

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

7-24-2021

Pandemic Governance

Yanbai Andrea Wang

University of Pennsylvania Law School

Justin Weinstein-Tull

Arizona State University

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [American Politics Commons](#), [Health Law and Policy Commons](#), [Health Policy Commons](#), [Public Law and Legal Theory Commons](#), [Public Policy Commons](#), and the [State and Local Government Law Commons](#)

Repository Citation

Wang, Yanbai Andrea and Weinstein-Tull, Justin, "Pandemic Governance" (2021). *Faculty Scholarship at Penn Law*. 2759.

https://scholarship.law.upenn.edu/faculty_scholarship/2759

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

PANDEMIC GOVERNANCE

Yanbai Andrea Wang & Justin Weinstein-Tull

The COVID-19 pandemic created an unprecedented need for governance by a multiplicity of authorities. The nature of the pandemic—globally communicable, uncontrolled, and initially mysterious—required a coordinated response to a common problem. But the pandemic was superimposed atop our decentralized domestic and international governance structures, and the result was devastating: the United States has a death rate that is eighteenth highest in the world, and the pandemic has had dramatically unequal impacts across the country. COVID-19's effects have been particularly destructive for communities of color, women, and intersectional populations.

This Article finds order in the chaos of the pandemic response by distilling a typology for the predominant intergovernmental relationships that emerged. Two of these behaviors describe intergovernmental conflict. Governments *undermined* each other by destabilizing and criticizing each other's actions. They did so at all levels: up (when local governments undermined states), down (when the federal government undermined states), and across (when the federal government undermined itself). Governments *abdicated* responsibility when they failed to act. Two additional behaviors describe intergovernmental coordination. Governments *collaborated* when they actively worked together, both vertically and horizontally, to harmonize their policies. And they engaged in *bandwagoning* when they avoided taking initiative in making pandemic policy, opting instead to follow the leads of others.

We argue that these behaviors were the predictable result of well-worn structural and political dynamics. Structurally, pandemic policy lies uncomfortably on two poles of the federal-state division of responsibilities. Ambiguous hierarchies and overlapping roles pushed governments toward conflict rather than coordination. Politically, intense partisanship transformed nearly every governance decision into symbolic, two-sided national battles. These battles provided a default set of relationships that became organizing principles for the pandemic response. We use these insights to sketch the contours of a way forward. To address the role confusion that arose from our multi-sovereigned system of governance, we propose a federal pandemic statute that emphasizes and balances role clarity, state independence, and explicit governmental action that disrupts inequality. To lessen the pull of partisanship, we advocate for the creation of decentralized but inclusive subject-matter networks among international, federal, state, and local authorities.

TABLE OF CONTENTS

Introduction	1
I. Pandemic Theory and Policy.....	7
A. Pandemics and Crisis Management Theory.....	8
B. Pandemic Policy	10
1. <i>Local and State</i>	11
2. <i>National</i>	15
3. <i>International</i>	19
II. Intergovernmental Behaviors	22
A. Conflict.....	23
1. <i>Active: Undermining</i>	24
2. <i>Passive: Abdication</i>	30
B. Coordination	37
1. <i>Active: Collaboration</i>	37
2. <i>Passive: Bandwagoning</i>	42
III. Explanations and Proposals	46
A. Structure.....	46
1. <i>Explanation: Federalism and Role Confusion</i>	47
2. <i>Proposal: Role Clarity Legislation</i>	51
B. Politics.....	54
1. <i>Explanation: Partisan Tribalism</i>	54
2. <i>Proposal: Inclusive Intergovernmental Networks</i>	59
Conclusion: Pandemic Governance Redux	61

INTRODUCTION

The nature of the COVID-19 pandemic—globally communicable, uncontrolled, and initially mysterious—gave rise to an unprecedented need for swift and coordinated action by a multiplicity of authorities.¹ But the pandemic was superimposed atop our domestic and international governmental structures, which are highly decentralized.² As a result, the governmental voices that emerged were largely uncoordinated and often combative, and the results were devastating. The United States has a death rate that is eighteenth highest in the world.³ The virus’s spread has had vastly unequal impacts across the country, with incidence reaching ten times as high in some states as in others by July 2020.⁴ The pandemic has also had

¹ See, e.g., ARJEN BOIN ET AL., THE POLITICS OF CRISIS MANAGEMENT: PUBLIC LEADERSHIP UNDER PRESSURE 12 (2006) (describing how coordination is necessary to avoid conflicts, unnecessary overlap, and to prevent miscommunication); World Health Organization [WHO], *A World At Risk: Annual report on global preparedness for health emergencies* 8 (Sept. 2019) (noting that “[h]eads of government must appoint a national high-level coordinator with authority and political accountability to lead whole-of-government and whole-of-society approaches”); World Health Organization [WHO], *Coronavirus disease (COVID-19) Strategy and Planning* (July 20, 2020) (emphasizing the importance of “[c]oordinat[ing] cross regions”), https://www.who.int/images/default-source/health-topics/coronavirus/covid-19-exr-srp-infographic-4bdabd6db24449e192eb-3fdbfe7ada63.png?sfvrsn=f2c0e77b_4.

² Responsibilities are decentralized from the federal government down to states, which in turn send many of those responsibilities down to their local governments. See generally Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839 (2017) (describing the many policy areas where the federal government has delegated responsibilities to states and noting that once states delegate those responsibilities downward to local governments, they “do not monitor local compliance with those laws”); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) (describing how states have “conferred significant political, economic and regulatory authority on many localities.”); Richard Briffault, “What About the ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1318 (1994) (noting that state-local delegations of authority are “often quite broad and [] rarely revoked. In most states, local governments operate in major policy areas without significant external legislative, administrative, or judicial supervision”).

³ See CDC COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker/#global-counts-rates>.

⁴ David M. Studdert, Mark A. Hall & Michelle M. Mello, *Partitioning the Curve — Interstate Travel Restrictions During the Covid-19 Pandemic*, 383 N. ENGL. J. MED. e83 (2020).

particularly destructive effects on women,⁵ communities of color,⁶ and intersectional populations.⁷

Governance—defined as the collective management of common problems by a multiplicity of often overlapping authorities that together constitute a system of rule⁸—looked like chaos during the early pandemic. It was states waiting for guidance from the federal government, but never receiving it.⁹ It was the World Health Organization dictating recommended public health measures under international law, and signatory countries

⁵ Women have experienced greater unemployment as a result of the pandemic than men. *See, e.g.*, Patricia Cohen, *Recession With a Difference: Women Face Special Burden*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/17/business/economy/women-jobs-economy-recession.html>.

⁶ *See* Richard A. Oppel Jr., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/-coronavirus-latinos-african-americans-cdc-data.html> (“Black and Latino people have been disproportionately affected by the coronavirus in a widespread manner that spans the country, throughout hundreds of counties in urban, suburban and rural areas, and across all age groups.”). African Americans, Latinos, and Native Americans have become infected with COVID-19 at far higher rates than Whites. *See* Centers for Disease Control and Prevention, *COVID-19 Hospitalization and Death by Race/Ethnicity* (Nov. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>. Once infected, rates of both hospitalization and death within these communities also far exceed those of Whites. *See id.*

⁷ The pandemic subjected African American women and Latinas not just to the diminished health outcomes associated with communities of color, but also the economic pressures the pandemic imposed on women. *See, e.g.*, Bethany Garner, *Why Black Women In The US Are Being Hit Hardest By Coronavirus*, BUSINESS BECAUSE (Aug. 7, 2020), <https://www.businessbecause.com/news/insights/7138/black-women-in-us-hit-hardest-by-coronavirus> (“The impact of coronavirus on Black women in America has been especially bleak.”); Economic Policy Institute, Elise Gould, Daniel Perez & Valerie Wilson, *Latinx workers—particularly women—face devastating job losses in the COVID-19 recession*, Aug. 20, 2020, <https://www.epi.org/publication/latinx-workers-covid/>; Pew Research Center, Rakesh Kochhar, *Hispanic women, immigrants, young adults, those with less education hit hardest by COVID-19 job losses*, PEW RESEARCH CENTER (June 9, 2020), <https://www.pewresearch.org/fact-tank/2020/06/09/hispanic-women-immigrants-young-adults-those-with-less-education-hit-hardest-by-covid-19-job-losses/>.

