S.C. § 4551 (authorizing the President to require that performance of federal contracts take precedent over any other contract or order); Baker, *supra* note 188, at 167.

190. See Baker, *supra* note 188, at 167 (discussing the Trump administration’s apparent use of the DPA to prioritize its contracts for restocking over those of the states and private entities).

191. Defense Production Act of 1950, 50 U.S.C. § 4511.

192. Reed Albergotti & Faiz Siddiqui, *Ford and GM Are Undertaking a Warlike Effort to Produce Ventilators. It May Fall Short and Come Too Late*, WASH. POST (Apr. 4, 2020), <https://www.washingtonpost.com/business/2020/04/04/ventilators-coronavirus-ford-gm/> (“But instead of making hybrid car batteries, the usual output from the factory, they are preparing to churn out tens of thousands of ventilators . . .”).

193. Christopher Rowland & Laurie McGinley, *Merck Will Help Make Johnson & Johnson Coronavirus Vaccine as Rivals Team Up to Help Biden Accelerate Shots*, WASH. POST (Mar. 3, 2021), <https://www.washingtonpost.com/health/2021/03/02/merck-johnson-and-johnson-covid-vaccine-partnership/> (“Two of the largest pharmaceutical companies in the world who are usually competitors are working together on the vaccine . . . This is the type of collaboration between companies we saw in World War II.”).

194. Pub. L. No. 104-321, 110 Stat. 3877 (1996).

D. Conditional Spending

Substantial challenges immunizing Americans arose with the infusion of federally supported or purchased COVID-19 vaccines. Logistical log jams stymied initial vaccine distributions at the end of the Trump administration.¹⁹⁵ Ethical conundrums regarding who would be first in line for vaccines led the National Academy of Medicine¹⁹⁶ and others to lay out strategic approaches that federal, state and local policymakers could adopt.

Doling out billions of dollars of COVID-19 vaccines presumably included federal control over how the vaccines would be distributed via state and local partners. National powers to tax and spend unquestionably allow setting constitutional conditions for receipt of federal funds and resources to which receiving jurisdictions must abide.¹⁹⁷ Yet the Trump administration initially allowed states and localities to diverge over the administration and timing of vaccines.¹⁹⁸ Federal deference reflected a respect for principles of cooperative federalism but may also have been driven by perceived limitations of federal agents to vaccinate the nation any faster than states could.

President Biden took considerably more aggressive steps to advance federal vaccine prioritizations. Under the National COVID-19 Strategic Plan, FEMA organized hundreds of new vaccine sites across the country in mostly under-served areas.¹⁹⁹ On March 11, 2021, in his first

195. Rebecca Robbins et al., *Here's Why Distribution of the Vaccine Is Taking Longer Than Expected*, N.Y. TIMES (Dec. 31, 2020), <https://www.nytimes.com/2020/12/31/health/vaccine-distribution-delays.html> (“[P]ublic health experts say[] federal officials have left many of the details of the final stage of the vaccine distribution process, such as scheduling and staffing, to overstretched local health officials and hospitals.”).

196. *A Framework for Equitable Allocation Vaccine for the Novel Coronavirus*, NAT'L ACADS. OF SCIS., ENG'G, & MED., <https://www.nationalacademies.org/our-work/a-framework-for-equitable-allocation-of-vaccine-for-the-novel-coronavirus> [<https://perma.cc/2ZLF-7VTX>] (“[T]he National Academies have formed a committee that will produce a consensus study to assist policymakers in the U.S. and global health communities in planning for equitable allocation of vaccines against COVID-19.”).

197. HODGE, JR., *supra* note 35, at 183–84.

198. Will Feuer, *Texas Breaks from CDC in Vaccinating Elderly Over Police and Teachers as States Set Own Priorities for Rationing Covid Shots*, CNBC (Dec. 23, 2020), <https://www.cnbc.com/2020/12/23/covid-vaccine-texas-other-states-break-from-cdc-in-prioritizing-who-gets-next-round-of-shots.html> [<https://perma.cc/B3MV-ZCVZ>] (noting the CDC Advisory Committee on Immunization Practices recommendations were not binding, leaving states to decide the order of vaccine prioritization).

