

The Pandemic and Privacy: The Global Culture of Intrusion

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Recommended Citation

Mills, Jon L.; Viana, Lucca; and Black, Danielle () "The Pandemic and Privacy: The Global Culture of Intrusion," *Legislation and Policy Brief*: Vol. 11: Iss. 1, Article 5.

Available at: <https://digitalcommons.wcl.american.edu/lpb/vol11/iss1/5>

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THE PANDEMIC AND PRIVACY: THE GLOBAL CULTURE OF INTRUSION

JON L. MILLS, LUCCA VIANA, AND DANIELLE BLACK*

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I. INTRODUCTION: CRISIS, INTRUSION, AND THE CONSTITUTION

In the time of the COVID-19 pandemic, the world experienced a dramatic global disaster that did not respect ideologies or borders. Hospitals overflowed with patients in democracies and dictatorships around the world. In San Francisco, the mayor closed all non-essential businesses. In India, bodies were burned in mass burials. In Brazil, the Federal Supreme Court endorsed compulsory vaccination.¹

Because of the COVID-19 pandemic, millions of people died, businesses went bankrupt, and the whole world changed the way it lived.² Cities locked down.³ Borders closed.⁴ Children

¹ Like virtually all compulsory policies, this policy is specified as a condition for utilization of various facilities, spaces, or activities. *Court Decides That Compulsory Vaccination Against COVID-19 Is Constitutional*, FED. SUP. TRIB. (Dec. 17, 2020), <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=457462&ori=1>.

² Lee Clifford & Phil Wahba, *A running list of companies that have filed for bankruptcy during the coronavirus pandemic*, FORTUNE (Oct. 8, 2020), <https://fortune.com/2020/08/04/companies-filing-bankruptcy-2020-due-to-covid-list-filed-chapter-11-coronavirus-pandemic>.

³ Chico Harlan & Stefano Pitrelli, *Italy extends coronavirus lockdown to entire country, imposing restrictions on 60 million people*, WASH. POST (Mar. 9, 2020), https://www.washingtonpost.com/world/europe/italy-extends-coronavirus-lockdown-to-entire-country-imposing-restrictions-on-60-million-people/2020/03/09/baa10058-6248-11ea-8a8e-5c5336b32760_story.html; *New York City to Close Schools, Restaurants and Bars*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/nyregion/new-york-coronavirus.html>; Cal. Exec. Order No. 33-20 (Mar. 4, 2020).

⁴ *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus*, U.S. DEP’T HOMELAND SEC. (Oct. 19, 2020), <https://www.dhs.gov/news/2020/10/19/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>; *The Department of State has issued COVID-19 Traveler Information and advises all U.S. citizens to read the country-specific Travel Advisories and U.S. Embassy COVID pages for updates on the impact of COVID-19 worldwide*, U.S. EMBASSY & CONSULATES IN FR. (Jan. 19, 2021), <https://fr.usembassy.gov/covid-19-information/>.

could not visit their dying parents.⁵ Zoom became a verb.⁶ Business travel changed.⁷ Sports teams were excluded from national championships.⁸ Some aspects of life will go back to “normal,” and some will be permanently changed.

Governments need to do better in the next pandemic. Government responses to emergencies generally have been chaotic,⁹ and the COVID crisis was no exception. Scholars have observed that governments are awkward in responding to crisis. This conclusion is unsurprising. Crises require governments to make difficult decisions under time pressures, public outcries, and constitutional limits.

One of the clear revelations that came out of this crisis was the vast new scope of intrusion into citizens’ personal lives. Intrusions are a part of a government’s response to most emergencies.¹⁰ Whether it is a global pandemic or a forest fire, governments are empowered to make decisions to protect the safety and welfare of their citizens, and that often results in intruding on someone’s rights. In response to the pandemic, governmental intrusions on individual liberties increased.¹¹ Those intrusions in this pandemic were different to those in typical emergencies. In a global pandemic, governments’ use of their vast capacity to observe and gather information through the internet, surveillance, and new technology was justified.¹²

While many intrusions have been justified to save lives and to prevent the continued spread of COVID-19,¹³ we should focus on the long-term impacts of emergency policies. This article

⁵ Katie Hafner, ‘*A Heart-Wrenching Thing*’: *Hospital Bans on Visits Devastate Families*, N.Y. TIMES (Mar. 29, 2020), <https://www.nytimes.com/2020/03/29/health/coronavirus-hospital-visit-ban.html>.

⁶ Jeffrey Barg, *How coronavirus made ‘zoom’ a verb and other ways the pandemic has changed our language*, PHILA. INQUIRER (Apr. 29, 2020), <https://www.inquirer.com/opinion/coronavirus-covid-zoom-pandemic-words-linguistic-20200429.html>.

⁷ *Airline mask requirements: Check the policies for 11 US carriers*, USA TODAY (Sept. 8, 2020), <https://www.usatoday.com/picture-gallery/travel/airline-news/2020/05/05/coronavirus-these-airlines-require-passengers-wear-face-masks/3085794001/>.

⁸ The NCAA excluded North Carolina State University in the middle of the college world series. The NCAA required unvaccinated players and coaches to undergo testing every other day at championship sites. Testing and contact tracing decided that the team could not continue playing one game away from the finals. Steve Wiseman, *Positive COVID-19 tests knocked NC State baseball out of the CWS. What about Vanderbilt?*, NEWS & OBSERVER (June 27, 2021), <https://www.newsobserver.com/sports/college/acc/nc-state/article252391598.html>.

⁹ Hurricane Katrina was one of the most appalling governmental failures in recent history. The U.S. government has a tendency to shy away from disaster preparation in the name of flexibility, but “[w]hile information typically becomes more plentiful over time, other inputs to legal decisions, particularly decisional resources, often become scarcer.” David Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1380 (2011).

¹⁰ In the wake of in the wake of 9/11, the United States Congress passed the USA PATRIOT Act, which authorized the U.S. government to spy on individuals without identifying to any court either the targeted individual or the communication devices to be tapped. USA PATRIOT Act, H.R. 3162, 107th Cong. (1st Sess. 2001).

¹¹ *Infra* section IV.

¹² Rahul De et al., *Impact on digital surge during Covid-19 pandemic: A viewpoint on research and practice*, 55 INT’L J. INFO. MGMT. 102171 (Dec. 2020).

¹³ Tatsiana Ziniakova, *Privacy, Mass Electronic Surveillance, and the Rule of Law in Times of COVID-19*, WORLD JUST. PROJECT 9 (2020),

will examine the possible policy changes for the next pandemic that will protect constitutional rights while also protecting people from another lethal pandemic. This article will also propose a framework for more efficient and forward-thinking emergency responses, which will help protect individual rights. The response to the global pandemic could be viewed as the most widespread and comprehensive limitation on individuals in modern history. The world's population experienced lockdowns, mandatory closings, curfews, mask mandates, travel limitations, workplace restrictions, vaccination passports, and gathering of personal data on a grand scale.¹⁴ What are the long-term implications, particularly for democratic societies?

As with other historical emergencies and threats to health and security, legal issues take a backseat to rapid responses to protect health and safety. For example, after the September 11 terrorist attacks, there was little public concern about electronic intrusion, but there was enormous concern about catching terrorists.¹⁵ The federal government grounded all commercial flights in the United States for seven days, arguing it had a compelling state interest to prevent other planes from being used as weapons as justification.¹⁶ The Government also implemented intrusive surveillance strategies to oversee and monitor private communications of foreign and domestic individuals in the United States, costing all Americans some of their privacy.¹⁷

The COVID-19 pandemic presents a unique set of legal issues because it occurs in a world that is interconnected and technologically intertwined. Much like the commerce and

https://worldjusticeproject.org/sites/default/files/documents/Surveillance%20COVID_v4.pdf (“According to media reports, drone surveillance has been deployed in the United States, Mexico, Malaysia, Spain, Italy and the UK.”).

¹⁴ Some states shut down nonessential businesses. See, e.g., Erin Schumaker, *Here are the states that have shut down nonessential businesses*, ABC NEWS (Apr. 3, 2020, 7:58 PM), <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806>; Alix Martichoux, *Gov. Newsom Orders Curfew for Most California Counties*, ABC NEWS 7 (Nov. 20, 2020), <https://abc7.com/governor-newsom-california-curfew-gavin-los-angeles/8101518/>. The mayor of Pueblo, Colorado issued a curfew for the city to decrease mobility among those ages 20 to 50, who carry the highest infection rate in the state. See Kwame Opam & Concepcion de Leon, *Why Are States Imposing Virus Curfews?*, N.Y. TIMES (Nov. 21, 2020), <https://www.nytimes.com/2020/11/21/us/coronavirus-curfew.html>; *Travel Recommendations by Destination*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notice.html>; Multiple countries made the COVID-19 vaccine mandatory. See, e.g., *Factbox: Countries Making COVID-19 Vaccines Mandatory*, REUTERS (Aug. 16, 2021, 11:36 AM), <https://www.reuters.com/world/countries-make-covid-19-vaccines-mandatory-2021-07-13/>; *COVID-19 Travel Restrictions by Destination*, CTRS. DISEASE CONTROL & PREVENTION (last updated Apr. 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notice.html>. Some countries implemented a vaccine passport system. See, e.g., *What is a Green Pass?*, MINISTRY OF HEALTH, <https://corona.health.gov.il/en/directives/green-pass-info/> (last visited Apr. 11, 2022). Data shows that hacking was more frequent during the pandemic. See Maggie Miller, *FBI Sees Spike in Cyber Crime Reports During Coronavirus Pandemic*, HILL (Apr. 16, 2020, 3:27 PM), <https://thehill.com/policy/cybersecurity/493198-fbi-sees-spike-in-cyber-crime-reports-during-coronavirus-pandemic>.

¹⁵ For instance, the Terrorist Surveillance Program created during the Bush Administration authorized electronic surveillance without judicial approval as an effort to catch terrorists. See Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV. 1259, 1293 (2008).

¹⁶ *All flights stopped nationwide*, CNN (Sept. 11, 2001), <https://www.cnn.com/2001/TRAVEL/NEWS/09/11/faa.airports/>.

¹⁷ See Maclin, *supra* note 15, at 1294.

communication in today's world, COVID-19 is not limited by national boundaries. Pandemic-based privacy intrusions include limitations on personal freedoms like the right to travel and the gathering of personal information through contact tracing. Different technologies have been used to gather large amounts of personal health data, pushing the constitutional limits of government action. Government and public health officials justified these intrusions and argued their constitutionality by showing how information on hospitalization, infection, and mortality rates helps them implement the best defenses against COVID-19 and its spread.¹⁸ However, even with these compelling justifications, the COVID-19 pandemic brings in to focus the most critical issues of personal privacy, and it does so in a way that magnifies the realities of the modern world.

United States courts have already begun to weigh in on the constitutional limits implicated in this pandemic. By the end of COVID-19, the United States will have a new jurisprudence that, at least preliminarily, defines the boundaries of governmental authority, tests the utility of federalism in nationwide crises, and defines a series of individual rights, including personal autonomy, data privacy, freedom of movement, freedom of religion, and personal property rights. Section IV of this article will discuss the initial cases on those issues.

Notably, there is a lack of universal agreement among government and health officials regarding the effectiveness of policies put in place to stop the spread of COVID-19. To balance the advantages and disadvantages of such measures, one must determine how dangerous a threat must be to justify restrictions on people's fundamental rights, including the right to privacy. There must also be a determination of the duration of the restrictions being enforced. In the context of the COVID-19 pandemic, it must be determined whether a virus provides enough legal justification to allow governments restrictions on privacy and justification for the severity of the restrictions. After all, part of the legal test to restrict a fundamental right is to restrict that right by the least intrusive means.¹⁹

The final determinations will vary greatly depending on the governmental regime and national culture. Governments have a duty to make decisions for the common good of their citizens,²⁰ but government action is not the only indicator of how a country will be affected during a pandemic. Culture is a central element to privacy invasions in the pandemic.²¹ Some cultures have already experienced lost freedoms and reduced privacy before COVID-19.²² The pandemic can justify

¹⁸ The Centers for Disease Control and Prevention states that “[c]ontact tracing is a key component of controlling transmission of infectious diseases.” *Operational Considerations for Adapting a Contact Tracing Program to Respond to the COVID-19 Pandemic in Non-US Settings*, CTRS. DISEASE CONTROL & PREVENTION (Dec. 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/operational-considerations-contact-tracing.html>.

¹⁹ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

²⁰ The common good is an important concept of political philosophy discussed in the literature by many philosophers such as Plato, Aristotle, John Locke, J.J. Rousseau, Adam Smith, G.W.F. Hegel, John Rawls and Michael Walzer. See Hussain Waheed, *The Common Good*, STANF. ENCYCLOPEDIA PHIL. (Feb. 26, 2018), <https://plato.stanford.edu/entries/common-good/>.

²¹ See *infra* Section III (discussing the relationship and effects that culture has on the law, specifically in the context of intrusions to privacy).

²² China is certainly the greatest example of mass surveillance by the government. See Charlie Campbell, *'The Entire System Is Designed to Suppress Us.' What the Chinese Surveillance State Means for the Rest of the World*, TIME (Nov. 21, 2019), <https://time.com/5735411/china-surveillance-privacy-issues/>.

governments to further their surveillance state under the guise of protecting public health.²³ Some citizens in certain cultures have accepted government or health care guidance, and citizens have voluntarily restricted their personal lives and activities.²⁴ Others obey the governmental mandates to wear masks, avoid crowds, and social distance with no pushback.²⁵ Conversely, there are cultures that seem inherently to distrust the government and revere individual freedom are more resistant to government regulation.²⁶

Although governments and cultures reacted in various ways, the pandemic honored no borders and created a global health crisis. Unlike localized disasters, wars, or terrorist attacks, virtually every individual in the world was vulnerable. This article seeks to evaluate the responses to this global crisis through the lens of individual freedoms. Unquestionably this crisis fostered multiple governmental reactions to the pandemic which we will describe. Fundamental to these reactions are the laws specifically designed to deal with emergencies, which this article will first identify.

II. CRISIS AND THE LAW OF EMERGENCIES

Extraordinary times require extraordinary measures. In fact, most countries have policies for emergencies that facilitate swift action.²⁷ Because emergencies, by definition, require rapid action,

²³ In the wake of COVID-19, many apps that aimed to control the spread of COVID-19 were created. As reported by Privacy International, “[t]he self-testing web app issued by Argentina’s Secretariat of Public Innovation, asked for national ID number, email[,] and phone as mandatory fields in order to submit the test, while the Android version required numerous permissions, including contacts, geolocation data (both network-based and GPS), and access to the microphone and camera.” *There’s an app for that: Coronavirus apps*, PRIVACY INT’L (Apr. 20, 2020), <https://privacyinternational.org/long-read/3675/theres-app-coronavirus-apps>.

²⁴ See Sheng-Fang Su & Yueh-Ying Han, *How Taiwan, a non-WHO member, takes actions in response to COVID-19*, 10 J. GLOB. HEALTH 010380 (June 2020); Paul de Vries, *COVID-19 versus Japan’s culture of collectivism*, JAPAN TIMES (May 22, 2020), <https://www.japantimes.co.jp/opinion/2020/05/22/commentary/japan-commentary/covid-19-versus-japans-culture-collectivism/>.

²⁵ See generally Dighe et al, *Response to COVID-19 in South Korea and implications for lifting stringent interventions*, 18 BMC MED. 1 (Oct. 9, 2020), <https://bmcmmedicine.biomedcentral.com/articles/10.1186/s12916-020-01791-8> (discussing South Korea’s rapid control of local transmission with its “test, trace, isolate” strategy); Daniel J. Samet, *Israel exemplifies how to respond to the coronavirus*, ATLANTIC COUNCIL (Mar. 12, 2020), <https://www.atlanticcouncil.org/blogs/menasource/israel-exemplifies-how-to-respond-to-the-coronavirus/> (noting how the Israeli response model is not feasible for other states, like the United States).

²⁶ For example, Brazilians demonstrated that they do not believe health crises justify intrusions upon the privacy of their homes and bodies. See Pedro Cantisano, *What a 1904 Vaccine Effort Can Teach Brazil Today*, U.S. NEWS (Dec. 7, 2020), <https://www.usnews.com/news/best-countries/articles/2020-12-07/brazils-leader-ignores-deadly-virus-lessons-from-the-past>. In 1904, the Brazilian National Congress passed a law establishing mandatory vaccination, aiming to combat the smallpox outbreak in the country. *Id.* Health authorities and police officers were authorized to enter homes and forcibly vaccinate members of the home. *Id.* The people responded with violence. *Id.* Because the people were not culturally accustomed to such intrusions, the response was so severe that the Government had to suspend the law and stop mandatory vaccinations. *Id.*

²⁷ See, e.g., *COVID-19 Civic Freedom Tracker: Keep Civic Space Healthy*, INT’L CTR. NOT-FOR-PROFIT L. (Feb. 11, 2021), <https://www.icnl.org/covid19tracker/?issue=5> (monitoring government emergency responses to COVID around the world that affect civic freedoms and human rights).

emergency actions are most often ordered by the Executive branch.²⁸ Legislatures are not inherently rapid response entities, and courts are more deliberative and reactive by design. Thus, the balance of power in emergencies is given to or taken by the executive branches of government.²⁹ By design, presidents, governors, and mayors are the focal point of emergency powers.³⁰ David Super, a public welfare law professor at Georgetown University Law Center, suggests that multi-tiered governments are ill suited to emergencies because of jurisdictional uncertainty.³¹ Super identifies the Hurricane Katrina disaster as emblematic of confusion and the failure of the federal government to exercise powers and capabilities.³² Clarifying federal responsibility for large scale responses makes sense. In the case of COVID-19, the federal government should take responsibility for large-scale multi state issues such as defining the threat level of the pandemic, funding large-scale responses to unemployment or physical damage, and verifying and testing vaccines and treatments. National uniformity makes sense for issues like international and interstate travel policies. However, even in a global pandemic some issues are more local and benefit from state and local government policies.³³ Cities may have different levels of infection that require different responses. Because of the vast geographical areas countries like Brazil and the United States can benefit from a federal system that provides for varied responses at different levels of government. The challenge is to define the boundaries of federal, state, and local authority.

The United States and Brazil are two countries that increase the power of the executive branch during emergencies.³⁴ Laws during emergencies may be certain regarding the enlargement of the executive power, but there is still great ambiguity and uncertainty regarding the exact definition of emergency and the extent of emergency powers.

This article will propose a legal framework for pandemic response that clarifies the constitutional authority possessed by each level of government during health emergencies.³⁵ The framework utilizes science to determine the extent of emergency, and it uses the resulting determination of extent to evaluate whether a compelling state interest exists.³⁶

Ultimately this article suggests an approach to the next pandemic. An “approach” is more than a plan. The Centers for Disease Control(CDC) and the World Health Organization

²⁸ *E.g.*, National Emergencies Act, 50 U.S.C. §§ 1601–51 (1976); Public Health Service Act, 42 U.S.C. 247(d) (1944); Robert T. Stafford Disaster Relief and Emergency Act, 42 U.S.C. §§ 5121 et seq. (1988).

²⁹ *Infra* Section II (these aspects will be discussed further throughout the article).

³⁰ *Id.*

³¹ Super, *supra* note 9, at 1380.

³² *Id.*

³³ M. Jae Moon, *Fighting COVID-19 with Agility, Transparency, and Participation: Wicked Policy Problems and New Governance Challenges*, 80 PUB. ADMIN. REV. 651, 652, 655 (2020).

³⁴ *Infra* Section II.

³⁵ *Infra* Section V.

³⁶ *Infra* Section V(b).

(WHO) have plans for pandemics.³⁷ Plans include rational threat assessments and responses, but they do not include guidance for how and when public officials at all levels of government implement emergency provisions. Guidance is possible but officials will make decisions based on their judgment, authority, legal limitations, and public support.

With a pervasive pandemic, it turns out that a federal system with strong local governments may be the best model if every level plays a role. There is a role for the courts as well – to provide the guardrails for actions of public and private entities that intrude or abuse individual rights. The courts will have to make the assessment of whether the government action is justified by the compelling interest of a pandemic and whether private action is legal, like whether an employer can require employees to be vaccinated.

Some lessons from COVID are clear. National governments must perform several functions: conduct research on the pandemic, fund research for vaccines and treatments, verify vaccines and treatments, provide a threat assessment and, perhaps most importantly, provide leadership with a cohesive, trustworthy message for individuals and other levels of government. The federal government should designate the level of the pandemic (on a scale of 1-10) and work with all levels of government to define actions and responses to the pandemic. These are complex tasks.

This article describes a wide array of responses to a pandemic. The list includes testing, tracking, tracing, quarantining, mask restrictions, travel restrictions, business closings, occupancy restrictions, curfews, and vaccination requirements. These various actions have been taken by the federal government, state governments, and local governments and, in some cases, private entities. For example, cruise lines implemented vaccination and testing requirements.³⁸

Sorting out an “approach” for the pandemic starts with identifying the pandemic and defining its severity. The medical standards are established that designate lethality and transmissibility.³⁹ For example, Ebola is deadly and highly contagious and common flu is contagious but not as deadly. There is also the daunting task of determining of how, where, and when to implement the wide array of intrusive requirements, mandates, or programs. How and when to implement them, at what level of government, and for how long are central questions. Different actions, different times, different facts, and different circumstances may justify actions or not. The national maps show how different the number of cases and rate of infection are in different locations at different times.

³⁷ *National Pandemic Strategy*, CTRS. FOR DISEASE CONTROL & PREVENTION (2017), <https://www.cdc.gov/flu/pandemic-resources/national-strategy/index.html>; *WHO Global Influenza Preparedness Plan*, WORLD HEALTH ORG. (2005), https://www.who.int/csr/resources/publications/influenza/WHO_CDS_CSR_GIP_2005_5.pdf.

³⁸ Alison Fox, *Every Cruise Line requiring Passengers to be Vaccinated Before Boarding*, TRAVEL + LEISURE (Feb. 9, 2022), <https://www.travelandleisure.com/cruises/cruises-that-allow-vaccinated-travelers>.