⁸ *See, e.g.*, James N. Rosenau, *Governance, Order, and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 4 (James N. Rosenau and E. O. Czempiel eds. 1992) (explaining that governance “is a more encompassing phenomenon than government” because it denotes a system of rule by a range of actors and mechanisms exercising authority).

⁹ *See, e.g.*, Anne Flaherty et al., *After delay, CDC releases new guidance on how states can safely reopen*, ABC NEWS (May 14, 2020), <https://abcnews.go.com/Politics/delay-cdc-releases-guidance-states-safely-reopen/story?id=70687074> (noting that the guidelines were issued “after most states already ha[d] started to reopen”).

diverging.¹⁰ It was local governments unsure of their authority, but acting anyway.¹¹ It was the Trump administration providing contradictory statements on the role of states in addressing the pandemic, sometimes in the span of mere days.¹²

This Article finds order in that chaos. First, we demonstrate that existing public health policies lacked a clear blueprint for intergovernmental coordination, creating a void that governments had to fill as the pandemic unfolded. To effectively respond to a pandemic crisis, political leaders must identify the crisis, make sense of it, and clearly communicate and coordinate their response.¹³ By contrast, pandemic policies at federal, state, and local levels lack effective coordination mechanisms. Thousands of state and local public health authorities hold broad but dispersed power to respond to outbreaks through quarantines, stay-at-home orders, and business restrictions.¹⁴ Federal public health authorities play a largely supporting role

¹⁰ See, e.g., Selam Gebrekidan, *The World Has a Plan to Fight Coronavirus. Most Countries Are Not Using It*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/03/12/world/coronavirus-world-health-organization.html> (noting that despite pandemic guidance and recommendations from the World Health Organization, “dozens of countries are flouting the international regulations and snubbing their obligations. Some have failed to report outbreaks to the organization, as required. Others have instituted international travel restrictions, against the advice of the W.H.O., and without notifying global health officials.”).

¹¹ See, e.g., Victoria Colliver, *Small California county prepares to defy Newsom by opening bars, churches*, POLITICO (Apr. 30, 2020), <https://www.politico.com/states/california/story/2020/04/30/small-california-county-prepares-to-defy-newsom-by-opening-bars-churches-1281627> (describing how a small county in California decided to reopen before the state sanctioned it).

¹² During the first re-open phase of the pandemic in April, 2020, for example, Trump claimed “total authority” to re-open down the country only to ultimately announce that he would leave it to the governors. Compare Jeremy B. White, *Trump Claims ‘Total authority’ over State Decisions*, POLITICO (Apr. 13, 2020), <https://www.politico.com/states/california/story/2020/04/13/trump-claims-total-authority-over-state-decisions-1275506> (“‘When somebody’s president of the United States, the authority is total,’ Trump said at a press briefing Monday when asked about the governors’ plans. ‘And that’s the way it’s got to be. It’s total. It’s total. And the governors know that.’”) with Peter Baker and 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> (“President Trump told the nation’s governors on Thursday that they could begin reopening businesses, restaurants and other elements of daily life by May 1 or earlier if they wanted to, but abandoned his threat to use what he had claimed was his absolute authority to impose his will on them.”).

¹³ See *infra* Section I.A.

¹⁴ See *infra* Section I.B.1.

by providing resources and technical guidance.¹⁵ And although international law provides relatively coherent coordination mechanisms between countries, it does not clarify pandemic policy *within* countries.¹⁶

Second, we chronicle the governance that filled this policy void by distilling a typology of intergovernmental behaviors that emerged during the pandemic. Two of these behaviors describe intergovernmental conflict. Governments *undermined* each other by destabilizing and criticizing each other's actions. They did so at all levels: up (when local governments undermined states), down (when the federal government undermined states), and across (when the federal government undermined itself).¹⁷ Governments *abdicated* responsibility when they failed to act. At times, lower-level governments filled those gaps.¹⁸ Two additional behaviors describe intergovernmental coordination. Governments *collaborated* when they actively worked together, both vertically and horizontally, to harmonize their policies.¹⁹ And they engaged in *bandwagoning* when they avoided taking initiative in making pandemic policy, opting instead to follow the leads of others.²⁰

Finally, we explain how these behaviors were the predictable result of well-worn structural and political dynamics. Structurally, pandemic policy lies uncomfortably on two poles of the federal-state division of responsibilities. Whereas public health is traditionally a local responsibility, states and local governments were ill-equipped to respond to this international problem. Ambiguous hierarchies and overlapping roles pushed governments toward conflict rather than coordination.²¹ Politically, intense polarization during an election year transformed nearly every governance decision, even those that should have been clear from the science, into symbolic, two-sided national battles. These battles provided a fallback set of governance relationships and policy positions that became organizing principles for the pandemic response.²²

We use the insights that flow from our analyses to sketch the contours of a way forward. To address the role confusion that arose from our multi-

¹⁵ See *infra* Section I.B.2.

¹⁶ See *infra* Section I.B.3.

¹⁷ See *infra* Section II.A.1.

¹⁸ See *infra* Section II.A.2.

¹⁹ See *infra* Section II.B.1.

²⁰ See *infra* Section II.B.2.

²¹ See *infra* Section III.A.1.

²² See *infra* Section III.B.1.

sovereigned system of governance, we propose a federal pandemic statute pursuant to Congress's Spending Power that places particular emphasis on role clarity and explicit governmental action that disrupts inequality. To preserve the values of federalism and state independence, we propose that states be able to negotiate their role in the pandemic response with the federal government ahead of time.²³ To lessen the pull of politics and provide counterweights to existing partisan networks, we advocate for the creation of decentralized but inclusive subject-matter networks among international, federal, state, and local authorities.²⁴

To craft these arguments and conclusions, we gathered *all* pandemic-related governance decisions in select jurisdictions beginning with the first actions in January 2020 and extending through mid-July 2020.²⁵ We examined decisions made by federal and international authorities, as well as by eight states and select local governments within each state.²⁶ We selected the individual states to span three axes: Democratic/Republican (as measured by FiveThirtyEight's "partisan lean" index²⁷), urban/rural (as measured by the percentage of state residents living in urban areas²⁸), and rich/poor (as measured by state gross domestic product per capita²⁹). We did not limit our analysis to actions taken in those jurisdictions, but we used them as our starting points.

Although legal scholars have produced an avalanche of COVID-19 research, scholarship on governance in the time of the pandemic is sparse and

²³ See *infra* Section III.A.2.

²⁴ See *infra* Section III.B.2.

²⁵ As these dates indicate, our data came primarily from *early* pandemic governance. But as we discuss later, the framework that we propose also describes later pandemic governance, even after President Trump left office.

²⁶ Those states are Arizona, California, Michigan, Mississippi, New York, Texas, Vermont, and Washington state. We additionally collected governance data from three to five local governments within each state.

²⁷ See Nathaniel Rakich, *The States Where Trump Is More (And Less) Popular Than He 'Should' Be*, FIVETHIRTYEIGHT (May 16, 2019), <https://fivethirtyeight.com/features/the-states-where-trump-is-more-and-less-popular-than-he-should-be/> ("FiveThirtyEight's partisan lean metric is the average difference between how a state votes and how the country votes \overall, with 2016 presidential election results weighted at 50 percent, 2012 presidential election results weighted at 25 percent and results from elections for the state legislature weighted at 25 percent.")

²⁸ Urban Percentage of the Population for States, Historical, U.S. census data from 2010, <https://www.icip.iastate.edu/tables/population/urban-pct-states>.