199. Press Release, FEMA, FEMA Supporting Vaccination Centers Nationwide (Feb. 26, 2021), <https://www.fema.gov/press-release/20210226/fema-supporting->

national address since his inauguration, the President asserted that states must open vaccination registries to all adults by May 1, 2021²⁰⁰ (which they all did).²⁰¹ Alternative federal interventions to reach affected populations included direct delivery options with national pharmacy chains like Walgreens and CVS in partnership with HHS.²⁰² On September 9, President Biden announced forthcoming federal rules mandating COVID-19 vaccinations for private sector employers with 100 or more employees as well as health care workers receiving Medicare or Medicaid funds through CMS.²⁰³

E. Preemption

Multiple state legislatures across the country introduced bills in 2021 to (1) reign in state-based executive emergency powers,²⁰⁴ (2) limit routine public health authorities, and (3) restrict localities' "home

vaccination-centers-nationwide [<https://perma.cc/HNL2-KW3M>] ("These community vaccination centers will help meet the President's goal of administering 100 million shots in 100 days and getting vaccines to everyone who wants one more rapidly and equitably.").

200. Kathryn Watson & Caroline Linton, *Biden Directs All States to Make All Adults Eligible for COVID-19 Vaccine by May 1*, CBS NEWS, <https://www.cbsnews.com/live-updates/biden-covid-vaccine-eligible-may-1> [<https://perma.cc/SLJ8-6QCV>] (Mar. 12, 2021, 6:46 AM) (noting President Biden in an address on the anniversary of the start of the COVID-19 pandemic set a "goal of July 4 to 'get closer to normal' in reopening the country" and that he would direct "all states to make all American adults eligible for the COVID-19 vaccine by May 1 [2021]" to reach that goal).

201. Danielle Ivory et al., *Who Can Get the Vaccine in Your State?*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/interactive/2021/us/covid-19-vaccine-eligibility.html>.

202. Mallory Hackett, *HHS Partners with CVS and Walgreens to Administer COVID-19 Vaccine to Long-term Care Facilities*, HEALTHCARE FIN. (Oct. 16, 2020), <https://www.healthcarefinancenews.com/news/hhs-partners-cvs-and-walgreens-administer-covid-19-vaccine-long-term-care-facilities> [<https://perma.cc/FM27-VFND>] ("The Pharmacy Partnership for Long-Term Care Program will give all long-term care facilities, skilled nursing facilities, nursing homes, assisted living facilities, residential care homes and adult family homes access to free COVID-19 vaccines for all residents and staff members who have not already received a vaccination.").

203. See Kathryn Watson et al., *Biden Announces COVID-19 Vaccine Mandates that Will Affect 100 Million Americans*, CBS NEWS (Sept. 9, 2021), <https://www.cbsnews.com/live-updates/biden-covid-19-vaccine-mandates-announcement>.

204. Reid Wilson, *Legislators Go After Governors to Rein in COVID-19 Powers*, HILL (Jan. 29, 2021), <https://thehill.com/homenews/state-watch/536479-legislators-go-after-governors-to-rein-in-covid-19-powers> [<https://perma.cc/2GGU-BWA9>] (noting "[m]ore than 150 bills and resolutions limiting a governor's authority have been introduced in 27 states").

rule” public health capacities.²⁰⁵ These efforts are the antithesis of pandemic preparedness and response.²⁰⁶ Curtailing public health authority in the midst of an ongoing pandemic may be politically popular with voters more interested in reopening the economy than preventing excess morbidity and mortality.²⁰⁷ Yet it represents an abrogation of state-based legislative and executive responsibilities to protect the public’s health.

Even as these reactionary state legal responses take root, broadening exercises of federal preemption have the capacity to negate them during emergencies. President Biden has asserted in multiple emergency Executive Orders that conflicting state-level efforts are preempted.²⁰⁸ PREP Act declarations include strong preemptive effects over contravening state-level actions.²⁰⁹ Congress built preemptive clauses into ARPA and other legislative responses.²¹⁰

Stronger national leadership in response to major PHEs recognizes that even if federal powers are not as broad as state police or *parens patriae* powers, they are supreme. When constitutionally invoked and clearly delineated under the premises of national security, interstate

205. Trip Gabriel, *State Lawmakers Defy Governors in a Covid-Era Battle for Power*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html> (explaining that legislators in more than 30 states across the country, “most of them Republicans, are moving aggressively to strip the powers of governors, often Democrats, who have taken on extraordinary authority to limit the spread of the virus for nearly a year” by “restrict[ing] the power of governors to act unilaterally under extended emergencies”).