³⁹ *Pandemic Severity Assessment Framework*, CTRS. FOR DISEASE CONTROL & PREVENTION (2016), <https://www.cdc.gov/flu/pandemic-resources/national-strategy/severity-assessment-framework.html>.

This array of possible actions is affected by legal and constitutional restraints. A wide array of lawsuits challenging various actions are pending.⁴⁰ There are boundaries and limits to emergency authority being exercised by federal state and local governments. There are constitutional boundaries related to free speech, freedom of religion, freedom of movement, due process, and right to travel. Even during a pandemic, the Constitution will apply.⁴¹ But facts and circumstances matter. A deadly and contagious virus provides a compelling government interest to justify emergency action.

Countries have enlisted numerous restrictive measures to combat the spread of COVID-19. These measures include: issuing quarantine mandates, curfew times, and stay at home orders; limiting access to businesses; enacting mandatory business closures; mandating vaccines and face masks; requiring a vaccine passport; issuing travel limitations; and requiring mandatory COVID-19 testing.

In the United States, state, and local governments imposed penalties for violating quarantine orders.⁴² California, for instance, considered violating a quarantine order to be a misdemeanor offense punishable by up to ninety days in county jail.⁴³ New York City has required vaccine passports or proof of COVID-19 vaccination for most indoor activities.⁴⁴ New York State uses an app called Excelsior Pass to determine an individual's vaccination status. Excelsior Pass uses personal information to check against state vaccination records, and a variation of the vaccine pass the app offers, called the 'Pass Plus,' may allow businesses "to save or store the information contained."⁴⁵

Similarly, Europe uses the European Union (EU) Digital COVID Certificate as a "vaccine passport."⁴⁶ The certificate is not a precondition to free movement, but without it, individuals

⁴⁰ *Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID-19) pandemic*, BALLOTPEdia, [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021) (last visited May 7, 2022).

⁴¹ "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69–70 (Nov. 25, 2020).

⁴² Many states issued quarantine orders during the COVID-19 pandemic; some states imposed penalties for violating these orders, and others did not. *See, e.g., State of Alaska COVID-19 Mandate 010*, STATE OF ALASKA COVID-19 (CORONAVIRUS) INFO. (last updated Oct. 15, 2020), <https://covid19.alaska.gov/wp-content/uploads/2020/10/10152020-COVID-MANDATE-010-REVISED.pdf>; Fla. Exec. Order No. 20-80 (Mar. 23, 2020); *State of California Travel Advisory*, CAL. DEP'T OF PUB. HEALTH (Dec. 13, 2021), <https://www.cdph.ca.gov/programs/CID/DCDC/pages/COVID-19/Travel-Advisory.aspx>. Many local governments within the United States also initiated quarantine orders. *See, e.g., County of Contra Costa Updated Mass Quarantine Order*, No. HO-COVID19-50 (July 23, 2021), https://813dcad3-2b07-4f3f-a25e-23c48c566922.filesusr.com/ugd/84606e_44a06b0178814954b916802e2e01e753.pdf.

⁴³ CAL. HEALTH & SAFETY CODE § 120275 (2020).

⁴⁴ New York implemented a vaccine passport system. Sharon Otterman, *Will the Excelsior Pass, New York's Vaccine Passport, Catch On?*, N.Y. TIMES (June 1, 2021), <https://www.nytimes.com/2021/06/01/nyregion/excelsior-pass-vaccine.html>.

⁴⁵ *Excelsior Pass Plus: Frequently Asked Questions*, N.Y. STATE, <https://covid19vaccine.health.ny.gov/excelsior-pass-plus-frequently-asked-questions> (last visited Apr. 11, 2022).

⁴⁶ *EU Digital COVID Certificate*, EUR. COMM'N, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en (last visited Apr. 11, 2022).

might be subject to restrictive measures like mandatory COVID testing or quarantining. Almost every nation in the world has adopted some sort of travel restrictions.⁴⁷ The countries that have not determined mandatory quarantine upon arrival still require a negative COVID-19 test.⁴⁸ This article will propose specific policies for defining a pandemic's severity, defining proper actions governments can take based on the severity, defining the limits of government action, and creating a committee to review and classify pandemics as they emerge. This chart below shows how national, state, and local U.S. governments, the Brazilian government, and other international governments are addressing the pandemic. It demonstrates lack of uniformity in combatting global pandemics and direct conflicts. For example, some entities ordered masking and some governments enacted policies to prohibit mask mandates.

	National	State	Local	Private	Brazil	Other Nations
Personal Restrictions						
Masking	X	X	X	X		X
Quarantine	X	X	X			X
Vaccine Mandate				X		X
Business						
Closing		X	X			X
Limited number		X	X			X
Movement						
Curfew		X	X			X
Deny entry						
Travel restrictions	X	X	X		X	X
Mandatory Testing		X		X		X
Mandatory Tracking				X	X	X

⁴⁷ *COVID-19 Travel Restrictions*, *supra* note 14.

⁴⁸ *Travel during the coronavirus pandemic*, EUR. COMM'N, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/travel-during-coronavirus-pandemic_en (last visited Apr. 11, 2022); *COVID-19 Testing Required for U.S. Entry*, U.S. DEP'T OF STATE (last updated Dec. 30, 2021), https://travel.state.gov/content/travel/en/international-travel/before-you-go/covid-19_testing_required_US_Entry.html.

Government PRECLUDES ACTIONS Prohibits mask or vaccination		X				X
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A. UNITED STATES

1. FEDERAL GOVERNMENT

The Constitution of the United States does not expressly provide for emergency powers, but several statutes expand federal powers during emergencies.⁴⁹

The National Emergencies Act provides that Congress is authorized to grant the president any special or extraordinary power during national emergencies.⁵⁰ This policy grants authority to *Congress* to confer authority on the president and therefore accords significant latitude for defining emergencies.⁵¹ Congress in fact recognized COVID as a national emergency.

In addition, the Stafford Act confers authority on *the president* and provides a broad definition of emergency. The Act defines emergency as:

[A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.⁵²

Thus, pursuant to the Act, the president has the authority to define the existence of an emergency and discretion to determine the nature of assistance.⁵³ The language of the Stafford Act provides no distinct boundaries for emergency power. The statute provides that the president is authorized to establish a program of disaster preparedness that utilizes services of “all appropriate agencies.”⁵⁴ The term “appropriate” is discretionary and allows the President, as the leader of the Executive branch, to exercise control over any agency he or she deems “appropriate.”⁵⁵

⁴⁹ See, e.g., the National Emergencies Act, 50 U.S.C. §§ 1601 et. seq. (2020); the Public Health Service Act, 42 U.S.C. §§ 319 et. seq. (2020).

⁵⁰ 50 U.S.C. §1621 (2020).

⁵¹ This definition allows Congress some flexibility in responding to novel circumstances.

⁵² 42 U.S.C. § 5122(1) (2020).

⁵³ *Id.*

⁵⁴ 42 U.S.C. § 5131 (2020).

⁵⁵ U.S. CONST. art. II, §2, cl.1.

The Stafford Act also provides that the president may coordinate federal programs of disaster preparedness and programs run by State and local authorities.⁵⁶ Depending on the philosophy of the president, this “coordination” could result in highly centralized authority; that has not been the case during the current pandemic. In fact, it is governors and mayors who enacted the most severe measures, as the national government receives criticism for failing to provide enough guidance or leadership.⁵⁷ Nonetheless, the statutory structure could justify more intrusive actions by the federal government in a future crisis.

Finally, the Stafford Act expressly provides that the president has the authority to apply science and technology to address the emergency.⁵⁸ That statement seems rational, especially when dealing with a crisis that needs scientific answers. However, the use of modern technology presents real risks of abuse. Some technologies that may be useful in a health crisis also carry a risk of abuse in a surveillance state. For example, CCTV coverage with thermal imaging can detect individuals with elevated temperatures, drones can identify where crowds gather in violation of social distancing standards, and internet surveillance can identify geographical concentrations of the disease.⁵⁹ Each of these uses can be a tool in a health crisis but also can provide a basis for intrusions on personal privacy.

In addition to emergency powers, the Stafford Act provides additional powers to address a “major disaster.”⁶⁰ Major disaster means any natural catastrophe which causes damage of sufficient severity and magnitude to warrant major disaster assistance.⁶¹ Unlike emergency powers, the extent of the major disaster powers is more limited.⁶² In a major disaster, the president is authorized to supplement efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused therein.⁶³ While emergency powers may affect the relationship of power between state and federal governments, the “major disaster” powers focus on providing federal support to the states, local authorities, and organizations.⁶⁴

⁵⁶ § 5131(5).

⁵⁷ Phillip A. Wallach & Justus Myers, *The Federal Government’s Coronavirus Response—Public Health Timeline*, BROOKINGS INST. (Mar. 31, 2020), <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/>.

⁵⁸ § 5131(a)(6).

⁵⁹ *Thermal Imaging Systems (Infrared Thermographic Systems / Thermal Imaging Cameras)*, U.S. FOOD & DRUG ADMIN. (Jan. 12, 2021), <https://www.fda.gov/medical-devices/general-hospital-devices-and-supplies/thermal-imaging-systems-infrared-thermographic-systems-thermal-imaging-cameras>; Jed Pressgrove, *Drones Become Part of Local U.S. Responses to COVID-19*, GOV’T TECH. (Apr. 22, 2020), <https://www.govtech.com/products/Drones-Become-Part-of-Local-US-Responses-to-COVID-19.html>; *Apps and COVID-19*, PRIVACY INT’L, <https://privacyinternational.org/examples/apps-and-covid-19> (last visited Apr. 11, 2022).

⁶⁰ 42 U.S.C. §§ 5121 et. seq. (2020).

⁶¹ § 5122(2).

⁶² *Id.*

⁶³ § 5121(b).

⁶⁴ § 5196.

Another source of statutory authority is the Public Health Service Act, which grants extraordinary powers to combat health emergencies.⁶⁵ The statute authorizes the Secretary of Health and Human Services (“Secretary”) to lead the federal public health and medical responses related to public health emergencies.⁶⁶ The Secretary is authorized to declare a public health emergency when a disease or disorder presents danger to the public health or when there are outbreaks of infectious diseases or bioterrorist attacks.⁶⁷ Additionally, the statute provides a wide range of measures the Surgeon General can take upon the Secretary’s approval to prevent the introduction and spread of communicable diseases.⁶⁸ For example, the Surgeon General can order inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals and articles, suspension of entries and imports, creation of quarantine stations, and other measures, as he or she deems necessary.⁶⁹

As a result of the confirmed cases of COVID-19, the Secretary declared a public health emergency exists.⁷⁰ Subsequently, the President designated COVID-19 as a national emergency due to the number of infections in the United States reaching a sufficient threshold to threaten the nation’s healthcare system, thus satisfying the circumstances necessary to declare a national emergency under the National Emergencies Act.⁷¹ Moreover, he determined that the severity and magnitude of the impacts of COVID-19 supported the declaration of a major disaster under the Stafford Act.⁷²

President Trump took a number of measures during the COVID-19 pandemic, utilizing the emergency and major disaster powers. Under the Social Security Act and the Health Insurance Portability and Accountability Act (HIPAA), the President authorized the Secretary to waive or modify certain requirements of Medicare, Medicaid, and Children’s Health Insurance programs.⁷³ Under the Stafford Act, the President encouraged states and local governments to activate their Emergency Operations Centers, to review emergency preparedness plans, and to request federal assistance.⁷⁴ The President utilized the Defense Production Act of 1950 to prioritize the allocation

⁶⁵ 42 U.S.C. §§ 201 et seq. (2020).

⁶⁶ § 300hh (2020).

⁶⁷ §§ 300hh–300hh-33 (2020).

⁶⁸ §§ 264–272.

⁶⁹ §§ 264–265, 267.

⁷⁰ *Determination that a Public Health Emergency Exists*, OFF. OF ASSISTANT SEC’Y FOR PREPAREDNESS & RESPONSE (last updated Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

⁷¹ *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak*, 85 Fed. Reg. 15337, 15337 (Mar. 18, 2020); 50 U.S.C. §§ 1601–1651 (2020).

⁷² Letter from Donald J. Trump, U.S. President, to Federal Agencies, on an Emergency Determination for the Coronavirus Disease 2019 (COVID–19) Pandemic Under the Stafford Act, Daily Comp. Pres. Doc. (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/03/LetterFromThePresident.pdf>.

⁷³ 42 U.S.C. § 1135b-5 (2020).

⁷⁴ 42 U.S.C. § 5131 (2020).

of health and medical materials, services, and facilities deemed “necessary or appropriate to promote national defense.”⁷⁵

During the pandemic, an exception to the standard protection on personal health information was used in order to promote public health objectives.⁷⁶ Under HIPAA’s Privacy Rule,⁷⁷ a covered entity⁷⁸ may disclose personal health information without the individual’s authorization (1) to a public health authority for the purpose of preventing or controlling disease⁷⁹ and (2) to a person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading.⁸⁰ Under the COVID-19 public health emergency, hospitals and clinics, for example, may disclose a broad range of medical information, including identifying information, of individuals who have been infected with, or exposed to, the virus to first responders and public health authorities without individuals’ authorization for public health purposes.⁸¹

As a matter of policy, we believe there should be limitations on the exercise of emergency and disaster relief. By definition, the powers granted are extraordinary and authorized for a specific purpose. Therefore, any emergency policy should be measured by the following three standards:

- (1) The measures taken should be taken within the defined and designated powers of the statutes or ordinances.
- (2) The measure should be limited in scope and accomplish purposes of the policy and not unnecessarily infringe on personal rights.
- (3) The measure should be limited in duration but renewable while the emergency exists.

In the early stages of the pandemic in 2019 and 2020, the actions of the federal government were defined, limited, and followed these basic guidelines. Emergency actions were authorized, and there was an increase in health care support and federal monetary assistance. Other subsequent federal actions that were legally contested include vaccine mandates that are specifically discussed in Section IV.

2. STATE AND LOCAL GOVERNMENT

Emergency powers are granted to states and local authorities, and those powers are defined very broadly.⁸² The issue of local control has come into sharp focus during the pandemic because

⁷⁵ Exec. Order No. 13,909, 56 Fed. Reg. 16,227, 16,227–28 (Mar. 18, 2020).

⁷⁶ 45 C.F.R. § 164.512(b) (2020). 45 C.F.R. §§ 164.102 et seq. (2020).

⁷⁷ §§ 160.101 et seq., 164.102 et seq.

⁷⁸ § 160.103 (“Covered entity means: (1) A health plan[;] (2) A health care clearinghouse[;] [or] (3) A health care provider who transmits any health information in electronic form in connection with a transaction . . .”).

⁷⁹ § 164.512(b)(1)(i).

⁸⁰ § 164.512(b)(1)(iv).

⁸¹ *COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities*, U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. FOR CIV. RTS., <https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf> (last visited Apr. 11, 2022).

⁸² *Infra* Section § II(a)(2).

of the differences in approach by various states and local governments. For example, San Francisco implemented a strict lockdown procedure while other areas such as South Dakota, Utah, and Oklahoma imposed very few restrictions.⁸³ There are rational reasons for different approaches based on the degree of outbreak, density of population, and other factors. The legal basis for these actions depends upon state laws and local ordinances as well as how the local actions interact with Federal policies. In state constitutional structures, local governments are given leeway in local policy making. However, under most state constitutional structures, the state government is empowered to preempt local governments on state issues.⁸⁴

Florida provides an example of a large state with multiple large municipalities and counties that take varied approaches. Florida defines emergency as “any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.”⁸⁵ Florida Governor Ron DeSantis declared that COVID-19 justified a state of emergency.⁸⁶ Under the state of emergency, Governor DeSantis issued several state mandates, and initially some of the state measures were stricter than federal measures.

Under Chapter 252, Section 36(5)(k) of the Florida statutes, Governor DeSantis issued a “stay at home” measure, ordering senior citizens and individuals with fragile health to stay at home and take all measures to limit the risk of exposure.⁸⁷ The measure required that all persons in Florida limit their movements to those necessary to obtain or provide essential services or conduct essential activities.⁸⁸ Additionally, social gatherings were prohibited.⁸⁹

Generally, under Chapter 252 of the Florida Statutes, Governor DeSantis ordered vacation rental businesses to stop activities, including advertisement and scheduling future reservations.⁹⁰ Governor DeSantis also ordered the suspension of mortgage foreclosures and evictions.⁹¹ Each measure taken by Governor DeSantis may be considered appropriate under the three-prong test.

The first element of the three-part test requires that measures taken must be within the defined and designated powers of the statutes. Governor DeSantis’s “stay at home” measure finds statutory support. According to Florida law:

⁸³ Ayla Ellison. *10 states with the fewest, most COVID-19 restrictions*, BECKER'S HOSP. REV. (Sep. 15, 2021), <https://www.beckershospitalreview.com/rankings-and-ratings/10-state-with-the-fewest-most-covid-19-restrictions-091520.html>.

⁸⁴ *Federal and State Pre-emption Basics*, NAT'L CONF. STATE LEGS. (Jul. 9, 2016), <https://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/webinar-federal-and-state-preemption-basics.aspx>.

⁸⁵ FLA. STAT. ANN. § 252.36 (5)(k) (West 2021).

⁸⁶ Fla. Exec. Order No. 20-52 (Mar. 9, 2020).

⁸⁷ Fla. Exec. Order No. 20-83 (Mar. 24, 2020).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Fla. Exec. Order No. 20-87, March 27, 2020.

⁹¹ Fla. Exec. Order No. 20-94, April 2, 2020.

In addition to any other powers conferred upon the Governor by law, he or she may (. . .) Take measures concerning the conduct of civilians, the movement and cessation of movement of pedestrian and vehicular traffic prior to, during, and subsequent to drills and actual or threatened emergencies, the calling of public meetings and gatherings, and the evacuation and reception of civilian population.⁹²

The statute explicitly grants the governor the power to control the movement of the population during a state of emergency.⁹³ Considering that the governor declared a state of emergency in reaction to COVID-19, the measure appears to be aligned with the law.

The second element requires evaluating whether the measures taken justify the limitations and intrusions on personal liberties. In other words: Do measures such as quarantining and social distancing help limit the spread of COVID? In 2019, COVID-19 was new. Medical professionals and public health specialists were asked how to stop the pandemic, how to reduce individual's chances of exposure, and how to make the health system able to address the issues of a pandemic.⁹⁴ All of these complex health issues had to be addressed by governmental officials who relied the continually evolving information from health care officials.⁹⁵ In retrospect, some of those decisions had a positive effect while others were not as successful. But there was rational support for the decisions. Ultimately, history will judge, but officials and the courts have the harder task of making decisions in the middle of the crisis.

The third element of the test requires that emergency powers have time limits. A state of emergency proclaimed by Florida's governor has a time limit of sixty days,⁹⁶ and Governor DeSantis's state of emergency in response to COVID-19 was extended eight times, extending to over 500 days.⁹⁷ This element of sound emergency policy requires continual review of the need to maintain restrictions and controls. Florida did continual reviews and terminated restrictions. Ultimately, continuation of emergency measures is a policy and health care debate. However, there is a necessity that the debate occurs and that restrictions are not perpetuated without review.

In response to a crisis like the pandemic, that government is entitled and even obligated to restrict liberty in the protection of public health.⁹⁸ There are, of course, challenges to these

⁹² FLA. STAT. ANN. 252.36(k) (West 2021).

⁹³ *Id.*

⁹⁴ See *CDC's Response: Preparing first responders, healthcare providers, and health systems*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/index.html> (Feb. 12, 2021)

⁹⁵ NPR interviewed three global leaders who shared how their countries are addressing COVID-19. Morning Edition, *The Global Leaders Who Have Been Effective During the Coronavirus*, NPR (Apr. 16, 2020), <https://www.npr.org/2020/04/16/835710001/the-world-leaders-who-have-been-effective-during-the-coronavirus>.

⁹⁶ FLA. STAT. ANN. § 252.36(2) (West 2021).

⁹⁷ Fla. Exec. Order 20-114 (May 8, 2020); Fla. Exec. Order 20-166 (July 7, 2020); Fla. Exec. Order 20-192 (Aug. 5, 2020); Fla. Exec. Order 20-213 (Sept. 4, 2020); Fla. Exec. Order 20-276 (Nov. 3, 2020); Fla. Exec. Order 20-316 (Dec. 29, 2020); Fla. Exec. Order 21-45 (Feb. 26, 2021); Fla. Exec. Order 21-94 (Apr. 27, 2021).

⁹⁸ Erwin Chemerinsky, *Yes, the government can restrict your liberty to protect public health*, LOS ANGELES TIMES (Apr. 20, 2020), <https://www.latimes.com/opinion/story/2020-04-20/government-can-restrict-your-liberty-to-protect-public-health-courts-have-made-that-clear>; Stephanie Wylie, *The Supreme Court Should not Politicize Valid Public*

intrusions on liberty. For example, challenges have been raised against local orders for business closings and mask orders.⁹⁹ Those challenges are grounded in privacy and liberty arguments.¹⁰⁰ Florida courts were reluctant to overturn emergency actions in the middle of a pandemic,¹⁰¹ and that was true nationwide.¹⁰² Overall, depending on the facts, quarantine and social distancing mandates are arguably justified within the statutory definitions of emergency powers. The legitimacy of government mandates depends on the actual circumstances of the pandemic and whether the measures continue to be justified by the facts.

As the pandemic evolved in 2022, some states, including Florida, changed course. In fact, Florida state government prohibited local restrictions such as mask requirements.¹⁰³ There was conflict between state and local authorities and the state ultimately prevailed.¹⁰⁴

In the rollercoaster ride of the pandemic, some localities suspended mandates and then reinstated them.¹⁰⁵ Restrictions have become more controversial as the pandemic continues to mutate and drag on. The severest of restrictions such as business shutdowns and quarantines test the patience of citizens, the limits of governmental power, and the resilience of the economy.

When “non-essential” businesses were temporarily shut down, millions of people lost their jobs, and the American economy took a downward turn.¹⁰⁶ The government took steps to alleviate the economic hardships caused by the pandemic by suspending foreclosures and evictions and by issuing stimulus checks.¹⁰⁷

While the federal and state governments enacted emergency policies, local governments took their own steps. A critical part of the ultimate legal story is the interaction of federal, state, and

Health Orders, CTR. FOR AM. PROGRESS (Sept. 2, 2020), <https://www.americanprogress.org/issues/courts/reports/2020/09/02/489964/supreme-court-not-politicize-valid-public-health-orders/>.