²⁹ Bureau of Economic Analysis, Regional Data, GDP and Personal Income, <https://apps.bea.gov/itable/iTable.cfm?ReqID=70&step=1>.

piecemeal.³⁰ The scholarship that exists uses specific examples of governance as support for related topics, like the nature of state-federal relationship³¹ or the extent of federal authority to intervene.³² This Article, by contrast, takes governance as its primary concern, allowing it to both more deeply probe the layered set of intergovernmental interactions that arose and more comprehensively describe the governance spectrum—including at the local, state, federal, and international levels.³³ This more targeted approach is

³⁰ *But see* Cary Coglianese & Neysun A. Mahboubi, *Administrative Law in a Time of Crisis: Comparing National Responses to COVID-19*, 73 ADMIN. L. REV. 1 (2021) (introducing a collection of essays comparing the regulatory responses to COVID-19 in key countries, as well as the operation of the World Health Organization).

³¹ *See* Nicole Huberfeld, Sarah Gordon & David K. Jones, *Federalism Complicates the Response to the COVID-19 Health and Economic Crisis: What Can Be Done?*, J. HEALTH POL'Y, POL., & L. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3698878 (describing the ways that federalism has engendered unequal responses to the pandemic by states); Lindsay F. Wiley, *Federalism in Pandemic Prevention and Response*, in ASSESSING LEGAL RESPONSES TO COVID-19 65 (Scott Burris et al. eds., 2020) (briefly describing how federal-state conflict has stymied the pandemic response); Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 N.Y.U. J. LEGIS. & PUB. POL. (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599239 (describing the role of federalism during the early days of the pandemic); Emily Berman, *The Roles of the State and Federal Governments in A Pandemic*, 11 J. NAT'L SECURITY L. & POL'Y 61 (2020) (describing the various roles for the federal and state governments during a pandemic); *see also* Alejandro E. Camacho & Robert L. Glicksman, *Structured to Fail: Lessons from The Trump Administration's Faulty Pandemic Planning and Response*, 10 MICH. J. ENVTL. & ADMIN. L. (forthcoming 2021) (examining the allocation of authority among federal officials during the pandemic under the Trump Administration); James Hodge, *National Legal Paradigms for Public Health Emergency Responses*, 71 AM. U. L. REV. (forthcoming 2021).

³² *See* Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608974 (describing the comparative scope of emergency powers exercised by governments around the world); Stephanie Cooper Blum, *Federalism: Fault or Feature-an Analysis of Whether the United States Should Implement A Federal Pandemic Statute*, 60 WASHBURN L.J. 1 (2020) (describing the extent of federal and state authority to combat a pandemic and advocating a federal pandemic statute).

³³ Examining governance at all four of these levels is particularly important given the global nature of COVID-19. Looking solely at the state and federal responses is inadequate. Pandemics are global problems and so long as borders remain open, even a perfect domestic response will be insufficient. *See, e.g.*, Lawrence O. Gostin, I. Glenn Cohen & Jeffrey P. Koplan, *Universal Masking in the United States: The Role of Mandates, Health Education, CDC*, J. AM. MED. ASS. (Aug. 10, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2769440> (noting the spillover effects of health emergencies). Additionally, local governments are often neglected in scholarship but have provided much of the relevant governance during the pandemic. *See, e.g.*, Dana Bash & Bridget Nolan, *Four mayors reflect on their evolving response to the coronavirus pandemic*, CNN (July 25, 2020), <https://www.cnn.com/2020/07/25/politics/mayors-coronavirus-response/index.html> (“Since the pandemic began, mayors have been at the front lines of the battle to contain the

crucial for reform efforts, as any reform that overlooks or decenters intergovernmental relationships will result in policy that fails to move beyond the scattershot response that we see now.

The Article proceeds in three Parts. Part I describes the governance needs created by the pandemic and the ways that our governance capabilities fell short at all levels. Part II provides a framework that describes and characterizes the intergovernmental behaviors that arose in the absence of preexisting pandemic guidance. Part III offers structural and political explanations for these intergovernmental behaviors, and proposes reforms that mitigate the potential for intergovernmental conflict and passivity, thereby increasing the chances of effective pandemic management. The Conclusion describes how our framework and insights can apply beyond the context of the early COVID-19 pandemic, potentially to other crises requiring robust and coordinated governmental response.

I. PANDEMIC THEORY AND POLICY

There is both a robust academic literature on pandemics and crisis management, as well as a host of international, federal, state, and local policies already in place that seek to respond to pandemics and related public health problems. Examining the theory and policy of pandemics together—as we do in this Part—reveals a gap between the serious demands that pandemics place on governments and the pandemic-related policies that we possess.

Crisis management theory tells us that effectively responding to a pandemic requires extensive intergovernmental work: governments must identify and define the crisis and then clearly communicate and coordinate their response. Our existing pandemic policies largely failed to accomplish these tasks, opening up space for the more ad hoc governance that we discuss in Part II. Nationally, there is no clear blueprint for a concerted response to a widespread infectious outbreak. The United States has not experienced a pandemic on the scale of COVID-19 for over a century. Infectious disease has received little federal policy attention until recent decades, when concerns about bioterrorism recast infectious disease in security terms. Internationally, the World Health Organization adopted an updated framework for addressing infectious disease in 2005—the revised International Health Regulations—but that framework provides only a partial path forward due to political and financial constraints as well as a lack of clarity on pandemic policy within countries. State and local public health authorities hold broad

coronavirus in cities all across the country.”).

powers to respond to outbreaks, but largely lack coordination mechanisms. The absence of a clear national template for action, key pressure points within the international template, and the fact that policies are enacted by institutions that themselves reflect existing inequalities, form the backdrop against which COVID-19 arose.

A. *Pandemics and Crisis Management Theory*

Crises in general, and pandemics in particular, place heavy demands on leaders, governments, and policies. A crisis is typically defined as a phase of disorder³⁴ marked by elevated levels of threat, urgency, and uncertainty.³⁵ Crises require actions to be taken on a compressed time scale. And they are characterized by a high degree of uncertainty surrounding the nature of the threat, its consequences, the search for solutions, and the public's response to the emerging situation. A crisis simultaneously generates an overload of raw data and a shortage of clear, accurate information, making it hard to parse signal from noise. When a crisis is global in scope, uncertainty may be magnified by lengthy and complex chains of causation. This description of crisis encompasses a wide range of events, from natural disasters to political unrest.³⁶ What these events have in common is that they call on political leaders to serve as crisis managers and to solve complex problems with incomplete information.

As crisis managers, political leaders are faced with varied tasks during the lifecycle of a crisis. First, they must determine that a crisis is occurring and make sense of it.³⁷ Identifying an event as a crisis is critical to raising public awareness, placing the crisis on the political agenda, and facilitating a collective response.³⁸ Yet crises are often hard to detect at the outset. Leaders must weigh the consequences of waiting for more information against committing resources on the basis of the limited or fragmented information

³⁴ See Charles Tilly & Arthur L. Stinchcombe, *Roads from Past to Future*, in LEGACIES OF SOCIAL THOUGHT SERIES (1997).

³⁵ URIEL ROSENTHAL ET AL., COPING WITH CRISES: THE MANAGEMENT OF DISASTERS, RIOTS, AND TERRORISM 10 (1989) (defining crisis as “a serious threat to the basic structures or the fundamental values and norms of a social system, which—under time pressure and highly uncertain circumstances—necessitates making critical decisions”).

³⁶ For more examples, see Eric Stern & Bengt Sundelius, *Crisis Management Europe: An Integrated Regional Research and Training Program*, 3 INT'L STUD. PERSPECTIVES 71 (2003).

³⁷ ARJEN BOIN ET AL., THE POLITICS OF CRISIS MANAGEMENT: PUBLIC LEADERSHIP UNDER PRESSURE 18-41 (2006).

