

# THE COVID-19 PANDEMIC AND FEDERALISM: WHO DECIDES?

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*The COVID-19 pandemic is an unprecedented public health crisis that has prompted an unprecedented response. Drastic and previously unthinkable steps have been taken to “flatten the curve” and avoid overwhelming our health systems. In the absence of a coordinated national response to the crisis, the pandemic has underscored both the promise and limits of the Tenth Amendment. As state and local actors have scrambled to adopt policies to protect their residents and minimize the loss of life, the result has been a patchwork of advisories and orders that reveal stark regional disparities and some confounding inconsistencies. The reliance on state and local actors has produced many innovative programs and novel attempts at regional coordination, but has also led to direct competition between and among jurisdictions as they vie for desperately needed resources. Moreover, it has elevated the friction between the federal government and state and local leaders to alarming levels.*

*This Article examines the role of federalism in the early days of the COVID-19 pandemic in the United States. It explores the dangers that arise when disaster relief is politicized and proposes failsafe mechanisms to prevent key institutions from abdicating their responsibility to the American people. The first section reviews our current preparedness and response policy, which is grounded on a strong vision of cooperative federalism where a response is federally supported, state managed, and locally executed. The second section uses the lens of comparative institutional analysis to evaluate the shortcomings of this approach, specifically in the context of pandemic planning. By addressing three core institutional considerations—competency, political responsiveness, and stability—this Article maps out potential gaps that have the potential to compromise response efforts. The third section discusses failsafe provisions to ensure that disaster relief does not fall victim to partisan wrangling. A brief conclusion notes that the reliance on state and local actors in this pandemic has been a pragmatic, but also imperfect, institutional choice because state and local level initiatives are by their nature partial and porous. They are necessarily hampered by the lack of uniformity and certainty that could come from a federal pandemic response,*

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\* Sheller Professor of Public Interest Law and Director of Law and Public Policy Programs, Temple University, Beasley School of Law. I would like to thank Lily V. Bernadel, Temple Law Class of 2022, for her excellent research and editing assistance. The COVID-19 pandemic presents dynamic and ever-changing challenges. The observations in this Article are based on the chaotic events of the early days of the pandemic through mid-May 2020 when some of the states started to reopen. A brief Epilogue provides an update on the status of the pandemic as this Article goes to press.

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INTRODUCTION . . . . .	2
I. FEDERALISM, DISASTER RELIEF, AND PANDEMIC PLANNING . . . . .	7
A. Comparative Institutional Analysis . . . . .	9
B. National Preparedness and Response Strategy . . . . .	13
C. Pandemic Planning . . . . .	18
II. ASSESSING INSTITUTIONAL STRENGTHS AND WEAKNESSES . . . . .	25
A. Institutional Competence . . . . .	27
B. Institutional Responsiveness . . . . .	31
C. Institutional Resilience . . . . .	34
III. MANDATING ACCOUNTABILITY . . . . .	39
A. Individual Empowerment . . . . .	40
B. Transparency . . . . .	42
C. Accountability . . . . .	43
IV. CONCLUSION . . . . .	44

#### INTRODUCTION

The COVID-19 pandemic is an unprecedented public health crisis that has prompted an unprecedented response.<sup>1</sup> In an effort to “flat-

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1. COVID-19 is an infectious disease cause by a newly discovered coronavirus. *Coronavirus Disease (COVID-19) Advice for the Public*, WORLD HEALTH ORGANIZATION [WHO], <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> [<https://perma.cc/9BAM-DUJH>] (last visited May 8, 2020); *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, WHO, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) [<https://perma.cc/HZ8Q-BL2A>] (last visited Oct. 7, 2020). Coronaviruses are a large family of viruses that cause illness in humans and animals. *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> [<https://perma.cc/Z797-GSRU>] (last visited Sept. 1, 2020). The virus and the disease were unknown until they were reported in Wuhan, China in 2019. *Id.* The World Health Organization (WHO) declared that the global spread of COVID-19 was a pandemic on March 11, 2020. Manfred S. Green, *Did the Hesitancy in Declaring COVID-19 a Pandemic Reflect a Need to Redefine the Term?*, 395 LANCET 1034, 1034-35 (2020). Because COVID-19 is a novel virus, humans have no immunity to it. *Coronavirus Disease 2019 (COVID-19) Situation Summary*, *supra* note 1. Through May 2020, there was no vaccine or approved treatments. *Information for Clinicians on Investigational Therapeutics for Patients with COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/therapeutic-options.html> [<https://perma.cc/3LFZ-U82A>] (last visited Sept. 1, 2020).

ten the curve” and not overwhelm our health systems,<sup>2</sup> drastic and previously unthinkable steps have been taken to blunt and slow the inevitable loss of life.<sup>3</sup> By April 2020, ninety-five percent of Americans were under a “stay-at-home” order,<sup>4</sup> and the workforce had shed over thirty million jobs.<sup>5</sup> Every state in the union had been declared a federal disaster area.<sup>6</sup> Colleges, schools and non-essential businesses either closed or retreated online.<sup>7</sup> Concerts, sporting events, religious services, and other mass gatherings were cancelled for the foreseeable future.<sup>8</sup> Air travel had declined by ninety-six percent.<sup>9</sup> Americans were prohibited from gathering for cherished life cycle events, such as weddings, graduations, and funerals.<sup>10</sup> When Americans did venture

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2. Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/article/flatten-curve-coronavirus.html> (defining “flatten the curve”).

3. A model prepared by the Imperial College London in March 2020 projected 2.2 million deaths in the United States if no mitigation measures were taken. David Adam, *Special Report: The Simulations Driving the World’s Response to COVID-19*, NATURE (Apr. 2, 2020), <https://www.nature.com/articles/d41586-020-01003-6>.

4. Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (reporting 316 million people in 42 states, two counties, ten cities, the District of Columbia, and Puerto Rico).

5. Lisa Beilfuss, *Another 3.8 Million Americans Filed for Unemployment Benefits Last Week. The Impact Will Be Lasting*, BARRON’S (Apr. 30, 2020, 8:44 AM), <https://www.barrons.com/articles/coronavirus-labor-market-toll-at-least-30-million-jobs-lost-51588250687> (reporting “at least 30 million people out of work as the coronavirus crisis ravages the economy”).

6. Justine Coleman, *All 50 States under Disaster Declaration for First Time in US History*, HILL (Apr. 12, 2020), <https://thehill.com/policy/healthcare/public-global-health/492433-all-50-states-under-disaster-declaration-for-first> (reporting that within a twenty-two day period, President “Trump declared a major emergency in all 50 states and most territories”).

7. See, e.g., Melissa Korn, *Coronavirus Prompts Colleges to Send Students Home*, WALL ST. J. (Mar. 10, 2020), <https://www.wsj.com/articles/coronavirus-prompts-colleges-to-send-students-home-11583862936>.

8. Nolan D. McCaskill, Joanne Kenen & Adam Cancryn, *‘This is a Very Bad One’: Trump Issues New Guidelines to Stem Coronavirus Spread*, POLITICO (Mar. 16, 2020), <https://www.politico.com/news/2020/03/16/trump-recommends-avoiding-gatherings-of-more-than-10-people-132323>.

9. Rebecca Klar, *Airline Travel Has Dropped 96 Percent Amid Coronavirus*, HILL (Apr. 9, 2020), <https://thehill.com/policy/transportation/492082-airline-travel-has-dropped-96-percent-amid-coronavirus>.

10. Alicia Lee, *From Weddings to Funerals, the Coronavirus is Canceling Life’s Biggest Moments and Leaving Families Heartbroken*, CNN (Mar. 20, 2020, 8:27 AM), <https://www.cnn.com/2020/03/20/us/coronavirus-wedding-funeral-wellness-trnd/index.html>.

outside, they were directed to wear face masks that covered their noses and mouths.<sup>11</sup>

In the absence of a coordinated national response to the public health crisis, state and local authorities spearheaded many of the actions designed to flatten the curve.<sup>12</sup> As confirmed cases of COVID-19 and deaths rose, they took it upon themselves to craft policies that first aimed to contain the effects of the virus in their jurisdictions and then to mitigate its impact.<sup>13</sup> Exercising their inherent police powers guaranteed by the Tenth Amendment, state and local authorities closed schools, rescheduled elections, placed limits on public gatherings, and shuttered non-essential businesses.<sup>14</sup> One by one, jurisdictions began to issue stay-at-home orders that required Americans to shelter in place with their families and leave only for reasons deemed “essential.”<sup>15</sup>

As these measures rapidly unfolded over the course of several weeks, the result was a confusing patchwork of advisories and orders that revealed stark regional disparities and sometimes confounding inconsistencies.<sup>16</sup> The governors of a number of states resisted pressure to issue stay-at-home orders, preferring instead to prioritize individual responsibility and liberty.<sup>17</sup> Even for states with stay-at-home orders, the scope of the orders sometimes differed widely,<sup>18</sup> and there was

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11. Claire Hansen, *CDC Advises All Americans to Wear Cloth Masks in Public*, USNEWS (Apr. 3, 2020), <https://www.usnews.com/news/national-news/articles/2020-04-03/cdc-advises-all-americans-to-wear-cloth-masks-in-public>.

12. Dan Balz, *As Washington Stumbled, Governors Stepped to the Forefront*, WASH. POST (May 3, 2020), <https://www.washingtonpost.com/graphics/2020/politics/power-to-states-and-governors-during-coronavirus/>.

13. *Id.*

14. *Id.*; U.S. CONST. amend. X. The federal government is a government of enumerated powers. U.S. CONST. art. 1, § 8. There are thirty expressly enumerated powers granted to Congress under Article 1, section 8 of the U.S. Constitution, including the power to regulate interstate and foreign commerce, coin money, and declare war. *Id.* The Tenth Amendment to the US Constitution makes it clear that all power not delegated to the federal government is reserved to the states. U.S. CONST. amend. X. These reserved powers include the police power, which is the ability to regulate behavior and enforce order to further health, safety, and general welfare. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (defining “police powers” as “the authority to provide for the public health, safety, and morals”).

15. Thomas Johnson & Angela Fritz, *You’re Under A Stay-At-Home Order? Here’s What That Means in Your State*, WASH. POST (May 5, 2020), <https://www.washingtonpost.com/health/2020/04/06/coronavirus-stay-at-home-by-state/>.

16. *See, e.g.*, Reuben Fischer-Baum, Daniela Santamariña & Juliet Eilperin, *What Counts as an Essential Business in 10 U.S. Cities*, WASH. POST (Mar. 25, 2020), <https://www.washingtonpost.com/graphics/2020/national/coronavirus-essential-businesses/>.

17. Mervosh, et al., *supra* note 4 (describing stay-at-home orders).

18. *Id.*

little consensus among the states as to what businesses should be considered “essential.”<sup>19</sup> Accordingly, the lived experience of the COVID-19 pandemic has varied depending on zip code—not simply because of the level of infection, but also because jurisdictions have imposed different mitigation efforts.

The varying state and local responses to the pandemic underscore both the promise and the limitations of federalism.<sup>20</sup> On one hand, this sort of regional experimentation represents the shining promise of federalism. It embodies the optimistic view famously expressed by Justice Brandeis that “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>21</sup> Indeed, the reliance on state and local actors during the early days of the pandemic produced many innovative programs and attempts at regional coordination.<sup>22</sup> Given the size and diversity of the United States, it follows that a one-size-fits-all approach might not be appropriate, and bottom-up state and local responses can arguably be more nimble than top-down federal intervention.<sup>23</sup>

On the other hand, the novel coronavirus is an extremely deadly and contagious virus for which humans have no natural immunity.<sup>24</sup> The virus does not respect borders and thus reveals the limitations of federalism. When dealing with questions of contagion, a novel experiment in one state can easily endanger the rest of the country. Despite the benefits of a regional and local approach to the public health crisis, the failure to adopt uniform measures across the country has potentially placed all of us at risk.<sup>25</sup> The strong push to “reopen” parts of

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19. Fischer-Baum, et al., *supra* note 16 (describing what constitutes “essential”).

20. See U.S. CONST. amend. X.

21. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

22. See, e.g., Maeve Reston, Kristina Sgueglia & Cheri Mossburg, *Governors on East and West Coasts Form Pacts to Decide When to Reopen Economies*, CNN (Apr. 13, 2020, 7:10 PM), <https://www.cnn.com/2020/04/13/politics/states-band-together-reopening-plans/index.html> (describing how some states formed regional pacts to coordinate reopening).

23. *Contra* Michèle Flournoy & Michael Morell, Opinion, *The 6 Factors that Determine Coronavirus Containment or Devastation*, WASH. POST (Apr. 19, 2020, 12:08 PM), <https://www.washingtonpost.com/opinions/2020/04/19/6-factors-that-determine-coronavirus-containment-or-devastation/> [<https://perma.cc/AK7D-KUKH>] (reporting that countries with uniform approach have fared better).

24. *Coronavirus Disease 2019 (COVID-19) Situation Summary*, *supra* note 1.

25. Katherine Shaver, *Smartphone Data Shows Out-Of-State Visitors Flocked to Georgia as Restaurants and Other Businesses Reopened*, WASH. POST (May 7, 2020, 6:00 AM), [https://www.washingtonpost.com/local/trafficandcommuting/smartphone-data-shows-out-of-state-visitors-flocked-to-georgia-as-restaurants-and-other-businesses-reopened/2020/05/06/b1db0056-8faf-11ea-9e23-6914ee410a5f\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/smartphone-data-shows-out-of-state-visitors-flocked-to-georgia-as-restaurants-and-other-businesses-reopened/2020/05/06/b1db0056-8faf-11ea-9e23-6914ee410a5f_story.html).

the country that began at the end of April threatened the progress that had been made. It was also disingenuous because some parts of the country never closed; indeed, some parts of the service economy were operating at breakneck speed through the early months of the pandemic.<sup>26</sup>

As the federal government focused on massive stimulus spending to shore up the economy,<sup>27</sup> the states were forced into direct competition with each other as they vied for desperately needed resources.<sup>28</sup> Moreover, the friction between the federal government and state and local leaders increased to alarming levels in the early months of the response.<sup>29</sup> The federal government also vacillated with respect to its role in addressing the pandemic. At one point, President Trump asserted that the President of the United States has “total” authority over when the American economy should reopen, but then reversed himself three days later, saying that Governors would be “calling the shots.”<sup>30</sup>

In many ways, the pandemic has exacerbated preexisting fissures in American society. It has added fuel to long-standing partisan polarization<sup>31</sup> and seized on the deep inequality that plagues our workforce and communities.<sup>32</sup> Responses to the pandemic will have to acknowledge and work to address these divisions, but they will also have to

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26. Catherine Thorbecke, *Amazon Shares Skyrocket Amid COVID Pandemic, But Some Workers Question 'Human Cost,'* ABCNEWS (May 7, 2020, 5:02 AM), <https://abcnews.go.com/Business/amazon-shares-skyrocket-amid-covid-pandemic-workers-question/story?id=70205363>.