⁹⁹ *Green v. Alachua County*, 323 So. 3d 246, 249 (Fla. Dist. Ct. App. 2021).

¹⁰⁰ Chemerinsky, *supra* note 98.

¹⁰¹ *See generally Machovec v. Palm Beach Cty.*, 310 So. 3d 941 (Fla. Dist. Ct. App. 2021); *Power v. Leon County*, No. 37-2020-CA-001200 (Fla. 2d Jud. Cir. Ct. 2020); *4 Aces Enters., LLC v. Edwards*, 479 F. Supp. 3d 311 (E.D. La. 2020).

¹⁰² Chemerinsky, *supra* note 98.

¹⁰³ Florida Executive Order 21-175 (2021); Fla. Stat. 112.0441.

¹⁰⁴ Florida First DCA Order upholding Governor DeSantis’s ban on mask mandates in public schools, Case No. 1D21-2685, September 10, 2021.

¹⁰⁵ Corky Siemaszko, *New Lockdowns and restrictions sweep across the country as COVID-19 cases continue to rise*, NBC NEWS (Nov. 16, 2020), <https://www.nbcnews.com/news/us-news/new-lockdowns-restrictions-sweep-across-country-covid-19-cases-continue-n1247919>.

¹⁰⁶ Michael Ettlinger & Jordan Hensley, *COVID-19 Economic Crisis: By State*, UNIV. OF N. H. CARSEY SCH. OF PUB. POL’Y (Jan. 13, 2021), <https://carsey.unh.edu/COVID-19-Economic-Impact-By-State>.

¹⁰⁷ *See* Alicia Adamczyk, *From Stimulus Checks to Unemployment Insurance, Here’s how 2021 Covid-19 Relief can Affect your 2022 Finances*, CNBC (Jan. 7, 2022, 2:10 PM), <https://www.cnbc.com/2022/01/07/how-2021-covid-19-relief-can-affect-your-2022-finances.html>; *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 86 Fed. Reg. 34010 (June 28, 2021).

local policies. In many ways, the national government allowed local and state governments to make decisions for their communities without intervening.¹⁰⁸

Mayor Giménez of Miami Dade County in Florida used local authority to implement COVID-19 policies. Under Section 8B 7(2)(f) of the Miami Code, Mayor Giménez ordered the closure of all non-essential retail and commercial establishments.¹⁰⁹ Without any specific legal authority, Mayor Giménez ordered the use of facial masks where social distancing was not possible.¹¹⁰ Mayor Giménez also ordered the use of facial masks everywhere under the penalty of arrest and monetary penalties without a specific provision giving him the authority to make this type of mandate.¹¹¹

The business closure measure is supported in the Miami-Dade County Code of Ordinances. The statute provides:

Once a Local State of Emergency has been declared, the Manager is authorized by the Mayor and the Board to order any or all of the following actions: (. . .))) An order requiring any or all commercial establishments located in areas of imminent or actual danger to close and remain closed until further order.¹¹²

Mayor Giménez is explicitly authorized by the ordinance to order business closure under a state of emergency. The first prong of our analysis is, therefore, met.

The second issue is whether the severity of the specific measures was justified to address issues arising from COVID-19. At the time of Mayor Giménez’s closures, there were serious concerns about their efficacy in reducing the spread and the potential negative impact the closures would have on local businesses.¹¹³ Studies show that business closure measures were effective in conjunction with stay at home orders and the prohibition of public gatherings, but the effectiveness of particular closings is still debated.¹¹⁴ While the measures may be controversial, they may be justified for a limited period of time.

Mayor Giménez’s facial mask measure may be appropriate because studies of masks suggest that they are beneficial to reducing the spread of COVID-19.¹¹⁵ However, the measures require more scrutiny when “recommendations” become rules with penalties like civil fines or criminal

¹⁰⁸ See discussion *infra* Section V.

¹⁰⁹ MIAMI-DADE, FLA., Emergency Order 07-20 (2020).

¹¹⁰ MIAMI-DADE, FLA., Emergency Order 20-20 (2020).

¹¹¹ MIAMI-DADE, FLA., Emergency Order 20-16 (2020).

¹¹² MIAMI-DADE, FLA., Municipal Code ch. 8, § 8B-7 (2020).

¹¹³ Alexander W. Bartik, *et al*, *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 ECON. SCIS. 17656, 17656 (2020).

¹¹⁴ J.M. Braunder *et al.*, *Inferring the Effectiveness of Government Interventions Against COVID-19*, 802 SCI. 371, 371 (2020); Henning Bundgaard *et al.*, *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Wearers*, 174 ANNALS INTERNAL MED. 335, 335 (2021).

¹¹⁵ Talib Dbouk & Dimitris Drikakis, *On Respiratory Droplets and Face Masks*, 32 PHYSICS FLUIDS 063303 (1994).

penalties.¹¹⁶ Strict standards were implemented and justified by showing the need to protect public health and safety; however, criminal penalties were not widely supported and not enforced in most places.¹¹⁷ Criminalizing an activity through executive order that is not based on a statute or ordinance raises legal and policy questions.¹¹⁸

The third prong of our test considers time limits for business closures and mask measures. Neither the business closure measure nor the mask measure specifies a time limit.¹¹⁹ Instead, the executive orders establishing those measures provide that they shall expire upon the expiration of the existing Miami-Dade County State of Local Emergency.¹²⁰ In addition, when the State of Local Emergency is extended, those measures shall also be extended.¹²¹ The lack of explicit deadlines for the measures is a defect, although when the overall emergency expires, these specific restrictions terminate as well.

It is reasonable and necessary for freedoms to be temporarily limited during a pandemic.¹²² Government at all levels has been confronted with an unprecedented crisis and compelled to make choices that affect public health, private rights, and the economic wellbeing of the states and the nation. COVID-19 demanded decisions be made while science and circumstances were evolving rapidly. For the future, we must learn from our experience and our mistakes. A central lesson is to limit restrictions on personal freedoms unless truly necessary. And in our system, the courts define the boundary between necessary and unnecessary intrusions on freedoms of movement, property rights, and personal data rights.

3. JUDICIARY

Inevitably, courts are drawn to high-level conflicts involving government actions and individual rights. United States courts have been asked to analyze and rule on various COVID-19 measures. Section IV of this article considers specific cases and limitations for federal testing requirements, mortgage moratoriums and other policies. Courts have recognized limits on pandemic policies but the courts often support for government policies based on the existence of an emergency.¹²³ For example, a California superior court upheld the governor's COVID-19

¹¹⁶ MIAMI-DADE, FLA., Emergency Order 20-16 (2020); Iván Espinoza-Madrigal, *Don't Criminalize the Coronavirus*, WBUR (Apr. 16, 2020), <https://www.wbur.org/cognoscenti/2020/04/16/police-coronavirus-ivan-espinoza-madrigal>.

¹¹⁷ Kristine Phillips, *Many Face Mask Mandates go Unenforced as Police Feel Political, Economic Pressure* (Sept. 16, 2020), <https://www.usatoday.com/story/news/politics/2020/09/16/covid-19-face-mask-mandates-go-unenforced-police-under-pressure/5714736002/>.

¹¹⁸ *What is an Executive Order?*, AM. BAR ASS'N, (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/.

¹¹⁹ MIAMI-DADE, FLA., Emergency Order 07-20 (2020); MIAMI-DADE, FLA., Emergency Order 20-20 (2020).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Supra* Section II.

¹²³ BALLOTEDIA, *Lawsuits About State Actions And Policies In Response To The Coronavirus (COVID-19) Pandemic, 2020-2021*, ,

restrictions on religious gatherings in a suit filed by a local church.¹²⁴ In *Power v. Leon County*, the Second Judicial Circuit Court in Florida denied a motion to enjoin Leon County’s mask ordinance (this decision was upheld by the state’s First District Court of Appeal).¹²⁵ The plaintiff argued that the ordinance violated guarantees of privacy, due process, religious freedom, and equal protection under the Florida Constitution.¹²⁶

Former New York Governor Andrew Cuomo was a party to a number of cases that challenged his COVID-19 mandates. In *Page v. Cuomo*,¹²⁷ the United States District Court for the Northern District of New York upheld the former New York Governor’s imposition of a two-week quarantine order on people entering New York from states that have high levels of coronavirus.¹²⁸ In upholding the governor’s order, the federal judge cited support from the 1905 Supreme Court case *Jacobson v. Commonwealth of Massachusetts*.¹²⁹ In *Jacobson*, the Court upheld the authority of states to enforce a compulsory vaccination order in Massachusetts when the government was combatting a smallpox outbreak.¹³⁰ At that time, the city government in Cambridge, Massachusetts, mandated that all adults be vaccinated against smallpox, and failure to do so would result in a five-dollar fine.¹³¹ *Jacobson*, which has previously been considered obscure, is back in the spotlight, as some civil rights advocates fear vaccine mandates.¹³²

One of the New York cases made its way to the U.S. Supreme Court in the case of *Roman Catholic Diocese of Brooklyn v. Cuomo*,¹³³ which presented an array of issues suitable for a constitutional law exam. The issues include the authority of states, the use of executive authority, the deference of courts to the political branches in a technical setting, the definition of emergency, and the limits of free exercise of religion.¹³⁴ The New York policy restricted gatherings to ten individuals for locations in the red zone and twenty-five for locations in the orange zone.¹³⁵ The per curiam majority concluded that the policy intruded on the free exercise of religion by limiting

[https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020) (last visited Mar. 23, 2022).

¹²⁴ *County of Ventura v. Godspcak Calvary Chapel*, 2020 WL 6557826 (Cal. Sup. Ct. 2020).

¹²⁵ *Power v. Leon County*, 2020 WL 4919774 (Fla. Cir. 2020); 20-2290, Fla. First Dist. Ct. App. (2022), <https://www.1dca.org/Resources/Cases-of-Public-Interest/20-2290> (listing case history for *Power v. Leon County*).

¹²⁶ *Power*, 2020 WL 4919774.

¹²⁷ 478 F. Supp. 3d 355 (N.D.N.Y. 2020).

¹²⁸ *Id.*

¹²⁹ *Id.* at 365 (citing *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)).

¹³⁰ *Jacobson*, 197 U.S. at 39.

¹³¹ *Toward a Twenty-First Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820, 1822 (2008).

¹³² Jillian Kramer, *COVID-19 Vaccines Could Become Mandatory. Here’s how it Might Work*, NAT’L GEOGRAPHIC, (Aug. 19, 2020), <https://www.nationalgeographic.com/science/2020/08/how-coronavirus-covid-vaccine-mandate-would-actually-work-cvd/>.

¹³³ 141 S. Ct. 63 (2020).

¹³⁴ *See generally id.*

¹³⁵ *Id.* at 64.

church gatherings.¹³⁶ The majority also concluded that the policy limiting religious gatherings must survive strict scrutiny and recognized that controlling COVID was a compelling state interest.¹³⁷ The Court decided that the policy failed by not being narrowly tailored and favoring other gatherings.¹³⁸ In a concurring opinion, Justice Gorsuch noted that restrictions on houses of worship violate the free exercise clause and said that the Constitution “cannot [take] a sabbatical” during a pandemic.¹³⁹ The dissent by Justice Breyer argued that houses of worship are treated equally with the same kind of secular gatherings and that the motion for temporary injunction should be denied.¹⁴⁰ But even though the injunction was granted, it is clear that the Court recognized the importance of government actions to control the pandemic. In his concurrence, Justice Kavanaugh said:

To be clear, the COVID–19 pandemic remains extraordinarily serious and deadly. And at least until vaccines are readily available, the situation may get worse in many parts of the United States. The Constitution “principally entrusts the safety and the health of the people to the politically accountable officials of the States” Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic.¹⁴¹

In the long term, while this case overturned a state action, it recognized clearly that there is a compelling interest for government to address a pandemic.

Courts are reluctant participants in the COVID crisis but, nonetheless, are necessary to provide boundaries. Even though courts defer to executive decisions and compelling interests of public health and safety, the courts and the Constitution “cannot [take] a sabbatical” on issues of individual liberty.

B. BRAZIL

Brazil and the United States have similar federal government systems, and both countries have been significantly affected by COVID-19. In fact, Brazil has found itself at the center of the largest COVID-19 outbreak in the Southern Hemisphere.¹⁴² An analysis of Brazilian history, government, and culture shows a striking similarity to the United States, and the country’s handling of the COVID-19 pandemic provides a look into another federal government’s approach to this pandemic.

¹³⁶ *Id.* at 68-69.

¹³⁷ *Id.* at 67.

¹³⁸ *Id.*

¹³⁹ *Id.* at 69–70.

¹⁴⁰ *Id.* at 76–78 (Breyer, J., dissenting).

¹⁴¹ *Id.* at 73–74 (Kavanaugh, J., concurring).

¹⁴² Manuela Andreoni, *Corona Virus in Brazil: What You Need to Know*, N.Y. TIMES, (Oct. 19, 2021), <https://www.nytimes.com/article/brazil-coronavirus-cases.html>.

Brazil's federal constitution asserts that during extraordinary circumstances that threaten the health, peace, and safety of the Brazilian people, Congress can implement a state of emergency.¹⁴³ It can declare one of the following situations: state of calamity, state of emergency, state of siege, and state of defense.¹⁴⁴ On March 20, 2020, Brazil's Congress declared a state of public calamity due to COVID-19. The measure was taken for financial reasons given that under a state of public calamity, the federal government can increase public spending to combat the spread of damage,¹⁴⁵ and the federal administration did not have to meet the fiscal target established for 2020.¹⁴⁶ In addition, emergency funds can be accessed, and States and municipalities can obtain assistance from the federal government.¹⁴⁷

Restrictions of individual rights, freedoms, and constitutional guarantees can occur temporarily during a state of public calamity.¹⁴⁸ Like American law, Brazilian law enlarges the executive powers during states of emergency,¹⁴⁹ and it has an ambiguous definition of emergency and emergency powers.¹⁵⁰

Like the United States, Brazilian courts are engaged in evaluating COVID policies. The courts resolved disputes involving social gatherings, business closures, lockdowns, curfews, face coverings, and COVID-19 mandates.¹⁵¹ A lawsuit was even filed against Brazil's president which sought to require him to wear a face mask while in public.¹⁵² Although the district court had ruled in favor of the plaintiff, the decree was later overruled by the Court of Appeals, and the President was not required to wear a mask.¹⁵³

¹⁴³ Brazil, Constitution of the Federative Republic of Brazil art. 21, V.
http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.html.

¹⁴⁴ *Id.*

¹⁴⁵ Congresso Nacional, Decreto Legislativo, No. 6 (2020).

¹⁴⁶ Redacao Migalhas, *Congresso Aprova Estado De Calamidade Pública*, MGALHAS (May 20, 2020), <https://migalhas.uol.com.br/quentes/322271/congresso-aprova-estado-de-calamidade-publica>.

¹⁴⁷ *The CARES Act Provides Assistance for State, Local, and Tribal Governments*, U.S. DEP'T OF TREAS., <https://home.treasury.gov/policy-issues/cares/state-and-local-governments> (last visited Apr. 11, 2022).

¹⁴⁸ The state of public calamity is a legal measure, instituted by the Presidential Decree nº 7.257/2010 - through Legislative Decree 6, of March 20, 2020, President Bolsonaro officially instituted the state of public calamity in Brazil due to COVID-19. In addition to easing budget limits and allowing the exceptional allocation of more resources to health without committing a crime of fiscal responsibility, the measure also legitimizes the establishment of urgent and provisional legal regimes, in order to contain the impacts of the dire situation. Circulation rights can be suspended and curfews can be implemented for instance.

¹⁴⁹ *Infra* section IV.

¹⁵⁰ *Id.* That will be discussed further throughout the article as we state that there no clear definitions of what types of situations should be considered an emergency.

¹⁵¹ *Infra* notes 159–65.

¹⁵² Mateus Silva Laves, *Liminar obriga Jair Bolsonaro a usar máscara de proteção contra a Covid-19*, CONSULTOR JURÍDICO (June 23, 2020), <https://www.conjur.com.br/2020-jun-23/liminar-obriga-bolsonaro-usar-mascara-protacao-covid-19>

¹⁵³ Agnce France-Presse, *Order for Brazil's Bolsonaro to Wear a Mask Dismissed*, COURTHOUSE NEWS SERV. (July, 1, 2020), <https://www.courthousenews.com/order-for-brazils-bolsonaro-to-wear-a-mask-dismissed/>.

The pandemic resulted in controversial government intrusions in Brazil. Like the United States, Brazil is a large diverse country with a wide a wide range of political views and diverse cultures. The personality and culture of different regions and nations affects outcomes, enforcement, and acceptance of governmental actions and policies. Culture is important. Laws matter, but how individuals react to those laws may be even more critical.

III. IS CULTURE MORE IMPORTANT THAN LAW IN RESPONDING TO A PANDEMIC?

The World Health Organization has stated that individual behavior is crucial to control the spread of COVID-19.¹⁵⁴ Individual behavior is affected by laws and by culture. The pandemic provides a global example of how individuals react to laws, leadership, and cultural practices. Some nations followed legal restrictions on personal conduct, and some resisted the restrictions.¹⁵⁵ In certain countries there is a culture of compliance, and in other countries, there is a culture of defiance. Some of the explanation for defiance may be rooted in failures of governmental leadership to persuade individuals to comply,¹⁵⁶ but there are also basic cultural tendencies that influence compliance.

Governments worldwide implemented similar restrictions, such as limiting private business hours of operation and capacity, imposing travel bans, restraining school attendance, imposing face coverings in public and private places, prohibiting large social gatherings, developing tracing applications, and forcing mandatory quarantines. Each of these measures restricts personal autonomy.

Because COVID-19 was a new virus with no ready cure, public health officials and governments frequently followed the playbook used for other pandemics to combat COVID-19.¹⁵⁷ The focus was to isolate and limit human contact with the goal of “flattening the curve.”¹⁵⁸

¹⁵⁴ The World Health Organization stated on its Covid-19 Strategy Update virtual booklet that “Individuals must protect themselves and others by adopting behaviors such as washing hands, avoiding touching their face, practicing good respiratory etiquette, individual level distancing, isolating in a community facility or at home if they are sick, identifying themselves as a contact of a confirmed case when appropriate, and cooperating with physical distancing measures and movement restrictions when called on to do so.” See *COVID-19 Strategy Update*, WORLD HEALTH ORG., (Apr. 14, 2020), https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf?sfvrsn=29da3ba0_12.

¹⁵⁵ *COVID: Huge protests across Europe over new restrictions*, BBC (Nov. 21, 2021), <https://www.bbc.com/news/world-europe-59363256>.

¹⁵⁶ The United States and Brazil are examples of countries where there has been a culture of defiance.

¹⁵⁷ Paul French, *In the 1918 flu pandemic, not wearing a mask was illegal in some parts of America. What changed?*, CNN (Apr. 4, 2020), <https://www.cnn.com/2020/04/03/americas/flu-america-1918-masks-intl-hnk/index.html>.

¹⁵⁸ Kara Gavin, *Flattening The Curve for COVID-19: What Does It Mean and How Can You Help?*, MICH. HEALTH (Mar. 11, 2020), <https://healthblog.uofmhealth.org/wellness-prevention/flattening-curve-for-covid-19-what-does-it-mean-and-how-can-you-help>.

Flattening the curve is not curing the disease—it is buying time by preventing large spikes in infection and reducing the burden on the healthcare system.¹⁵⁹

Culture and political structure influence individual compliance with COVID restrictions. Political structures based on centralized authority or dictatorial power can expect a high rate of compliance with a populace used to intrusion. If a governmental system has already achieved a level of suppression of dissent and limited civil liberties, it will likely achieve a high level of compliance in pandemic restrictions. Fear is a motivator. Governments that celebrate and support civil liberties have a different issue. In a pluralistic society with a history of individualism, compliance with broad government intrusions is questioned.

University of Maryland Professor of Psychology Michele Gelfand states that the world can be divided into tight and loose cultures.¹⁶⁰ In a tight culture, social norms are clearly defined and reliably imposed, leaving little room for individual improvisation and interpretation.¹⁶¹ Loose cultures have social norms that are flexible and informal. Loose cultures propose expectations but permit individuals to define the range of tolerable behavior within which they may exercise their own preferences.¹⁶²

A recent study published in *Safety Science* reveals that cultural determinants play an important role in controlling infection behavior.¹⁶³ According to that study, countries with higher a “Uncertainty Avoidance Index” will have the lower proportion of people gathering in public such as retail and recreation, grocery and pharmacy, parks, transit stations, and workplaces.¹⁶⁴

Previous studies indicate that a tight culture is associated with success during natural disasters, invasions, population density, and pathogen outbreaks.¹⁶⁵ For example, China, a country with a tight culture, demands and receives compliance with restrictions.¹⁶⁶ A high compliance rate with the government restrictions may explain China was able to control the spread of the first wave of COVID-19 faster than most nations.¹⁶⁷

¹⁵⁹ *Id.*

¹⁶⁰ MICHELE GELFAND, *RULE MAKERS RULE BREAKERS: HOW TIGHT AND LOOSE CULTURES WIRE OUR WORLD* 52 (2018).

¹⁶¹ *Id.* at 53–61

¹⁶² *Id.* at 64–72.

¹⁶³ Toan Luu & Duc Huynh, *Does Culture Matter Social Distancing Under The COVID-19 Pandemic?*, 130 *SAFE SCI.* 104872 (2020).

¹⁶⁴ *Id.*

¹⁶⁵ *See, e.g.*, Jesse R. Harrington & Michele J. Gelfand, *Tightness–Looseness Across The 50 United States*, 111 *PSYCH. & COGNITIVE SCIS.* 7990, 7992–93 (2014).

¹⁶⁶ Bo Yan et al., *Why Do Countries Respond Differently to COVID-19? A Comparative Study of Sweden, China, France, and Japan*, 50 *AM. REV. PUB. ADMIN.* 762, 763, 765 (2020).