³⁸ Sandra K. Schneider & Marty P. Jordan, *Political Science Research on Crises and Crisis Communications*, in THE HANDBOOK OF INTERNATIONAL CRISIS COMMUNICATION RESEARCH 14 (Andreas Schwarz, Matthew W. Seeger & Claudia Auer eds., 2016).

available. They must identify what the crisis is, the level of threat it poses, and how the situation is likely to evolve over time. And they must make sense of the crisis' meaning and frame it with a compelling story that shapes attitudes and behaviors in a productive way.³⁹

Second, political leaders must mount an effective response based on strategies that resonate with how they have framed the crisis.⁴⁰ Such a response requires clear communication and competent coordination. During a crisis, the public is in a state of anxiety and has a heightened need for transparency and guidance.⁴¹ Uncertainty and fear are highest at the outset of a crisis, limiting the public's ability to process information. Early communication, therefore, needs to be clear, simple, and frequent,⁴² relaying accurate information—good and bad—quickly.⁴³ The public needs straightforward instructions on how to stay safe, and the key elements must be repeated.⁴⁴ One study found that an audience needs to hear a message related to health risk nine to twenty-one times to effectively communicate risk.⁴⁵

Effective crisis management also requires different actors to coordinate their efforts. An emergency requires clear lines of authority. Coordination is needed to avoid conflicts, unnecessary overlap, and to prevent miscommunication.⁴⁶ When a crisis extends across multiple jurisdictions or its scope exceeds the response capacity of local authorities,⁴⁷ there can be an “upward” shift in decision-making as the task of coordinating the response

³⁹ JOHN HANNIGAN, DISASTERS WITHOUT BORDERS: THE INTERNATIONAL POLITICS OF NATURAL DISASTERS 82 (2012).

⁴⁰ BOIN ET AL., *supra* note [], at 82.

⁴¹ Ana Mendy, Mary Lass Stewart & Kate VanAkin, *A Leader's Guide: Communicating with Teams, Stakeholders, and Communities During COVID-19*, in LEADERSHIP IN A CRISIS: RESPONDING TO THE CORONAVIRUS OUTBREAK AND FUTURE CHALLENGES 1 (2020), <https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/A%20leaders%20guide%20Communicating%20with%20teams%20stakeholders%20and%20communities%20during%20COVID%2019/A-leaders-guide-Communicating-with-teams-stakeholders-and-communities-during-COVID-19-vF.pdf>.

⁴² MENDY, STEWART & VANAKIN, *supra* note [], at 2.

⁴³ Fran H. Norris et al., *Community Resilience as a Metaphor, Theory, Set of Capacities, and Strategy for Disaster Readiness*, 41 AM. J. CMTY. PSYCH 127, 127–50 (2008).

⁴⁴ T. Vihalemm, M. Küsel & H. Harro-Loit, *Citizens' Response Patterns to Warning Messages*, 20 J. CONTINGENCIES AND CRISIS MGMT. 13, 13–25 (2012).

⁴⁵ Lu Liu, Xi Lu, & Xiaofei Xie, *Inverted U-shaped Model: How Frequent Repetition Affects Perceived Risk*, 10 JUDGMENT AND DECISION MAKING No. 3, at 219–24 (2015).

⁴⁶ BOIN ET AL., *supra* note [], at 12.

⁴⁷ *Id.*

moves up to regional, national, or international authorities.⁴⁸

By nature, infectious disease is not geographically contained and requires coordination across all jurisdictions affected. By the time an epidemic becomes a pandemic, there is worldwide transmission.⁴⁹ For this reason, infectious disease control is considered a global public good that no single government can provide on its own.⁵⁰ National authorities must work together to coordinate reporting and response efforts, and hard international law is needed to discourage countries from defecting.⁵¹ Guides on public health preparedness and response recommend a “whole-of-government” and “whole-of-society” approach for combatting public health emergencies, typically recommending federal and international leadership, coordination, and support,⁵² with local execution of crisis response.⁵³

B. Pandemic Policy

These demands of successful pandemic management are at odds with the pandemic policies we possess. Because our constitution disperses power

⁴⁸ *Id.* at 42; see also *id.* at 171 (“Crises exert upward pressure on routine decision-making structures.”).

⁴⁹ *What is a Pandemic?*, WORLD HEALTH ORG. (Feb. 24 2010), https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/ (“A pandemic is the worldwide spread of a new disease.”).

⁵⁰ A global public good is “nondivisible,” meaning that all can benefit from the public good once it is produced, and “nonexcludable,” meaning that it is not possible to exclude any individual or group from the benefits. Lincoln C. Chen, Tim G. Evans & Richard A. Cash, *Health as a Global Public Good*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 284 (Inge Kaul, Isabelle Grunberg & Marc A. Stern, eds., Oxford University Press 1999).

⁵¹ Hard international law—law that is binding, precise, and delegates interpretive and enforcement authority to a third party—is useful for making serious commitments. Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT’L ORG. 401 (2000).

⁵² World Health Organization [WHO], *A World at Risk: Annual report on global preparedness for health emergencies* 8 (Sept. 2019), https://apps.who.int/gpmb/assets/annual_report/GPMB_annualreport_2019.pdf; Barishansky, *supra* note [], at 5, 13; U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 21 (4th ed. 2019). The National Response Framework sought to create a guide for how to best organize federal, state, local, and private response to any type of domestic incident, whether or not an emergency has been declared. https://www.fema.gov/pdf/emergency/nrf/NRF_FAQ.pdf.

⁵³ U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 16 (4th ed. 2019). The National Response Framework sought to create a guide for how to best organize federal, state, local, and private response to any type of domestic incident, whether or not an emergency has been declared. https://www.fema.gov/pdf/emergency/nrf/NRF_FAQ.pdf.

between state and federal authorities,⁵⁴ pandemic policies—to the extent they exist at all—exist at all levels of government. In theory, multi-level pandemic policies allow the federal government and international authorities to act on questions of national and international importance while permitting states and local governments to enact laws more tailored to the needs and preferences of their constituents.⁵⁵ In practice, the existence of policies at multiple levels requires tremendous coordination to execute, both vertically among governments and horizontally within governments.⁵⁶

To control a pandemic, all levels of government must work together at surveillance, testing, implementing protective measures, developing drugs and vaccines, and maintaining hospital and equipment capacity. But whereas relatively clear coordination mechanisms exist at the international level, they are lacking at federal, state, and local levels. Across the country, thousands of state- and local- level public health authorities hold broad but dispersed power to respond to outbreaks through quarantines, stay-at-home orders, and business restrictions. Federal public health authorities play a supporting role by injecting resources and providing technical guidance. This supporting role is shaped by federal statutes of relatively recent vintage that were created to address the particular concern of bioterrorism, and do not provide marching orders for a nation-wide response to a widespread and protracted outbreak. Internationally, the World Health Organization and its predecessor organizations have long regulated and coordinated cross-border efforts at infectious disease control. Our decentralized system of government, nationally and globally, complicates those efforts.

1. Local and State

States and local governments possess a “police power” which includes the authority “to enact quarantine laws and ‘health laws of every description.’”⁵⁷ The power to regulate public health “has long been regarded as one of the

⁵⁴ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

⁵⁵ See generally Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987) (discussing the normative values of federalism and decentralized policymaking).

⁵⁶ LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 394 (2016) (“The vast expansion of emergency preparedness laws has raised concerns about coordination among different levels of government, interagency coordination within each level of government, and protections for individual rights.”).

⁵⁷ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824)).

states' primary and most important 'police powers.'"⁵⁸ States have historically enacted a host of laws responsive to health emergencies—and outbreaks in particular—including forced isolations, quarantines, and detentions.⁵⁹ More recently, states have deployed their powers to respond to the security concerns raised by the September 11 attacks. Following 9/11, the CDC commissioned the creation of a “Model State Emergency Health Powers Act” (MSEHPA), which was designed to provide a statutory framework for states to respond to public health emergencies, especially those related to terrorism.⁶⁰ The MSEHPA has been adopted by thirty-nine states and the District of Columbia.⁶¹

The MSEHPA and other state laws provide broad powers to governors to take action to respond to emergencies.⁶² Governors are empowered to declare emergencies in outbreaks of communicable disease.⁶³ Some states specify that state emergencies are partly defined as emergencies so severe that they exceed the capacities of local governments to handle.⁶⁴ During declared emergencies, governors consolidate the authority of the state executive branch, including its agencies.⁶⁵ Specific powers vary by state, but as a general

⁵⁸ *Women's Cmty. Health Ctr. of Beaumont, Inc. v. Texas Health Facilities Comm'n*, 685 F.2d 974, 981 n.11 (5th Cir. 1982) (citing Supreme Court cases). For an overview of the state police power as it relates to public health, see James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 318-30 (1998).