27. Jacob M. Schlesinger & Joshua Jamerson, *After Three Coronavirus Stimulus Packages, Congress is Already Prepping Phase Four*, WALL ST. J. (Mar. 29, 2020, 5:39 PM), <https://www.wsj.com/articles/after-three-coronavirus-stimulus-packages-congress-is-already-prepping-phase-four-11585483203>.

28. Clary Estes, *States are Being Forced into Bidding Wars to Get Medical Equipment to Combat Coronavirus*, FORBES (Mar. 28, 2020, 6:00 AM), <https://www.forbes.com/sites/claryestes/2020/03/28/states-have-are-being-forced-into-bidding-wars-to-get-medical-equipment-to-combat-coronavirus>.

29. Matt Perez, *Trump Encourages Pence to Ignore Democratic Governors: 'If They Don't Treat You Right, I Don't Call,'* FORBES (Mar. 29, 2020, 8:02 PM), <https://www.forbes.com/sites/mattperez/2020/03/27/trump-encourages-pence-to-ignore-democratic-governors-if-they-dont-treat-you-right-i-dont-call>.

30. Peter Baker & Michael D. Shear, *Trump Says States Can Start Reopening While Acknowledging the Decision Is Theirs*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/us/politics/coronavirus-trump-guidelines.html>.

31. E.g., Cailin O'Connor & James Owen Weatherall, *Hydroxychloroquine and the Political Polarization of Science*, BOS. REV. (May 4, 2020), <http://bostonreview.net/science-nature-politics/cailin-oconnor-james-owen-weatherall-hydroxychloroquine-and-political>.

32. Aaron van Dorn, Rebecca E. Cooney & Miriam L. Sabin, *COVID-19 Exacerbating Inequalities in the US*, 395 LANCET 1243-44 (2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30893-X/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30893-X/fulltext) [<https://perma.cc/JK2Y-2GMC>].

navigate the shifting and evolving roles of our federal, state, and local governments. To better understand the ramifications of these potentially seismic changes, this Article examines the role of federalism in the early days of the COVID-19 pandemic in the United States. It also explores the dangers that can arise when preparedness and response policy is politicized and makes the case for failsafe mechanisms geared to prevent key institutions from abdicating their responsibility to the American people in times of a catastrophic emergency.

The first section of the Article introduces comparative institutional analysis and reviews our national preparedness and response policy, which is grounded on a strong vision of cooperative federalism where a response is “federally supported, state managed, and locally executed.”<sup>33</sup> Our current policy assumes a robust cross-institutional response and active participation by all levels of government, along with private industry and the non-profit sector.<sup>34</sup> The second section uses the lens of comparative institutional analysis to evaluate the shortcomings of this approach, specifically in the context of pandemic planning.<sup>35</sup> By addressing three core institutional considerations—competency, political responsiveness, and stability—the Article maps potential gaps that could compromise emergency preparedness and response efforts. The third section raises the need for failsafe provisions to ensure that our preparedness and response policy does not fall victim to partisan wrangling.<sup>36</sup> A brief conclusion notes that the reliance on state and local actors in this pandemic has been a pragmatic, but also imperfect, institutional choice because state and local level initiatives are by their nature partial and porous. They are necessarily hampered by the lack of uniformity and certainty that could come from a federal pandemic response and, unfortunately, are ill-suited to stop a novel virus in search of its next host.

## I.

### FEDERALISM, DISASTER RELIEF, AND PANDEMIC PLANNING

Our current disaster relief policy and pandemic planning is part of a broader national preparedness and response strategy that adopts an “all hazards” tiered approach and incorporates key roles for federal,

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33. U.S. DEP’T OF HOMELAND SEC., THE NATIONAL RESPONSE FRAMEWORK 7 (4th ed. 2019) (hereinafter “NRF”).

34. *Id.* at ii.

35. NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 9 (2001) (describing comparative institutional analysis).

36. See Kaila Philo & Christian Paz, *The Atlantic Politics Daily: Even the Pandemic is Partisan*, ATLANTIC (Mar. 24, 2020), <https://www.theatlantic.com/politics/archive/2020/03/covid-19-is-turning-into-a-partisan-battle-politics-daily/608578>.

state, and local authorities.<sup>37</sup> By employing an “all-hands-on-deck” tactic, disaster relief policy and pandemic planning casts a comprehensive net for resources that also includes non-governmental institutions, such as private industry and the diverse non-profit sector.<sup>38</sup> Generally, state and local authorities are expected to take the lead in domestic localized emergencies, such as hurricanes and other mass casualty events, with the federal government playing a supporting role by providing financial support and resources.<sup>39</sup> Ideally, the goal is for these efforts to be “federally supported, state managed, and locally executed.”<sup>40</sup> The policy envisions a greater role for federal coordination and support in the case of catastrophic events, such as a pandemic.<sup>41</sup> This expanded role recognizes that “catastrophic incidents”<sup>42</sup> can quickly overwhelm the capacity of state and local governments and that there are some countermeasures that are solely within the capacity of the United States government, such as global threat monitoring and vaccine development.

This section first introduces comparative institutional analysis as a means to evaluate the relative capacity of the different institutional actors involved in the policy. It then outlines the structure of our disaster relief policy and pandemic planning, specifically with respect to federalism considerations and questions of institutional decision making. It suggests that the “all hazards” approach and the emphasis on “incident management” have obscured the uniqueness of a novel pandemic and left the federal government ill-prepared to respond to the COVID-19 pandemic because of conflicting priorities. Finally, it shows how the federal government has failed to follow its own pandemic planning policy and guidance, leaving other institutional actors to take the lead in shaping the COVID-19 response.

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37. NRF, *supra* note 33, at 3. “All-hazards” planning is designed to provide “an integrated approach to emergency preparedness planning that focuses on capacities and capabilities that are critical to preparedness for a full spectrum of emergencies or disasters, including internal emergencies and man-made emergencies (or both) and natural disasters.” CTRS. FOR MEDICARE AND MEDICAID SERVS., FREQUENTLY ASKED QUESTIONS EMERGENCY PREPAREDNESS REGULATION 1 (2017), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/FAQ-Round-Four-Definitions.pdf> [<https://perma.cc/VX3R-P8PW> ] (last visited July 30, 2020).

38. NRF, *supra* note 33, at 3.

39. *Id.* at 6.

40. *Id.* at 7–8, 15.

41. *Id.* at 4. Examples of catastrophic events requiring an enhanced federal response would include extreme and widespread natural disasters such as Hurricane Katrina, terrorist attacks (especially those involving weapons of mass destruction), and pandemics.

42. *Id.*

### A. Comparative Institutional Analysis

The cross-institutional approach to disaster relief and pandemic planning provides a real-world example of comparative institutional analysis—a method of public policy analysis that looks across institutions to determine their relative strengths and weaknesses.<sup>43</sup> Comparative institutional analysis acknowledges that our primary decision-making processes, such as markets, the courts, and the political process, are each subject to certain structural constraints that necessarily affect an institution’s ability to provide the desired relief or to further an agreed-upon policy goal.<sup>44</sup> In other words, every one of our major institutions is limited by its design, leaving only “imperfect alternatives.”<sup>45</sup> Numerous “imperfect” institutions are tapped in order to leverage their complementary skills and resources, a dynamic that holds true in the context of disaster relief policy and pandemic planning.<sup>46</sup> Traditionally, the goal of comparative institutional analysis is to choose between and among institutions and determine the optimal answer to the age-old question of “who decides” a particular policy point.<sup>47</sup> However, the exercise of comparative institutional choice applied to disaster relief and pandemic planning is better expressed as a means to identify, quantify, and prioritize the competencies of various institutions. In other words, the analysis does not result in the choice of a single institution, but rather informs how to best deploy and utilize the relative capacities of the various institutions. As explained in Section II, this process is ultimately flawed because it assumes an ideal institutional response and the absence of countervailing political considerations.

Considerations of federalism are central to our national disaster relief policy and its tiered response that enlists all levels of government. For example, the National Response Framework (NRF) expressly acknowledges that the guiding principles of our national preparedness and response strategy are “rooted in the federal system

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43. KOMESAR, *supra* note 35, at 9 (asserting “law and rights are the product of tough institutional choices impacted by systemic variables such as the costs of participation and numbers and complexity”).

44. *Id.*

45. *Id.* at 9. Komesar uses the term “imperfect alternatives” to describe the inevitable result of comparative institutional analysis. *Id.* at 271. No single institutional choice will produce an optimal result. *Id.*

46. *Id.* at 20–21. Given that all institutions feel the weight of increasing numbers and complexity, it is not sufficient to identify the shortcomings of a particular institution because all institutions have shortcomings. *Id.* at 23 (“All institutions are imperfect and choices between alternatives can be sensibly made only by considering their relative merits.”).

47. *Id.* at 34.

and the U.S. Constitution's division of responsibilities between federal and state governments."<sup>48</sup> In many ways, this cross-institutional approach exemplifies the notion of shared power that is at the heart of federalism. Although the U.S. Constitution sets the baseline for the balance of power between the federal and state governments, there are many instances, which are neither mandated nor prohibited by the Constitution, where federal, state and local authorities can share power and responsibilities.<sup>49</sup>

The cross-institutional response reminds us that federalism is, at core, an institutional choice that answers the fundamental question of "who decides?" Accordingly, federalism provides an added and essential vertical dimension to comparative institutional analysis. It requires policy makers to evaluate the competencies of the different branches of government at three different levels: federal, state, and local.<sup>50</sup> Disaster relief and pandemic planning largely focus on the executive branch of the government at each level because that is the institution responsible for coordinating and implementing the response plan. Each level of government, in turn, is expected to leverage its relationships with the non-profit sector and private industry.<sup>51</sup>

As a practice of shared sovereignty, there have been different understandings of federalism throughout different periods in our nation's history. The concept of dual federalism that ended with the New Deal divided responsibility and power into discrete categories and has been described as the "layer-cake" model of federalism.<sup>52</sup> The following period of cooperative federalism saw a looser application of the Tenth Amendment as the federal government sought active collaboration and cooperation with state governments to implement federal policies.<sup>53</sup>

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48. NRF, *supra* note 33, at 6.

49. Federalism is a system of shared sovereignty between the federal government and the states. Guaranteed by the Tenth Amendment, the contours of federalism are determined by U.S. Supreme Court precedent. U.S. CONST. amend. X.

50. At the local level, some jurisdictions do not have what would be considered a strong executive model. Benjamin Zimmerman, *Does the Structure of Local Government Matter?*, FELS INST. OF GOV'T. (Dec. 7, 2017), <https://www.fels.upenn.edu/re-cap/posts/1475> [<https://perma.cc/YE8V-JNNL>] (explaining that "[t]he International City/County Management Association (ICMA) classifies local governments into five forms: council-manager, mayor-council, commission, town meeting, and representative town meeting").

51. See NRF, *supra* note 33, at 15.

52. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (documenting passing of dual federalism); see *Layer Cake Federalism*, CTR. FOR THE STUDY OF FEDERALISM, [http://encyclopedia.federalism.org/index.php/Layer\\_Cake\\_Federalism](http://encyclopedia.federalism.org/index.php/Layer_Cake_Federalism) [<https://perma.cc/6EJ4-X7N9>] (last visited Oct. 8, 2020).

53. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (stating that cooperative federalism "allows the States, within limits established by

This period was described as the “marble-cake” model of federalism where federal and state power swirled together for the common good.<sup>54</sup> In the late 20th century, New Federalism sought to return power to the states that many thought had been stripped away under the guise of large federal programs.<sup>55</sup> During this current time of polarization, federalism has increasingly been wielded by states as a means to reject federal policies and strike out on their own.<sup>56</sup> Our preparedness and response policy relies on a marble-cake vision of cooperative federalism.

In the case of the current pandemic, governors have the right to exercise their inherent police powers reserved to the states under the Tenth Amendment.<sup>57</sup> According to most authorities, these powers include issuing stay-at-home orders, imposing restrictions on gatherings, and closing private businesses.<sup>58</sup> There are several pending court cases challenging these orders as unconstitutional takings without compensation in violation of the Fifth Amendment, but these cases are unlikely to succeed based on existing precedent.<sup>59</sup> Other cases have been brought by gun rights supporters based on the Second Amendment,<sup>60</sup> and churches have filed lawsuits based on the Free Exercise clause of

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federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs”).

54. MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 152 (Daniel J. Elazar ed., 1966) (describing “The Marble Cake of Government”).

55. Judith Resnick, Symposium, *Constructing a New Federalism: Jurisdictional Competence and Competition: Afterword: Federalism’s Options*, 14 *YALE J. ON REG.* 465, 467–69 (1996).

56. John C. Blakeman & Christopher P. Banks, *The U.S. Supreme Court, New Federalism, and Public Policy*, in *CONTROVERSIES IN AMERICAN FEDERALISM AND PUBLIC POLICY* 1–17 (Christopher P. Banks ed., 2018).

57. *Smith v. Turner*, 48 U.S. 283, 408 (1849) (“The police power of the State cannot draw within its jurisdiction objects which lie beyond it.”).

58. *E.g.*, Jonathan Turley, *Trump Says It’s His Call to Reopen the Country. The Constitution Says Otherwise*, *WASH. POST* (Apr. 14, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/04/14/coronavirus-federalism-trump-states/>.

59. *See, e.g.*, Complaint, *Schulmerich Bells, LLC v. Wolf*, No. 2:20-cv-01637 (E.D. Pa. Mar. 26, 2020), ECF No. 1; *see also* Ilya Somin, *Does the Takings Clause Require Compensation for Coronavirus Shutdowns?*, *REASON* (Mar. 20, 2020), <https://reason.com/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/> (“Under current Supreme Court precedent, the answer [to whether compensation is required] is almost always going to be ‘no.’”). The 5th Amendment prohibits a taking of property without “just compensation.” U.S. CONST. amend. V. It is made applicable to the states through the 14th Amendment. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978).

60. Jon Passantino, *NRA Sues California Gov. Gavin Newsom and Other State Officials over Gun Store Closures*, *CNN* (Mar. 28, 2020, 11:26 AM), <https://www.cnn.com/2020/03/28/us/nra-sues-california-over-gun-store-closures/index.html>.

the First Amendment.<sup>61</sup> When President Trump famously asserted that he had “total” authority over when the individual states would lift their stay-at-home orders, he was mistaken, as many news outlets were quick to point out.<sup>62</sup> Although he backed down from his claim of “absolute authority,” President Trump instructed the Attorney General, William Barr, to investigate instances where governors, in the President’s view, have gone too far.<sup>63</sup> As these legal battle lines continue to be drawn, it remains to be seen whether the pandemic will result in an impairment of state police powers in favor of economic interests that seem paramount in the rush to “reopen” the economy.<sup>64</sup>

Although the balance between state and federal power has waxed and waned over time, it is important to remember that federalism is a decision-making process and not an ideology.<sup>65</sup> It determines the locus for decision making, but it does not control the substance of that decision absent a constitutional constraint.<sup>66</sup> State decision-making power can facilitate either a progressive or conservative impulse. Today, progressive advocates invoke principles of federalism to support state level innovations with respect to the legalization of marijuana,

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61. See *infra* text accompanying notes 217–23 (describing religious liberty claims). On May 13, the Wisconsin Supreme Court struck down the governor’s stay-at-home order on a technical point involving whether the necessary rulemaking procedures were followed. Katherine J. Zimmerman, *Wisconsin Supreme Court Strikes Down Stay at Home Order*, NAT’L L. REV. (May 18, 2020), <https://www.natlawreview.com/article/wisconsin-supreme-court-strikes-down-stay-home-order> [https://perma.cc/R8HZ-SEKN].