¹⁶⁷ Kai Kupperschmidt & Jon Cohen, *China's aggressive measures have slowed the coronavirus. They may not work in other countries*, *SCI. INSIDER* (Mar. 2, 2020), <https://www.science.org/content/article/china-s-aggressive-measures-have-slowed-coronavirus-they-may-not-work-other-countries>; *see also* Dan Chen, *China's coronavirus response could build public support for its government*, *WASH. POST* (Mar. 27, 2020),

Chinese society is a tight culture where government surveillance and intrusion is commonplace.¹⁶⁸ Its highly regulated culture plays an important role when the government is trying to enforce health measures during a pandemic.¹⁶⁹ Clearly there are factors connecting culture and compliance such as cultural heritage of a community and reliance on government. China illustrates how intrusive policies can prevail because of a combination of authoritarian government and a culture of compliance. The Chinese government's ability to forcibly vaccinate is an example of the effectiveness of this combination.¹⁷⁰

In contrast, a loose culture will prioritize the privacy and individual freedom. There is evidence that the spread of COVID-19 in the United States began in January 2020.¹⁷¹ Yet the country debated COVID-19 policies even as cases and deaths rose.¹⁷² For example, in May 2020, armed protesters took the streets of Michigan to protest the Governor's order to extend the stay-at-home and social distance mandates, as well as to protest business closures.¹⁷³ Undoubtedly, the complicated and often confusing information about the pandemic prevented a consensus, but so did the underlying culture of resisting governmental controls.

A lack of a unified approach was an important reason why COVID-19 spread.¹⁷⁴ A decentralized decision-making process is fundamental part of federalist systems like that of the United States, but decentralization can result in different policies in different jurisdictions. As previously noted, some cities in 2020 were completely and quarantined,¹⁷⁵ while other states had

<https://www.washingtonpost.com/politics/2020/03/27/chinas-coronavirus-response-could-build-public-support-its-government/> (noting how popular the COVID-tracking QR code is among Chinese residents).

¹⁶⁸ Bo Yan et al., *supra* note 166, at 763; RONALD GOLDFARB ET. AL., AFTER SNOWDEN: PRIVACY, SECRECY, AND SECURITY IN THE INFORMATION AGE 200 (2015).

¹⁶⁹ Bo Yan et al., *supra* note 166, at 765.

¹⁷⁰ Nicholas Goldberg, *You think vaccine mandates are controversial? What if the police pinned you down and injected you?*, L.A. TIMES (Sept. 29, 2021), <https://www.latimes.com/opinion/story/2021-09-29/forced-vaccinations-china-ethics-covid> (“[P]olice in China’s Hunan province came to the home of Zhang Jianping. They questioned him about why he had not been vaccinated against COVID-19, and took him by car to a hospital. . . . Zhang said he was very clear that he did not want to be immunized. . . . But they held down his arms and legs and forcibly injected him.”).

¹⁷¹ *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CTR. FOR DISEASE CONTROL AND PREVENTION, (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

¹⁷² *CDC 2020 in Review*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 29, 2020), <https://www.cdc.gov/media/releases/2020/p1229-cdc-2020-review.html>.

¹⁷³ Lois Beckett, *Armed protesters demonstrate against Covid-19 lockdown at Michigan capitol*, GUARDIAN, (June 2, 2020), <https://www.theguardian.com/us-news/2020/apr/30/michigan-protests-coronavirus-lockdown-armed-capitol>; *Coronavirus: Armed protesters enter Michigan statehouse*, BBC NEWS (May 1, 2020), <https://www.bbc.com/news/world-us-canada-52496514>.

¹⁷⁴ See Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to COVID-19*, N. ENG. J. MED., (May 28, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2006740> (highlighting how the United States’ failure to have a unified approach to COVID-19 caused more harm and confusion during the pandemic).

¹⁷⁵ San Francisco Bay Area is notable as one of the places with stricter and longer lockdown in the United States with the most stringent isolation orders in the country taking effect on March 17, 2020. Kate Eby, *Coronavirus Timeline:*

virtually no restrictions.¹⁷⁶ A positive consequence (at least for this article) is that the success of different policies is observable since different locations can react differently to different circumstances. The risk posed by decentralization is that some areas may choose to ignore good policies.

In addition, decentralized decision-making causes jurisdiction issues. Can states supersede cities' determinations of mask ordinances? Can the federal government order a state to lift restrictions on business? Can the federal government order a state to implement a stay-at-home order? These legal issues are important to address as we consider how future pandemics might be handled. The critical policy issue is whether this type of diverse decision-making works during a pandemic. Ultimately, variations in policy makes sense because facts and circumstances vary across jurisdictions, but some issues should be addressed through uniform, national policy.

State borders do not stop COVID-19 from spreading. Without uniform, national consensus or direction, viruses will spread across governmental boundaries.¹⁷⁷ A 2009 study stated that British and American citizens are unlikely to stay at home to work if they think that the risk of illness transmission is uncertain.¹⁷⁸ Loose cultures with a commitment to individual liberty are a stark contrast to tight cultures with dictatorial governments.¹⁷⁹ This reality is not an endorsement of dictatorships as the best means to address pandemics. Rather, it is recognition that a national emergency capable of crossing state boundaries requires national policies and guidance. In addition to the national need, there is also a need for a mutual understanding of policies across jurisdictions and how they should be shaped depending on each population. The policy appropriate to a densely populated urban environment may be quite different from the policy in a small rural city.¹⁸⁰

Latin American countries with loose cultures have nevertheless enacted strict lockdown measures in response to severe COVID-19 outbreaks. In Honduras, the government instituted a

Tracking major moments of COVID-19 pandemic in San Francisco Bay Area, ABC 7 NEWS (last updated Apr. 7, 2022), <https://abc7news.com/timeline-of-coronavirus-us-covid-19-bay-area-sf/6047519/>.

¹⁷⁶ The North Dakota Governor held off on imposing stay-at-home orders in the beginning of the COVID-19 contamination in the U.S. and later took very few restrictive measures to control the spike of the virus. See Sarah Mervosh et al., *Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

¹⁷⁷ See Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to COVID-19*, THE NEW ENGLAND JOURNAL OF MEDICINE (May 28, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2006740> (emphasizing the need for a uniform national direction when handling crises).

¹⁷⁸ See Luu & Huynh, *supra* note 163.

¹⁷⁹ See generally Michele J. Gelfand, *Universal and culture-specific patterns of tightness-looseness across the 31 Chinese provinces*, 116 PSYCH. & COGNITIVE SCIS. 6522 (2019).

¹⁸⁰ *A Recommendation of the European Commission on “The Method to Delineate Cities, Urban and Rural Areas for International Statistical Comparisons,”* at 7 (Mar. 2020), <https://unstats.un.org/unsd/statcom/51st-session/documents/BG-Item3j-Recommendation-E.pdf> (“[T]owns and semi-dense areas may differ significantly from both cities and rural areas. Policies that are uniformly applied to these three classes may not be suitable and could benefit from being tailored for each of these types of areas.”).

nationwide centralized, militarized lockdown, devoid of oversight.¹⁸¹ The lockdown allocated specific days in which people could leave their homes to get food.¹⁸² Similarly, Chile instituted a strict curfew, and its residents must obtain a permit to leave home for very specific reasons.¹⁸³ In Brazil, numerous local government placed travel barriers on city borders, restricting the circulation of people as a response to COVID-19.¹⁸⁴ Additionally, interstate private transportation buses have been restricted, and interstate roads have been closed.¹⁸⁵ Many citizens have also protested the face covering impositions and movement-restrictions measures.¹⁸⁶

Compare the Latin American countries' responses to the response of Asian countries' responses. For residents in many Asian countries, some of which are tight-cultured countries, wearing a mask and the government's restrictions are not unusual and compliance is high.¹⁸⁷ There is cultural acceptance and pressure to conform. However, residents of loose-cultured countries have shown they are less likely to abide by government rules that implicate a limitation of privacy or individual freedoms.

Government trustworthiness plays a crucial role in how countries deal with the pandemic. Tight cultures have strong social norms, little tolerance for deviance, and higher individual trust in government authority, while loose cultures are more permissive to varying social norms.¹⁸⁸ In loose cultures, people can be politically polarized, which causes a divide in society and in society's reaction to government policies.¹⁸⁹ Moreover, studies show that tight cultures have "more law enforcement per capita, desire greater media restriction, and endorse the use of any force necessary to maintain law and order . . . and have higher conscientiousness."¹⁹⁰ Conversely, looser cultures

¹⁸¹ See Lisa Haugaard, *Honduras: Repression in the Time of COVID-19*, LAT. AM. WORKING GRP. (Apr. 22, 2020), <https://www.lawg.org/honduras-repression-in-the-time-of-covid-19-2>.

¹⁸² See *id.*

¹⁸³ Lidia Casas Becerra, *The Novel Coronavirus and Civil Rights: A Snapshot from Chile*, PETRIE-FLOM CTR. (May 14, 2020), <https://blog.petrieflom.law.harvard.edu/2020/05/14/chile-global-responses-covid19/>.

¹⁸⁴ Paulo Massaharu Yafusso, *Ações nas barreiras sanitárias são intensificadas no combate à Covid-19*, GOVERNO DO ESTADO MATO GROSSO DO SUL (May 25, 2020), <http://www.ms.gov.br/acoes-nas-barreiras-sanitarias-sao-intensificadas-no-combate-a-covid-19/>.

¹⁸⁵ Folha de São Paulo, *Governadores fecham estradas e vetam ônibus de outros Estados*, FOLHA DE S.PAULO (Mar. 24, 2020), <https://www1.folha.uol.com.br/cotidiano/2020/03/governadores-fecham-estradas-e-vetam-onibus-de-outros-estados.shtml>.

¹⁸⁶ Por Da Redação Atualizado, *Coronavírus: durante quarentena, manifestantes fazem buzinação em São Paulo*, VEJA (Apr. 11, 2020), <https://veja.abril.com.br/brasil/coronavirus-durante-quarentena-manifestantes-fazem-buzinaco-em-sao-paulo/>; *Contrariando orientações da OMS, apoiadores de Bolsonaro protestam em SP contra isolamento social*, O GLOBO (Nov. 4, 2020), <https://oglobo.globo.com/brasil/contrariando-orientacoes-da-oms-apoiadores-de-bolsonaro-protestam-em-sp-contrain-isolamento-social-24366136>.

¹⁸⁷ Uri Friedman, *Face Masks Are In*, ATLANTIC, (Apr. 2, 2020), <https://www.theatlantic.com/politics/archive/2020/04/america-asia-face-mask-coronavirus/609283/>.

¹⁸⁸ MICHELE GELFAND, *Rule Makers Rule Breakers: How Tight and Loose Cultures Wire Our World* 3–4 (2018).

¹⁸⁹ Thomas Carothers & Andrew O'Donohue, *How to Understand the Global Spread of Political Polarization*, CARNEGIE ENDOWMENT FOR INTL. PEACE (Oct. 10, 2020, 6:30 pm), <https://carnegieendowment.org/2019/10/01/how-to-understand-global-spread-of-political-polarization-pub-79893>.

¹⁹⁰ Gelfand, *supra* note 188, at 6524.

are more open and tolerate other culture's values, beliefs, experiences and more concerned about individual freedoms.¹⁹¹

Therefore, privacy fears arose more in loose cultures when companies like Google, Facebook, and Apple announced that they teamed up to create a contact tracing software application that could be used by governments around the world.¹⁹² The broad collection of personal data is an example of the type of intrusion that is viewed differently in different cultures.

Cultural acceptance is a critical element of COVID policy. It is an important mission of government to gain support of its population and, to do so, government must understand its own culture. It is uncertain how governments will use the data collected, for how long the data will be stored, and if governments will use it only for COVID-19 controlling measures.

IV. LEGAL ISSUES IN A PANDEMIC – THE BASIS OF GOVERNMENT AUTHORITY AND THE EFFECT ON INDIVIDUAL RIGHTS

Protecting safety, security, and health is a fundamental element of the social contract. Individuals give up certain liberties to be part of an ordered society. Restrictions range from prohibiting using cell phones while driving to making assisted suicide unlawful. We pay taxes with the expectation that we receive government services like education, national security, and police protection. There are constitutional limits that are designed to prevent government from inordinately invading civil liberties. In the United States, due process and liberty interests are constitutionally protected, like they are in most democratic societies.¹⁹³ Emergencies like COVID-19 stress the balancing of liberties and governmental duties to protect the health and welfare of the entire community.¹⁹⁴

A. EXECUTIVE AUTHORITY

Because emergencies by their nature demand quick action, governments turn to executive actions. That has been the case during the pandemic. Presidents, governors, and mayors are granted emergency powers within their jurisdictions to protect the health and welfare of their constituents. There are limitations on duration and limitation of authority as discussed above.¹⁹⁵

¹⁹¹ *Id.*

¹⁹² See Mike Feibus, *Are Coronavirus Contact Tracing Apps Doomed To Fail In America?*, USA TODAY (June 25, 2020), <https://www.usatoday.com/story/tech/columnist/2020/06/24/apple-google-contact-tracing-apps-privacy/3253088001/>; see also Geoffrey A. Fowler, *A Covid-Fighting Tool Is Buried In Your Phone. Turn It On*, WASH. POST. (Jan. 22, 2021), <https://www.washingtonpost.com/technology/2020/11/18/coronavirus-app-exposure-alerts/>.

¹⁹³ U.S. CONST. amend. XIV; see generally Vivien Hart, *Democratic Constitution Making*, U.S. UNIFIED INST. OF PEACE (July 2003), <https://www.usip.org/sites/default/files/resources/sr107.pdf>.

¹⁹⁴ *Human Rights Dimensions of COVID-19 Response*, HUMANS RIGHTS WATCH, (Mar. 19, 2020), <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>.

¹⁹⁵ *Supra* Section II.

The mode of policy making is through executive orders or proclamations as authorized by law. In the pandemic, these executive policies clashed with individual rights on a regular basis.¹⁹⁶

At the federal level, the issue of extraordinary powers is supported by the executive power through the Vesting Clause,¹⁹⁷ the Stafford Act,¹⁹⁸ and the Public Health Service Act.¹⁹⁹ The Constitution makes it clear that general welfare is a pillar of the government. Considering that the executive power is vested in the president, arguably the Vesting Clause grants the president the authority to issue extraordinary measures aimed to protect the people.²⁰⁰ Scholars refer to these extraordinary powers as inherent powers of the president.²⁰¹ The Stafford Act provides legislative authorization that grants the president wide authority to execute measures in order to save lives, protect property, and ensure safety and health.²⁰² The Public Health Service Act authorizes the Surgeon General, upon approval of the Secretary of Health and Human Services (HHS), to make and enforce measures in his judgment necessary to prevent the introduction, transmission, or spread of communicable diseases.²⁰³

The Commerce Clause²⁰⁴ provides a constitutional basis for Congress to regulate emergencies because they tend to affect interstate commerce or commerce with foreign nations.²⁰⁵ According to the Constitution, Congress can regulate “commerce with foreign nations, and among the several states, and with the Indian tribes.”²⁰⁶ The Constitution also recognizes the residual power of the states and the states have exercised significant authority during the pandemic.²⁰⁷

Similar to the exception powers granted to the United States government in states of emergency, the Brazilian Constitution specifically authorizes several different types of emergency

¹⁹⁶ Anthony F. DellaPelle, *Constitutional Implications of COVID-19 and its Impact on Property Rights and Personal Liberties*, AM. BAR ASS’N, (July 27, 2020), <https://www.americanbar.org/groups/litigation/committees/real-estate-condemnation-trust/articles/2020/covid-19-constitutional-impact-property-rights-personal-liberties/>.

¹⁹⁷ U.S. CONST. art. II, § 1.

¹⁹⁸ 42 U.S.C. §§ 5121 et seq. (2020).

¹⁹⁹ 42 U.S.C. §§ 201 et seq. (2020).

²⁰⁰ Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570–72 (1994).

²⁰¹ *Id.* at 565.

²⁰² 42 U.S.C. §§ 5121–22 (2020).

²⁰³ 42 U.S.C. §§ 264–272 (2020).

²⁰⁴ U.S. CONST. art. I, § 8.

²⁰⁵ *Two centuries of law guide legal approach to modern pandemic*, AM. BAR ASS’N (Apr. 2020), <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/>.

²⁰⁶ U.S. CONST. art. I, § 8.

²⁰⁷ William N. Eskridge, Jr. & Neomi Rao, *Common Interpretation: Article I, Section 1: General Principles*, <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/749> (last visited Mar. 26, 2022).

actions.²⁰⁸ The exceptionality and the time limit are the main characteristics of Brazil's State of Exception measures, as restrictions on individual rights, freedom, and constitutional guarantees can temporarily occur during its effectiveness.²⁰⁹ Moreover, when a state of emergency is declared, the extraordinary administration of power is concentrated in the federal branch and its authority becomes very broad.²¹⁰ This concentration of power leads to fear of possible abuses based on a presidential decision made during a state of emergency. In that scenario, the judiciary will be the only organization capable of challenging the executive decision.

Governments across the world can and have been granted additional power to temporarily curtail constitutional rights when dealing with a public health emergency.²¹¹ Courts have frequently supported emergency measures during this pandemic but have also recognized that constitutions and human rights laws are not suspended during a pandemic.²¹² However, as the COVID-19 virus spread around the world, executive branches of governments gained power to implement privacy-restrictive measures.²¹³ History teaches us that when society faces emergencies and disasters, perceived public and collective interests will gain priority over individual interests. At present, numerous scientists say that COVID-19 has no sign of ending and future pandemics are a virtual certainty.²¹⁴ This future require that we examine the legal limits of the intrusions that may occur during a pandemic.

B. RESTRICTIONS ON PERSONAL MOVEMENT: QUARANTINE, LOCKDOWN, AND TRAVEL RESTRICTIONS

Restriction of personal movement is a basic strategy to fight a pandemic. Events that bring people into closer contact increase the odds of transmitting the virus. That fact seems to be confirmed by “super spreader events” that have resulted in the outbreak of multiple cases of the virus.²¹⁵ Quarantines have long been held legal in the realm of infectious disease.²¹⁶ However, quarantining has been more controversial during the COVID outbreak because of the skepticism about the dangers of the disease.

²⁰⁸ National Emergencies Act, 50 U.S.C. §§ 1601 et seq. (2020).; Constituição Federal [C.F.] [Constitution] art. 21 (Braz.)

²⁰⁹ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 136, § 1 (Brazil).

²¹⁰ *Id.*

²¹¹ *Supra* Section II.

²¹² *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69–70 (2020).

²¹³ *Territorial Impact of COVID-19: Managing the Crisis Across Levels of Government*, OECD (Nov. 20, 2020) <http://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government-d3e314e1/>.

²¹⁴ *Why the coronavirus may never “go away”*, ADVISORY BD. (Aug. 6, 2020) <https://www.advisory.com/daily-briefing/2020/08/06/coronavirus-future>.

²¹⁵ Angela Laguipo, *Genomic sequence of the White House "superspreader" event*, NEWS MED. (Nov. 2, 2020), <https://www.news-medical.net/news/20201102/Genomic-sequence-of-the-White-House-superspreader-event.aspx>.

²¹⁶ *History of Quarantine*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated July 20, 2020), <https://www.cdc.gov/quarantine/historyquarantine.html>.

One strategy implemented to stop the rapid spread of COVID-19 in communities was establishing lockdowns.²¹⁷ The term “lockdown” entails various practices like requiring mandatory quarantines, recommending individuals stay at home, maintaining social distancing, closing businesses, and banning events and gatherings.²¹⁸ At the end of 2019, when the first cases of COVID-19 were detected in China, a lockdown seemed like an unlikely scenario.²¹⁹ Four months later, lockdowns were the most common strategies to slow down the outbreak, forcing millions of people across the world to isolate.²²⁰

While some dispute the effectiveness of lockdowns,²²¹ it is certain that lockdowns raise legal issues. The government has a duty to protect people’s health and security; however, the current practices implemented represent a direct intrusion upon freedom of movement, which has been found to be a fundamental right.²²² Balancing constitutional rights with public health requirements is difficult but necessary.

Constitutional scholars argue that the Commerce Clause is a basis for regulating emergencies and disasters that affect interstate commerce.²²³ COVID-19 undeniably generated profound impacts on commerce among the several states, in addition to compromising commerce globally.²²⁴ The rapidly increasing number of people infected and sudden deaths produced fear. As a result, the exchange of goods and commodities had a sharp downturn both nationally and internationally.²²⁵ Economies took a downward turn, the stock market dropped, and thousands of laborers were fired.²²⁶

The freedom of movement is a recognized fundamental constitutional right under the Privileges and Immunities Clause, which states that “[t]he Citizens of each State shall be entitled

²¹⁷ Stacey Lastoe, *What quarantining around the world really looks like*, CNN TRAVEL (Sept. 1, 2020), <https://www.cnn.com/travel/article/quarantining-around-the-world-reader-images/index.html>.

²¹⁸ *Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19*, WORLD HEALTH ORG. (Dec. 31, 2020), <https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19>.

²¹⁹ Berkeley Lovelace Jr and Noah Higgins-Dunn, *Trump says nationwide lockdown would ‘ultimately inflict more harm than it would prevent’*, CNBC (Aug. 3, 2020) <https://www.cnbc.com/2020/08/03/trump-says-nationwide-lockdown-would-ultimately-inflict-more-harm-than-it-would-prevent.html>.

²²⁰ Global COVID-19 Lockdown Tracker, AURA VISION, <https://auravision.ai/covid19-lockdown-tracker/> (last visited Apr. 11, 2022).

²²¹ Vincenzo Alfano and Salvatore Ercolano, *The Efficacy of Lockdown Against COVID-19: A Cross-Country Panel Analysis* (June 3, 2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7268966/>.

²²² *Crandall v. Nevada*, 73 U.S. 35, 49 (1867) (finding that movement is a fundamental right of the people, so a state cannot tax people entering or exiting state borders).

²²³ Calabresi & Prakash, *supra* note 200, at 582.