⁵⁹ See generally Hodge, *supra* note [], at 325-30; Adam Klein & Benjamin Wittes, *The Long History of Coercive Health Responses in American Law*, LAWFARE.COM (Apr. 13, 2020, 2:56 PM), <https://www.lawfareblog.com/long-history-coercive-health-responses-american-law>.

⁶⁰ GOSTIN & WILEY, *supra* note [], at 399-400.

⁶¹ *Id.* at 394.

⁶² Some have criticized the MSEHPA for granting unchecked emergency powers that may infringe on civil liberties. See, e.g., ACLU, *Model State Emergency Health Powers Act*, <https://www.aclu.org/other/model-state-emergency-health-powers-act>.

⁶³ See, e.g., ARIZ. REV. STAT. § 26-301(15) (defining a “State of emergency” as a “condition[] of disaster or of extreme peril” caused by, among other things, “epidemic”); CAL. GOV'T CODE § 8558(b) (same).

⁶⁴ See ARIZ. REV. STAT. § 26-301(15) (requiring that states of emergency be “likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat”); CAL. GOV'T CODE § 8558(b) (same).

⁶⁵ See, e.g., CAL. GOV'T CODE § 8627 (“During a state of emergency the Governor shall . . . have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter.”); ARIZ. REV. STAT. § 26-303(E) (same); N.Y. EXEC. LAW § 29 (“Upon the declaration of a state disaster emergency the governor may direct any and all agencies of the state government to provide assistance under the coordination of the disaster preparedness commission”); TEX.

matter, governors and other state actors may prevent people from gathering together,⁶⁶ administer quarantines, detentions, and disinfection,⁶⁷ use state funding for relief spending,⁶⁸ commandeer private property for the emergency response,⁶⁹ suspend state laws,⁷⁰ engage in enhanced surveillance techniques,⁷¹ and regulate businesses.⁷²

Some of these state laws encourage coordination with other governmental authorities, but only weakly. The MSEHPA, for instance, requires the development of a plan “to provide a coordinated appropriate response” to public health emergencies.⁷³ Upon the declaration of a public health emergency, the MSEHPA requires the state public health authority to coordinate response efforts between state and local authorities as well as to collaborate with relevant federal government authorities and elected officials

GOV'T CODE § 418.015(c) (same); VT. STAT. ANN. tit. 20, § 9(1) (same).

⁶⁶ MICH. COMP. LAWS § 333.2253(1) (“If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws.”); TEX. GOV'T CODE § 418.018 (empowering the governor to regulate the “[m]ovement of [p]eople”).

⁶⁷ TEX. HEALTH & SAFETY CODE § 81.082(f) (empowering state officials to regulate “(1) immunization; (2) detention; (3) restriction; (4) disinfection; (5) decontamination; (6) isolation; (7) quarantine; (8) disinfestation; (9) chemoprophylaxis; (10) preventive therapy; (11) prevention; and (12) education”).

⁶⁸ *See, e.g.*, CAL. GOV'T CODE § 8566 (“The Governor is empowered to expend any appropriation for support of the California Emergency Services Act to carry out the provisions of this chapter.”).

⁶⁹ *See, e.g.*, CAL. GOV'T CODE § 8572 (“In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof.”); TEX. GOV'T CODE ANN. § 418.017(c) (“The governor may commandeer or use any private property if the governor finds it necessary to cope with a disaster, subject to the compensation requirements of this chapter.”).

⁷⁰ *See, e.g.*, N.Y. EXEC. LAW § 29-a(1) (“[T]he governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster.”).

⁷¹ *See, e.g.*, ARIZ. REV. STAT. § 36-782.

⁷² *See, e.g.*, WASH. REV. CODE ANN. § 43.06.220(2)(g) (authorizing the governor to issue “statutory and regulatory obligations or limitations prescribing the procedures for conduct of state business”).

⁷³ MSEHPA Preamble.

of other states.⁷⁴ Vermont's emergency management director, for example, is required to “[m]aintain liaison and cooperation with emergency management agencies and organizations of the federal government, other states, and Canada.”⁷⁵ However, these state directives lack policy specificity, clear lines of authority, and mechanisms for decision-making that would enable a coordinated response to a nation-wide pandemic.

Local governments are also important sources of pandemic policy. Local governments are technically creations of the state.⁷⁶ In practice, however, they are often quite independent from their states and exercise significant discretion of their own.⁷⁷ State laws both grant legal authority to local government actors to respond to pandemics and constrain local power.⁷⁸ In Arizona, for example, local government leaders may declare local states of emergency and exercise a wide range of powers, including ordering curfews and closing businesses.⁷⁹ New York designates its local governments as “the first line of defense in times of disaster,” with support from the state,⁸⁰ and empowers local executives to establish curfews, suspend sales, and regulate public gatherings.⁸¹ State laws constrain these local powers as well. In Arizona, local orders may not conflict with state action.⁸² In Vermont, state actors—and not local ones—appoint the members of local emergency planning committees.⁸³

⁷⁴ MSEHPA art. IV, § 403(b).

⁷⁵ VT. STAT. ANN. tit. 20, § 3(b)(3); see also MICH. COMP. LAWS ANN. § 30.407(1) (same).

⁷⁶ See *Hunter v City of Pittsburgh*, 207 U.S. 161, 178 (1907) (local governments are “subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them”).

⁷⁷ See Richard Briffault, “What About the ‘Isms?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1318 (1994) (“In practice, [local governments] function as representatives of local constituencies and not as field offices for state bureaucracies.”); Weinstein-Tull, *supra* note [], at 1105 (noting that “[l]ocal governments are quirky hybrids” between state creation and independent entity).

⁷⁸ Those delegations of authority may track the diversity of state-local relationships more broadly. See Weinstein-Tull, *supra* note [], at 877-83 (describing how the broader relationships between states and their local governments inform the state-local balance of power in the context of specific policy areas).

⁷⁹ See ARIZ. REV. STAT. § 26-311.

⁸⁰ N.Y. EXEC. LAW § 20(1)(a). Other states grant similarly broad local powers. See, e.g., MICH. COMP. LAWS § 333.2453(1).

⁸¹ *Id.* § 24.

⁸² ARIZ. REV. STAT. § 26-307(A) (“[C]ounties, cities and towns may make, amend and rescind orders, rules and regulations necessary for emergency functions but such shall not be inconsistent with orders, rules and regulations promulgated by the governor.”).

⁸³ VT. STAT. ANN. tit. 20, § 32(a).

State and local public health policies mirror and perpetuate existing income inequalities. Pandemic policy exists at all levels of domestic government, but it is enacted by a myriad of public health systems that vary greatly, both between and within states, in capacity and preparedness. The degree of inequality in local public health spending approximates household income inequality, ranging from less than \$1 per capita to \$400 per capita.⁸⁴ Due to long-term underfunding of public health and emergency preparedness systems,⁸⁵ only five states have over half of their population served by a comprehensive public health system.⁸⁶ More generally, there are significant differences in health care access and outcomes across the country, with rural populations faring worse than their urban and suburban counterparts.⁸⁷

2. National

Sandwiched between state and local governments on the one hand and international organizations on the other, the federal government has used its policymaking authority predominantly to play a supportive role in public health emergencies.