62. Peter Baker & Maggie Haberman, *Trump Leaps to Call Shots on Reopening Nation, Setting Up Standoff With Governors*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/us/politics/trump-coronavirus-governors.html> (“Asked what provisions of the Constitution gave him the power to override the states if they wanted to remain closed, he said, ‘Numerous provisions,’ without naming any. ‘When somebody’s the president of the United States, the authority is total.’”); e.g., Charlie Savage, *Trump’s Claim of Total Authority in Crisis Is Rejected Across Ideological Lines*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/trump-total-authority-claim.html>.

63. *A Close Look at President Trump’s Assertion of “Absolute” Authority Over States*, NPR (Apr. 14, 2020, 4:16 PM), <https://www.npr.org/2020/04/14/834460063/a-close-look-at-president-trumps-assertion-of-absolute-authority-over-states>; see *infra* text accompanying notes 209–25 (describing DOJ involvement).

64. Amy Davidson Sorkin, *Trump’s Reckless Rush to Reopen*, NEW YORKER (Mar. 24, 2020), <https://www.newyorker.com/news/daily-comment/trumps-reckless-rush-to-reopen>.

65. See *infra* text accompanying notes 52–56 (describing evolution of federalism as system of shared sovereignty).

66. For example, in *U.S. v. Windsor*, 570 U.S. 744 (2013), the U.S. Supreme Court struck down the Defense of Marriage Act that prescribed a federal definition of marriage. Two years later, the Court held that restrictive state definitions of marriage violated the Fourteenth Amendment. *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015).

right-to-die initiatives, climate change measures, and health care reform.<sup>67</sup> At the same time, conservative advocates also employ federalism to support socially conservative causes, including broad religious exemptions and restrictive abortion laws.<sup>68</sup> Accordingly, the decision-making deference afforded to the states under disaster relief policy and pandemic planning could produce either a progressive pro-science, pro-public health response or a more conservative response that prioritized individual liberty and commerce. In the case of the COVID-19 pandemic, it did both.

### B. National Preparedness and Response Strategy

The present-day incident preparedness and response protocols were initiated after the September 11, 2001 terrorist attacks, which prompted a searching reappraisal of our domestic security apparatus.<sup>69</sup> The following year, Congress created the Department of Homeland Security to coordinate and unify domestic security efforts.<sup>70</sup> As part of a series of Presidential Directives to the newly appointed Secretary of Homeland Security, President George W. Bush issued Homeland Security Presidential Directive #5 (HSPD-5), establishing a comprehensive national domestic incident management system.<sup>71</sup> The objective of HSPD-5 was to develop a single, comprehensive approach to domestic incident management in order “to prevent, prepare for, respond

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67. See, e.g., Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Fed. Crime*, 62 VAND. L. REV. 1421, 1424 (2009).

68. See, e.g., Ronald Brownstein, *A New Age of Conflict Between Washington and the States*, ATLANTIC (May 30, 2019), <https://www.theatlantic.com/politics/archive/2019/05/kamala-harriss-plan-curb-state-anti-abortion-laws/590593>.

69. IVO H. DAALDER, I. M. DESTLER, DAVID L. GUNTER, JAMES M. LINDSAY, MICHAEL E. O'HANLON, PETER R. ORSZAG & JAMES B. STEINBERG, BROOKINGS INSTITUTE, PROTECTING THE AMERICAN HOMELAND: ONE YEAR ON 1 (2003), <https://www.brookings.edu/wp-content/uploads/2016/06/20030101-1.pdf> (“Since the attacks of September 11, 2001, a good deal has been done to improve the safety of Americans, not only in the offensive war on terror abroad but in protecting the homeland as well.”).

70. Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135. The Department of Homeland Security opened for business on March 1, 2003. Andrew Glass, *Bush Creates Homeland Security Department, Nov. 26, 2002*, POLITICO (Nov. 26, 2018), <https://www.politico.com/story/2018/11/26/this-day-in-politics-november-26-1012269>.

71. HOMELAND SEC. PRESIDENTIAL DIRECTIVE 5, WEEKLY COMP. PRES. DOC. 225 (Mar. 10, 2003), <https://www.dhs.gov/sites/default/files/publications/HoHomela%20Security%20Presidential%20Directive%20.pdf> [<https://perma.cc/C23H-TW67>] (hereinafter “HSPD-5”). Section 1 of HSPD-5 aims “[t]o enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system.” *Id.* at ¶ 1.

to, and recover from terrorist attacks, major disasters, and other emergencies.”<sup>72</sup> It outlines a *national* incident management system, rather than a *federal* incident management system, in recognition of the vital role played by state and local authorities.<sup>73</sup> Although “[i]nitial responsibility for managing domestic incidents generally falls on State and local authorities,” HSPD-5 provides that the “Federal Government will assist State and local authorities when their resources are overwhelmed, or when Federal interests are involved.”<sup>74</sup> HSPD-5 also recognizes the important role of “the private and nongovernmental sectors.”<sup>75</sup>

Pursuant to HSPD-5, the Secretary of Homeland Security developed the National Incident Management System (NIMS), which was adopted in 2004 to provide a comprehensive national management system for responding to domestic incidents.<sup>76</sup> According to NIMS, “[i]ncident management priorities include saving lives, stabilizing the incident, and protecting property and the environment.”<sup>77</sup> NIMS provides a consistent nationwide framework and approach that enables government at all levels (federal, state, and local), the private sector, and nongovernmental organizations (NGOs) to work together to prepare for, prevent, respond to, recover from, and mitigate the effects of incidents, regardless of cause, size, location, or complexity.<sup>78</sup> In order to ensure interoperability, it takes a functional approach to incident management and sets forth core concepts, principles, and terminology.<sup>79</sup> NIMS was later revised post-Katrina in 2008 and most recently in 2017.<sup>80</sup>

HSPD-5 also mandated the development of a National Response Plan, now known as the National Response Framework (NRF), to “integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan.”<sup>81</sup>

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72. *Id.* at ¶ 4.

73. *Id.* at ¶ 6.

74. *Id.* at ¶ 6.

75. Specifically, HSPD-5 states that these actors have a role to “play in preventing, preparing for, responding to, and recovering from terrorist attacks, major disasters, and other emergencies.” *Id.* at ¶ 7.

76. *Id.* at ¶ 15.

77. FED. EMERGENCY MGMT. AGENCY, NATIONAL INCIDENT MANAGEMENT SYSTEM 3 (3d ed. 2017), [https://www.fema.gov/media-library-data/1508151197225-ced8c60378c3936adb92c1a3ee6f6564/FINAL\\_NIMS\\_2017.pdf](https://www.fema.gov/media-library-data/1508151197225-ced8c60378c3936adb92c1a3ee6f6564/FINAL_NIMS_2017.pdf) [https://perma.cc/5NGT-8Q8N] (hereinafter “NIMS”).

78. *Id.* at iii. It also includes tribal authorities. *Id.* at 32.

79. HSPD-5, *supra* note 71, at ¶ 15.

80. NIMS, *supra* note 77, at 4.

81. HSPD-5, *supra* note 71, at ¶ 16.

The NRF provides protocols for operating under different threats or threat levels.<sup>82</sup> It is designed to work as a “framework for all types of threats and hazards, ranging from accidents, technological hazards, natural disasters, and human-caused incidents.”<sup>83</sup> Central to both NIMS and the NRF is the concept of Emergency Support Functions (ESFs) that help organize the functional approach to all-hazards planning.<sup>84</sup> ESFs group governmental and some private sector capabilities into an organizational structure that categorizes the capabilities and services most likely to be needed when managing domestic incidents.<sup>85</sup> Most pertinent for the response to the COVID-19 pandemic is ESF-8 – Public Health and Medical Services, for which the Department of Health and Human Services is the lead federal agency.<sup>86</sup>

The NRF notes that most incidents “begin and end locally,” and some may require assistance from neighboring jurisdictions.<sup>87</sup> The NRF is clear that an “optimal” incident response will be primarily led by state and local authorities “with private sector and NGO engagement throughout.”<sup>88</sup> However, it recognizes that additional federal coordination and support is warranted in the case of a catastrophic incident that is not limited to a particular geographic area, such as a pandemic.<sup>89</sup>

At the national level, a catastrophic incident is one of such extreme and remarkable severity or magnitude that the Nation’s collective capability to manage all response requirements would be overwhelmed, thereby posing potential threats to national security, na-

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82. NRF, *supra* note 33, at 3. The NRF also advances progress under the National Security Strategy of the United States of America. The Framework helps achieve the strategy’s first pillar: to “protect the American people, the homeland, and the American way of life.” *Id.*

83. *Id.* at 3.

84. U.S. DEP’T OF HEALTH AND HUMAN SERVS., EMERGENCY SUPPORT FUNCTIONS, <https://www.phe.gov/Preparedness/support/esf8/Pages/default.aspx#8> (last visited June 11, 2020).

85. NIMS, *supra* note 77, at 63.

86. ESF #8, titled Public Health and Medical Services, “[c]oordinates the mechanisms for assistance in response to an actual or potential public health and medical disaster or incident.” NRF, *supra* note 33, at 40. The categories in the support function “include but are not limited to the following: Public Health; Medical Surge Support, including patient movement; Behavioral Health Services; Mass Fatality Management; and Veterinary, Medical, and Public Health Services.” *Id.* at 40.

87. NRF, *supra* note 33, at 6.

88. *Id.* at 15.

89. The other example provided is a cyberattack. *Id.* at 6 n.13. *See also id.* at 19 (“When an incident occurs that exceeds or is anticipated to exceed local, state, tribal, territorial, or insular area resources or when an incident is managed by federal departments or agencies acting under their own authorities, the Federal Government may use the management structures described within the NRF.”).

tional economic security, and/or the public health and safety of the Nation. A national catastrophic incident implies that the necessary resources are not available within expected timeframes for incident response. During a national catastrophic incident, decision makers would be forced to consider the landscape of requirements and prioritize resources to manage shortfalls rather than to address all needs at once. Such a situation would also require the extraordinary means of mobilizing and prioritizing national resources to alleviate human suffering; protect lives and property; reduce damage to natural, cultural, and historic resources; stabilize the Nation's economy; and ensure national security.<sup>90</sup>

The NRF places the ultimate responsibility on the President for the federal response to catastrophic incidents. Specifically, it provides that “[r]egardless of the type of incident, the President leads the Federal Government response effort to ensure that the necessary resources are applied quickly and efficiently to large-scale and catastrophic incidents.”<sup>91</sup>

The NRF also includes a number of Annexes that address specific threats. Pandemic disease is covered by the Annex on Biological Incidents that was most recently revised in 2017.<sup>92</sup> While the Annex discusses pandemic disease, the specific threat is subsumed under a modified all-hazards approach that also includes terrorist attacks and biological warfare.<sup>93</sup> A premise of the Annex is that response needs triggered by a biological incident have “the potential to overwhelm state and local resources,” thus placing biological incidents in the category of a catastrophic incident.<sup>94</sup> Moreover, the Annex outlines capacities that are uniquely within the power of the federal government when preparing for and responding to a biological threat. These “key federal roles/responsibilities” include, *inter alia*, national declarations,

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90. *Id.* at 4. It defines “catastrophic incident” by reference to the Post-Katrina Emergency Management Reform Act of 2006, which provides that the term “catastrophic incident” includes “any natural disaster, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the population (including mass evacuations), infrastructure, environment, economy, national morale, or government functions in an area.” 6 U.S.C. § 701(4).

91. NRF, *supra* note 33, at 34.

92. U.S. DEP’T OF HOMELAND SEC., BIOLOGICAL INCIDENT ANNEX TO THE RESPONSE AND RECOVERY FEDERAL INTERAGENCY OPERATIONAL PLANS FINAL (2017) (hereinafter “BIOLOGICAL INCIDENT ANNEX”).

93. *Id.* at vii. The Annex provides that “a biological incident refers to the occurrence of cases or outbreaks involving an infectious agent that affects people, regardless of natural or deliberate cause, for which response needs have the potential to overwhelm state and local resources.” *Id.* at 13.

94. *Id.* at vii.

operational coordination, public information and warning, personal protective equipment, Defense Production Act (DPA) Resource adjudication, screening, medical and non-pharmaceutical interventions, health and medical services, modeling, decontamination standards and clearance goals, infrastructure remediation, waste management, relocation, alternative housing and re-occupancy, and patient transportation.<sup>95</sup>

The year after the issuance of the Annex on Biological Incidents, the White House also released the National Biodefense Strategy and the National Biodefense Strategy Implementation Plan, both of which specifically address the possibility of pandemic flu.<sup>96</sup> As with the Annex, the National Biodefense Strategy covers all biological agents, regardless of whether they are naturally occurring, accidental, or intentional.<sup>97</sup> Goal 4 of the Implementation Plan outlines the “rapid response to limit the impacts of bioincidents.”<sup>98</sup> It differs from the Annex in that it foregrounds the federal government as the key actor, noting that the “federal mission is contingent upon the coordination with and the success of the community response.”<sup>99</sup> It also clearly acknowledges the importance of international partnerships because “[i]nfectious disease threats do not respect borders.”<sup>100</sup>

The NRF provides the framework for managing all types of disasters or emergencies, regardless of scale, scope, and complexity.<sup>101</sup> Although it strikes a balance of power that foregrounds state and local actors, it recognizes the need for greater federal involvement when the incident is not localized to a particular geographic area, requires specialized support that is uniquely within the capacity of the federal government, or has the potential to overwhelm the resources of state and local authorities. The more specific plans dealing with biological incidents and biodefense assume an even greater role for the federal gov-

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95. *Id.* at 34–40.

96. EXEC. OFFICE OF THE PRESIDENT, NATIONAL BIODEFENSE STRATEGY (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/09/National-Biodefense-Strategy.pdf> [<https://perma.cc/H588-U5PQ>] (hereinafter “NATIONAL BIODEFENSE STRATEGY”). An accompanying presidential memorandum specifically provides that the National Biodefense Strategy supersedes certain prior biodefense policy announcements, but it does not mention the national pandemic planning documents. National Security Presidential Memorandum on Support for National Biodefense, DAILY COMP. PRES. DOC. 201800608 (Sept. 18, 2018), <https://www.govinfo.gov/content/pkg/DCPD-201800608/html/DCPD-201800608.htm>.