²²⁴ Lauren Bauer et al., *Ten facts about COVID-19 and the U.S. economy* (Sept. 17, 2020), <https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/>; *Impact of COVID-19 Pandemic on Trade and Development*, U.N. CONF. ON TRADE & DEV. (2020), https://unctad.org/system/files/official-document/sg2020d1_en.pdf.

²²⁵ *Id.*

²²⁶ *Id.*

to all Privileges and Immunities of Citizens in the several States.”²²⁷ In *Paul v. Virginia*, the Supreme Court defined freedom of movement as “right of free ingress to other States, and egress from them.”²²⁸ The COVID-19 lockdowns operate directly against the freedom of movement. By being ordered to self-isolate, an individual’s right to free ingress and egress from other states was directly limited.

According to the United States Code, individuals may be apprehended or detained to prevent the introduction, transmission, or spread of a communicable disease.²²⁹ The order depends on the decision of the President upon the recommendation of the Secretary of Health and Human Services, in consultation with the Surgeon General.²³⁰ The law gives permission to the government to apprehend and forcibly examine individuals reasonably believed to be infected in a qualifying stage and reasonably believed to be moving or about to move from one state to another, or believed to be a probable source of infection to individuals who are moving or are about to move to other state.²³¹ Therefore, the government may have the authority to apprehend and forcibly examine a contaminated individual in a pandemic.

However, the United States Code does not define the communicable disease. Based on the vague text, any communicable disease could justify an executive order permitting apprehension and forced examination. Some diseases would certainly justify such measures. Medical literature confirms that Ebola is contagious, incredibly severe, and deadly.²³² An executive order allowing the apprehension and forced examination of a person suspected to have Ebola seems justified. Although the order would affect several constitutional rights, including the right of movement, the lethal nature of Ebola provides a compelling state interest for the intrusion. Conversely, detaining a person contaminated with a seasonal flu would be excessive. Future pandemics may provide more difficult questions about when detaining infected individuals advances a compelling state interest.

Thus far there is no movement to detain COVID-19 patients although an infected individual is expected to quarantine in numerous jurisdictions. Could the US government require universal testing for COVID-19?²³³ The federal government did not require mandatory examinations for

²²⁷ U.S. CONST. art. IV, § 2; *see also* *Corfield v. Coryell*, 6 F. Cas. 546, 551 (1823).

²²⁸ 75 U.S. 168, 180 (1869).

²²⁹ 42 U.S.C. § 264(b) (2006). Though the United States federal government did not forcibly detain individuals during the COVID-19 pandemic, it has previously indicated a willingness to do so “to prevent the entry and spread of communicable diseases.” *Legal Authorities for Isolation and Quarantine*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Sept. 17, 2021), <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

²³⁰ § 264(b).

²³¹ *Infra* part IV(e).

²³² *History of Ebola Virus Disease*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated May 27, 2021), <https://www.cdc.gov/vhf/ebola/history/summaries.html>; *Ebola Virus Disease*, WORLD HEALTH ORG. (Feb. 23, 2021), <https://www.who.int/news-room/fact-sheets/detail/ebola-virus-disease>.

²³³ The exam involves a six-inch cotton swab being inserted into a patient’s nose. The nurse practitioner inserts the swab in both sides of a person’s nose and twists for about fifteen seconds. *Coronavirus (COVID-19) testing: What you should know*, U.C. DAVIS HEALTH (Nov. 23, 2020), <https://health.ucdavis.edu/coronavirus/coronavirus-testing.html>.

the general public, but perhaps in a future more severe pandemic, it might.²³⁴ The federal government did require more extensive action for government employees, who were required to either sign a form attesting that they received the COVID-19 vaccine or to comply with strict rules on mandatory masking, weekly testing, distancing, and more.²³⁵ Other nations implemented mandatory testing or conditioned travel on testing. For example, a test may be required to travel by plane.²³⁶ Conditioning travel on testing is far different than compelling a physical intrusion.

COVID-19 created an unprecedented global emergency where medical professionals prescribed restrictions on personal movement to reduce the spread of the disease.²³⁷ The challenge is to balance individual rights to gather, travel, and freely move with the need to employ medically necessary standards. The standards and definitions must be established.

C. RESTRICTIONS ON BUSINESS OPERATIONS: CLOSURES, REGULATED OCCUPANCY, REGULATED OPERATIONS

Limiting and closing businesses has been a frequent feature of pandemic remedies and the effect on individual businesses has been devastating.²³⁸ Some estimates suggest 17% of restaurants may be permanently out of business.²³⁹

There are limitations on business closings and a general executive order mandating complete business closure is likely unconstitutional.²⁴⁰ The federal government did not issue any executive order directing business closure during COVID-19, but there are arguments against general federal authority to close businesses. The general due process language that provides “no person shall be . . . deprived of life, liberty, or property, without due process of law,”²⁴¹ is a clear protection of personal property. The federal government is prohibited from issuing orders taking away individuals’ property without proper process.²⁴² Both the businesses *per se* and the incomes from

²³⁴ By utilizing the Vesting Clause, Commerce Clause and current statutes on emergencies and disasters. *Supra* Section II. *Infra* notes 261 and 265 at 877.

²³⁵ Alexandra Jaffe et al., *Biden Orders Tough New Vaccination Rules for Federal Workers*, ASSOCIATED PRESS (July 29, 2021), <https://apnews.com/article/lifestyle-joe-biden-business-health-travel-a1670ffa08f1f2eab42c675d99f1d9ad>.

²³⁶ *Requirement for Proof of Negative COVID-19 Test or Recovery from COVID-19 for All Air Passengers Arriving in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>.

²³⁷ *Preventing the Spread of the Coronavirus*, HARV. HEALTH PUBL’G (Feb. 28, 2022), <https://www.health.harvard.edu/diseases-and-conditions/preventing-the-spread-of-the-coronavirus>.

²³⁸ Alexander W. Bartik et al., *The impact of COVID-19 on small business outcomes and expectations*, 117 ECON. SCIS. 17656, 17656 (2020).

²³⁹ *Restaurant Industry in Freefall; 10,000 Close in Three Months*, NAT’L REST. ASS’N (Dec. 7, 2020), <https://restaurant.org/news/pressroom/press-releases/restaurant-industry-in-free-fall-10000-close-in>.

²⁴⁰ *Two centuries, supra* note 205. Notably, it would not be unconstitutional if the business violated a valid U.S law or an order from the Center for Disease Control and Prevention to implement certain safety measures. *Id.*

²⁴¹ U.S. CONST. amend. V.

²⁴² HENRY BRANNON, TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 138 (1901).

businesses constitute property. However, if there is a compelling interest or if a business has violated a federal law, a business could be penalized or closed. A business affecting interstate commerce that directly affected welfare and safety would be subject to regulation; for example, airlines could have passenger limits imposed.²⁴³

Even in exceptional circumstances, the authority of the president has limits. In *Youngstown Sheet & Tube v. Sawyer*,²⁴⁴ President Truman issued an executive order directing the Secretary of Commerce Sawyer to seize and operate most of the nation’s steel mills.²⁴⁵ The act was issued during the Korean War, and its objective was to avert the expected effects of a strike by the United Steelworkers of America.²⁴⁶ The Supreme Court of the United States held that the President did not have the authority to issue such an order.²⁴⁷ The holding is a strong statement for the importance of private property and business even in times of crisis.²⁴⁸ The Court added, “[t]he President’s power to see that the laws are faithfully executed [Article II, Section 3] refutes the idea that he is to be a lawmaker.”²⁴⁹ The holding is a limitation on executive powers, even when based on war powers.²⁵⁰ Certainly there may be federal policies on business practices and policies based on the effect on interstate commerce, but a general nationwide closing seems beyond the enumerated or inherent powers of the federal government.

At the state level, however, business closure measures were widely utilized. During the COVID-19 pandemic, at least forty-six out of the fifty states ordered non-essential businesses to close.²⁵¹ Different states approached business closures differently, ranging from closure to capacity limits.²⁵² In New York, it was a total shutdown, but in Florida, there was no statewide shutdown but there were local restrictions.²⁵³ Depending on what your closure rules were, it affected you economically. Unquestionably, limitations and closures have caused economic hardship, but this hardship was also caused by COVID-19 health issues and general public fear.

Even though states have broad authority under police powers, lengthy or total closings may be subject to constitutional issues, such as takings or due process arguments under the Fifth and

²⁴³ During the COVID-19 pandemic, the Federal Aviation Administration chose not to require airlines to limit capacity on flights, but such regulation could be an option in future health emergencies. Associated Press, *U.S. Officials Recommend—But Don’t Require—Masks on Planes*, L.A. TIMES (July 2, 2020), <https://www.latimes.com/business/story/2020-07-02/airlines-rules-coronavirus-social-distancing>.

²⁴⁴ 343 U.S. 579 (1952).

²⁴⁵ *Id.* at 579.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 580.

²⁴⁸ *Id.* at 579-80.

²⁴⁹ *Id.* at 587.

²⁵⁰ There are takings of property for imminent domain, etc. *Id.* at 579–80.

²⁵¹ Erin Schumaker, *Here are the states that have shut down nonessential businesses*, ABC NEWS (Apr. 3, 2020), <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806>.

²⁵² The state of New York mandated business closures. Exec. Order No. 202.6 (Mar. 18, 2020).

²⁵³ *The Impact of the COVID-19 Pandemic on Florida’s Small Businesses*, FLA. SMALL BUS. DEV. CTR. (Oct. 2020), http://www.floridasbdc.org/Reports/Publications/COVID%20Impact%20Survey_October.pdf.

Fourteenth Amendments. In *4 Aces Enterprises, LLC v. Edwards*,²⁵⁴ twenty-two Louisiana bar owners filed a motion to enjoin Louisiana Governor John Bel Edwards and Louisiana State Fire Marshal H. “Butch” Browning Jr. from enforcing orders banning the on-site consumption of food and drinks at bars and determining closure of “non-essential” businesses.²⁵⁵ The plaintiffs argued they were denied substantive due process because the ban prevented them from profiting from their businesses.²⁵⁶ They also argued they were denied procedural due process because the bans were issued without notice, and that this violated their equal protection rights because the ban singled out their type of businesses.²⁵⁷

Utilizing the precedents in *Jacobson*²⁵⁸ and in re *Abbott*,²⁵⁹ the court noted that the police power precludes the judiciary “from second-guessing the wisdom or efficacy of measures taken by state officials in response to the COVID-19 pandemic.”²⁶⁰ The court recognized that the bar owners have a constitutionally protected property interest in the profits of their own business, but the presence of great danger like a pandemic justifies the ban.²⁶¹ The court noted that the bar owners did not have the opportunity to be heard, but found no due process violation because of the circumstances created by the COVID-19 pandemic.²⁶² Finally, the court found that singling-out plaintiffs’ businesses was justified during the COVID-19 pandemic, citing testing data and information from the White House Coronavirus Task Force.²⁶³

Courts have also rejected the argument that temporary business closure orders during COVID-19 constitute regulatory takings of private property.²⁶⁴ In *Friends of DeVito v. Wolf*,²⁶⁵ a group of Pennsylvania businesses and an individual filed a lawsuit against the Governor of Pennsylvania, seeking to vacate an executive order determining the closure of all “non-life-sustaining” businesses.²⁶⁶ Petitioners argued that prohibiting the use of their property constituted a taking of private property for public use without just compensation, in violation of the Fifth

²⁵⁴ No. 20-2150 (E.D. La. 2020).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 326.

²⁵⁷ *Id.* at 327.

²⁵⁸ 197 U.S. 11, 25 (1905).

²⁵⁹ 954 F.3d 772, 783–84 (5th Cir. 2020).

²⁶⁰ *4 Aces*, 479 F. Supp. 3d at 315.

²⁶¹ *Id.* at 324.

²⁶² *Id.* at 327.

²⁶³ *Id.* 328–29.

²⁶⁴ *Friends of DeVito v. Wolf*, 227 A.3d 872, 895 (Pa. 2020).

²⁶⁵ *Id.* at 876.

²⁶⁶ *Id.* at 872, 876.

Amendment of the Constitution.²⁶⁷ Petitioners asserted that the principle governing their claim is found in *Lucas v. S.C. Coastal Council*.²⁶⁸

In *Lucas*, the state of South Carolina enacted a law preventing the plaintiff from erecting permanent habitable structures on his land.²⁶⁹ The law aimed to protect erosion and destruction of barrier islands.²⁷⁰ The issue was whether the law’s “dramatic effect on the economic value of Lucas’ lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of ‘just compensation.’”²⁷¹ According to the Court, “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”²⁷² The Court held that the law rendered Lucas’ property valueless, constituting a taking, and thus requiring just compensation pursuant to the Fifth and Fourteenth Amendments.²⁷³

However, the *Friends of DeVito* court found that *Lucas* did not apply to COVID-19 business closures.²⁷⁴ According to the court, while the law litigated in *Lucas* imposed a permanent ban on Lucas’ property, the measures implemented during COVID-19 were temporary.²⁷⁵ Following precedent from *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court held that temporary restrictions do not constitute regulatory takings.²⁷⁶ In *Tahoe*, the Tahoe Regional Planning Agency imposed two moratoria, totaling thirty-two months, on development in the Lake Tahoe Basin while formulating a land-use plan for the area.²⁷⁷ The Court held that the mere enforcement of the moratoria did not constitute *per se* a regulatory taking of private property.²⁷⁸ Rather, whether a taking occurred required evaluating a set of standards, such as landowners’ expectations, actual impact, public interest, and reasons behind the action.²⁷⁹

Notwithstanding the decision in *Friends of DeVito*, the holding in *Tahoe* demonstrates that it is not only the length of the restrictions that determine whether a taking occurred, but the assessment of a set of standards. The same rationale applied in *Arkansas Game & Fish Commission v. United States*.²⁸⁰ The Supreme Court evaluated whether a government action was

²⁶⁷ *Id.* at 893.

²⁶⁸ *See id.* at 894 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

²⁶⁹ *Lucas*, 505 U.S. at 1007.

²⁷⁰ *Id.* at 1022.

²⁷¹ *Id.* at 1007.

²⁷² *Id.* at 1019.

²⁷³ *Id.* at 1009 (ordering the respondent to pay just compensation in the amount of \$1,232,387.50).

²⁷⁴ *Friends of DeVito*, 227 A.3d. at 895.

²⁷⁵ *Id.*

²⁷⁶ *See id.* (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 303 (2002)).

²⁷⁷ *Tahoe*, 535 U.S. at 306.

²⁷⁸ *Id.* at 342.

²⁷⁹ *Id.* at 320–21.

²⁸⁰ *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 31–32 (2012).

a taking under the Fifth Amendment by weighing a number of factors including the length of the taking, the severity of the taking's interference, the intention behind the taking, and the foreseeability of the taking.²⁸¹ The Court also noted that the assessment of a taking would also depend on its duration. If a taking is permanent, the Court's main concern will be the economic impact on the property taken. However, if the taking is temporary, the Court will conduct a general analysis by looking at the length, severity, economic impact, intention, and foreseeability of the government action to determine if there was a taking.²⁸²

The majority of the COVID-19 implemented measures are temporary, lasting as long as the virus poses a threat for the public health. Therefore, the analysis for whether a business closure order constitutes a regulatory taking should be determined using the factors the Supreme Court provided in *Tahoe* and *Arkansas Game*. Business closure orders during COVID-19 have produced severe financial impacts, causing the highest unemployment rate observed since 1948.²⁸³ The financial sacrifices imposed onto individuals during COVID-19 must have a limit. *Tahoe* and *Arkansas Game* provide those limits and help provide a roadmap for courts to determine whether business closures during COVID-19 are, in fact, temporary government takings under the Fifth and Fourteenth Amendments.

Eviction moratoriums triggered the Contract Clause, which asserts that “No State shall . . . make any . . . Law impairing the Obligation of Contracts, or grant any Title of Nobility.”²⁸⁴ The denial of evictions affected a number of contracts by denying landlords the ability to collect rent from paying tenants and prohibiting the eviction of tenants that refused to pay. There are other historic instances of emergencies that justified the government's impairment of contracts. For example, during the Great Depression, mortgage foreclosures were suspended.²⁸⁵ The Supreme Court found that the policy for suspending mortgage foreclosures was necessary for public policy.²⁸⁶ However, even if foreclosures and evictions are suspended, their suspension cannot be indefinite. They cannot be perpetual. They must be reasonable, which means they must terminate.

The Supreme Court has already held that the eviction moratorium, put in place to account for the financial hardships during COVID-19, could not extend past July 31, 2021. In *Alabama Association of Realtors v. Department of Health & Human Services*,²⁸⁷ the Court found in favor of landlords, rental property managers, and relators challenging the nationwide ban on evictions

²⁸¹ *Id.* at 38-39.

²⁸² *Id.*

²⁸³ GENE FALK ET AL., CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC 2 (last updated Aug. 20, 2021).

²⁸⁴ U.S. CONST. art.1, §10, cl.1.

²⁸⁵ Geoff Walsh, *Analysis of Constitutional Issues Related to Foreclosure Crisis-Driven State Relief Laws*, NAT'L CONSUMER L. CTR. 1, 2-3 (Feb. 2009), https://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/model-foreclosure-crisis-driven.pdf.

²⁸⁶ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 476 (1934).

²⁸⁷ 141 S. Ct. 2485 (2021).

implemented by the CDC, holding that the moratorium constituted an unconstitutional intrusion on landlords' interest in property ownership and exceeded CDC's statutory authority.²⁸⁸

Prior to this case being appealed to the Supreme Court, the District Court for the District of Columbia held that the CDC exceeded the authority provided in § 361 of the Public Health Service Act.²⁸⁹ As a result, the District Court granted the plaintiff's motion for expedited summary judgment, thus vacating the nationwide eviction moratorium.²⁹⁰ The CDC sought to stay the vacation order pending appeal.²⁹¹ The District Court granted the motion to stay.²⁹² According to the court, the CDC failed to show likelihood of success on the merits, but it has made a showing of (1) irreparable injury related to the lifting of state-implemented eviction moratoriums; (2) possibility to recover landlord's financial losses; and (3) public interest weighing in favor of the stay due to the extraordinary public moment.²⁹³

Plaintiffs appealed to the Supreme Court. The Court determined whether the CDC exceeded its existing statutory authority by issuing a nationwide eviction moratorium.²⁹⁴ The justices unanimously agreed that the CDC lacked authority to implement a nationwide eviction moratorium.²⁹⁵ However, the Court decided to keep the moratorium in effect until July 31, 2021.²⁹⁶ This decision sets the precedent that the CDC cannot issue or extend nationwide eviction moratoriums without congressional authorization.

However, even though the Court noted the CDC lacked the authority to issue or extend a nationwide eviction moratorium, the Court did not address the constitutional grounds alleged by the plaintiffs in *Alabama Association of Realtors*. Therefore, the claims on unlawful taking of private property and violation of due process remain uncertain in the pandemic context.²⁹⁷

D. RESTRICTIONS ON PERSONAL CONDUCT: MASKING REQUIREMENTS AND ADMINSTRATING VACCINES

Two issues that have generated great controversy are mask and vaccine mandates. As vaccines became available and more broadly utilized, vaccinated individuals were able to not wear masks. In some jurisdictions, identification proving vaccination was required to access certain public

²⁸⁸ *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489-90 (2021).

²⁸⁹ *Id.* at 2485.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 2487.

²⁹⁴ *Id.* at 2488.

²⁹⁵ *Id.* at 2489.

²⁹⁶ *Id.*

²⁹⁷ *Supra* Section IV(c).

places and commercial establishments.²⁹⁸ For example, the Israeli green passport, which can be downloaded to a smart phone, serves many purposes, including access to gyms, hotels, theaters, and workplaces.²⁹⁹ In March 2021, New York launched a similar system through its Excelsior Pass, a government-issued vaccine passport.³⁰⁰

Masking and vaccines mandates are not new. The United States Supreme Court ruled on compulsory vaccination in 1905 in *Jacobson v. Massachusetts*.³⁰¹ However, scholars argue that *Jacobson* is not a strong precedent for broad compulsory vaccination policies because the penalty in that case was a small fine, and other manners of compulsory vaccination—such as those that limit children’s access to public schools—involve more significant deprivations of liberty.³⁰² These arguments suggest that a nationwide compulsory vaccination would likely be challenged on constitutional grounds. Facial masks were also required when the influenza pandemic raged across the United States in 1918 and 1919.³⁰³ After a century, some governments continue to argue for masks,³⁰⁴ and some governments and individuals argue against them, claiming violation of personal freedom and social control.³⁰⁵

There are three arguments that have been used to resist mask wearing: freedom of speech, freedom of movement, and violation of privacy.³⁰⁶ The first is based on a violation of the First Amendment’s freedom of speech.³⁰⁷ Under this theory, masks create a barrier to sharing ideas, thereby abridging the freedom of speech.³⁰⁸ As of this writing, several courts have addressed and rejected this argument.

²⁹⁸ Governor Cuomo Announces Launch of Excelsior Pass to Help Fast-Track Reopening of Businesses and Entertainment Venues Statewide, N.Y. STATE PRESS OFF. (Mar. 26, 2021), <https://www.governor.ny.gov/news/governor-cuomo-announces-launch-excelsior-pass-help-fast-track-reopening-businesses-and>.

²⁹⁹ *What is a Green Pass?*, ISR. MINISTRY OF HEALTH, <https://corona.health.gov.il/en/directives/green-pass-info/> (last visited May 8, 2022).

³⁰⁰ Otterman, *supra* note 44.

³⁰¹ 197 U.S. 11, 26 (1905).

³⁰² Sean Trende, *Vaccine Mandates and Jacobson v. Massachusetts: A Closer Look*, REALCLEARPOLITICS (Oct. 12, 2021), <https://www.aei.org/articles/vaccine-mandates-and-jacobson-v-massachusetts-a-closer-look/>.

³⁰³ Christine Hauser, *The Mask Slackers of 1918*, N.Y. TIMES, (Dec. 10, 2020), <https://www.nytimes.com/2020/08/03/us/mask-protests-1918.html>.

³⁰⁴ WEN SHEN, CONG. RSCH. SERV., LSB10530, COULD THE PRESIDENT OR CONGRESS ENACT A NATIONWIDE MASK MANDATE? 1–4 (Aug. 6, 2020).