206. See James G. Hodge, Jr. & Jennifer L. Piatt, *COVID’s Counterpunch: State Legislative Assaults on Public Health Emergency Powers*, BYU J. PUB. L. (forthcoming 2021) (manuscript at 1–3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846081 (noting that the limiting of emergency powers could have dire consequences).

207. See Alec Tyson et al., *Majority in U.S. Says Public Health Benefits of COVID-19 Restrictions Worth the Costs, Even as Large Shares Also See Downsides*, PEW RSCH. CTR., 4 (stating that over one-third of Americans view the public health benefits attained through pandemic-related restrictions as not worth the economic costs), https://www.pewresearch.org/science/wp-content/uploads/sites/16/2021/09/PS_2021.09.15_covid19-restrictions_REPORT.pdf

208. See, e.g., Exec. Order No. 13,998, 86 Fed. Reg. 7205, 7205–06 (Jan. 21, 2021) (“To the extent permitted by applicable law, the heads of agencies shall ensure that any action taken to implement this section does not preempt State, local, Tribal, and territorial laws or rules imposing public health measures that are more protective of public health than those required by the heads of agencies.”). By implication, any state or territorial measures that are less protective of the public’s health are preempted.

209. See 42 U.S.C. § 247d-6d(a) (8); see also Charrow, *supra* note 101 (referring to the PREP Act as a statute of “complete preemption”).

210. See Kranz et al., *supra* note 131 (highlighting the clawback provision in ARPA).

commerce, or conditional spending, federal powers override contrary state or local laws. Greater utilization of federal preemption tactics to obliterate opposing state actions that conflict with national public health objectives is foreseeable. Used wisely, federal preemption generates consistency across states.²¹¹ Used inappropriately, however, it may negate innovative lower-level government responses without justification.

F. States' Roles

Future enhanced exercises of federal PHE authorities do not displace states' essential role on the frontlines of preparedness and response. In a federalist system, states will always retain the capacity to intervene in promotion of their population's health.²¹² Their public legal authorities are safe especially as applied to threats within their own borders (e.g., disease outbreaks or natural disasters limited or confined to a single jurisdiction). States' innovations in public health response are beneficial when tied to epidemiologic findings.²¹³

During pandemics, however, the public should not tolerate ad hoc, jurisdiction-specific reactions disconnected from known science, disassociated from best public health practices,²¹⁴ or driven by

211. James G. Hodge, Jr. et al., *Public Health "Preemption Plus"*, 45 J. L., MED. & ETHICS 156, 156 (2017).

212. See, e.g., DYLAN CAIN, COVID-19 AND THE CONSTITUTION: STATE POLICE POWERS AND JUDICIAL SCRUTINY 3–4 (2020), <https://truman.missouri.edu/sites/default/files/publication/covid-19-and-the-constitution-state-police-powers-and-judicial-scrutiny.pdf> [<https://perma.cc/L8MK-2B9W>] (explaining state government authority related to quarantine and isolation powers and reviewing variations in how states exercised their police powers to mitigate the spread of COVID-19).

213. See, e.g., GERY P. GUY JR. ET AL., ASSOCIATION OF STATE-ISSUED MASK MANDATES AND ALLOWING ON-PREMISES RESTAURANT DINING WITH COUNTY-LEVEL COVID-19 CASE AND DEATH GROWTH RATES—UNITED STATES, MARCH 1–DECEMBER 31, 2020, 70 CDC MORBIDITY & MORTALITY WKLY. REP. 350, 350 (Mar. 12, 2021) (observing changes in the spread of COVID-19 associated with community requirements that affect universal mask use).