97. NATIONAL BIODEFENSE STRATEGY, *supra* note 96, at i.

98. *Id.* at 7.

99. *Id.* at 1.

100. *Id.* at 2.

101. NRF, *supra* note 33, at 2.

ernment vis-à-vis the states given the nature of the threat. However, as explained in the following section dealing with pandemic-specific planning, this all-hazards approach, even when focused on biodefense, fails to account for the singularity of the current public health crisis.<sup>102</sup>

### C. Pandemic Planning

The COVID-19 pandemic is caused by a novel virus for which humans have no natural immunity and for which there was no vaccine or effective treatment.<sup>103</sup> It killed over 75,000 Americans in an initial nine-week period, and it is poised to kill many more.<sup>104</sup> Although the scalable all-hazards approach to incident management has many advantages, it fails to take into account the specific challenges and horrors presented by the current pandemic. The nature of pandemic disease does not fit well within the confines of an “incident,” which implies a discrete event bounded in time. To the contrary, the COVID-19 pandemic promises to advance in temporal waves as a multi-year event with staggering mass casualties.<sup>105</sup> As the 2006 National Strategy for Pandemic Influenza Implementation Plan explains: “In terms of its scope, the impact of a severe pandemic may be more comparable to that of war or a widespread economic crisis than a hurricane, earthquake, or act of terrorism.”<sup>106</sup>

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102. Apparently, it can also be overshadowed by the threat of bioterrorism. Jon Swaine, Robert O’Harrow Jr. & Aaron C. Davis, *Before Pandemic, Trump’s Stockpile Chief Put Focus on Biodefense. An Old Client Benefited.*, WASH. POST (May 4, 2020), [https://www.washingtonpost.com/investigations/before-pandemic-trumps-stockpile-chief-put-focus-on-biodefense-an-old-client-benefited/2020/05/04/d3c2b010-84dd-11ea-878a-86477a724bdb\\_story.html](https://www.washingtonpost.com/investigations/before-pandemic-trumps-stockpile-chief-put-focus-on-biodefense-an-old-client-benefited/2020/05/04/d3c2b010-84dd-11ea-878a-86477a724bdb_story.html).

103. *Coronavirus Disease 2019 (COVID-19) Situation Summary*, *supra* note 1. Carl Zimmer, Jonathan Corum & Sui-Lee Wee, Coronavirus VaccineTracker, N.Y. TIMES (Nov. 24, 2020) [https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html?name=styl%3Dcoronavirus-vaccines&region=TOP\\_BANNER&block=storyline\\_menu\\_recirc&action=click&pgtype=Article&impression\\_id=238e7a93-30c6-11eb-a133-adf1cadf431a&variant=1\\_Show](https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html?name=styl%3Dcoronavirus-vaccines&region=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=Article&impression_id=238e7a93-30c6-11eb-a133-adf1cadf431a&variant=1_Show).

104. The first COVID-19-related death in the U.S. was thought to be on February 28th, but subsequent testing has revealed that COVID-19 was spreading in the community much earlier, with the first death now documented on February 6th, 2020. Thomas Fuller, Mike Baker, Shawn Hubler & Sheri Fink, *A Coronavirus Death in Early February Was ‘Probably the Tip of an Iceberg,’* N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/santa-clara-county-coronavirus-death.html>.

105. Dan Keating & Chiqui Esteban, *COVID-19 Is Rapidly Becoming America’s Leading Cause of Death*, WASH. POST (Apr. 16, 2020), <https://www.washingtonpost.com/outlook/2020/04/16/coronavirus-leading-cause-death>.

106. HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA IMPLEMENTATION PLAN 2 (2006), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf> [<https://perma.cc/5KKY-G8QJ>]. It provides that:

In addition to coordinating a comprehensive and timely national response, the Federal Government will bear primary responsibility for certain criti-

The federal government first spearheaded comprehensive pandemic planning in 2005 under the George W. Bush administration when the White House released the National Strategy for Pandemic Influenza (National Strategy),<sup>107</sup> which was then followed by the 233-page Implementation Plan in 2006 (National Implementation Plan).<sup>108</sup> That same year, Congress passed the Pandemic and All-Hazards Preparedness Act (PAHPA).<sup>109</sup> The PAHPA appropriated over \$7.1 billion for pandemic planning and related activities, expanded the preparedness and response activities of HHS, and created the office of the Assistant Secretary for Preparedness and Response (ASPR).<sup>110</sup> It was most recently reauthorized in 2019.<sup>111</sup> The National Implementation Plan explains that “the overarching imperative is to reduce the morbidity and mortality caused by a pandemic.”<sup>112</sup> In order to achieve this objective, the National Implementation Plan seeks to “leverage all instruments of national power and ensure coordinated action by all segments of government and society, while maintaining the rule of law, and other basic societal functions.”<sup>113</sup>

As the lead federal agency for public health emergencies, HHS also released its first Pandemic Influenza Plan in 2005 (2005 HHS

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cal functions, including: (1) the support of containment efforts overseas and limitation of the arrival of a pandemic to our shores; (2) guidance related to protective measures that should be taken; (3) modifications to the law and regulations to facilitate the national pandemic response; (4) modifications to monetary policy to mitigate the economic impact of a pandemic on communities and the Nation; (5) procurement and distribution of vaccine and antiviral medications; and (6) the acceleration of research and development of vaccines and therapies during the outbreak.

*Id.* at 2.

107. HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (2005), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf> [<https://perma.cc/32N9-RWEP>] (hereinafter “NATIONAL STRATEGY”).

108. HOMELAND SEC. COUNCIL, *supra* note 106.

109. Pandemic and All-Hazards Preparedness Act (PAHPA), Pub. L. No. 109-417, 120 Stat. 2831 (2006).

110. *Id.* The Public Health Security and Bioterrorism Preparedness Act of 2002 gave funding to hospitals and health systems. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-88, 116 Stat. 594 (2002). In 2004, the Project BioShield Act authorized the federal government to give incentives to the private sector to create drugs that could protect people from biological weapons and naturally occurring biological threats. Project BioShield Act of 2004, Pub. L. No. 108-276, 118 Stat. 835 (2004).

111. It was reauthorized by the Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019. Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019, Pub. L. No. 116-22, 133 Stat. 905 (2019).

112. HOMELAND SEC. COUNCIL, *supra* note 106, at 8.

113. *Id.*

Plan).<sup>114</sup> Its initial plan was considerably more detailed than the White House's National Pandemic Influenza Strategy Implementation Plan and spanned almost 400 pages.<sup>115</sup> The 2005 HHS Plan has since been updated four times to incorporate lessons learned from H5N1, avian flu, and the 2009 H1N1 pandemic, as well as the Zika virus and Ebola outbreaks.<sup>116</sup> It was most recently updated in 2017 (2017 HHS Plan).<sup>117</sup> All of the White House and HHS pandemic plans remain current policy and are available on the CDC website.<sup>118</sup>

Reading the plans in the midst of the COVID-19 pandemic, it is striking how eerily familiar they sound. All the topics that have dominated the 24-hour news cycle are spelled out clearly in the various planning scenarios.<sup>119</sup> The plans explain the importance of foreign containment to buy time for preparedness measures and the development of medical countermeasures.<sup>120</sup> They note that containment will most likely not be effective, leaving mitigation measures and non-pharmaceutical interventions such as social distancing and school closings as the only option.<sup>121</sup> They describe how the rush for diagnostic tests, effective treatment, and a vaccine will require streamlined approval processes and distribution priorities.<sup>122</sup> In the meantime, daily life will be disrupted for extended periods of time, as the pandemic hits in waves and risks overwhelming our health systems.<sup>123</sup> Hospitals will need to extend their surge capacity and increase the number of ICU beds and ventilators.<sup>124</sup> There will be shortages of

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114. U.S. DEP'T OF HEALTH AND HUMAN SERVS., HHS PANDEMIC INFLUENZA PLAN (2005), <https://www.cdc.gov/flu/pandemic-resources/pdf/hhspandemicinfluenzaplan.pdf> (hereinafter "HHS 2005 PLAN").

115. *Id.*

116. For a list of all the current national pandemic planning policies, see *National Pandemic Influenza Plans*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/planning-preparedness/national-strategy-planning.html> [<https://perma.cc/D4CX-JDLM>] (last visited Sept. 10, 2020).

117. U.S. DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL PANDEMIC INFLUENZA PLANS: 2017 UPDATE, <https://www.cdc.gov/flu/pandemic-resources/pdf/pan-flu-report-2017v2.pdf> [<https://perma.cc/RFE6-FGUR>] (hereinafter "HHS 2017 UPDATE").

118. For a list of all the current national pandemic planning policies, see *National Pandemic Influenza Plans*, *supra* note 116.

119. HHS 2017 UPDATE, *supra* note 117, at 44. Under the most severe scenario, the model predicts close to two million deaths and 11.5 million hospitalizations in the case of a severe pandemic. *Id.*

120. *Id.* at 21.

121. HOMELAND SEC. COUNCIL, *supra* note 106, at 6 ("While complete containment might not be successful, a series of containment efforts could slow the spread of a virus to and within the United States, thereby providing valuable time to activate the domestic response.").

122. HHS 2017 UPDATE, *supra* note 117, at 11.

123. *Id.* at 42.

124. HHS 2005 PLAN, *supra* note 114, at 18.

personal protective equipment (PPE) and new technologies will have to be developed to both make and sanitize PPE.<sup>125</sup> Mortuary services will be overwhelmed and there will be significant delays in processing bodies.<sup>126</sup> The level of detail and spot-on description of the first wave of the pandemic belies President Trump's repeated statements that "[n]o one could have predicted something like this."<sup>127</sup> We did, multiple times, and across multiple plans.

The 2017 HHS Plan also provides sobering projections of the number of potential deaths and hospitalizations in the case of a pandemic that is classified as "very severe," with close to 2 million deaths and 11.5 million hospitalizations.<sup>128</sup> Despite how familiar the considerations now sound, there is one important difference between our current situation and the scenarios described in these government documents. The government scenarios all assume strong federal leadership and coordination – something that has been strikingly absent in the COVID-19 pandemic.<sup>129</sup>

The National Strategy states with assurance that "[o]nce health authorities have signaled sustained and efficient human-to-human spread of the virus has occurred, a cascade of response mechanisms will be initiated, from the site of the documented transmission to locations around the globe."<sup>130</sup> The National Implementation Plan acknowledges that much of the pandemic planning is focused on preparedness, but stresses that it is also "important to show how this preparedness will translate to action in the period of time immediately before, during, and after the emergence of a pandemic."<sup>131</sup> In order to spell out the necessary steps at each phase of a pandemic, the National Implementation Plan adopts a seven-stage pandemic framework and identifies the required federal action for each stage.<sup>132</sup> The first four stages are before the first human case appears in North America; in the current pandemic, the first case of COVID-19 in North America was reported on January 21, 2020 in Washington state.<sup>133</sup> According to the National Implementation Plan, that fact should have triggered

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125. *Id.* at app. 2 § (S4)(7).

126. *Id.* at app. 1 § (D)(16).

127. Ian Schwartz, *Trump on Coronavirus: "Nobody Could Have Predicted Something Like This"*, REALCLEAR POLITICS (Mar. 30, 2020), [https://www.realclearpolitics.com/video/2020/03/30/trump\\_on\\_coronavirus\\_nobody\\_could\\_have\\_predicted\\_something\\_like\\_this.html](https://www.realclearpolitics.com/video/2020/03/30/trump_on_coronavirus_nobody_could_have_predicted_something_like_this.html).

128. HHS 2017 UPDATE, *supra* note 117, at 44.

129. Balz, *supra* note 12.

130. NATIONAL STRATEGY, *supra* note 107, at 5.

131. HOMELAND SEC. COUNCIL, *supra* note 106, at 30.

132. *Id.* at 31.

133. *Id.* at 32; Roni Caryn Rabin, *First Patient with Wuhan Coronavirus Is*

numerous actions by the federal government, including the deployment of stockpile materials to the region, the limiting of non-essential travel in the area, the institution of protective measures and social distancing, the activation of pandemic plans at all levels of government, activation of surge plans in the federal health system and the request that state and local authorities do the same, the development and deployment of diagnostic reagents to all laboratories “with capability and expertise in pandemic influenza diagnostic testing,” and the development of antivirals.<sup>134</sup> In each instance, HHS is designated as the lead agency responsible for these actions, sometimes working in conjunction with DHS.<sup>135</sup> There are also clear guidelines on how to manage communications with state, local, and tribal authorities, institutions, the public, and global partners.<sup>136</sup>

The 2017 HHS Plan shared this sense of urgency.<sup>137</sup> Recognizing that globalization means that “a human outbreak anywhere means risk everywhere,” the 2017 HHS Plan provides that “[s]ustained human-to-human transmission anywhere in the world will be the triggering event to initiate a pandemic response by the United States.”<sup>138</sup> The 2017 HHS Plan also sets forth multiple and detailed preparedness and readiness goals that should be addressed well before the initiation of the “pandemic response,” such as “developing technology and processes that allow for rapid production of N95 respirators, to significantly increase respirator supply during an influenza pandemic”<sup>139</sup> and developing “effective reusable respirators that will reduce the burden to produce and dispense large volumes of disposable respirators during an outbreak.”<sup>140</sup> There were also plans to seek FDA approval for a “next-generation ventilator for all populations, which will mean a more affordable ventilator with increased neonatal capability” and as-

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*Identified in the United States*, N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2020/01/21/health/cdc-coronavirus.html>.

134. *Id.* at 39–41.

135. *Id.*

136. HHS 2005 PLAN, *supra* note 114, at 9 (“During a pandemic, HHS will provide honest, accurate and timely information on the pandemic to the public. It will also monitor and evaluate its interventions and will communicate lessons learned to health-care providers and public health agencies on the effectiveness of clinical and public health responses.”).

137. The HHS 2017 Update replaced the earlier seven-stage pandemic model in the National Strategy with the Pandemic Intervals Framework. HHS 2017 UPDATE, *supra* note 117, at 46–47. It identifies six stages of a pandemic: two are pre-pandemic and represent a time of preparedness and readiness, three are during a pandemic wave, and one is the period of recovery where preparedness for the next wave begins. *Id.*

138. HHS 2005 PLAN, *supra* note 114, at 20.

139. HHS 2017 UPDATE, *supra* note 117, at 24.

140. *Id.*

tures that “HHS is leading efforts to determine the feasibility of standardized and interchangeable ventilator components.”<sup>141</sup> Another goal was the development and clearing of a diagnostic test that can identify a virus subtype in 20 minutes.<sup>142</sup>

This sense of urgency, however, was not shared by the key decision makers in the federal government. President Trump was slow to acknowledge the threat posed by COVID-19.<sup>143</sup> He repeatedly downplayed the threat and assured the American people that the virus was contained and that it would go away one day like a “miracle.”<sup>144</sup> The President did not declare a national emergency until March 13th, which was seventy-four days after the first reported case.<sup>145</sup> The CDC announced its first tepid social distancing guidelines on March 15th, limiting gatherings to fewer than 50 people.<sup>146</sup> By that time, large employers, cities and states, colleges and universities, and private businesses had already stepped into the void and started to adopt their own social distancing rules.<sup>147</sup> Hospitals had already activated their pandemic plans and set up triage tents in their parking lots.<sup>148</sup> Once the President acknowledged the pandemic threat, he sent deeply conflict-

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141. *Id.*

142. *Id.* at 23.