³⁰⁵ Jonathan Jerry, *Why Some People Choose Not to Wear a Mask*, MCGILL UNIV., OFF. SCI. & SOC’Y, (Sept. 3, 2020), <https://www.mcgill.ca/oss/article/covid-19-health/why-some-people-choose-not-wear-mask>.

³⁰⁶ *Id.*

³⁰⁷ U.S. CONST. amend. I.

³⁰⁸ Polly J. Price & Patrick C. Diaz, *Face-Covering Requirements and the Constitution*, EXPERT F. L. & POL’Y ANALYSIS (June 3, 2020), <https://www.acslaw.org/expertforum/face-covering-requirements-and-the-constitution/>.

In *Antietam Battlefield KOA v. Hogan*,³⁰⁹ plaintiffs asked the Federal District of Maryland court to enjoin the governor’s executive orders mandating use of facial masks. The court denied the request to enjoin.³¹⁰ Quoting *Jacobson v. Commonwealth of Massachusetts*,³¹¹ the court argued that “real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.”³¹² This language embodies the reasoning that policies implemented during the pandemic can impair individual freedoms to protect the welfare of the general public. Moreover, the court asserted that “[t]o overturn the Governor's orders, those who disagree with them must show that they have ‘no real or substantial relation’ to protecting public health, or that they are ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’”³¹³ However, it did not interpret the mandatory use of masks as a “plain, palpable invasion of rights secured by the fundamental [right to freedom of speech].”³¹⁴ The court concluded that the orders at issue regulated conduct, not speech,³¹⁵ and that the executive orders do not restrain the speech of a certain group of people or of certain content. The orders merely regulate a conduct aiming to protect public health.³¹⁶

The second argument relates to the freedom of movement.³¹⁷ Individuals argue that mandating masks compels a person to decide to either wear a facial covering or stay home.³¹⁸ No case has upheld this argument yet. In comparison to the lockdown and business closure measures, mandatory masking is less restrictive. The mandatory masking measures will most likely end as the pandemic fades away. Based on our three-prong test,³¹⁹ mandatory masking orders are constitutional if there is a serious communicable disease that poses a severe risk to the public health.

The impact of vaccinations adds another issue to the discussion of personal intrusions. Despite the global effort to develop a vaccine able to combat the SARS-CoV-2 infection and end the pandemic, some of the challenges that countries face are vaccine skepticism and privacy concerns. A survey conducted from November 30 to December 8, 2020 revealed that 27% of the public is vaccine hesitant, saying they probably not or definitely would not get a COVID-19 vaccine even

³⁰⁹ *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214 (D. Md. 2020), *appeal dismissed*, No. 20-1579, 2020 WL 6787532 (4th Cir. July 6, 2020).

³¹⁰ *Id.* at 215.

³¹¹ 197 U.S. 11, 26 (1905).

³¹² 461 F. Supp. 3d at 223.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 237.

³¹⁶ *Id.* at 235–36.

³¹⁷ *See infra* note 397.

³¹⁸ *Arguments against mask requirements during the coronavirus (COVID-19) pandemic, 2020-2021*, BALLOTPEdia, [https://ballotpedia.org/Arguments_against_mask_requirements_during_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021#Mask_requirements_restrict_freedom](https://ballotpedia.org/Arguments_against_mask_requirements_during_the_coronavirus_(COVID-19)_pandemic,_2020-2021#Mask_requirements_restrict_freedom) (last visited Apr. 11, 2022).

³¹⁹ *Supra* Section II(b).

if it were available for free and deemed safe by scientists.³²⁰ Vaccine hesitancy is highest among Republicans (42%), those ages 30–49 (36%), and rural residents (35%).³²¹

Brazil has a history of vaccine mandates. Brazil mandated vaccines during the smallpox outbreak of 1904,³²² which was the catalyst to the rebellion known as the *Vaccine Revolt*.³²³ Failure to get vaccinated resulted in severe penalties, including fines for non-compliance.³²⁴ Brazilians were required to have a vaccination certificate to have access to public education and employment in public institutions.³²⁵ Vaccination certificates were even required to get married and for travel.³²⁶ Additionally, sanitary officials and police officers were authorized to enter private residences to vaccinate the residents.³²⁷

After the riots, the Brazilian government suspended the obligatory nature of the vaccination program,³²⁸ and the smallpox vaccination was slowly incorporated into daily life in Rio de Janeiro and other main cities of Brazil.³²⁹ While there was considerable opposition to the forced vaccinations in Brazil, the government did ultimately succeed in reducing mortality rates, reaching near zero in 1906.³³⁰

Brazil also experienced resistance to compelled vaccinations during the COVID-19 pandemic. A legal challenge regarding compelled vaccinations was filed in the Brazil Supreme Court even before the vaccine was approved in the country.³³¹ The Supreme Court upheld the constitutionality of mandatory vaccination and held that it is constitutional for the state to impose restrictive measures such as fines, prohibitions to be in certain places, or requirements to enroll children in

³²⁰ Liz Hamel et al., *KFF COVID-19 Vaccine Monitor: December 2020*, KAISER FAM. FOUND. (Dec. 15, 2020), <https://www.kff.org/coronavirus-covid-19/report/kff-covid-19-vaccine-monitor-december-2020/>.

³²¹ *Id.*

³²² Gilberto Hochman, *Priority, Invisibility and Eradication: The History of Smallpox and the Brazilian Public Health Agenda*, 53 *MED. HIST.* 229, 234 (2009).

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ James Green et al., *The Vaccination Riots and the Difficulty of Modernization in Rio de Janeiro*, *BRAZIL: FIVE CENTURIES OF CHANGE*, BROWN UNIV. LIBR., (2021), <https://library.brown.edu/create/fivecenturiesofchange/chapters/chapter-5/modernization-in-rio/> (last visited Apr. 11, 2022).

³²⁹ *Id.*

³³⁰ Hochman, *supra* note 322, at 235.

³³¹ Octávio Luiz Motta Ferraz, *Brazil: compulsory (but not forced) vaccination is constitutional, says Supreme Federal Tribunal*, LEX-ATLAS: COVID-19 (Apr. 29, 2021), <https://lexatlas-c19.org/compulsory-but-not-forced-vaccination-is-constitutional-says-brazilian-supreme-federal-tribunal/>.

school.³³² However, the State cannot forcibly immunize its citizens.³³³ According to Justice Luís Roberto Barroso, although the Brazilian federal constitution protects the right of every citizen to maintain their philosophical, religious, moral and existential convictions, society's rights must prevail over individual rights.³³⁴ Therefore, the state can, in exceptional situations, protect people, even against their will.³³⁵

In the United States, employers are allowed to require that their employees be vaccinated. For example, Delta Airlines has been permitted to require new employees be vaccinated.³³⁶ The District Court for the Southern District of Texas allowed a hospital to require all employees—regardless of tenure—be vaccinated.³³⁷ These decisions were bolstered by a release by the Equal Employment Opportunity Commission, which said that federal equal employment opportunity laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as they provide reasonable accommodations.³³⁸

In the wake of the spike in COVID-19 cases due to the rise of the Delta variant, many health advocates sought to expand policies to include mandatory vaccinations. Congress could not reach any agreement on mandatory vaccinations.³³⁹ The executive branch sought a “work around” to Congressional action through administrative agency rulemaking.³⁴⁰ Both the Secretary of Labor and the Secretary of Health and Human Services issued vaccine mandates.³⁴¹

On behalf of the Occupational Safety and Health Administration (OSHA), the Secretary of Labor promulgated a regulation that all employers with 100 or more employees must (1)

³³² S.T.F.-D.F. 6586, Ação Direta De Inconstitucionalidade No. 0106444-70.2020.1.00.0000, Relator: Min. Ricardo Lewandowski, 17.12.2020, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA [S.T.F.J.], 07.04.2021 (Braz.).

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ The Associated Press, *Delta Will Require New Hires to Be Vaccinated Against Virus*, WFLA NEWS CHANNEL 8 (May 14, 2021, 1:44 PM), <https://www.wfla.com/community/health/coronavirus/delta-will-require-new-hires-to-be-vaccinated-against-virus/>.

³³⁷ *Bridges v. Houston Methodist Hosp.*, 543 F. Supp. 3d 525, 526–28 (S.D. Tex. June 12, 2021).

³³⁸ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

³³⁹ See Tony Romm, *Senate votes to repeal key Biden administration vaccine and testing policy*, WASH. POST (Dec. 8, 2021), <https://www.washingtonpost.com/us-policy/2021/12/08/republicans-vaccine-congress-coronavirus/>.

³⁴⁰ The Editorial Board, *The Vaccine Mandate ‘Work-Around’ May Run Aground*, WALL ST. J. (Jan. 7, 2022), <https://www.wsj.com/articles/the-work-around-may-go-aground-supreme-court-john-roberts-biden-vaccine-mandate-covid-osha-elizabeth-prelogar-11641597592>.

³⁴¹ *Secretary Becerra to Require COVID-19 Vaccinations for HHS Health Care Workforce*, H.H.S. PRESS OFF. (Aug. 12, 2021), <https://www.hhs.gov/about/news/2021/08/12/secretary-becerra-to-require-covid-19-vaccinations-for-hhs-health-care-workforce.html#:~:text=To%20increase%20vaccination%20coverage%20and,be%20vaccinated%20against%20COVID%2D19;Summary%20of%20COVID-19%20Vaccination%20and%20Testing%20ETS>, OCCUPATION SAFETY & HEALTH ADMIN., <https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf> (last visited May 8, 2022).

ensure all employees are vaccinated against COVID-19 or (2) require employees to wear a mask at work and take weekly COVID-19 tests. In reviewing the employer mandate, the U.S. Supreme Court determined that the Occupational Safety and Health Act did not “empower[] the Secretary [of Labor] to set . . . [such] broad public health measures.”³⁴² Rather, the Act only allowed OSHA to regulate *work-related dangers*.³⁴³ The Court explained that COVID-19 is not a work-related danger because the virus is “no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.”³⁴⁴ Moreover, the employer mandate “would significantly expand OSHA’s regulatory authority without clear congressional authorization.”³⁴⁵ Joined by Justices Thomas and Alito, Justice Gorsuch wrote a concurring opinion to emphasize the lack of Congressional authorization, arguing that the power to pass COVID-19 legislation rests with the States and Congress, not OSHA.³⁴⁶ Ultimately, the decision to stay the employer mandate rested on the Court’s concern over the separation of powers and the lack of legislative authorization. The decision leaves open the question of whether another agency could pass COVID-19 regulations if authorized by Congress.

A second regulation, an interim final rule (IFR), was codified by the Secretary of Health and Human Services.³⁴⁷ This IFR required the Centers for Medicare & Medicaid Services (CMS) Mandate certified facility providers to ensure their staff were fully vaccinated. Here, the Executive branch was acting under authority that Congress had previously conferred under the spending power.³⁴⁸ The U.S. Supreme Court permitted the vaccine mandate to stay in effect pending resolution of the case.³⁴⁹ The Court stated that Congress granted the Secretary of Health and Human Services the authority over the Medicare and Medicaid programs and authority to promulgate “health and safety” regulations to administer the programs effectively.³⁵⁰ Further, requiring vaccination in this context was “necessary for the health and safety of individuals to whom care and services are furnished,” as most of the patients were elderly and therefore particularly vulnerable to COVID-19.³⁵¹ Although the Court noted that “the challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it,” the Court acknowledged the need for compromise in the medical realm during unprecedented times.³⁵²

³⁴² Nat’l Fed’n Indep. Bus. v. Dep’t of Lab., 142 S. Ct. 661, 665 (2022).

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *See id.* at 667–70 (Gorsuch, J., concurring).

³⁴⁷ 86 Fed. Reg. 61,555 (Nov. 5, 2021) (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482, 483, 484, 485, 486, 491, 494).

³⁴⁸ *See id.*

³⁴⁹ Biden v. Missouri, 142 S. Ct. 647, 647 (2022) (per curiam).

³⁵⁰ *See id.* at 650.

³⁵¹ *Id.* at 651.

³⁵² *See id.* at 654.

These U.S. Supreme Court’s decisions regarding the vaccine mandates reflect divergent views on the government’s role in the COVID-19 pandemic. On the one hand, the Court’s rejection of the employer mandate suggests that the government is limited in its control over private entities and that only Congress or the states can exert that control. On the other hand, in the context of Medicare and Medicaid, the Court held that the government could compel vaccinations where a heightened risk would affect government program funding. These two decisions can be viewed as consistent because the Court concluded that the Medicare and Medicaid programs were justified under the spending clause whereas the OSHA based requirements applied broadly and was found to be done without Congressional authorization. The continuing uncertainty over who has the authority to pass vaccine mandates suggests that Congress should articulate the path for decision-making during the remainder of the COVID-19 pandemic and for any future pandemics.

While lockdowns, business closures, and mandatory masking orders are likely to disappear, the intrusions enforced upon privacy rights may remain intact as society moves into the new normal. Because people tend to accept privacy intrusions to address emergencies,³⁵³ it is critical to prevent short-term acceptance during an emergency from becoming long-term privacy intrusions.

E. INTRUSIVENESS OF PREVAILING MEDICAL PROTOCOLS FOR RESPONDING TO A PANDEMIC

Logically, emergency measures taken through the declaration of a state of calamity or a state of emergency should stop when the emergency ends. But, when does the threat to public health end when there is a pandemic like COVID-19?

While there is not a political consensus, there appears to be some medical consensus on how to react to the COVID-19 pandemic. Public health specialists have used the Testing, Treating, and Tracking Method (“The TTT Method”) in pandemics for decades, including the 1918 flu pandemic.³⁵⁴ Additionally, the medical community generally accepts quarantines and mandatory vaccinations and masking as means of abating a pandemic; however, these methods are the subject of political and legal controversy that we will discuss in another section of this article.³⁵⁵

A consensus is easier to reach for testing, treating, and tracking. Given the rising number of administered COVID-19 tests,³⁵⁶ the public seems accepting of testing, virtually everyone who is sick wants to be treated, and individuals are likely to want to know if they were exposed to the

³⁵³ Cf. *Nat’l Fed’n Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 669–670 (2022) (Gorsuch, J., concurring).

³⁵⁴ Douglas Jordan, *The Deadliest Flu: The Complete Story of the Discovery and Reconstruction of the 1918 Pandemic Virus*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Dec. 17, 2019), <https://www.cdc.gov/flu/pandemic-resources/reconstruction-1918-virus.html>; Nina Storchlic & Riley D. Champine, *How some cities ‘flattened the curve’ during the 1918 flu pandemic*, NAT’L GEOGRAPHIC (Mar. 27, 2020), <https://www.nationalgeographic.com/history/article/how-cities-flattened-curve-1918-spanish-flu-pandemic-coronavirus>.

³⁵⁵ *Supra* Section IV(d).

³⁵⁶ *Total COVID-19 Tests*, OUR WORLD IN DATA (last updated May 5, 2022), <https://ourworldindata.org/grapher/full-list-total-tests-for-covid-19> (documenting the number of COVID-19 test administered to the public).

virus. Each of these activities involves some intrusion and the gathering of personal information. Testing and treating are a part of virtually all medical procedures. The pandemic makes tracking an important part of the public health formula. But tracking, particularly with new technologies, can be intrusive.

The TTT Method is a result of practices developed during other historical disease outbreaks,³⁵⁷ like cholera, typhoid, influenza, tuberculosis, diphtheria, polio, measles, HIV, and the former coronavirus.³⁵⁸ Some of these diseases have been controlled, and some of them still cause thousands of deaths annually.³⁵⁹ Based on history, acceptance in the medical community, and agreement of the general public, when the next pandemic occurs tracking, treating and tracing will be first steps.

Testing. Public health officials have pressed for increased testing from the beginning of the pandemic.³⁶⁰ Testing not only identifies individuals who need treatment, but can also identify geographical outbreaks that may require more general controls and emergency measures.³⁶¹

COVID testing garners less enthusiasm because of skepticism about the severity of the disease itself. Not all people who have COVID-19 have symptoms of COVID-19, which makes persuading people to take tests harder.³⁶² An individual can be infected and asymptomatic, which means that individual may not feel ill but he or she may spread the virus to others.³⁶³ Many COVID cases have mild symptoms, so the need for the test may not be apparent to the individual while other COVID cases are severe and require hospitalization.³⁶⁴ Therefore, mass testing is about more than just the individual health of a person—it is a priority to prevent spread of the virus.³⁶⁵

Testing identifies individuals who are infected. Once identified, that infected individual should quarantine and must identify individuals who may have exposed to the virus.³⁶⁶ Once an individual is diagnosed, it follows that he or she will experience significant intrusions into his or her personal

³⁵⁷ *History of Quarantine*, *supra* note 216.

³⁵⁸ *CDC Current Outbreak List*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Dec. 23, 2021), <https://www.cdc.gov/outbreaks/index.html>.

³⁵⁹ *Achievements in Public Health, 1900-1999: Control of Infectious Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 30, 1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4829a1.htm>.

³⁶⁰ *See WHO publishes new Essential Diagnostics List and urges countries to prioritize investments in testing*, WORLD HEALTH ORG. (Jan. 29, 2021), <https://www.who.int/news/item/29-01-2021-who-publishes-new-essential-diagnostics-list-and-urges-countries-to-prioritize-investments-in-testing>.

³⁶¹ *See Why COVID-19 testing is the key to getting back to normal*, NAT'L INST. OF HEALTH (Sept. 4, 2020), <https://www.nia.nih.gov/news/why-covid-19-testing-key-getting-back-normal>.

³⁶² *See Bianca Nogrady, What the data say about asymptomatic COVID infections*, NATURE (Nov. 18, 2020), <https://www.nature.com/articles/d41586-020-03141-3>.

³⁶³ *Id.*

³⁶⁴ *See Symptoms of Coronavirus*, WebMD, <https://www.webmd.com/lung/covid-19-symptoms#1>.

³⁶⁵ *Overview of Testing for SARS-CoV-2, the virus that causes COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Feb. 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>.

³⁶⁶ *Contact Tracing*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Jan. 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/contact-tracing.html>.

life. People may find their personal movements restricted and their health care records examined. Health authorities will want to know about the individual's contacts with other persons.

Treating. After receiving a positive result, health authorities may encourage individuals to initiate treatment.³⁶⁷ The seriously ill will seek treatment from the stressed health care systems.³⁶⁸ However, many individuals with the disease do not require extensive treatment.³⁶⁹

The rules of confidentiality change during a pandemic. Health officials need to know the characteristics of the individuals affected to better understand how the virus affects different groups.³⁷⁰ Thus, privacy gives way to the emergency needs of a pandemic. The personal information of those treated for COVID-19 is part of a database used to predict impacts, to inform treatments, and to control the spread of the virus.³⁷¹ However, there can and should be rational limits; health professionals should have limited access to some information while other information could be anonymized.

Tracking. Tracking and contact tracing have always been a part of pandemic response. Traditional tracking practice involves a healthcare official to fill out forms with a patient's information.³⁷² Tracking entails obtaining intrusive personal information including the patient's movements, home and work addresses, people contacted, allergies, infirmities, and sampling.³⁷³ Now, that information can be collected more efficiently through technology. Government tracking

³⁶⁷ *Don't Delay: Test Soon and Treat Early*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 6, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/communication/print-resources/Test-Soon-Treat-Early.pdf>. As a legal matter, the government cannot force treatment. *Privacy Rights and Personal Autonomy*, JUSTIA (last updated Oct. 2021), <https://www.justia.com/constitutional-law/docs/privacy-rights/>. There is an established constitutional right to refuse treatment that is consistent with the international human right to bodily integrity. *Id.*

³⁶⁸ See Sean McMinn et al., *Are COVID hospitalizations high where you live? Look up your hospital*, NPR (Dec. 9, 2020), <https://www.npr.org/sections/health-shots/2020/12/09/944379919/new-data-reveal-which-hospitals-are-dangerously-full-is-yours>.

³⁶⁹ *COVID-19: Who's at higher risk of serious symptoms?*, MAYO CLINIC (Mar. 1, 2022), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-who-is-at-risk/art-20483301> (describing factors that increase risk of developing COVID-19 symptoms that require intensive care).

³⁷⁰ *HIPAA, Health Information Exchanges, and Disclosures of Protected Health Information for Public Health Purposes*, U.S. DEP'T of Health & HUM. SERVS., OFF. OF CIV. RTS. (2020), <https://www.hhs.gov/sites/default/files/hie-faqs.pdf>; *What is Case Surveillance?* CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Sept. 29, 2021), <https://cdc.gov/nndss/about/index.html>; see also *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Jan. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html#anchor_1595551043298.

³⁷¹ *FAQ: COVID-19 Data and Surveillance*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Mar. 14, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/faq-surveillance.html#CDC-Publicly-Available-Datasets>.

³⁷² *Information for Health Departments on Reporting Cases of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 2, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/php/reporting-pui.html>.

³⁷³ See *Contact Tracing*, *supra* note 366.

of an individual 24-7, for example through a GPS device, requires a warrant in a criminal investigation.³⁷⁴ Tracking is potentially highly intrusive.

Artificial intelligence with data from contact-tracing apps, temperature-sensing cameras, and location detection technology is now a significant tool to fight a pandemic.³⁷⁵ COVID-19 spawned a staggering number of surveillance technologies that have been launched and accepted across the world.³⁷⁶ The heightened sense of danger to public health supports using more intrusive new technology. Consequently, the question arises: how long will data collected and produced to fight the pandemic be maintained? Clearly governments must address the public health emergency, and the general public sentiment is to protect health risks while there is limited public outcry to protect privacy. Ultimately, policy for the next pandemic must address limitations on data use and storage.

Some countries, including China, South Korea, and Singapore quickly began using advanced technology to impose quarantine measures and maintain social distancing through location devices.³⁷⁷ For instance, China's residents are assigned a QR code based on a combination of big data consisting of information submitted by the users themselves and by third parties.³⁷⁸ China also utilizes thermal cameras that can identify individual's body temperatures from a distance and immediately notify authorities if abnormalities are detected.³⁷⁹ Other cameras verify whether people are obeying social distance policies in public spaces.³⁸⁰

Other countries have begun to rely on technologies such as contact tracing and notification apps. Contact tracing apps can trace our movements constantly, relying on the GPS embedded in

³⁷⁴ See generally *United States v. Jones*, 565 U.S. 400 (2012).