The Constitution does not provide pandemic-specific federal powers, but it does provide Congress with general Commerce and Spending powers to enact pandemic-related policies. The Commerce Clause empowers Congress to “regulate Commerce . . . among the several States.”⁸⁸ Although not as broad a power as it once was,⁸⁹ the Commerce power still permits the federal

⁸⁴ *Public Health Spending and Medicare Resource Use: A Longitudinal Analysis of U.S. Communities*, SYSTEMSFORACTION.COM (2017), <http://systemsforaction.org/projects/public-health-spending-and-medicare-resource-use-longitudinal-analysis-us-communities>.

⁸⁵ See LAURIE GARRETT, BETRAYAL OF TRUST: THE COLLAPSE OF GLOBAL PUBLIC HEALTH, 316-480 (2000) (describing deep cuts to the American public health infrastructure during the second half of the twentieth century).

⁸⁶ 2018 National Longitudinal Survey of Public Health Systems, SYSTEMS FOR ACTION.COM (2018), <http://systemsforaction.org/projects/nalsys-resources-and-results/articles/national-longitudinal-survey-public-health-systems-nalsys-united-states-1998-2018> (based on following a nationally representative cohort of communities from 1998 to 2018).

⁸⁷ Department of Health and Human Services, Health Resources and Services Administration Office of Health Equity, *Health Equity Report 2017* (2018), <https://www.hrsa.gov/sites/default/files/hrsa/health-equity/2017-HRSA-health-equity-report.pdf>.

⁸⁸ U.S. CONST. art. I, § 8, cl. 3.

⁸⁹ See generally *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (striking down the Gun-Free School Zones Act as beyond Congress’s Commerce Clause authority, and noting that although prior Commerce Clause cases had “giv[en] great deference to congressional action,” the Court “declin[e] here to proceed any further”); Ernest A. Young, *The Rehnquist*

government to regulate even private action in areas of traditional state regulation⁹⁰ so long as those activities “substantially affect interstate commerce.”⁹¹ The Spending Clause empowers Congress to “pay the Debts and provide for the . . . general Welfare of the United States,”⁹² and allows Congress, with some limitations, to offer federal funding to states in exchange for state action that enacts federal priorities.⁹³ Emergencies, like pandemics, do not *create* additional constitutional powers,⁹⁴ and though the President may take action to respond to emergencies, the Court has generally required those actions to find support in existing legislation.⁹⁵

Over the past two decades, Congress has used these powers to enact a host of pandemic-related laws.⁹⁶ Most were shaped by the September 11, 2001 terrorist attacks and the ensuing anthrax attacks of 2001, when letters laced with anthrax appeared in the United States mail targeting news media offices and two Democratic Senators.⁹⁷ Around the same time, Congress enacted the Public Health Threats and Emergencies Act,⁹⁸ the Public Health

Court's Two Federalisms, 83 TEX. L. REV. 1, 2 & n.1 (2004) (noting *Lopez* was part of “a change in the Court’s direction”).

⁹⁰ See generally *Gonzales v. Raich*, 545 U.S. 1 (2005) (affirming federal marijuana laws as a constitutional exercise of the Commerce Power, even as applied to an individual using privately grown marijuana for medical purposes within a state with legalized medical marijuana).

⁹¹ *Id.* at 17.

⁹² U.S. CONST. art. I, § 8, cl. 1.

⁹³ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576, 580-81 (2012) (noting that the Court has “long recognized that Congress may use [its Spending] power to grant federal funds to the States, and may condition such a grant upon the States’ taking certain actions that Congress could not require them to take” but also holding that Congress may not *coerce* states to take action by threatening to withdraw existing federal funding) (internal quotations omitted).

⁹⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting) (“Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.”).

⁹⁵ See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

⁹⁶ Because these laws have been ably collected and described elsewhere, what follows is just a summary. See GOSTIN & WILEY, *supra* note [], at 399-400; James Hodge & Evan Anderson, *Principles and Practice of Legal Triage During Public Health Emergencies*, 64 N.Y.U. ANN. SURV. AM. L. 249, 255-63 (2008).

⁹⁷ Federal Bureau of Investigation, *Amerithrax or Anthrax Investigation*, <https://www.fbi.gov/history/famous-cases/amerithrax-or-anthrax-investigation>.

⁹⁸ Public Health Threats and Emergencies Act of 2000, Pub. L. No. 106-505, 114 Stat.

Security and Bioterrorism Preparedness and Response Act,⁹⁹ Project Bioshield Act,¹⁰⁰ the Public Readiness and Emergency Preparedness Act,¹⁰¹ the Pandemic and All-Hazards Preparedness Act,¹⁰² the National Response Framework,¹⁰³ and the National Strategy for Pandemic Influenza.¹⁰⁴ These law joined pre-existing public health statutes such as the Robert T. Stafford

2314. This law amended the Public Health Service Act to fund improved federal response capabilities, a system for evaluating state readiness, and grant programs for states to improve their public health capacity.

⁹⁹ Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat 594 (codified at 42 U.S.C. § 300hh). This law amended the Public Health Service Act in response to anthrax concerns to better prepare the federal government to respond to a bioterrorism or other public health emergency.

¹⁰⁰ Project Bioshield Act of 2004, Pub. L. No. 108-276, 118 Stat 835. This law authorizes the Secretary of the Department of Health and Human Services to research, create, acquire, and stockpile countermeasures to chemical, biological, radiological, or nuclear threats.

¹⁰¹ Public Readiness and Emergency Preparedness Act of 2005, Pub. L. No. 109-148, Div. C, § 2, 119 Stat. 2818. This law provides some immunity from tort liability from the use of countermeasures authorized by the HHS Secretary during a public health emergency.

¹⁰² Pandemic and All-Hazards Preparedness Act of 2006, Pub. L. No. 109-417. This law provided funding for public health and medical preparedness programs, including Project BioShield, created the Assistant Secretary for Preparedness and Response in the Department of Health and Human Services, and established the National Health Security Strategy, a response plan to be updated every four years “to prevent, detect, assess, prepare for, mitigate, respond to, and recover from disasters and emergencies.” Ass’n of State and Territorial Health Officials, *Pandemic and All-Hazards Preparedness Act Fact Sheet* (2011), <https://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Pandemic-and-All-Hazards-Preparedness-Act-Fact-Sheet/>. The current Assistant Secretary for Preparedness and Response has received some criticism for using funds to stockpiling defense against manmade bioterrorism rather than viral pandemics. See Jon Swaine et al., *Before pandemic, Trump’s stockpile chief put focus on biodefense. An old client benefited.*, WASH. POST (May 4, 2020, 7:35 AM), 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. The Pandemic and All-Hazards Preparedness Act was reauthorized as 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).

¹⁰³ U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK (4th ed. 2019). The National Response Framework sought to create a guide for how to best organize federal, state, local, and private response to any type of domestic incident, whether or not an emergency has been declared.

¹⁰⁴ U.S. Homeland Sec. Council, *National Strategy for Pandemic Influenza* (2005), <https://www.cdc.gov/flu/pandemic-resources/planning-preparedness/national-strategy-planning.html>. The National Strategy for Pandemic Influenza was established by the George W. Bush administration in 2005 and an implementation plan was published in May 2006 by the Department of Homeland Security. Its purpose was to prepare for a response to a potential pandemic, with a focus on the avian flu.

Disaster Relief and Emergency Assistance Act,¹⁰⁵ the Public Health Service Act,¹⁰⁶ and the Federal Food, Drug and Cosmetic Act.¹⁰⁷ These statutes are administered by a number of bureaucratic agencies, including the Centers for Disease Control and Prevention,¹⁰⁸ the Food and Drug Administration,¹⁰⁹ and the Homeland Security Council.¹¹⁰

These statutes enable the federal government to play largely *supporting* roles—like providing financial assistance, technical guidance, and research support—in public health emergencies. The Stafford Act, for example, authorizes the federal government to assist state and local governments during declared disasters or emergencies, but governors typically need to initiate the request.¹¹¹ The Public Health Threats and Emergencies Act, the Public Health Security and Bioterrorism Act, and the Pandemic and All-

¹⁰⁵ 42 U.S.C. § 5121 (2012).