143. See Harry Stevens & Shelley Tan, *From ‘It’s Going to Disappear’ to ‘WE WILL WIN THIS WAR,’* WASH. POST (Mar. 31, 2020), <https://www.washingtonpost.com/graphics/2020/politics/trump-coronavirus-statements/>.

144. See *id.* The full quote is “It’s going to disappear. One day, it’s like a miracle, it will disappear.” *Id.* Two days after the first case was reported in the U.S., the President said “We have it totally under control. It’s one person coming in from China, and we have it under control. It’s going to be just fine.” *Id.*

145. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

146. Madeline Holcombe & Dakin Andone, *The CDC Recommends Organizers Cancel or Postpone Events with 50 People or More for 8 Weeks*, CNN (Mar. 16, 2020, 4:15 PM), <https://www.cnn.com/2020/03/15/health/us-coronavirus-sunday-updates/index.html>.

147. See, e.g., Karen Weise, *Ahead of the Pack, How Microsoft Told Workers to Stay Home*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/technology/microsoft-coronavirus-response.html> (reporting that Microsoft asked its employees to work from home on March 3); see also Lauren Camera, *Seattle Public Schools Close Due to Coronavirus*, USNEWS (Mar. 11, 2020, 5:39 PM), <https://www.usnews.com/news/education-news/articles/2020-03-11/seattle-public-schools-close-due-to-coronavirus-first-major-system-to-announce-prolonged-closure> (reporting that the Seattle School District was the first major school district to announce a prolonged closure); Karen Weintraub & Susan Syrluga, *Harvard Tells Students to Move out and Finish Classes Remotely After Spring Break in Response to COVID-19*, WASH. POST (Mar. 10, 2020), <https://www.washingtonpost.com/education/2020/03/10/harvard-moves-classes-online-advises-students-stay-home-after-spring-break-response-covid-19/>.

148. See, e.g., Darran Simon, Kyle Swenson, Rachel Chason & Jenna Portnoy, *Maryland Reports First Coronavirus Fatality as Health Facilities Ramp up*, WASH. POST (Mar. 18, 2020), <https://www.washingtonpost.com/local/virginia-dc-maryland->

ing messages to the American people, hawked unproven remedies, pushed unrealistic deadlines to reopen the economy, and expressed support for armed protestors who swarmed state capitols to “liberate” their states from “slavery.”<sup>149</sup> As of the end of April 2020, states were set to reopen non-essential businesses in the hope of returning to some semblance of normal well ahead of federal guidelines.<sup>150</sup> Revised models that take these steps into account drastically increased the projected death toll.<sup>151</sup>

It has also come to light that many of the preparedness steps that were outlined in the 2017 HHS Plan were either abandoned or not implemented. Some reports have suggested that one of the reasons this happened was that the Assistant Secretary for Preparedness and Defense was more focused on biodefense.<sup>152</sup> For example, an Obama-era \$35 million initiative to develop a machine that would make 1.5 million N95 respirator masks in a day was discontinued.<sup>153</sup> The Assistant Secretary also transferred responsibility for the National Stockpile from the CDC to his office.<sup>154</sup> In testimony before Congress in 2011, the Assistant Secretary seemed to dismiss the potential threat of a pandemic when he said: “Quite frankly, Mother Nature is not a thinking enemy intent on inflicting grievous harm to our country, killing our citizens, undermining our government or destroying our way of life.

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coronavirus-news-wednesday/2020/03/18/9e49700a-6925-11ea-abef-020f086a3fab\_story.html.

149. See Morgan Chalfant & Brett Samuels, *Trump Support for Protests Threatens to Undermine Social Distancing Rules*, HILL (Apr. 20, 2020, 2:10 PM), <https://thehill.com/homenews/administration/493701-trump-support-for-protests-threatens-to-undermine-social-distancing>; Siobhan O’Grady, *Trump Is Not the Only Leader Pushing Unproven Coronavirus Remedies*, WASH. POST (May 22, 2020), <https://www.washingtonpost.com/world/2020/05/22/trump-is-not-only-leader-pushing-unproven-coronavirus-cures/>; Demetri Sevastopulo & Kadhim Shubber, *Trump Cheers as Anti-lockdown Protests Spread*, FIN. TIMES (Apr. 19, 2020), <https://www.ft.com/content/c8f6f413-39c4-47ce-b1ff-0e02969cb612>.

150. Baker & Shear, *supra* note 30. The guidelines released by the President—entitled, “Opening Up America Again”—urge states not to lift stay-at-home or travel restrictions until they reach a 14-day period in which the number of coronavirus cases is steadily declining, hospitals are not overwhelmed, and robust testing is in place for both health care workers and others. *Id.*

151. *Models Project Sharp Rise in Deaths as States Reopen*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/05/04/us/coronavirus-live-updates.html>.

152. Swaine, et al., *supra* note 102.

153. Swaine, et al., *supra* note 102; see also Jon Swaine, *Federal Government Spent Millions to Ramp Up Mask Readiness, but that Isn’t Helping Now*, WASH. POST, (Apr. 3, 2020, 1:27 PM), [https://www.washingtonpost.com/investigations/federal-government-spent-millions-to-ramp-up-mask-readiness-but-that-isnt-helping-now/2020/04/03/d62dda5c-74fa-11ea-a9bd-9f8b593300d0\\_story.html](https://www.washingtonpost.com/investigations/federal-government-spent-millions-to-ramp-up-mask-readiness-but-that-isnt-helping-now/2020/04/03/d62dda5c-74fa-11ea-a9bd-9f8b593300d0_story.html).

154. Swaine, et al., *supra* note 102.

Mother Nature doesn't develop highly virulent organisms that are resistant to our current stockpiles of antibiotics."<sup>155</sup>

In the absence of a strong federal response, the national pandemic plans have floundered. The national disaster policy and pandemic plans took an "all hands on deck" approach, but they did not foresee that the key player would ignore longstanding guidelines and policy and thereby jeopardize the entire national response. The national response was predicated on a cross-institutional coordinated effort that assumed consensus regarding both the means and the ends to accomplish a common goal: the containment, mitigation, and eventual end of a pandemic outbreak. The federal government was supposed to play a pivotal role in this national response, given that the COVID-19 pandemic is not restricted to a particular geographical location, requires expertise and resources that are uniquely within the purview of the federal government, and has the potential to overwhelm the capacities of state and local authorities.<sup>156</sup> A pandemic is by its very nature the type of catastrophic incident that demands strong and swift federal action.<sup>157</sup> The pandemic-specific plans all envision a strong federal response and a trigger that ignites a "cascade" of federal action.<sup>158</sup> In the case of COVID-19, that trigger occurred when the first confirmed animal-to-human transmission was reported to the World Health Organization on December 31, 2019 in Wuhan, China.<sup>159</sup>

## II.

### ASSESSING INSTITUTIONAL STRENGTHS AND WEAKNESSES

Our national disaster relief policy and pandemic planning does an admirable job of positioning and prioritizing the relative competencies of the various institutional actors. However, the policy does not contemplate the possibility that the lead governmental actor would fail to follow its own plans. The cross-institutional approach that leverages capabilities and backstops limitations assumes that all of the institutional players are committed to a shared common goal. It does not take

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155. *Bioterrorism Threats with Officials From Depts. of DHS, HHS, & the FBI: Hearing Before the S. Homeland Security and Governmental Affairs Comm.*, 112th Cong. (2011) (statement of Robert Kadlec, M.D., Former Homeland Security Senior Director for Biosecurity Defense), <https://www.c-span.org/video/?302149-1/us-bioterrorism-threats> [<https://perma.cc/JR6R-A9FJ>].

156. See NRF, *supra* note 33, at 4 (defining "catastrophic incident").

157. *Id.*

158. NATIONAL STRATEGY, *supra* note 107, at 5.

159. See generally John S Mackenzie & David W. Smith, *COVID-19: A Novel Zoonotic Disease Caused by a Coronavirus from China: What We Know and What We Don't*, MICROBIOLOGY AUSTL. (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7086482/>.

into account that the goals embedded in our disaster relief and pandemic policy could become deeply contested and politicized, as in the case of the COVID-19 pandemic.<sup>160</sup> State and local governments, private industry, and the non-profit sector have all stepped into the breach, but the result has been an uneven response that no doubt has cost lives.<sup>161</sup>

Once a stated policy goal, such as pandemic preparedness and response, becomes contested and politicized, it is no longer sufficient to simply evaluate an institution's capabilities or competence and assume that all institutional players will faithfully shoulder their responsibilities as scripted. There are other institutional features that must be considered beyond the organic competence of an institution, such as its projected responsiveness and whether its actions can withstand countervailing political forces. In other words, assuming the target institution has the power to grant it, is the desired relief politically attainable, and will the form of the relief granted be sufficiently stable and durable to withstand attempts to overturn it? In the current pandemic, we have seen an inverse relationship between the responsiveness of an institution and its competence to address the crisis. For example, the federal government has many capabilities and resources that make it uniquely situated to lead a pandemic response, especially during the initial stages when the outbreak is overseas. This fact notwithstanding, our federal government has been reluctant to acknowledge the extent of the threat posed by COVID-19.<sup>162</sup> In contrast, many state and local governments have sounded the alarm early and often, but they do not have sufficient resources to respond to the pandemic without federal assistance, let alone to forge a coordinated national response.<sup>163</sup> We have also seen an inverse relationship between the

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160. Jay Van Bavel, *In a Pandemic, Political Polarization Could Kill People*, WASH. POST (Mar. 22, 2020, 10:00 AM), <https://www.washingtonpost.com/outlook/2020/03/23/coronavirus-polarization-political-exaggeration/> (highlighting several polls that indicate that partisan polarization is affecting individual perception and behavioral response to the COVID-19 pandemic).

161. Balz, *supra* note 12.

162. The initial response to a pandemic threat is uniquely within the capability of the federal government: working with global partners to contain the outbreak overseas, securing the borders, evaluating the efficacy of known vaccines, developing and deploying diagnostic tests, coordinating all levels of government, private industry and the non-profit sector, issuing guidelines, and messaging to the American people.

163. *E.g.*, Dana Bash & Bridget Nolan, *When Coronavirus Hit her City, this Mayor Didn't Wait for Florida's Governor to Sound the Alarm*, CNN (Apr. 4, 2020, 10:46 AM), <https://www.cnn.com/2020/04/04/politics/tampa-mayor-coronavirus-jane-castor/index.html> (stating that Tampa Mayor, Jane Castor, instituted a "safer at home" order in Tampa about a week before Florida's Governor Ron DeSantis did the same statewide).

responsiveness of an institution and the resilience of its policy decisions. Mayors were early adopters of social distancing measures, but their orders were easily overturned by state level edicts.<sup>164</sup>

This section addresses the relationship among these three institutional constraints—competence, responsiveness, and resilience—in the context of our current contested and politicized disaster relief and pandemic policy. The evaluation of these constraints reveals gaps within our existing policy and raises the important question of how we can incorporate failsafe mechanisms to prevent key institutional actors from abdicating their responsibility to the American people.

### A. Institutional Competence

The starting point for any institutional analysis is always the competence of a given institution to further a particular policy goal or objective.<sup>165</sup> In the case of disaster relief and pandemic planning, no single institution is capable of providing the level of relief and response necessary to address a pandemic outbreak of a novel virus. This is why national pandemic planning assumes a cross-institutional and all-hands-on-deck approach with a strong federal presence.<sup>166</sup> Only the federal government can provide the necessary uniformity, resources, and expertise, especially with respect to early containment efforts, testing, and the development of treatments and vaccines.

In the present pandemic, governors, mayors, and county executives have been important players and early adopters of social distancing measures through school closings, restrictions on non-essential businesses, stay-at-home orders, and consistent messaging.<sup>167</sup> Many of these actions designed to mitigate the spread of the virus were taken well in advance of federal guidance.<sup>168</sup> Private industry was also

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164. Steve Contorno, *Ron DeSantis Quietly Signed Second Executive Order Targeting Local Coronavirus Restrictions*, TAMPA BAY TIMES (Apr. 2, 2020), <https://www.tampabay.com/news/health/2020/04/02/ron-desantis-quietly-signed-second-executive-order-targeting-local-coronavirus-restrictions/> (stating that new state guidelines “supersede any conflicting official action or order issued by local officials in response to COVID-19”).

165. KOMESAR, *supra* note 35, at 29-31 (noting that the relative competence of each institution is necessarily limited by its design).

166. *See supra* text accompanying notes 108-18 (describing federal pandemic planning).

167. Justine Coleman, *Atlanta Mayor Urges Residents to Stay at Home as Governor Reopens State: ‘Look at the Science.’* HILL (Apr. 22, 2020, 7:49 AM), <https://thehill.com/homenews/state-watch/494043-atlanta-mayor-urges-residents-to-stay-at-home-as-governor-reopens-state>.

168. Hannah Miller, *San Francisco Extends Stay-at-Home Order Through May Amid Coronavirus Pandemic*, CNBC (Apr. 27, 2020, 3:02 PM), <https://www.cnbc.com/2020/04/27/san-francisco-extends-stay-at-home-order-through-may-amid->

ahead of the curve. Large tech firms, such as Microsoft, urged their employees to work from home beginning on March 3rd, almost two weeks before the federal government advocated social distancing measures.<sup>169</sup> These actions reveal an inverse relationship between an institution's responsiveness to demands for public health measures and its competency to provide comprehensive relief; in the COVID-19 pandemic, the first movers were also the least competent to comprehensively respond to the threat.

Without a consistent federal response, the actions of state and local authorities created a patchwork of social distancing efforts across the United States that varied from state to state and often from county to county. The variation was most stark when neighboring jurisdictions refused to enact stay-at-home orders or had differing definitions as to what businesses were considered "essential."<sup>170</sup> In these instances, the failure of one state to act could seriously undercut the effectiveness of a policy of a neighboring state.<sup>171</sup> For example, when residents of Pennsylvania saw their state-run liquor stores close on March 17, 2020,<sup>172</sup> those living in the southeastern part of the state started to make the short trip over the state line to Delaware where liquor stores were deemed essential.<sup>173</sup> Pennsylvania residents who traveled to Delaware to purchase alcohol were violating both the Pennsylvania stay-at-home order and the Delaware quarantine order for out-of-state residents.<sup>174</sup> The traffic across the state line was so

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coronavirus.html (describing the first stay-at-home order issued in San Francisco on March 16th when federal guidelines first called for limiting gatherings to fewer than fifty).