214. Texas and Mississippi governors announced in early March 2021 that they were lifting all state mask mandates and allowing businesses to resume operation as normal. Tex. Exec. Order No. GA-34 (Mar. 2, 2021), <https://open.texas.gov/uploads/files/organization/opentexas/EO-GA-34-opening-Texas-response-to-COVID-disaster-IMAGE-03-02-2021.pdf> [<https://perma.cc/6QQQ-2X5M>]; Miss. Exec. Order No. 1549 (Mar. 2, 2021), <https://www.sos.ms.gov/content/executiveorders/ExecutiveOrders/1549.pdf> [<https://perma.cc/T3UB-AGEJ>]. President Biden quickly labeled the states' decisions as a "big mistake" and examples of "Neanderthal thinking." Betsy Klein and Kate Sullivan, *Biden Criticizes Texas and Mississippi for Lifting Restrictions:*

misperceptions of American liberty, other rights, or pursuit of other political ends.²¹⁵ Americans' expressions of disdain for governmental public health authority are a protected facet of First Amendment rights to political and other free speech²¹⁶ but not a justification for knowingly inflicting harms on individuals or groups left to the mercy of a stealthy, infectious condition. Divergent state efforts to control COVID-19, resulting in gross inequities, justify appropriate federal authorities and conditional use of resources to (1) reshape state actions under national priorities; (2) assure greater uniformities; and (3) maximize public health outcomes for all Americans. In the end, a new vision for cooperative federalism during PHEs relies on the federal government as strategic play-callers with states as primary players.

CONCLUSION

In a national letter published on May 30, 2020, hundreds of prior and current CDC Epidemic Intelligence Service (EIS) Officers eloquently observed:

The absence of national leadership on COVID-19 is unprecedented and dangerous. The [U.S.] epidemic is sustained by deadly chains of transmission that crisscross the entire country. Yet states and territories have been left to invent their own differing systems for defining, diagnosing and reporting cases of this highly contagious disease. Inconsistent contact tracing efforts are confined within each

'Neanderthal Thinking', CNN POL. (Mar. 3, 2021), <https://www.cnn.com/2021/03/03/politics/biden-abbott-texas-coronavirus/index.html> [<https://perma.cc/48GN-8XGL>]; see also Roni Caryn Rabin, *Covid-19: Fauci Says Ending Mask Mandates is 'Risky'*, N.Y. TIMES, Mar. 14, 2021, <https://www.nytimes.com/live/2021/03/14/world/covid-19-coronavirus?>. On March 25, Arizona Governor Doug Ducey followed suit, lifting extensive social distancing measures across the state. Az. Exec. Order No. 2021-06 (Mar. 25, 2021), https://azgovernor.gov/sites/default/files/eo_2021-06.pdf [<https://perma.cc/HP4P-TPTP>].

215. Robert Henneke, *Two Views: Texas Stands Ready to Fight Overreach by Biden Administration*, AUSTIN AM.-STATESMAN (Feb. 1, 2021), <https://www.statesman.com/story/opinion/two-views/2021/02/01/opinion-texas-use-lawsuits-block-biden-policies/4265681001> [<https://perma.cc/VF2G-WTR3>] (noting Texas Public Policy Foundation's Center for the American Future proclaims it will sue President Biden if his COVID-19 measures go too far).

216. MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 825, 975 (3d ed. 2017) (explaining freedom of speech can be understood as "the right of all citizens to exchange information and opinion on public matters," and political speech that deals with matters of public concern falls "at the core of First amendment protections").

state's borders—while coronavirus infections sadly are not. Such chaos is what CDC customarily avoided by its long history of collaboration with state and local health authorities in developing national systems for disease surveillance and coordinated control.²¹⁷

At the date of the EIS correspondence, the U.S. death toll from COVID-19 disease had just surpassed 100,000 persons. A year later, the nation had lost six-times this number of Americans to the pandemic. Reflected in the pleas of these scientists months ago are the public health, law, and policy elements of a new national blueprint for effective emergency preparedness and response. This blueprint includes a change in focus among national leadership, an aggressive federal plan of attack, epidemiologic and financial support for states and localities, greater consistency in public health approaches, higher-level coordination across federal and state governments, and a revitalized national public health infrastructure informed by science and undergirded by law.

217. EIS Officers, *supra* note 12.