¹⁰⁶ 42 U.S.C. § 201 (2012). The Public Health Service Act of 1944 gave the Department of Health and Human Services (HHS) the responsibility of limiting the spread of communicable diseases in the United States. 42 U.S.C. § 247d (2012). It gives the HHS Secretary broad discretion to declare a public health emergency, which frees up federal funds for the executive branch to use, without having to wait for a governor to request it.

¹⁰⁷ 21 U.S.C. §§ 301-399 (2012). This law provides a process through which drugs, vaccines, and other countermeasures to pandemics are approved. It also allows for the emergency authorization for unapproved countermeasures in some circumstances. *See* 21 U.S.C. § 360bbb-3(a)(1) (2012).

¹⁰⁸ The Centers for Disease Control is responsible for preventing entry and spread of communicable diseases from foreign countries into the United States and between states pursuant to the Public Health Service Act. *See* Centers for Disease Control and Prevention, *Legal Authorities for Isolation and Quarantine*, <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

¹⁰⁹ The Food and Drug Administration has authority to promote potential treatments for diseases. U.S. Food and Drug Administration, *Emergency Use Authorization*, <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization>.

¹¹⁰ The Homeland Security Council created the National Strategy for Pandemic Influenza Implementation Plan and advises the President on potential threats. Other agencies with some responsibility for pandemic response include the Biomedical Advanced Research and Development Authority, the Department of Veteran Affairs, the Federal Emergency Management Agency, the General Services Administration, the National Security Council, and the Department of State.

¹¹¹ 42 U.S.C. § 5121 (2012). There are two types of declarations under the Stafford Act that allows the President to access additional federal funding and other resources. First, a “major disaster” declaration is limited to “any natural catastrophe” that overwhelms state capabilities and must be initiated by a governor request for federal assistance to which the President agrees. 42 U.S.C. §§ 5170, 5122(2) (2018). It is not clear if a pandemic qualifies as a major disaster. Second, an “emergency” declaration can be “any occasion or instance” and can be either initiated by a governor request for assistance or unilaterally declared by the President where the incident involves primary federal responsibility. 42 U.S.C. § 5170.

Hazards Preparedness Act each authorize the provision of funding and assistance to states and local governments to assess readiness and improve capacity in areas such as surveillance, reporting, laboratory infrastructure, and personnel training.¹¹²

By contrast, the federal government engages in limited *direct* response and regulatory activities. These activities are rare in practice and are focused on individuals suspected or confirmed to be infected who are arriving from foreign countries or moving between states.¹¹³ The CDC also provides guidelines to states, but these are not legally binding, nor does the CDC have personnel on the ground to implement them.

Many of these federal statutes place federal agencies in a coordinating role, but like their state statute counterparts, the coordination envisaged is vague. For instance, the Pandemic and All-Hazards Preparedness Act established a National Health Security Strategy that promotes a “whole-of-government” and “whole-of-nation” response, but does not provide a clear action plan or lines of authority.¹¹⁴

3. International

Sitting above a thick layer of broad but dispersed local and state authority, and a thin layer of federal supportive activity, is a clear framework for international cooperation led by the World Health Organization (WHO). WHO is the overall “directing and co-ordinating authority on international health work.”¹¹⁵ Its functions include providing technical assistance and aid during emergencies, establishing epidemiological services, and working toward the eradication of epidemic diseases.¹¹⁶ WHO’s policy-making body,

¹¹² Public Health Threats and Emergencies Act, Pub. L. No. 106-505, 114 Stat. 2314 (2000); Public Health Security and Bioterrorism Act, Pub. L. No. 107-188, 116 Stat. 594 (2002); Pandemic and All-Hazards Preparedness Act, Pub. L. No. 109-417, 120 Stat. 2831 (2006).

¹¹³ The Division of Global Migration and Quarantine within the CDC can apprehend, detain, or examine individuals arriving from a foreign country. 42 U.S.C. § 264(c). It can also apprehend and examine individuals who are moving between states that it “reasonably believes” to be infected, and can detain them if they are confirmed to be infected. 42 U.S.C. § 264(d)(1).

¹¹⁴ Department of Health and Human Services, Office of the Assistance Secretary for Preparedness and Response, Office of Strategy, Policy, Planning, and Requirements, *National Health Security Strategy: Implementation Plan 2019-2022*, <https://www.phe.gov/Preparedness/planning/authority/nhss/Documents/2019-2022-nhss-ip-v508.pdf>.

¹¹⁵ World Health Organization [WHO], *WHO Constitution*, art. 2(a) (2006).

¹¹⁶ *WHO Constitution*, *supra* note [], at art. 2(d), (f), (g).

the World Health Assembly, has the authority to adopt regulations aimed at preventing the international spread of disease.¹¹⁷ Most recently, WHO updated an earlier version of international infectious disease law by enacting the 2005 International Health Regulations (2005 IHR).¹¹⁸

The 2005 IHR provides a roadmap for coordinating international infectious disease control efforts and has been adopted by 196 state parties, including the United States, making it one of the most widely subscribed to instruments of international law.¹¹⁹ It vastly expanded WHO's power to lead an international response to outbreaks like COVID-19. It covers "all events which may constitute a public health emergency of international concern" and aims to rapidly detect and swiftly control epidemics at their source. Unlike predecessor regulations that sought to prevent the movement of specific diseases across national borders, this approach entails greater authority on the part of WHO, deeper obligations on the part of signatory countries, and significant overlap between domestic and international infectious disease control efforts.

The 2005 IHR requires state parties to assess public health events within their territory and to notify WHO of all events "which may constitute a public health emergency of international concern."¹²⁰ After the initial notification, state parties must continue communicating to WHO "timely, accurate, and sufficiently detailed public health information" concerning the event, including case definitions, lab results, the number of cases and deaths, as well as the difficulties encountered and support needed to respond to the event.¹²¹ State parties must also develop and maintain the domestic public health capacity necessary to detect, report, and respond promptly to public health emergencies of international concern.¹²²

On WHO's part, the organization must carry out its independent

¹¹⁷ *Id.* at art. 21(a).

¹¹⁸ World Health Organization [WHO], *International Health Regulations*, 2509 U.N.T.S. 79 (May 23, 2005), https://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf;jsessionid=20FCAB9DC8D5BE67F27BF53FD2C27C56?sequence=1 [hereinafter 2005 IHR].

¹¹⁹ See World Health Organization, *Strengthening health security by implementing the International Health Regulations (2005): States Parties to the International Health Regulations (2005)*, https://www.who.int/ihr/legal_issues/states_parties/en/. Adoption of the 2005 IHR is voluntary and member states of WHO can opt out. World Health Organization [WHO], *WHO Constitution*, art. 22 (2006).

¹²⁰ 2005 IHR, *supra* at note [], at art. 6-7.

¹²¹ *Id.* at art. 6(a).

¹²² *Id.* at art. 5(1) and 13(1). These capacity building requirements must be met within five years of the 2005 IHR entering into force, with the possibility of two two-year extensions.

surveillance activities by collecting its own information as well as considering reports from sources other than the state party where the event is occurring.¹²³ Once WHO has received and verified outbreak information with the state party where the outbreak is occurring, the organization has the authority to disseminate that information, declare a public health emergency of international concern, and issue recommendations regarding health measures to be implemented.¹²⁴ It can recommend health measures such as restrictions for people, cargo, and conveyances that are intended to prevent or reduce the international spread of disease while avoiding unnecessary interference with international traffic.¹²⁵ State parties that implement measures beyond those recommended by WHO and that significantly interfere with international traffic must provide a public health rationale.¹²⁶ When requested, WHO must also assist state parties in reaching their capacity building requirements.¹²⁷

Although the 2005 IHR was considered a “revolution in the governance of global infectious disease,”¹²⁸ its implementation is complicated by domestic and international governance constraints. In adopting the 2005 IHR, the United States reserved the right to assume obligations under the agreement “in a manner consistent with its fundamental principles of federalism.”¹²⁹ It

¹²³ *Id.* at art. 5, ¶ 4 and 9, ¶ 1. Previously, WHO had no authority to actively collect information regarding disease outbreaks and could not act even if it had become aware of an epidemic covered by the predecessor law.