169. Weise, *supra* note 147.

170. *What Counts as an Essential Business in 10 U.S. Cities*, WASH. POST (Mar. 23, 2020), <https://www.washingtonpost.com/graphics/2020/national/coronavirus-essential-businesses/>.

171. Shaver, *supra* note 25.

172. Pennsylvania remains the only state to restrict alcohol sales to state-run stores—a measure that was designed to provide a transition from Prohibition. Brad Japhe, *In Pennsylvania, State Liquor Stores Remain Closed and People Are Getting Thirsty*, FORBES (Mar. 29, 2020, 7:34 PM), <https://www.forbes.com/sites/bradjaphe/2020/03/29/pennsylvania-state-liquor-board-opens-stores-to-online-sales/#7b38df8c6b64> [<https://perma.cc/K62B-TSBR>].

173. Luz Lazo & Katherine Shaver, *COVID-19 Checkpoints Targeting Out-Of-State Residents Draw Complaints and Legal Scrutiny*, WASH. POST (Apr. 14, 2020, 3:39 PM), [https://www.washingtonpost.com/local/trafficandcommuting/covid-19-checkpoints-targeting-out-of-state-residents-draw-complaints-and-legal-scrutiny/2020/04/14/3fc0ed42-774e-11ea-b6ff-597f170df8f8\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/covid-19-checkpoints-targeting-out-of-state-residents-draw-complaints-and-legal-scrutiny/2020/04/14/3fc0ed42-774e-11ea-b6ff-597f170df8f8_story.html).

174. *Id.*; Angela Coulombis, *Gov. Tom Wolf Extends Coronavirus Stay-at-Home Order to all of Pennsylvania*, INQUIRER (Apr. 1, 2020), <https://www.inquirer.com/news/pennsylvania/spl/pennsylvania-pa-coronavirus-stay-at-home-order-statewide-20200401.html> (describing Pennsylvania's stay-at-home order); Matt Smith, *Delaware State Police Authorized to Search Out-of-State Vehicles*, DELAWARE CTY.

great that the Delaware State Police established roadblocks to stop all cars with out-of-state plates.<sup>175</sup> Drivers were told that they had to turn around or they would be required to quarantine in Delaware for fourteen days.<sup>176</sup> A similar concern occurred in the Washington, DC metropolitan area, consisting of the District, northern Virginia and parts of Maryland. Prior to St. Patrick's Day, March 17th, both the District of Columbia and Maryland closed non-essential businesses, including bars and restaurants (except for carry out).<sup>177</sup> Virginia did not issue a similar order until March 23, 2020.<sup>178</sup> Over the St. Patrick's Day weekend, the bars and pubs of downtown Alexandria, Virginia were just an easy Metro ride away.<sup>179</sup>

The nature of the pathogen, however, means that these concerns extend beyond simply the actions of neighboring states because the virus does not respect borders. The Governor of Florida refused to issue a stay-at-home order before Spring Break when throngs of college students from across the country swarmed the Florida beaches, convinced of their own immortality and oblivious to the risk they could pose to others.<sup>180</sup> They then traveled home, potentially spreading the virus and placing their families and friends at risk.<sup>181</sup>

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DAILY TIMES (Apr. 4, 2020), [https://www.delcotimes.com/news/coronavirus/delaware-state-police-authorized-to-search-out-of-state-vehicles/article\\_0591efc8-75e5-11ea-83e3-076ab966f85c.html](https://www.delcotimes.com/news/coronavirus/delaware-state-police-authorized-to-search-out-of-state-vehicles/article_0591efc8-75e5-11ea-83e3-076ab966f85c.html) (describing Delaware's quarantine order).

175. Lazo & Shaver, *supra* note 173.

176. *State Police Set Up Checkpoint After Out of Staters Flock to Total Wine, Home Depot in Claymont*, DELAWARE BUS. NOW (Apr. 5, 2020), <https://delawarebusinessnow.com/2020/04/state-police-checkpoint-near-total-wine-home-depot-aims-to-end-in-flux-of-out-of-state-shoppers/>.

177. Elliot Williams & Daniella Cheslow, *Why Not All Northern Virginia Restaurants and Bars are Closed Right Now*, DCIST (Mar. 17, 2020, 8:16 PM), <https://dcist.com/story/20/03/17/why-not-all-northern-virginia-restaurants-and-bars-are-closed-right-now/>.

178. Anna Spiegel, *Virginia Restaurants and Bars Close for Dine-In Service to Help Curb Coronavirus*, WASHINGTONIAN (Mar. 23, 2020), <https://www.washingtonian.com/2020/03/23/virginiarestaurants-and-bars-close-for-dine-in-service-to-help-curb-coronavirus/>.

179. Several days later, health authorities issued a warning to self-quarantine. Andrew Swalec, *Alexandria Advises Self-Quarantine If You Went to Irish Pub*, NBC WASH. (Mar. 26, 2020, 7:13 PM), <https://www.nbcwashington.com/news/local/alexandria-advises-self-quarantine-if-you-went-to-irish-pub/2254343/>.

180. The exploits of the spring breakers in Florida were widely covered in the press, defined by the refrain "If I get corona, I get corona." Poppy Noor, *'If I Get Corona, I Get Corona': The Americans Who Wish They'd Taken COVID-19 Seriously*, GUARDIAN (Mar. 28, 2020, 4:45 PM), <https://www.theguardian.com/lifeandstyle/2020/mar/28/americans-who-dont-take-coronavirus-seriously>.

181. David Montgomery & Manny Fernandez, *44 Texas Students Have Coronavirus After Spring Break Trip*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/04/01/us/coronavirus-texas-austin-spring-break-cabo.html>.

As the country began to reopen its economy in May and June 2020, a similar patchwork of rules and guideposts emerged, recognizing, of course, that some states never shut down.<sup>182</sup> Many states moved forward in advance of the federal guidelines—ignoring the scientific community that urged caution.<sup>183</sup> In early May 2020, President Trump initially applauded the Governor of Georgia for moving to reopen the economy despite not meeting the federal guideposts, only to reverse his position the next day.<sup>184</sup> The pandemic model relied on by the White House showed that opening states ahead of the federal guidance would increase the number of deaths significantly.<sup>185</sup> For example, cellphone surveillance data showed that when Georgia finally opened its economy, over 60,000 people from out-of-state flocked to its stores and restaurants.<sup>186</sup> Obviously, nationwide standards or guideposts based on accepted scientific evidence for reopening the various geographical sectors of the United States would be preferable to a state or local solution, due to their ability to secure uniform and predictable results throughout the country. A blanket set of guidelines ensures that no jurisdiction moves too quickly and thereby risks igniting a second wave of infection. Still, the federal government continued to send mixed messages to the states, and the President tweeted his support for armed protestors who swarmed state capitols to protest stay-at-home orders.<sup>187</sup>

Beyond the lack of uniformity, the current health crisis has upended the concept of cooperative federalism that is at the heart of disaster policy and pandemic planning—in both the vertical and horizontal sense. Instead, it has been replaced by something much more confrontational and combative. Vertical integration and cooperation among all levels of government—federal, state, and local—is an essential feature of preparedness and response policy in the United States. Rather than offering support and leadership, President Trump

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182. Valerie Dittrich, *COVID-19: 'People Have to Be Responsible for Themselves': Eight U.S. States Still Not Locked Down*, NAT'L POST (Apr. 7, 2020), <https://nationalpost.com/news/covid-19-people-have-to-be-responsible-for-themselves-eight-states-still-not-locked-down/>.

183. Keith Collins & Lauren Leatherby, *Most States That are Reopening Fail to Meet White House Guidelines*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/interactive/2020/05/07/us/coronavirus-states-reopen-criteria.html>.

184. Jonathan Lemire & Ben Nadler, *President Trump Reportedly Approved Georgia Governor's Plan to Reopen State, Before Publicly Attacking It*, TIME (Apr. 25, 2020, 10:17 AM), <https://time.com/5827411/trump-georgia-brian-kemp-coronavirus-lockdown/>.

185. *Models Project Sharp Rise in Deaths as States Reopen*, *supra* note 151.

186. Shaver, *supra* note 25.

187. Chalfant & Samuels, *supra* note 149.

has been overtly hostile and demeaning towards many of the governors and mayors at the forefront of the COVID-19 response.<sup>188</sup> He has consistently minimized the role of the federal government and claimed that both testing and securing necessary medical equipment was the responsibility of the individual states, despite the clear division of responsibility outlined in the pandemic plans.<sup>189</sup> And he has refused to “bail out” beleaguered jurisdictions, characterizing them as failed Democratic regimes.<sup>190</sup> In addition to these vertical relationships, preparedness and relief policy also incorporates a horizontal element of federalism where sister states share resources and support one another in times of crisis. During the current pandemic, there has been some interstate cooperation, such as when individual states have sent unneeded ventilators or excess PPE to harder-hit sister states.<sup>191</sup> States have also organized in regional blocs to standardize reopening plans and to consolidate buying power when searching for medical supplies in the open market.<sup>192</sup> However, states have also been pitted against each other (and the federal government) as they compete for scarce medical resources and federal financial support,<sup>193</sup> thereby undermining the cooperative basis of the pandemic plans. This muscular and combative form of federalism is counter-productive and antithetical to the type of cooperation necessary to mount an effective response to the COVID-19 pandemic.

### B. Institutional Responsiveness

Beyond assessing the competency of an institution, disaster policy and pandemic planning must be predictive in nature and assess

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188. E.g., Jeremy Diamond, *Trump Lashes Out at Governors Over Testing Shortfalls*, CNN (Apr. 18, 2020, 8:07 PM), <https://www.cnn.com/2020/04/18/politics/trump-governors-testing/index.html>.

189. Emma Tucker, *Trump to U.S. Governors: Get Your Own Ventilators*, DAILY BEAST (Mar. 16, 2020, 2:05 PM), <https://www.thedailybeast.com/trump-to-us-governors-get-your-own-ventilators>.

190. Christina Wilkie, *Trump Says Coronavirus ‘Bailouts’ for Blue States Are Unfair to Republicans*, CNBC (May 5, 2020, 3:56 PM), <https://www.cnbc.com/2020/05/05/coronavirus-trump-says-blue-state-bailouts-unfair-to-republicans.html>.

191. Kathleen Ronayne, *California Ventilators en Route to New York, Other States*, AP NEWS (Apr. 7, 2020), <https://apnews.com/8a187705fd6511bda78cc5ea7e745e1f>.

192. Caroline Linton, *Cuomo Announces 7-State Coalition for Purchasing Medical Equipment*, CBS NEWS (May 4, 2020) <https://www.cbsnews.com/news/andrew-cuomo-ppe-medical-equipment-coronavirus-7-state-coalition/>.

193. Estes, *supra* note 28 (demonstrating states bidding against each other); Diana Falzone, “*Like a Bully at the Lunchroom*”: *How the Federal Government Took Control of the PPE Pipeline*, VANITY FAIR (May 6, 2020), <https://www.vanityfair.com/news/2020/05/how-the-federal-government-took-control-of-the-ppe-pipeline> (highlighting states competing with the federal government).

how responsive a given institution will be to a demand for participation. The failure to take this factor into account risks crafting policy based on an ideal but unreliable institutional choice. The assessment of whether an institution will shoulder its responsibilities involves issues of design, including structural roadblocks, and the institution's susceptibility to majoritarian or minoritarian bias.<sup>194</sup> In the case of the COVID-19 pandemic, initial warnings were viewed through a partisan lens that labeled the potential threat a "hoax" and an attempt to derail the Trump presidency.<sup>195</sup> As the stock market reached new heights in February 2020, administration officials continued to dismiss and downplay the threat of the novel virus.<sup>196</sup> Many Republican governors adopted a similar stance.<sup>197</sup> Whistleblower reports now allege that during those early days, officials in the Trump White House turned their back on science in favor of cronyism and a myopic focus on the economy.<sup>198</sup>

Pandemic response is an all-hands-on-deck global public health crisis where there is a clear and present danger and moments matter.<sup>199</sup> The goal is to mobilize institutions to minimize risk to the life and health of our communities and to engage the relevant institutions

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194. KOMESAR, *supra* note 35, at 62-63 (describing two-force model of majoritarian and minoritarian bias).

195. Bryan Sullivan, *Fox News Faces Lawsuit for Calling COVID-19 a 'Hoax'*, FORBES (Apr. 10, 2020, 7:32 PM), <https://www.forbes.com/sites/legalentertainment/2020/04/10/covid-19-lawsuit-against-fox-news>.

196. Greg Miller & Ellen Nakashima, *President's Intelligence Briefing Book Repeatedly Cited Virus Threat*, WASH. POST (Apr. 27, 2020, 5:22 PM), [https://www.washingtonpost.com/national-security/presidents-intelligence-briefing-book-repeatedly-cited-virus-threat/2020/04/27/ca66949a-8885-11ea-ac8a-fe9b8088e101\\_story.html](https://www.washingtonpost.com/national-security/presidents-intelligence-briefing-book-repeatedly-cited-virus-threat/2020/04/27/ca66949a-8885-11ea-ac8a-fe9b8088e101_story.html).

197. Cleve R. Wootson Jr. & Tim Craig, *Southern Governors who Initially Downplayed Coronavirus Threat Ease into Reopening of Their States*, WASH. POST (Apr. 29, 2020, 8:07 PM), [https://www.washingtonpost.com/national/southern-governors-who-initially-downplayed-coronavirus-threat-ease-into-reopening-of-their-states/2020/04/29/92d9d122-8a3d-11ea-9dfd-990f9dcc71fc\\_story.html](https://www.washingtonpost.com/national/southern-governors-who-initially-downplayed-coronavirus-threat-ease-into-reopening-of-their-states/2020/04/29/92d9d122-8a3d-11ea-9dfd-990f9dcc71fc_story.html).

198. Eric Lutz, *Shocking: Jared Kushner's Young Consultant Army Was Clueless on Coronavirus*, VANITY FAIR (May 6, 2020), <https://www.vanityfair.com/news/2020/05/shocking-jared-kushners-young-consultant-army-was-clueless-on-coronavirus>.

199. Pandemic influenza is a threat to the first pillar of our National Security Strategy (NSS), namely to "Protect the American People, the Homeland, and the American Way of Life." Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986); EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017), [whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf](https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf). The NSS is a congressionally mandated document that originated with the Goldwater-Nichols Department of Defense Reorganization Act of 1986. *Id.* It outlines the administration's appraisal of U.S. national security interests, the global security environment, challenges to U.S. interests, and policies and tools for securing such interests. *Id.*

simultaneously. Obviously, this sort of cross-institutional plan will only work if the institutions themselves are held to task. Pandemic response requires swift and immediate action on the part of all the institutions included in the plan. Although the plans envision a “trigger” that prompts rapid federal action, much of the cooperation that is the hallmark of the tiered approach to disaster relief in the United States is discretionary. This includes the various emergency declarations that make federal funds available,<sup>200</sup> as well as the application of the National Defense Production Act that forces private industry to produce necessary supplies to respond to the pandemic.<sup>201</sup> Even where the policy or plan states in the affirmative that a particular action will happen in response to a given trigger, there are no enforcement mechanisms.