³⁷⁵ Kayleigh Shooter, *Artificial Intelligence vs Covid-19*, HEALTHCARE MAG. (Sept. 22, 2020), <https://healthcare-digital.com/technology-and-ai/artificial-intelligence-vs-covid-19>.

³⁷⁶ Adam Schwartz, *COVID-19 and Surveillance Tech: Year in Review 2020*, ELEC. FRONTIER FOUND. (Jan. 5, 2021), <https://www EFF.ORG/deeplinks/2020/12/covid-19-and-surveillance-tech-year-review-2020>.

³⁷⁷ See, e.g., *Responding to COVID-19 With Tech*, GOV'T TECH. AGENCY SINGAPORE (last updated Apr. 8, 2022), <https://www.tech.gov.sg/products-and-services/responding-to-covid-19-with-tech> (last visited Apr. 6, 2022) (detailing Singapore's multiple novel uses of technology to handle the Covid-19 pandemic); *All About Korea's Response to Covid-19*, KOREAN CULTURE & INFO. SERV., (Oct. 13, 2020), <http://www.korea.net/Government/Current-Affairs/National-Affairs/view?articleId=56914&subId=6&affairId=2034&pageIndex=1> (detailing the Korean response to Covid-19 which included technological advancement); *How China used technology to combat COVID-19 – and tighten its grip on citizens*, AMNESTY INT'L (Apr. 17, 2020), <https://www.amnesty.org/en/latest/news/2020/04/how-china-used-technology-to-combat-covid-19-and-tighten-its-grip-on-citizens/> (detailing China's use of new technology to combat Covid-19).

³⁷⁸ Interview by Danielle Black with Joana Molgaard (Aug. 7, 2020) (Molgaard lives in Shanghai and I had the pleasure to speak with her. She informed me that a few days prior she had a cough and went to a private hospital that technically has no relationship with the government, and that her medical condition was immediately uploaded on the QR code, which she noticed only a few days later); Chen, *supra* note 167.

³⁷⁹ Claudia Glover, *China to Roll Out Temperature-Taking Infrared Cameras*, TECH MONITOR (Mar. 31, 2020), <https://techmonitor.ai/technology/ai-and-automation/china-to-roll-out-temperature-taking-infrared-cameras>.

³⁸⁰ Lydia Khalil, *Digital Authoritarianism, China and COVID*, LOWY INST. (Nov. 2, 2020), <https://www.lowyinstitute.org/publications/digital-authoritarianism-china-and-covid>.

all cell phones.³⁸¹ With the apps, individuals can upload their personal information, including their live location, through applications downloaded on their cellphones and the apps may send an “exposure notification” if the individual has encountered someone carrying the virus.³⁸²

The developer of the contact tracing app can identify the user of the app, while the developer of the contact notification app can pseudonymize the user.³⁸³ Thus, the developer of the contact notification app will arguably have access to an individual’s personal information, but it will not be able to identify the individual. Another difference between contact tracing apps and contact notification apps relates to the device utilized to verify the exposure. Contact tracing apps utilize the GPS embedded in cellphones.³⁸⁴ By knowing a phone’s current location, the app should be able to identify whether the owner has come in contact with an individual who has tested positive for COVID-19.³⁸⁵ On the other hand, contact notification apps utilize Bluetooth.³⁸⁶ An owner’s phone and the phone of the individual close to him or her will exchange information.³⁸⁷ If the individual close to the owner has tested positive and has informed the app, the owner will receive an “exposure notification.”³⁸⁸

Google and Apple partnered to create an exposure notification application-programming interface (API) that can be used by different apps for contact tracing.³⁸⁹ More than forty countries launched Google and Apple’s API apps.³⁹⁰ The two tech giants argue that their contact notification apps are privacy protective because the user will be pseudonymized and because individuals would

³⁸¹ *Mobile Location Data and COVID-19: Q&A*, HUM. RTS. WATCH (May 13, 2020), <https://www.hrw.org/news/2020/05/13/mobile-location-data-and-covid-19-qa>.

³⁸² *Privacy-Preserving Contact Tracing*, APPLE, <https://covid19.apple.com/contacttracing> (last visited Apr. 6, 2022) (explaining the partnership between Apple and Google to create a Privacy-Preserving Contact Tracing technology; it is argued that the two tech giants aim to help governments and health agencies reduce the spread of the virus, with user privacy and security as central to the design).

³⁸³ Roxana Ologeanu-Taddei, *Privacy, perceptions and effectiveness: the challenges of developing coronavirus contact-tracing apps*, CONVERSATION (July 21, 2020), <https://theconversation.com/privacy-perceptions-and-effectiveness-the-challenges-of-developing-coronavirus-contact-tracing-apps-143118>; *COVID-19 Exposure Notification Apps Are Available. But are They Working?*, U.S. GOV’T ACCOUNTABILITY OFF., (Sept. 16, 2021), <https://www.gao.gov/blog/covid-19-exposure-notification-apps-are-available.-are-they-working> (stating that users will not know the identity of who exposed them to COVID).

³⁸⁴ *Mobile Location Data*, *supra* note 381.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Governor Cuomo and Governor Murphy Launch Exposure Notification Apps to Help Stop the Spread of COVID-19*, N.Y. STATE PRESS OFF. (Oct. 1, 2020), <https://www.governor.ny.gov/news/governor-cuomo-and-governor-murphy-launch-exposure-notification-apps-help-stop-spread-covid-19>.

³⁸⁹ *Privacy-Preserving Contact Tracing*, *supra* note 382.

³⁹⁰ Mishaal Rahman, *Here are the countries using Google and Apple’s COVID-19 Contact Tracing API*, QXDA (Dec. 28, 2020), <https://www.xda-developers.com/google-apple-covid-19-contact-tracing-exposure-notifications-api-app-list-countries>.

not be traced constantly.³⁹¹ Instead, their personal information would be exchanged with cellphones of individuals they are in close proximity to only for a certain period of time.

There is also a concern about what information is considered COVID-related and should be collected; Apple and Google would define what information is COVID-19 related for their technology.³⁹² The definition will probably be crafted in complicated terms and injected into digital terms of agreement. Usually, users tend not to read through before clicking “I agree,”³⁹³ but the next “I agree” may put the user’s privacy at increased risk.

Moreover, apprehension concerning where the data will be stored is also a factor. In terms of data storage, we may categorize apps as centralized and decentralized. Centralized apps will concentrate all the information collected into one single database that is controlled by the government.³⁹⁴ On the other hand, decentralized apps promise to keep personal information stored on the individual’s phone.³⁹⁵ Countries such as Austria, Croatia, Denmark, Ireland, and Italy implemented decentralized apps in order to track the spread of COVID-19.³⁹⁶

In the United States, governmental monitoring of individual movement without a warrant is unconstitutional.³⁹⁷ In *United States v. Jones*,³⁹⁸ the Supreme Court held that, under the Fourth Amendment, “longer term GPS monitoring in investigations of most offenses impinges on expectation of privacy.”³⁹⁹ The case involved the warrantless installation of a GPS on the defendant’s vehicle in order to produce evidence of the investigated crime.⁴⁰⁰ However, it is important to note that the Fourth Amendment protection does not apply to the private sector.⁴⁰¹ The private surveillance industry has the ability to gather personal information without the Fourth Amendment restrictions placed on the government restrictions.⁴⁰² The industry may end up sharing the personal information collected with anyone consistent with terms of service, including,

³⁹¹ Reed Albergotti, *Apple and Google Expand Coronavirus Warning Software*, WASH. POST (Sept. 1, 2020), <https://www.washingtonpost.com/technology/2020/09/01/apple-google-exposure-notification-express/>.

³⁹² *Id.*

³⁹³ David Berreby, *Click to agree with what? No one reads terms of service, studies confirm*, GUARDIAN (Mar. 3, 2017), <https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print>; Caroline Cakebread, *You're not alone, no one reads terms of service agreements*, BUS. INSIDER (Nov. 15, 2017), <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11>.

³⁹⁴ Cristina Criddle & Leo Kelion, *Coronavirus contact-tracing: World split between two types of app*, BBC NEWS (May 7, 2020), <https://www.bbc.com/news/technology-52355028>.

³⁹⁵ *Id.*

³⁹⁶ *Mobile applications to support contact tracing in the EU’s fight against COVID-19: Progress reporting June 2020*, EUR. COMM’N (June 2020), https://ec.europa.eu/health/system/files/2020-07/mobileapps_202006progressreport_en_0.pdf.

³⁹⁷ *United States v. Jones*, 565 U.S. 400 (2012).

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 412.

⁴⁰⁰ *Jones*, 565 U.S. at 427, (2012).

⁴⁰¹ *United States v. Miller*, 152 F.3d 813, 815 (8th Cir. 1998); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

⁴⁰² JON L. MILLS, *PRIVACY: THE LOST RIGHT* 271 (2008)

in certain circumstances, the government.⁴⁰³ Decentralized apps might be more intrusive to privacy than they appear.

During COVID-19, the world opted for the security and convenience provided by contact-tracing apps at the expense of privacy.⁴⁰⁴ With the growing use of contact-tracing apps, individuals potentially forfeit their protected right to privacy in their movement. The convenience of the apps provides for an excellent way to slow the spread of COVID-19. In the long term, future policies should assure that contact-tracing data is only used for medical purposes and that when the data is no longer valuable for that purpose, it should be destroyed. With the growing number of personal privacy breaches in recent years, it only makes sense to set policies to assure that data gathered in health emergencies cannot be abused.⁴⁰⁵

The ability to undermine privacy rights is proportional to the importance that society places on individual privacy. Privacy and individual liberty are accepted rights in the United States and internationally. Legally, privacy and individual liberty can be a fundamental right in some instances. As a fundamental right, government must show the highest level of justification—a compelling state interest for the intrusion. There is no doubt that tracking can be an intrusion, as can other issues raised by COVID. The legal issue is how much tracking information is justified in fighting a deadly pandemic and how to limit the intrusion while fulfilling the public health needs.

V. THE NEXT PANDEMIC: BLUEPRINT TO PROTECT HEALTH AND INDIVIDUAL RIGHTS

The reaction to the COVID-19 pandemic has been chaotic and uneven. Different nations made different decisions with different consequences. We can learn from the mistakes, and we can learn from what worked. With the perspective of hindsight, we can make better policies for the next pandemic.

A. DEFINE THE THREAT LEVEL OF A PANDEMIC WITH A CREDIBLE AND SCIENTIFICALLY SOUND PROCESS

Misunderstanding, lack of information, disinformation, lies, and social media created misunderstanding and confusion that harmed the response to COVID-19. The exact nature of COVID-19 was initially a matter of scientific uncertainty and, therefore, was subject to different responses from government leaders. Unfortunately, initial ambiguity established a platform for

⁴⁰³ See Patrick Howell O’Neill et al., *A flood of coronavirus apps are tracking us. Now it’s time to keep track of them.*, MIT TECH. REV. (May 7, 2020), <https://www.technologyreview.com/2020/05/07/1000961/launching-mittr-covid-tracing-tracker/>.

⁴⁰⁴ *Id.*

⁴⁰⁵ In 2018, the Facebook-Cambridge Analytica data breach showed the world how companies can harvest valuable personal information without an individual’s knowledge. Carole Cadwalladr & Emma Graham-Harrison, *50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, BENTON INST. FOR BROADBAND & SOC’Y (Mar. 18, 2020), <https://www.benton.org/headlines/50-million-facebook-profiles-harvested-cambridge-analytica-major-data-breach>.

continuing confusion.⁴⁰⁶ A major goal in addressing a future pandemic is establishing a credible means of defining the threat level of a disease and thereby establishing justifications for making certain policy decisions.

While institutions like the CDC exist currently to make these assessments, it would be wise to create a commission of experts with broad public credibility to present conclusions and assessments specifically targeted toward pandemic response. Time is of the essence when addressing pandemics, so such an entity would need to create solution frameworks in advance and need to be designed to respond quickly to emerging health crises. A major issue is public acceptance and understanding of the threat. A centralized and predetermined classification system could aid in accomplishing this goal: if the criterion for severe diseases is determined and published in advance, the public is more likely to believe declarations of threat assessments. Official declarations of emergency would be less likely to be interpreted as political posturing or panicked overreaction; instead, declarations of emergency will be verifiable and use familiar, preexisting standards. In other words, by establishing the criteria and process for defining a threat before the threat occurs, it is more likely that the emergency responses that follow will be readily accepted.

The following standards, which are utilized by the WHO when assessing the existence of a Public Health Emergency of International Concern, could be the basis for assessing public health emergencies: (1) is the number of cases and/or deaths for this type of event large for the given place, time or population; (2) does the event have potential to have a high public health impact; or (3) is cooperation among states needed to detect, investigate, respond and control the current event, or prevent new cases?⁴⁰⁷ To assess whether the event has the potential to have a high public health impact, the following criteria identified by medical experts may be applied: (1) the event is caused by a pathogen with high potential to cause an epidemic (infectiousness, fatality, multiple transmission routes or carriers); (2) there is an indication of treatment failure (new or emerging antibiotic resistance, (3) vaccine failure, antidote resistance or failure); (4) there are cases reported among health staff; (5) the event is in an area with high population density; and (6) the population at risk is especially vulnerable (e.g., refugees, low level immunization, children, elderly, low immunity, undernourished).⁴⁰⁸ The classification system could sort pandemics into “levels,” as we do with hurricanes, earthquakes, and tornadoes.⁴⁰⁹ The pandemic classification system should rely on specific, measurable data points. The chart to the below shows how the CDC utilizes

⁴⁰⁶ See, e.g., Erika Edwards, Do you need a mask? The science hasn't changed, but public guidance might, NBC News (Mar. 31, 2020), <https://www.nbcnews.com/health/health-news/do-you-need-mask-science-hasn-t-changed-public-guidance-n1173006>.

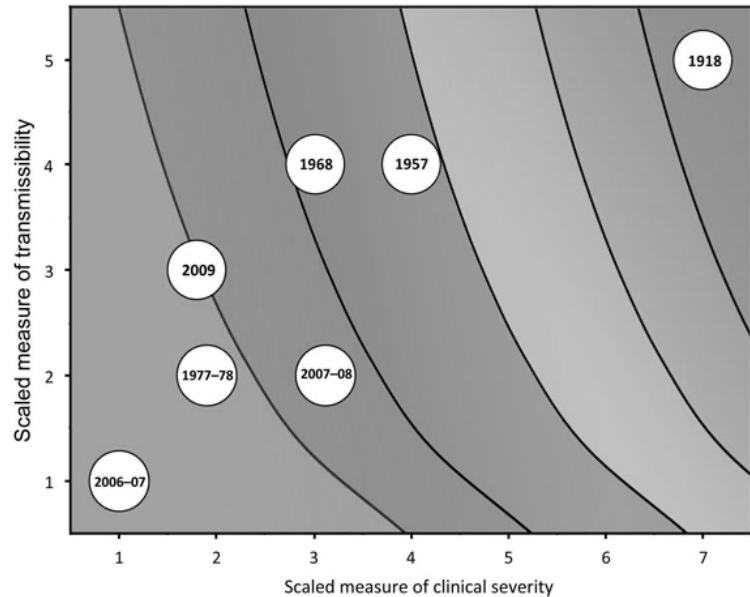
⁴⁰⁷ WORLD HEALTH ORG., INTERNATIONAL HEALTH REGULATIONS (2005) 43 (3d ed., 2016).

⁴⁰⁸ *Id.* at 43–46.

⁴⁰⁹ *Saffir-Simpson Hurricane Wind Scale*, NAT'L HURRICANE CTR & CENT. PACIFIC HURRICANE CTR., <https://www.nhc.noaa.gov/aboutsshws.php> (last visited May 8, 2022); *Earthquake Magnitude Scale*, MICH. TECHN. UNIV. (2022), <http://www.geo.mtu.edu/UPSeis/magnitude.html>; *The Enhanced Fujita Scale*, NAT'L WEATHER SERV., <https://www.weather.gov/oun/efscale>.

transmissibility and severity to classify pandemics.⁴¹⁰ A commission should evaluate these metrics for use in their pandemic scale and report.

Transmissibility addresses the disease's ability to spread, and severity addresses the damage the disease inflicts.⁴¹¹ A disease with high transmissibility but low severity, such as the common cold, does not warrant exercise of emergency powers, while a disease with low transmissibility but high severity could warrant the exercise of emergency powers in localized settings.⁴¹² As the above CDC chart shows, the 1918 Spanish Flu Epidemic was highly dangerous. There are other pandemics and epidemics that would be categorized as a high threat level, for instance, Ebola. The Ebola virus disease is rare, yet severe, and has a death rate of up to 90% in humans. The danger provided by Ebola made it easier for society to accept intrusions upon individuals with the disease.⁴¹³ The public is likely to accept the application of quarantine, mandatory use of masks, and tracking measures if a threat as severe as Ebola arose, and the existence of the threat was credibly described. If we can generally accept the concept of a Category 5 hurricane, a category 4.5 Earthquake, or a category F5 tornado, then the public can accept a category 9 pandemic.



1. A STANDING PANDEMIC COMMISSION

As we have recently seen with COVID-19, a pandemic can strangle the resources, the rule of law, and the will of even the most technologically advanced countries.⁴¹⁴ To mitigate these concerns, we suggest the United States create a standing pandemic commission with the goal of

⁴¹⁰ Carrie Reed et al., *Novel Framework for Assessing Epidemiol Effects of Influenza Epidemics and Pandemics*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 20, 2012), <https://wwwnc.cdc.gov/eid/article/19/1/12-0124-f3>.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Fear, Politics, and Ebola*, AM. CIV. LIBERTIES UNION (Dec. 2015), https://www.aclu.org/sites/default/files/field_document/aclu-ebolareport.pdf.

⁴¹⁴ Marisa Iati, *More experts now recommend medical masks. Good ones are hard to find*, WASH. POST (Feb. 2, 2021), <https://www.washingtonpost.com/health/2021/02/02/medical-mask-shortage/>; Ted Piccone, *COVID-19 has worsened a shaky rule of law environment*, BROOKINGS INST. (Apr. 15, 2021) <https://www.brookings.edu/blog/order-from-chaos/2021/04/20/covid-19-has-worsened-a-shaky-rule-of-law-environment/>; Paola Perenzieto & Ilse Oehler, *Social Costs of the COVID-19 Pandemic*, INDEP. PANEL FOR PANDEMIC PREPAREDNESS & RESPONSE (May 2021), <https://ycsg.yale.edu/sites/default/files/files/Social%20Costs%20of%20Covid-19.pdf>.

appointing sixteen non-partisan members. The conscious effort to avoid partisan imbalance is a critical aspect of its formation, so that the commission can have the greatest possible acceptance from the people. While there is always a risk of divisions in a commission, the risk of a misinformed general public during a lethal pandemic is even greater. There is a rational hope that the high stakes for the country will bring commissioners together for the public welfare.

The commission's initial task would be to connect the medical community's assessment framework for grading pandemics with a potential response matrix the government could legally implement to mitigate likely consequences.⁴¹⁵ The commission's ultimate goals would be to create a pandemic scale, and potential response matrix, that is legally rational, medically defensible, and publicly understandable. A pandemic scale of 1–10 might be a good starting place, as it would likely allow enough gradations between the common flu, COVID-19, and diseases with greater lethality such as Ebola/hemorrhagic fevers. This task will be accomplished prior to the next pandemic.

Public acceptance of this committee's statements will depend upon the committee's credibility and the credibility of the medical data. Therefore, the makeup of the advisory group is essential to its success and should consist of a diverse range of individuals from medicine, law, emergency response, military, state and local government, academia, and the private sector.

Science should be the guiding factor. The central reason to create a new commission, however, is not to duplicate the scientific findings of the CDC and others, but rather to provide a publicly credible messenger that provides a sense of balanced policy that considers practical and constitutional principles in delivering difficult crisis recommendations. Accordingly, we suggest that three members of the commission are selected each by the majority party of the Senate, the minority party of the Senate, the majority party of the House of Representatives, and the minority party of the House of Representatives—totaling twelve members. The president would then appoint two members and the Chief Justice of the Supreme Court would appoint two members. All members serve a four-year term.

This commission would likely be housed in the Executive Branch, which would help it to respond more quickly to emerging threats and would issue public reports to the legislative and judiciary branches. This commission could be created by executive order or, possibly, legislation. Realistically, existing institutions with authority during a pandemic may resist this type of change. However, a credible commission can augment and help other institutions make difficult and controversial decisions.

To enhance credibility, members of the commission should be drawn from the following categories: (1) privacy, constitutional, or health law experts; (2) mental health experts in long-term disasters from the fields of psychiatry, sociology, or psychology; (3) experts from epidemiology, critical care or infectious disease physicians; (4) emergency response or infectious disease experts from the CDC, NIH, or FEMA; (5) experts in biological warfare or logistics division from the military or intelligence community; and (6) state and local officials.

Ideally, the commission should be created when there is not an existing pandemic. The commission could set standards for evaluation and evaluate responses in a non-crisis atmosphere. The review of current crisis policies in light of COVID-19 will reveal structural weaknesses in the

⁴¹⁵ *Pandemic Severity*, *supra* note 39.

response process. It is better to create emergency policy when the country is not living an emergency. The flaws and mistakes should be openly addressed to allow for a response to the next pandemic to have a roadmap for timely and effective emergency actions.

After implementing the first task, such an organization would respond in an as-needed capacity when public health crises arise and evolve. Once a significant disease appears, the commission would be tasked with: (1) assessing the severity and transmissibility of the threat and classifying it in accordance with the predetermined set of standards; (2) informing the HHS Secretary a public health emergency exists; and (3) if so, providing the extent of the threat through use of its classification framework. The commission's determinations would be advisory in nature and directed toward comprehensive policy recommendations for the national, state, and local governments as well as the private sector. Careful review and finding by the Commission would provide support for actions including findings that can provide evidence of compelling government interests when intrusive actions are unavoidable. Evidence of compelling interest is, of course, a standard for reviewing various governmental actions and has been a standard for judicial review of action in previous pandemics.