Given the lack of enforcement mechanisms, it is imperative to assess the likelihood that a given institution could be susceptible to political pressure that would compromise its participation. Pandemic preparedness and response are highly dependent on scientific projections and expertise.<sup>202</sup> There is a current strain of American politics that is highly skeptical of science, as exemplified by the opposition to climate change initiatives.<sup>203</sup> These science-skeptics are most often associated with the Republican Party, so it would make sense that a Republican-controlled administration, whether it be on the federal, state, or local level, may be less likely to respond full throttle to a pandemic threat that is based on scientific modeling of an “invisible enemy.”<sup>204</sup> Within the Republican Party there is also strong support for individual liberty and economic freedoms that might run contrary to certain social distancing measures, especially those impacting private indus-

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200. Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, Pub. L. No. 93-288, 102 Stat. 4689 (codified as amended in scattered sections of 42 U.S.C. §§ 5121-5206, 12 U.S.C., 16 U.S.C., 20 U.S.C., 26 U.S.C., 38 U.S.C.) (2002) (explaining that even once declared, the scope of the support and resources made available to the states continues to be discretionary).

201. Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-2171 (2018). The DPA is the primary authority to ensure the timely availability of resources for national defense and civil emergency preparedness and response.

202. See generally HHS 2017 UPDATE, *supra* note 117.

203. Brian Kennedy & Cary Funk, *Democrats and Republicans Differ Over Role and Value of Scientists in Policy Debates*, PEW RES. CTR. (Aug. 9, 2019), <https://www.pewresearch.org/fact-tank/2019/08/09/democrats-and-republicans-role-scientists-policy-debates/>; *The Politics of Climate*, PEW RES. CTR. (Oct. 4, 2016), <https://www.pewresearch.org/science/2016/10/04/the-politics-of-climate/>.

204. Ronald Brownstein, *Red and Blue America Aren't Experiencing the Same Pandemic*, ATLANTIC (Mar. 20, 2020) <https://www.theatlantic.com/politics/archive/2020/03/how-republicans-and-democrats-think-about-coronavirus/608395/>.

try.<sup>205</sup> These are minority views in the United States, but not within the Republican Party, meaning that Republican control could amplify a minoritarian bias that is distrustful of science and highly protective of individual liberty and economic freedoms.<sup>206</sup> As discussed in Section III below, disaster relief and pandemic planning should include failsafe mechanisms to ensure institutional participation and prevent such minoritarian bias from derailing future preparedness and response efforts. Without adequate failsafe mechanisms to hold institutions accountable, we risk repeating the present scenario where the institutions that are most responsive to the demand for bold public health measures are also the institutions least competent to confront the virus.

### C. Institutional Resilience

Institutional resilience attempts to measure the potential longevity of any policy decision, and it is closely related to both an institution's competence and responsiveness. It most frequently arises in the context of the hierarchy of institutional authority, when one level of government can overrule a particular policy decision or action taken by a lower level of government. Of course, sometimes an individual decision maker will simply reverse course due to political pressure. There are also instances where a policy decision or action is severely undercut, but not necessarily overruled, by conflicting actions or statements made by another institution. In the case of the current pandemic, local measures designed to mitigate the spread of the virus were sometimes expressly overturned by later state action.<sup>207</sup> Both state and local action were undercut by the dismissive federal response and the policy decisions of other states. There has been an inverse

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205. *Id.*

206. Jeanine Santucci, *Partisan Divide Over Social Distancing Narrows as States Ramp Up Coronavirus Measures, Poll Finds*, USA TODAY (Apr. 2, 2020, 1:23 PM), <https://www.usatoday.com/story/news/politics/2020/04/02/coronavirus-social-distancing-gap-between-democrats-gop-narrows/5109621002/>.

207. In the case of meatpacking plants, it was federal interference. Jacob Bunge, Jesse Newman & Kirk Maltais, *Meat Companies Want to Reopen, but Officials Fear New Wave of Coronavirus Infections*, WALL ST. J. (Apr. 30, 2020, 11:55 AM), <https://www.wsj.com/articles/meat-companies-want-to-reopen-but-officials-fear-new-wave-of-coronavirus-infections-11588261811>; Dan Charles, *How One City Mayor Forced a Pork Giant to Close Its Virus-Stricken Plant*, NPR (Apr. 14, 2020, 4:22 PM), <https://www.npr.org/2020/04/14/834470141/how-one-city-mayor-forced-a-pork-giant-to-close-its-virus-stricken-plant#:~:text=live%20Sessions,Smithfield%20Foods%3A%20How%20A%20Mayor%20Forced%20Pork%20Giant%20To%20Close,mayor%20forced%20the%20company's%20hand.>

relationship between the responsiveness of the first movers and the resilience of their policy decisions.

There are numerous cases where mayors and county executives issued stay-at-home orders and closed non-essential businesses only to have those orders superseded by state actions.<sup>208</sup> In Georgia, the Mayor of Atlanta was at odds with the Governor over his decision to reopen the state in advance of the federal guidelines.<sup>209</sup> In the absence of authority to do otherwise, she pleaded with businesses to stay closed until Atlanta complied with the federal guidelines for reopening.<sup>210</sup> Speaking to the press, the mayor said that she was “not willing to sacrifice [her] mother” to speed the reopening of businesses.<sup>211</sup>

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208. Local governments wield derivative power—they get their authority from the state in which they are located. JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 55, at 101–02 (1872). In the United States, there are two general ways that local governments receive their authority from the state. Some states constitutionally or legislatively grant “Home Rule” to the municipalities within their borders, although they may limit the grant of Home Rule to certain classes of municipalities. Hugh Spitzer, “Home Rule” vs. “Dillon’s Rule” for Washington Cities, 38 SEATTLE U. L. REV. 809, 820–25 (2015). Other states follow what is referred to as “Dillon’s Rule” that was derived from an 1868 case, *Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868). The concept of Home Rule provides that power devolves from the state to the municipality, which is then empowered to adopt a city charter or other organic organizing document by referendum. Spitzer, *supra* at 824–25. The municipality has the authority to enact laws pursuant to the terms of the charter, although the state still has authority over matters of statewide concern. *Id.* at 820–21. Under Dillon’s Rule, a municipality only has the power expressly granted to it through enabling legislation. *Id.* at 813. If a locality is governed by Dillon’s Rule, it can only exercise the power that it has been granted by the state and most likely would require enabling legislation before it could enact any enforceable social distancing requirements. Vernon Miles, *County Board Considers Mask Mandate but Hamstrung by Dillon Rule*, ARL NOW (May 11, 2020, 5:20 PM), <https://www.arlnow.com/2020/05/11/county-board-considers-mask-mandate-but-hamstrung-by-dillon-rule/>. This was the case in Virginia which, despite a Democratic governor, was relatively slow to issue a stay-at-home order and close non-essential businesses. See Charlotte Rene Woods, *As Northam Issues Stay-At-Home Order, Local Hospitals Continue to Prepare for Influx of Patients*, CHARLOTTESVILLE TOMORROW (Mar. 30, 2020, 10:13 PM), <https://www.cvilletomorrow.org/articles/as-northam-issues-stay-at-home-order-local-hospitals-continue-to-prepare-for-influx-of-patients/>. The city of Charlottesville urged the Governor to issue a stay-at-home order because it lacked the authority to do so. *Id.* Arlington County in Virginia, which includes the tourist destination of Old Town Alexandria, appealed directly to businesses and urged them to close voluntarily. Patricia Sullivan & Gregory S. Schneider, *Unable to Order Closures, Arlington County Pleads with Restaurants, Bars to End Dine-In Service*, WASH. POST (Mar. 16, 2020), <https://www.washingtonpost.com/dc-md-va/2020/03/16/coronavirus-dc-maryland-virginia-updates/>.

209. *The Latest: Atlanta Mayor: Opening Businesses ‘Defies Logic,’* ASSOCIATED PRESS (Apr. 22, 2020, 11:58 AM), <https://accesswdun.com/article/2020/4/897042>.

210. Coleman, *supra* note 167.

211. Meg Wagner, Mike Hayes & Elise Hammond, *Coronavirus Pandemic in the US*, CNN (May 5, 2020), <https://www.cnn.com/us/live-news/us-coronavirus-update->

Similar controversies erupted in Florida where, as noted earlier, the Governor was slow to issue a stay-at-home order.<sup>212</sup> When he finally did issue the order, it was more permissive than some of the city and county level orders, which the Governor's executive order expressly superseded.<sup>213</sup>

President Trump has consistently taken conflicting and alternating positions regarding the reach of state power and authority—one day asserting that he had “absolute authority” over the states and then saying that the decision to reopen their state was the governors' call to make.<sup>214</sup> Although the majority of governors have supported social distancing and sometimes adopted guidelines that were more stringent than the federal guidance, a handful of governors dismissed the federal guidelines and refused to close non-essential business, or reopened their economies in advance of federal guidelines.<sup>215</sup> The President also weighed in regarding the proposed reopenings and urged states to move ahead of the federal guidelines, despite the fact that the rush to reopen significantly increased the number of projected deaths and hospitalizations.<sup>216</sup>

After conceding that he did not have “total authority” to force states to reopen, President Trump tasked the U.S. Department of Justice (DOJ) with investigating social distancing policies.<sup>217</sup> The President's enlistment of DOJ raises interesting questions regarding the scope of federal power and the Tenth Amendment and promises to further define the emerging contours of this new and distinctly pugilistic flavor of federalism. On April 27, 2020, the Attorney General, William Barr, issued a memorandum instructing the Assistant Attorney General for Civil Rights and all U.S. Attorneys to “be on the lookout for state and local directives that could be violating the constitutional rights and civil liberties of individual citizens.”<sup>218</sup> The memorandum

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05-05-20/index.html#:~:text=atlanta%20mayor%20on%20reopening%20state,willing%20to%20sacrifice%20my%20mother%22&text=Brian%20Kemp%2C%20Atlanta's%20Democratic%20Mayor,the%20sake%20of%20economic%20recovery.

212. Jacob Fischler, *After Delay, Florida Gov. DeSantis Issues Stay-At-Home Order*, ROLL CALL (Apr. 1, 2020, 6:38 PM), <https://www.rollcall.com/2020/04/01/after-delay-florida-gov-desantis-issues-stay-at-home-order/>.

213. Contorno, *supra* note 164.

214. Baker & Shear, *supra* note 30.

215. Dittrich, *supra* note 182.

216. Chalfant & Samuels, *supra* note 149.

217. Lisa Lerer & Kenneth P. Vogel, *Trump Administration Signals Support for Allies' Fight Against Virus Orders*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/us/politics/coronavirus-trump-justice-department.html>.

218. WILLIAM BARR, MEMORANDUM BALANCING PUBLIC SAFETY WITH THE PRESERVATION OF CIVIL RIGHTS 1 (2020), <https://www.justice.gov/opa/page/file/1271456/download>.

is short on law, but specifically singles out religious liberty, “disfavored speech,” and “undue interference with the national economy.”<sup>219</sup> It designates two DOJ employees to “coordinate . . . efforts to monitor state and local policies and, if necessary, take action to correct them.”<sup>220</sup>

The notion that DOJ would “correct” state and local public health policies is an intriguing one, especially given the broad police powers enjoyed by the states. It remains to be seen how DOJ would craft its complaint in these cases, but it is clear that the cases that it chooses to pursue will help shape the contours of government responsibility and authority for the 21st century. Although the federal government has quarantine authority in a public health emergency, states are generally free to impose greater restrictions on residents pursuant to their police powers and as expressed in statutory public health and emergency laws.<sup>221</sup> Of course, even the most innovative state “experiment” must comport with the constitutional safeguards of the U.S. Constitution, which seems to be the point of Barr’s memorandum.<sup>222</sup> The authority to regulate public health is necessarily constrained by the federal constitutional guarantees of liberty, equal protection, and free exercise.<sup>223</sup> In this way, Barr’s promise to challenge state pandemic restrictions that infringe on constitutional rights is consistent with the template of federalism sketched out by the Tenth Amendment, which refers to not only the powers delegated to the national government, but also the powers prohibited to the States by the Constitution: “The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people.”<sup>224</sup> The questions presented will force courts to balance individual rights with the public health and determine which restrictions constitute impermissible infringements in the midst of a pandemic.

With respect to religious liberty, DOJ has filed statements of interest in two cases, one in Mississippi and one in Virginia.<sup>225</sup> In both instances, churches alleged that the stay-at-home orders issued by

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219. *Id.*

220. *Id.*

221. The CDC has authority to detain and medically examine persons arriving to the United States and traveling between states who are suspected of carrying communicable diseases. 42 U.S.C. § 243; *see also* *Gibbons v. Ogden*, 22 U.S. 1 (1824).

222. BARR, *supra* note 218, at 1–2; U.S. CONST. amend. XIV.

223. U.S. CONST. amend. XIV; BARR, *supra* note 218 (implying that DOJ would also pursue claims that allege “undue interference with the national economy”).

224. U.S. CONST. amend. X (emphasis added); *see also* BARR, *supra* note 218, at 1–2.

225. United States’ Statement of Interest in Support of Plaintiffs, *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-00064-DMB-JMV (N.D. Miss. Apr. 14,

their respective governors impermissibly infringed on their free exercise rights guaranteed under the First Amendment.<sup>226</sup> In *Lighthouse Fellowship Church v. Northam*, the church objected to Governor's Northam's executive orders prohibiting religious gatherings of more than ten people, noting that his order also permitted secular gatherings of more than ten people under a number of circumstances.<sup>227</sup> Since *Employment Division v. Smith*, it has been clear that laws of general applicability do not violate the Free Exercise clause,<sup>228</sup> but the churches alleged that the state order treated religious gatherings differently, thereby violating the First Amendment.<sup>229</sup> On May 2, 2020, the United States Court of Appeals for the Sixth Circuit granted an injunction in a similar case involving a church in Kentucky where the church alleged that the governor's order prohibiting religious gatherings impermissibly infringed on its free exercise rights.<sup>230</sup> The Sixth Circuit concluded: "The Governor has offered no good reason so far for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same."<sup>231</sup>

Finally, it bears mentioning that DOJ's scrutiny is occurring at a time of increased civil disobedience and pushback regarding social distancing measures—pushback that at times has erupted into violence.<sup>232</sup> Organized protests that flout social distancing requirements have become more frequent and arguably more dangerous to both the participants and those required to keep the peace.<sup>233</sup> Owners of non-essential businesses have defied orders to close while receiving af-

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2020); United States' Statement of Interest in Support of Plaintiffs, *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204-AWA-RJK (E.D. Va. May 3, 2020).

226. See Complaint at 10-11, *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-00064-DMB-JMV 3 (N.D. Miss. Apr. 14, 2020); Complaint at 23, *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204-AWA-RJK (E.D. Va. Apr. 24, 2020).

227. Complaint at 3, *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204-AWA-RJK.

228. *Emp't Div. v. Smith*, 494 U.S. 872, 908 (1990).

229. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2018 (2017).

230. See *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam).

231. *Id.* at 615. In November 2020, the U.S. Supreme Court upheld a temporary injunction enjoining a New York state executive order that limited religious gatherings on the grounds that the order impermissibly targeted religion. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. \_\_\_\_ (2020).

232. Raja Razek, Christina Maxouris & Melissa Alonso, *Customer Shot a McDonald's Employee After Being Told to Leave Due to Coronavirus Restrictions, Police Say*, CNN (May 7, 2020, 2:03 PM), <https://www.cnn.com/2020/05/06/us/mcdonalds-employees-shot-coronavirus/index.html>.

233. Chalfant & Samuels, *supra* note 149.

firming shout outs from the President on social media.<sup>234</sup> The new requirements in many states that individuals must wear masks in certain venues have resulted in violence directed at employees attempting to enforce social distancing requirements.<sup>235</sup> The potential for civil unrest will only increase as social distancing measures remain in place and the virus continues to disrupt our daily lives and the economic health of the country.

### III.

#### MANDATING ACCOUNTABILITY

Ultimately, history will judge the response of the federal government to the COVID-19 pandemic, but just as the economic crisis of 2008 prompted congressional hearings and remedial legislation, so too will the present health crisis.<sup>236</sup> Although the details and extent of the failure of our federal leadership will most likely not be known until the conclusion of many hearings and Freedom of Information Act (FOIA) requests, two general observations can be made at this time. First, our “all-hazards” and “incident” management rubric obscured the uniqueness of a novel virus pandemic and left the United States unprepared for COVID-19. Second, the politicization of the pandemic response and disdain for science-driven policy recommendations also compromised preparedness and have resulted in a chaotic and uneven state-run response. The question for Congress is how to ensure that the federal executive branch—the key institutional player in our national preparedness and response policy—does not abdicate its clearly articulated responsibilities in future emergencies. The first observation can be addressed by a return to the pandemic-specific planning that was launched during the George W. Bush administration, whereas the second requires the adoption of checks and balances to ensure that misguided beliefs in American exceptionalism do not further jeopardize the health and wellbeing of the American people.

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234. Joshua Nelson, *Trump Reacts to Jailing of Texas Salon Owner*, FOXNEWS (May 8, 2020), <https://www.foxnews.com/media/trump-shelley-luther-texas-salon-reopening>; *Trump Appears to Side with Restaurant Owner Over State Leaders in Maine*, NBC10 BOSTON (May 3, 2020, 5:06 PM), <https://www.nbcboston.com/news/local/trump-appears-to-side-with-restaurant-owner-over-state-leaders-in-maine/2117825/>.

235. See, e.g., Carlie Porterfield, *No-Mask Attacks: Nationwide, Employees Face Violence for Enforcing Mask Mandates*, FORBES (Aug. 15, 2020, 2:42 PM), <https://www.forbes.com/sites/carlieporterfield/2020/08/15/no-mask-attacks-nationwide-employees-face-violence-for-enforcing-mask-mandates/?sh=AA3884360d6c>.

236. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376–2223 (hereinafter “Dodd-Frank Act”).

Executive branch action is routinely subject to checks and balances wielded by its co-equal branches of government, while also being constrained by the Tenth Amendment. Congressional oversight and judicial review are the traditional methods by which the executive branch is held accountable. More recently, whistleblower protections have empowered individual civil servants to report government malfeasance and nonfeasance.<sup>237</sup> FOIA also provides an opportunity for the media and public watchdogs to shine a light on government activities.<sup>238</sup> Traditional congressional oversight and judicial review generally occurs after the fact and simply takes too long when moments matter.<sup>239</sup> To the contrary, pandemic response requires swift and immediate science-driven action that is triggered by certain markers, such as the first confirmed human-to-human transmission overseas. Accordingly, remedial legislative action should seek to streamline oversight and review, as well as attempt to insulate pandemic preparedness and response efforts from partisan influence and anti-science bias. Consistent with good government principles, such steps would empower individuals, increase transparency, and mandate accountability.

#### A. *Individual Empowerment*

Whistleblowing is a powerful tool for government employees who are on the ground with the most knowledge of a given situation. There are ways to both incentivize and streamline the procedures for complaints in the public health context. The Whistleblower Protection Act currently extends workplace protections to government employees who reveal activity that poses a “substantial and specific danger to public health and safety.”<sup>240</sup> However, it might be possible to further incentivize whistleblowing in a way that is similar to the provisions of

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237. The Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8)-(9) (codified as amended at 26 U.S.C. § 1201 (2018)).

238. The Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012).

239. For example, after the Great Recession, the U.S. Senate Permanent Subcommittee on Investigations began a two-year investigation into the origins of the financial crisis. CARL LEVIN & TOM COBURN, WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 1 (2011), [https://www.hsgac.senate.gov/imo/media/doc/PSI%20REPORT%20%20Wall%20Street%20&%20the%20Financial%20Crisis-Anatomy%20of%20a%20Financial%20Collapse%20\(FINAL%205-10-11\).pdf](https://www.hsgac.senate.gov/imo/media/doc/PSI%20REPORT%20%20Wall%20Street%20&%20the%20Financial%20Crisis-Anatomy%20of%20a%20Financial%20Collapse%20(FINAL%205-10-11).pdf) [<https://perma.cc/5HZ9-HV3R>]. In 2011, the Subcommittee released the 635-page Levin-Coburn Report that documented the inquiry into the key causes of the financial crisis. The result of the investigations was the 848-page Dodd Frank Wall Street Reform and Consumer Protection Act of 2010. *Id.* at 43.

240. Whistleblower Protection Act § 1213(a)-(b).

the Dodd-Frank Act.<sup>241</sup> Dodd-Frank both enhanced protections for whistleblowers and incentivized whistleblowers to report information about federal securities laws violations and foreign corruption to the SEC with a potential monetary reward.<sup>242</sup> In the ten years since the enactment of Dodd-Frank, whistleblowers have been paid more than \$500 million under the Dodd-Frank incentive program.<sup>243</sup>

Federal employees who wish to disclose information about wrongdoing, fraud, or a threat to public safety generally have two options. They can report the information to the Office of Inspector General in their respective agency,<sup>244</sup> or they can file a report with the U.S. Office of Special Counsel, which has jurisdiction over most prohibited personnel practices.<sup>245</sup> In addition to providing greater whistleblower incentives, there are opportunities to streamline the provisions at both the Office of the Inspector General of HHS and the Office of Special Counsel in order to fast-track congressional oversight.<sup>246</sup> For example, the Inspector General Act provides for the “immediate” reporting of any “particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations.”<sup>247</sup> The report goes to the head of the agency who is then required to transmit the report to the relevant congressional authorities within seven days.<sup>248</sup> Given the urgent nature of pandemic response and the high stakes involved, it would be prudent to sound the alarm immediately and broadly if credible allegations suggest that federal authorities were not following national pandemic plans. Accordingly, there could be an added immediate report out to Congress in the case

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241. Section 922 of Dodd-Frank authorizes the SEC to pay eligible whistleblowers a percentage of any monetary recovery. Dodd-Frank Act § 922.

242. Mary Jane Wilmoth, *Dodd-Frank Act: Ten Years Later and More Than \$500 Million Paid to Whistleblowers*, NAT'L L. REV. (July 21, 2020), <https://www.natlawreview.com/article/dodd-frank-act-ten-years-later-and-more-500-million-paid-to-whistleblowers>.

243. *Id.* One sticking point would be to determine a funding mechanism. Under the Dodd-Frank Act, the rewards are a portion of the monetary sanctions imposed on account of the wrongdoing. Dodd-Frank Act § 922.

244. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (as amended through Pub. L. No. 114-317 (2016)).

245. 5 U.S.C. § 1214.

246. Inspector General Act of 1978 § 5(d) (duty to keep Congress informed). The Inspector General has the authority to “receive and investigate complaints or information from an employee . . . concerning the possible existence of an activity constituting . . . abuse of authority or a substantial and specific danger to the public health and safety.” *Id.* at § 7(a).

247. *Id.* at § 5(d).

248. *Id.*

of a complaint regarding a pandemic response or similar catastrophic public health issue.

### B. Transparency

In terms of transparency, Congress could increase the public reporting responsibility of HHS, specifically the CDC. For example, the CDC is currently required to report “national notifiable diseases” as part of a congressionally mandated national surveillance program.<sup>249</sup> The reports are made public each week with the publication of the CDC’s influential *Weekly Mortality and Morbidity Report*.<sup>250</sup> Going forward, the CDC could report out the pandemic threat level using its various assessment tools. In the case of COVID-19, the press did a good job of ferreting out the initial details of the outbreak, but reliable and centralized reporting from the CDC would provide consistency and authority. Beyond public reporting, Congress could mandate notification requirements when the threat level reaches a certain point or specific triggering events occur, although such a level of detail would be more typically left to regulations or subregulatory guidance.

During a pandemic or other public health emergency, the CDC could be mandated to provide data in real time on its dashboard. For example, Johns Hopkins has developed a real time dashboard that reflects world-wide cases and provides data visualization that is designed to increase transparency and help the public understand the nature of the pandemic.<sup>251</sup> The real-time dashboard could also include supply-chain information, such as the number of ICU beds and ventilators.<sup>252</sup> The CDC has come under criticism recently when testing data temporarily disappeared from its website in early March 2020, amid the growing controversy about the availability of diagnostic tests.<sup>253</sup>

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249. *National Notifiable Diseases Surveillance System (NNDSS)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://web.archive.org/web/20200509/https://wwwn.cdc.gov/nndss/> (last visited May 9, 2020).

250. *Morbidity and Mortality Weekly Report (MMWR)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/mmwr/index.html> (last visited May 9, 2020).

251. Doug Donovan, *Map Tracks Coronavirus Outbreak in Near Real Time*, JOHNS HOPKINS UNIV. (Jan. 23, 2020), <https://hub.jhu.edu/2020/01/23/coronavirus-outbreak-mapping-tool-649-em1-art1-dtd-health/>.

252. *Id.*

253. John Bonifield & Elizabeth Cohen, *Congressman Calls CDC’s Plan to Report Number of US Coronavirus Tests ‘Wholly Inadequate,’* CNN (Mar. 4, 2020, 7:15 AM), <https://www.cnn.com/2020/03/04/health/cdc-website-coronavirus-testing/index.html>.

Consistent public health messaging during a pandemic is essential for members of the general public as well as other stakeholders. The current pandemic plans designate HHS as the lead agency in terms of communications.<sup>254</sup> In the present public health emergency, the role of HHS has been sidelined in favor of the Coronavirus White House Task Force led by Vice-President Pence.<sup>255</sup> In addition, the President has often handled much of the messaging himself, speaking in ways that contradicted or undermined the recommendations of his own Task Force.<sup>256</sup> It would be possible to hard wire communications channels legislatively, but again that is not typically the level of detail that would be enshrined in a statute. As discussed below, one option would be to create an independent agency that would not be directly managed by the Executive Office of the President. The independent agency would then be responsible for messaging and be somewhat insulated from partisan politics.

### C. Accountability

With respect to accountability, conventional congressional oversight would continue, but the urgency of a pandemic, as well as other public health threats, requires new proactive safeguards. The goal of the legislation needs to be to prevent a failed response, rather than simply investigate it after the fact. Accordingly, Congress should consider ways to insulate any future pandemic response, and those for other potentially catastrophic public health emergencies, from partisan influence and anti-science bias. Using the pandemic-as-war metaphor, and thinking big for a moment, perhaps it would be appropriate for Congress to reconstitute the CDC, and possibly the FDA, as independent agencies that would monitor administration preparedness and response while exercising enforcement powers, similar to the Consumer Financial Protection Bureau. There are a number of actions that are currently under the discretion of the President that could be transferred

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254. See U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 84 (discussing role of HHS in ESF-8).

255. Rebecca Ballhaus, *Trump Announces Coronavirus Task Force*, WALL ST. J. (Jan. 29, 2020, 11:39 PM), <https://www.wsj.com/articles/trump-announces-coronavirus-task-force-11580359187>. The Task Force was originally led by the Secretary of HHS, who was later replaced by Vice President Pence. Dan Diamond & Adam Cancryn, *Inside Pence's Coronavirus Task Force*, POLITICO (Aug. 26, 2020), <https://www.politico.com/newsletters/politico-pulse/2020/08/26/inside-pences-coronavirus-task-force-790161>.

256. Andrew Solender, *Trump May Skip Daily Briefings as Polls Show Low Public Trust in White House COVID-19 Response*, FORBES (Apr. 25, 2020, 10:40 AM), <https://www.forbes.com/sites/andrewsolender/2020/04/25/trump-may-skip-daily-briefings-as-polls-show-low-public-trust-in-white-house-covid-19-response/>.

to the new agency, such as the power to deploy federal medical stations, activate the medical reserve corps, and invoke the Defense Production Act.<sup>257</sup> It could also oversee the production of diagnostic testing and the development of medical countermeasures and vaccines. It could interface with other government agencies and provide expert and independent scientific guidance on a wide range of issues.

There are other opportunities to separate science-driven policy from politics, short of creating new independent agencies. For example, Congress could amend the National Security Act of 1947 to mandate the reinstatement of the White House National Security Council Directorate for Global Health Security and Biodefense, adding oversight provisions and reporting requirements.<sup>258</sup> It could restructure the Office of Assistant Secretary of Response and Preparedness in HHS that was created in 2006 under the original Bush-era pandemic legislation and mandate the return of responsibility for the National Stockpile back to the CDC, whether or not it was an independent agency.<sup>259</sup> The goal of these reforms would be to ensure that public health measures are driven by science, and not partisan politics. It will not be possible to detail the extent of these reforms until more is known about what went wrong with the federal response to the current pandemic.

#### IV.

#### CONCLUSION

During the early days of the COVID-19 pandemic, the Tenth Amendment guaranteed that the states could take bold and swift action pursuant to their inherent police powers, rather than wait for the federal government to acknowledge the severity of the threat. In this way, the Tenth Amendment was our ultimate failsafe mechanism. State and local governments stepped up in the face of federal inaction, indifference, and frequently, outright hostility. They marshalled their capacities and resources in innovative and new ways, but this resourcefulness should not be held up as a shining achievement of federalism. Just as a “miracle” should not be our Plan A for a pandemic, neither should the police power reserved to the several states be our response to a global public health crisis.

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257. 50 U.S.C. App. §§ 2061-171.

258. Glenn Kessler & Meg Kelly, *Was the White House Office for Global Pandemics Eliminated?*, WASH. POST (Mar. 20, 2020), <https://www.washingtonpost.com/politics/2020/03/20/was-white-house-office-global-pandemics-eliminated/>.

259. Swaine et al., *supra* note 102.