Such a function is reminiscent of that served by the National Council of Justice of Brazil, which issues non-binding recommendations to the Brazilian judiciary system.⁴¹⁶ Over the last ten years, this Council has proposed over one-hundred recommendations addressing health litigation; though its determinations are not binding, they are useful in increasing confidence and efficiency in judicial decision making.

The U.S. Congress and the executive branch could then utilize the commission's categorization system, and their recommendations for legal and publicly understandable options, to establish plans and policies for the next pandemic. These policies would recommend the extent of governmental authority that should be used by each branch and level of government, dependent on the category of threat that is present at a particular point in time. Whenever a new pathogen arises, the panel would categorize it and submit its recommendation to the Secretary. The president would decide whether to declare a nationwide Public Health Emergency. Once a Public Health Emergency is declared, government actors could look to existing statutes for recommendations of the measures they are able to enact.

Of course, an advisory authority cannot be expected to answer all questions. In an emergency, leaders at all levels are asked to make difficult decisions with dramatic consequences. Even with the established threat levels, decisions will be difficult. As we have learned, delays can be disastrous, and making no decision is a decision.

To be properly prepared for the next pandemic, we must have the best architecture for a response, and a system that provides the best information possible to all decision makers. The aforementioned classification framework could provide this structure. The advisory authority is a critical component of this architecture to ensure this classification framework is scientifically rational and publicly acceptable. Those tools were either not available or did not operate smoothly for most of the COVID-19 crisis.

⁴¹⁶ *National Council of Justice*, SUPERIOR TRIBUNAL DE JUSTIÇA, <https://international.stj.jus.br/en/Brazilian-Judicial-Branch/National-Council-of-Justice> (last visited Apr. 11, 2022).

B. DEFINE AND LIMIT “EMERGENCY AUTHORITY” TO SPECIFY PANDEMIC EMERGENCIES BASED ON THREAT LEVEL

The general definition of “emergency” is too vague. It is possible to categorize emergencies in a way that will help define government actions. Certain emergencies are geographically definable. Hurricane Katrina was a disaster that required focused attention in one part of the United States. The September 11 terrorist attack emergency had a focused impact but, in many ways, required a nationwide response. Emergencies can also be defined by their duration. Natural disasters often occur in a short duration of time but have lasting effects; a pandemic, in contrast, can span months or even years. Emergency authority for pandemics should be defined based on the category of the pandemic as described in Section V(a) above.

Defining emergencies must recognize that emergencies take different forms. Earthquakes, hurricanes, and pandemics are very different types of emergencies, and each one of these extraordinary occurrences affects people in different ways. For example, while earthquakes and hurricanes end in hours, pandemics may last months or years. While earthquakes and hurricanes depend on quick evacuations, pandemics may require people to stay at home as much as possible. Emergencies are different and the federal law should treat them differently. The public is acquainted with the concept of a Category 5 hurricane and a 4.5 Earthquake.⁴¹⁷ Based on the process described in Section V(a) above, we can promote a public understanding of a level 9 pandemic with an understanding of what responses should be made.

An important component of limiting emergency authority is the duration of emergency powers. Time limits are currently part of many emergency measures, and, in the case of COVID-19, emergency powers have been repeatedly renewed to bypass those time limits. The time limits are appropriate for limiting the expansion of power to impose extraordinary measures.

Congress and both state and local governments should define and establish government responses dependent on the category of a pandemic threat. Such statutes could contemplate powers exercised during COVID-19 and evaluate what threat level justifies various actions. Logically, a defined high-level threat like Ebola could justify significant measures based on the emergency and threat level. Following are examples of some of the policies implemented during COVID-19:

- **Travel Restrictions:** During the coronavirus pandemic, the federal government issued bans on international travel, which were easily upheld. States were more equipped to limit travel between states as part of their police power. Though outright bans on entry were not enacted, states were able to implement quarantine requirements for entry because of health and safety justifications.
- **Business Closures:** Complete business closures nationwide are likely unconstitutional at the federal level.⁴¹⁸ However, at the state level, these closures are more viable because of the broad authority granted by police powers.⁴¹⁹ Temporary closures and limits on occupancy require a less compelling state interest than a lengthy closure would, and lengthy or complete closures could be subject to takings or due process arguments.⁴²⁰

⁴¹⁷ *Supra* Section V(a).

⁴¹⁸ *Supra* Section IV(c).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

- **Masking:** Though masking requirements restrain personal liberty, masking is one of the least invasive pandemic prevention measures available, and countless studies have demonstrated its effectiveness at limiting the transmission of disease.⁴²¹ As such, state and local governments possess authority to require masking when diseases reach a high level of classification. The disease would have to have an even higher transmissibility and severity for the federal government to gain this authority, but in these instances, some federal mask mandates would also be possible.
- **Vaccination:** Vaccination is significantly more invasive than masking and constitutes a more severe intrusion on personal liberty. Because of this fact, it is questionable whether federal government would ever gain the right to mandate nationwide vaccination. If the federal government ever assumes this power, it would have to be under the extremely severe circumstances, such as the Ebola crisis. Statewide conditional vaccination requirements, initiated by state governments, are more likely to be upheld.⁴²² Multiple states already mandate COVID-19 vaccination to attend public school.⁴²³ However, these existing vaccine mandates are often accompanied by justification that citizens can opt out of the vaccine mandate under certain circumstances.⁴²⁴

Emergency statutes at the state and federal level should establish a definition of public health emergency based on the declaration of a pandemic under an established process described above. Based on the characteristics of a pandemic, emergency powers can be more clearly defined and limited. Only in the most severe health crisis should the most draconian measures be authorized. It is possible for policy makers to authorize future decisions based on threat level. For example, if there were to be a category 10 Ebola outbreak, it would be worthwhile to establish certain travel restrictions, quarantine requirements, business closures, masking, and vaccination policies during that kind of emergency. The benefit of making these policies in advance is that they will not be perceived as arbitrary under the general category of an emergency. Further, with established standards, courts could stop overreaches beyond established policy.

C. DEFINE AUTHORITY AND LIMITS OF LEVELS OF GOVERNMENT TO ACT--MAKE FEDERALISM WORK

In addition to defining threat level of the pandemic and defining and limiting emergency powers, future policies should contemplate the advantages and challenges of the federal system. Both Brazil and the United States are federalist nations. A federalist country divides power

⁴²¹ Richard Peltier, *There's No Reason Not to Wear a Mask – and still plenty of reasons to wear one*, WASH. POST (2021), <https://www.washingtonpost.com/outlook/2021/07/28/masks-inside-cdc-delta-variant/>.

⁴²² *See, e.g.,* Klaassen v. Trustees of Indiana Univ., 7 F.4th 592, 592 (7th Cir. Aug. 2, 2021) (*cert. denied*).

⁴²³ *See States Address School Vaccine Mandates and Mask Mandates*, NAT'L ACAD. FOR STATE HEALTH POL'Y (last updated May 2, 2022), <https://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html>.

⁴²⁴ *Id.* In these states, citizens who do not want their child to receive a vaccine can elect to homeschool their child to avoid the requirement. Craig Palosky, *Most Parents Don't Want Their Schools to Require COVID-19 Vaccination, But Most Favor Requiring Masks for Unvaccinated Children and Staff*, KAISER FAM. FOUND. (Aug. 11, 2021), <https://www.kff.org/coronavirus-covid-19/press-release/most-parents-dont-want-their-schools-to-require-covid-19-vaccination-but-most-favor-requiring-masks-for-unvaccinated-children-and-staff/>.

between multiple vertical layers of government.⁴²⁵ During a pandemic, that structure can be an advantage, but it can also be a source of confusion and disparate treatment.

The COVID-19 virus highlighted the difficulty that federalist countries face when determining authority to act on a subject that has national collective interest. For instance, Sao Paulo, Brazil's most populous state and city, went into lockdown for several months after both the mayor and the governor announced stay at home orders, but the President of Brazil continuously attacked the lockdowns and social distance measures that were adopted amid the pandemic.⁴²⁶

In fact, even when Brazil's President had COVID-19, and he was seen outside without a mask, talking to people,⁴²⁷ most states were enforcing strict quarantine measures. The President's actions sent a confusing message to Brazilian citizens about how to act during the pandemic and what policies to follow.⁴²⁸ The lack of a uniform national policy to fight the virus was identified as one of the causes for the high number of people infected in Brazil.⁴²⁹

The misalignment in policymaking throughout the country extended to vaccine distribution. In September 2020, Sao Paulo's governor signed an agreement with the Chinese pharmaceutical Sinovac Biotech for a supply of 46 million doses of their vaccine "Coronovac."⁴³⁰ The vaccine was to be manufactured by Instituto Butanta—a Sao Paulo-based research institute. However, while the governor was working to get vaccines, Brazil's President had started a "vaccine war" against Sao Paulo's Governor, announcing that the federal government would purchase a vaccine developed by the pharmaceutical Astrazeneca and Oxford University.⁴³¹ Sao Paulo was also the only state to take steps to obtain a COVID-19 vaccine.⁴³² The President repeatedly questioned

⁴²⁵ *Federalism: Basic Structure of Government*, LUMEN, <https://courses.lumenlearning.com/american-government/chapter/introduction-3/> (last visited Mar. 24, 2022).

⁴²⁶ Lisandra Paraguassu, *Major Brazilian cities set lockdowns as virus spreads*, REUTERS (May 5, 2020), 4:22 PM, <https://www.reuters.com/article/us-health-coronavirus-brazil-lockdown/major-brazilian-cities-set-lockdowns-as-virus-spreads-idUSKBN22H2V3>; Maria Carolina Marcello & Leonardo Benassatto, *Brazil's Bolsonaro attacks coronavirus lockdowns as supporters take to streets*, REUTERS (Apr. 19, 2020), <https://www.reuters.com/article/us-health-coronavirus-brazil/brazils-bolsonaro-attacks-coronavirus-lockdowns-as-supporters-take-to-streets-idUSKBN2210V1>.

⁴²⁷ Marcello & Benassatto, *supra* note 426.

⁴²⁸ *Id.*

⁴²⁹ Juliana Gragnani, *Coronavírus: os sete erros que põem Brasil na rota do 'lockdown,' segundo especialistas*, BBC NEWS (May 6, 2020), <https://www.bbc.com/portuguese/brasil-52551974>.

⁴³⁰ *SP assina acordo por 46 milhões de doses de vacina contra o coronavírus até dezembro*, DO PORTAL DO GOVERNO (Sept. 30, 2020), <https://www.saopaulo.sp.gov.br/ultimas-noticias/governo-do-estado-apresenta-informacoes-sobre-o-combate-ao-coronavirus-8/>.

⁴³¹ Tom Hennigan, *COVID-19: Bolsonaro caught up in 'vaccine war' with Brazil's institutions*, IRISH TIMES (Nov. 3, 2020), <https://www.irishtimes.com/news/world/covid-19-bolsonaro-caught-up-in-vaccine-war-with-brazil-s-institutions-1.4398936>.

⁴³² Terrence McCoy, *Should a coronavirus vaccine be mandatory? In Brazil's Most Populous State, It Will Be*, WASH. POST (Dec. 7, 2020), https://www.washingtonpost.com/world/the_americas/virus-mandatory-vaccine-brazil-bolsonaro/2020/12/06/31767b4a-33e5-11eb-8d38-6aea1adb3839_story.html.

Coronavac, publicly saying he had no intentions to purchase it.⁴³³ However, when the Coronavac vaccine was cleared, the federal government claimed the vaccine for national distribution.⁴³⁴

The United States faced similar challenges because of the lack of uniformity in federal, state, and local approaches to COVID-19. On May 4, 2020, Florida restaurants were allowed to offer outdoor dining at 25% capacity, and retailers could operate at 25% of indoor capacity.⁴³⁵ The governor's reopening order gradually increased until the state's stay-at-home order ended on April 30, 2020.⁴³⁶ Walt Disney World parks reopened in Orlando on July 11, 2020 and July 15, 2020.⁴³⁷ Meanwhile, California's governor issued a stay-at-home order on March 19, 2020 that lasted until January 25, 2021, and Disneyland California remained closed until April 30, 2021.⁴³⁸

Compare the United States and Brazil to New Zealand, a unitary country. New Zealand has been praised for its success in controlling COVID-19 because of strict nationwide measures.⁴³⁹ Is a unified approach necessarily better? Should federalist countries enact more comprehensive national policies or accept that states can enact different policies? The United States and Brazil are far different countries than New Zealand. They are larger and more complex. Logically, there are certain tasks that are better performed with the resources of a national government such as vaccine research, national data evaluation, funding to mitigate economic impacts, international travel policies and overall guidelines for response to particular pandemic. It makes sense for the federal government to support research on, and facilitate the acquisition of, treatments and vaccines and to provide federal funds can be granted to the states for implementing elements of the plan.⁴⁴⁰ While a federal government is best equipped to compile data and issue widespread health recommendations, state and local governments still played a major in implementing a wide range of COVID-19 policies. As noted, local governments have widely divergent policies. In a

⁴³³ *Bolsonaro desautoriza acordo de Pazuello e diz que não comprará CoronaVac*, UOL (Oct. 21, 2020), <https://noticias.uol.com.br/politica/ultimas-noticias/2020/10/21/bolsonaro-responde-a-criticas-sobre-vacina-chinesa-nao-sera-comprada.htm?cmpid=copiaecola>.

⁴³⁴ *Id.*

⁴³⁵ *Id.*; Chelsea Tatham and Andrew Krietz, *Gov. DeSantis says Reopening Begins May 4, Restaurants can Open with Restrictions*, 10 TAMPA BAY (Apr. 29, 2020), <https://www.wtsp.com/article/news/regional/florida/governor-desantis-plans-for-reopening-florida/67-05764814-3e46-44d3-9388-264ad443e5be>.

⁴³⁶ Alaa Elassar, *This is where each state is during its phased reopening*, CNN (May 27, 2020), <https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/>.

⁴³⁷ *Walt Disney World Resort Reopening Information and Updates*, DISNEY INFO. STATION, <https://www.wdwinfo.com/disney-world/reopening-information-updates.htm#:~:text=EPCOT%20and%20Disney's%20Hollywood%20Studios,extended%20to%20September%2026%2C%202021> (last visited Apr. 11, 2022).

⁴³⁸ Juliana Shallcross, *Disneyland California Just Announced that Vaccinated Guests No Longer Need Masks*, CONDÉ NAST TRAVELER (Jun. 15, 2021), <https://www.cntraveler.com/story/disneyland-california-reopening>.

⁴³⁹ *New Zealand takes early and hard action to tackle COVID-19*, WORLD HEALTH ORG. (Jul. 15, 2020), <https://www.who.int/westernpacific/news-room/feature-stories/item/new-zealand-takes-early-and-hard-action-to-tackle-covid-19>.

⁴⁴⁰ See U.S. Const. art. I, § 7, cl. 1; U.S. Const. art. I, § 9, cl. 7; see also *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 575–80 (2012).

future pandemic, that policies may be appropriate because local governments may be better equipped to make determinations based on local situations.⁴⁴¹

D. DEFINE AND LIMIT DATA COLLECTION TO PROTECT INDIVIDUAL PRIVACY

The consequences of data privacy from the worldwide pandemic have been profound.⁴⁴² Gathering and using medical data in a medical emergency is entirely necessary.⁴⁴³ Privacy laws gave way to the medical emergency.⁴⁴⁴ European Union countries suspended their landmark privacy policies for the emergency.⁴⁴⁵ When the emergency is over, it is unlikely privacy protections will return to normal immediately.⁴⁴⁶ Therefore, it makes sense to create a data policy for pandemics, so they do not have to be made during an emergency. A thoughtful data privacy plan will avoid unnecessary intrusions and will provide more comfort to citizens who are already afraid and potentially skeptical of government intrusions. The following policy points are ones that should be considered when forming the best data privacy plan in preparation for the next pandemic:

1. **Minimize collection.** Privacy is best served when only essential data is collected, but in a pandemic, sensitive health data must be collected. Limits on collection limits intrusion. During a pandemic, government does not need to collect health care information on every citizen and monitor every citizen's movement. The nature of data collected during a pandemic is intrusive: health data, location data and personal association data. Before the emergency starts, establish the limits.
2. **Define use of data.** Data collected for health care purposes should not be used for any other purpose.⁴⁴⁷ In some countries, there are massive amounts of information being collected and maintained. A government in a surveillance state could abuse the ability to gather deeply personal healthcare information, increasing the already expansive amount of data it has on individuals.

⁴⁴¹ A small town in Idaho may have different health needs than New York City based on the infection rates of its population.

⁴⁴² See BENJAMIN BOUDREAUX ET AL., DATA PRIVACY DURING PANDEMICS 3 (2020).

⁴⁴³ *Monitoring and Tracking the Disease*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jul. 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/about-epidemiology/monitoring-and-tracking.html>.

⁴⁴⁴ *Supra* Section II(a).

⁴⁴⁵ Article 9(2)(i) of the GDPR authorizes the temporary suspension of data-protection rights in times of public health emergencies. To cope with the COVID-19 pandemic, countries like Italy, France, Germany, and Hungary lifted restrictions on processing and sharing personal data. See Axel Spies, *Corona Virus: Whatever Happens, The Crisis Has an Impact on Data Protection Rights*, AM. INST. FOR CONTEMPORARY GERMAN STUDS. (Feb. 28, 2020), <https://www.aicgs.org/2020/02/corona-virus-whatever-happens-the-crisis-has-an-impact-on-data-protection-rights/>; *Hungarian government suspends some aspects of GDPR*, PRIV. INT'L (May 9, 2020), <https://privacyinternational.org/examples/3837/hungarian-government-suspends-some-aspects-gdpr>; Clara Hainsdorf, *COVID-19 and Data Protection Compliance in France*, WHITE & CASE (Apr. 20, 2020), <https://www.whitecase.com/publications/alert/covid-19-and-data-protection-compliance-france>.

⁴⁴⁶ *Supra* Section IV(e).

⁴⁴⁷ For example, marketing.

3. **Anonymize Data.** Not all data needed during a pandemic should to be individualized. There were examples in this pandemic where programs assessed community wide compliance with stay-at-home orders without identifying individuals.⁴⁴⁸
4. **Destroy data when no longer needed.** While there may be long term uses for health data on individuals and demographic groups, the retention of individualized data should be limited or anonymized.⁴⁴⁹ Potential misuses can be avoided if data is not individualized.
5. **Be transparent about data collection.** Data collection is important in fighting against a pandemic. Testing and contact tracing are necessary weapons for fighting a pandemic, but they gather sensitive information. The more transparent government is about data collection, the higher the level of citizen cooperation. Except where government can dictate citizens' conduct, good faith and cooperation are keys to success.

Establishing specific data policies before the next pandemic makes sense. There will be time to learn from the mistakes of this pandemic, take the best data policies, and provide a blueprint for the future that will facilitate rapid and rational actions with greater understanding and cooperation from citizens.

VI. CONCLUSION

COVID-19 created a global health care emergency. Government responses were uneven and confusing to citizens worldwide. Before the next pandemic governments at all levels should define plans for that inevitable emergency. Time is of the essence and establishing processes for decision-making will save time and lives. Considering and defining limits of authority is also the best way to protect individual freedom and privacy rather than making decisions in the heat of a crisis.

Existing policies grant substantial authority to executives during emergencies, including presidents, governors, and mayors. During past emergencies, individual rights have been constrained—COVID-19 was no different. The severe consequences of lockdowns, closings and quarantines are undeniable. So are the social, community, and individual consequences of a pandemic that kills millions worldwide. Balancing government authority to constrain individuals and the need to protect the greater good with individual liberties and freedoms is a necessity. The Constitution and the courts cannot take a sabbatical. They must work together to create balance. Therefore, the courts are asked to play the uncomfortable role of medical policy arbiter.

The law on emergencies is general and vague. The current definitions of state of emergency and disasters grant the governments vast authority to intrude upon individual rights. In addition, the extraordinary powers granted are broadly defined. It is timely to reassess emergency powers *vis a vis* personal liberty. COVID-19 has been a warning that emergency powers can generate rational policies but also can produce highly intrusive government practices.

⁴⁴⁸ See *Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak*, EUR. DATA PROT. BD. 5 (Apr. 21, 2020), https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf.

⁴⁴⁹ *Id.* at 8, 12.

During COVID-19, countries have required businesses to close and limited hours of operation, issued mandates, and required long-term isolation. There has also been a massive collection of sensitive personal data. These measures drastically affect critical democratic values and fundamental rights such as property, self-determination, movement, and privacy.

The future holds more crises, more emergencies, more pandemics, and more governmental intrusions. In some countries, intrusion is just business as usual, but in democratic societies, now is the time to address balancing individual liberties with responses to public health crisis. The intrusions on personal liberties have been pervasive and unprecedented during the COVID pandemic. Arguably, many were necessary. However, the absence of established policy added to the ambiguity and anguish of the citizens of every country. What are the rules? Who is in charge? What are the limits?

The overall response to the COVID crisis cannot be considered a success. Some failures were based on poor leadership, some successes were a result of cultural characteristics, but generally there was a vacuum of cohesive and comprehensive policy. Now is the time to define a policy that does three things. First, define the authority to implement emergency powers (state, federal and local). In the United States there are constitutional limits and rational policy reasons to divide the duties and authority. Because a pandemic will have different impacts in different places, local governments and state governments should be empowered as well. Second, define time limits. The nature of emergencies is that they are urgent and time sensitive. Therefore, there should be time limits on delegation of power, as there are in many statutes now. The limits may be different for different policies. Third, the policies must recognize and establish limits that protect personal freedom and privacy.

The world experienced an unprecedented level of government intrusion because of the scale of the pandemic, the compelling need for action, and the capacity of technology to facilitate intrusions. It seemed policy was ever changing and unpredictable. That was true because the pandemic was ever changing and unpredictable. Consequently, the intrusions such as quarantines, vaccinations, business shutdowns, masking, and tracing, even when justified by health considerations, created public uncertainty and anxiety. With perspective on COVID-19, it is timely to create specific structures, processes, guidelines, and policies *before* the next pandemic.