¹²⁴ *Id.* at art. 11, 12, 15, 16, 17, and 18.

¹²⁵ *Id.* at art. 15.

¹²⁶ *Id.* at art. 43(3).

¹²⁷ *Id.* at art. 5(1).

¹²⁸ David P. Fidler, *Germ, Governance, and Global Public Health in the Wake of SARS*, 113 J. CLINICAL INVESTIGATION 799, 799 (2004).

¹²⁹ 2005 IHR, *supra* at note [], at appendix 2. International law permits countries the freedom to determine the domestic mechanisms and structures through which they meet their international obligations. ANTONIO CASSESE, *INTERNATIONAL LAW* 220 (2d ed., Oxford University Press 2005) (States consider that the translation of international commands into domestic legal standards is part and parcel of their sovereignty and are unwilling to surrender it to international control.”).

Other federalist countries have utilized innovative strategies for implementing the agreement, with Australia, Canada, and India each introducing new federal-level legislation to comply with the 2005 IHR. Rebecca Katz & Sarah Komblet, *National Models for International Health Regulations, Comparative Analysis of National Legislation in Support of the Revised International Health Regulations: Potential Models for Implementation in the United States*, 100 Am. J. Pub. Health 2347, 2349-50 (2010); Australian Government, National Health Security Act 2007, No. 174, available at <https://www.legislation.gov.au/Details/C2021C00048> (accessed Feb. 28, 2021); Overview of Pan-Canadian Public Health Network, <http://www.phn-rsp.ca/index-eng.php> (last updated Mar. 21, 2016); Kumanan Wilson et al., *Strategies for Implementing the New*

thus agreed to the framework, but subordinated compliance to its decentralized form of governance. The 2005 IHR's implementation has also been hampered by insufficient resources to improve national core capacities for detection and response, particularly in low-income countries,¹³⁰ as well as the need to further refine centralized coordination mechanisms. Following the Ebola outbreak that emerged in West Africa in 2013, global health scholars recommended the establishment of a dedicated center for outbreak response at WHO with clear lines of accountability and a politically protected WHO standing committee for declaring public health emergencies.¹³¹

II. INTERGOVERNMENTAL BEHAVIORS

Without a clear blueprint for a coordinated governance response, a dischord of governmental voices emerged. As Section I.A described, the nature of the pandemic required not just independent actions from each governmental authority, but *coordinated* governance across them. Federal authorities, who possessed resources and expertise, needed to lead a nation-wide response and provide assistance to those governments that did not.¹³² State authorities, who possessed bird's-eye views of their states, had to decide which public health measures to enact on a statewide basis and which to delegate to local governments.¹³³ Neighboring authorities needed to work together to ensure a consistent set of regulations in any given regional area.¹³⁴ Viewed holistically, however, early pandemic

International Health Regulations, 86 BULLETIN OF THE WORLD HEALTH ORG. 215, 215-220 (2008).

¹³⁰ David P. Fidler & Lawrence O. Gostin, *The new International Health Regulations: an historic development for international law and public health*, 34 J. OF L., MED. & ETHICS 85, 88 (2006) (describing the availability of resources for national capacity building as the 2005 IHR's "most pressing question").

¹³¹ Suerie Moon et al., *Will Ebola change the game? Ten essential reforms before the next pandemic. The report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola*, 386 LANCET 2204, 2204-21 (2015).

¹³² See Carl Hulse, *Financial Aid to Struggling States Is Next Big Congressional Battle*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/us/politics/congress-state-aid-coronavirus.html> ("Anxious governors on the front lines of battling the pandemic have been clamoring for more federal help, saying their budgets are being stretched to the breaking point and their revenues are collapsing as they pour resources into health care while their economies are shut down.").

¹³³ See Sheila R. Foster, *The Georgetown Project on State and Local Government Policy and Law, As COVID-19 Proliferates Mayors Take Response Lead, Sometimes in Conflicts with Their Governors*, <https://www.law.georgetown.edu/salpal/as-covid-19-proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/>.

¹³⁴ See Adam Rogers, *State Alliances Are Leading the US Fight Against Covid-19*, WIRED (Apr. 16, 2020, 7:00 AM), <https://www.wired.com/story/state-alliances-are-leading-the-us-fight->

governance did not correspond with the recommendations of the crisis management literature. The multi-sovereigned, decentralized nature of our governments resulted in a disarray of policies that operated at times in tension and at times in tandem.

This Part distills patterns of intergovernmental cooperation and conflict from the hodge-podge of governmental actions and inactions taken in the early months of the pandemic. Focusing on the actions taken by the WHO, the federal government, eight contrasting states, and select local governments within each state, we identify and categorize these intergovernmental behaviors. Emergent pandemic behaviors fell into two categories: those that implicated intergovernmental conflict and those that implicated intergovernmental coordination. Both types of actions had forms that were more passive and forms that were more active.

Intergovernmental Behaviors

	Conflict	Coordination
Active	<i>Undermining</i>	<i>Collaboration</i>
Passive	<i>Abdication</i>	<i>Bandwagoning</i>

Active conflict is what we call *undermining*: governments destabilized and frustrated each other's actions in various ways and at all levels. Passive conflict consisted of *abdication*: governments failed to act when necessary and abdicated their responsibilities, leaving gaps that were sometimes filled by the unilateral—but largely uncoordinated—efforts of lower-level authorities. Active coordination consisted of *collaboration*: governments explicitly worked together, both vertically and horizontally, to harmonize their policies as well as benefit from each other's knowledge and mistakes. Finally, passive coordination consisted of *bandwagoning*: governments avoided taking initiative in making pandemic policy, opting instead for inaction and then following the leads of others.

A. Conflict

Intergovernmental conflict is built into our system of governance. The founders believed this kind of conflict would prevent any single political actor

against-covid-19/ (“[A]s Covid-19 became a bigger and bigger national problem, a back channel of public health bureaucrats started working on this problem before the federal politicians got to it.”).

from becoming too powerful, and thus protect individual freedom against governmental overreach.¹³⁵ Conflict is thus a “feature” of our federal system,¹³⁶ but it also comes with serious costs, especially during a deadly pandemic. Because nearly any governmental action during an outbreak requires some cooperation with other governments, intergovernmental conflict can frustrate the effectiveness of most public policies.¹³⁷

1. Active: Undermining

One of the most prominent features of early pandemic governance was intergovernmental undermining: when one authority took an action or made a statement that diminished the effectiveness of another authority’s action. Undermining occurred at all levels of government during the response to the pandemic. The federal government undermined the WHO, the states, and local governments. States undermined their local governments, and local governments undermined their states. There has been horizontal undermining as well, largely in the form of the federal government undermining itself.

As we describe at greater length in Section III.A below, undermining is a tool made available to governments by our system of federalism, which provides overlapping responsibilities to multiple layers of government.¹³⁸ Some have argued that undermining has the potential to stimulate discourse

¹³⁵ See *New York v. United States*, 505 U.S. 144, 181 (1992) (“[T]he Constitution divides authority between federal and state governments for the protection of individuals.”); Justin Weinstein-Tull, *The Experience of Structure* (manuscript on file with authors) (describing the ways that divided powers are meant to increase liberty for individuals); THE FEDERALIST NO. 28, 180-81 (Hamilton) (C. Rossiter ed. 1961) (“Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.”).

¹³⁶ See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 61 (2014) (noting that “[c]onflict is a recurring feature of . . . federalism. . . . State-federal friction has long been understood to be both a problem and a valuable part of a well-functioning democracy.”).

¹³⁷ See Weinstein-Tull, *State Bureaucratic Undermining*, *supra* note [], at 1086-87.

¹³⁸ See Robert A. Schapiro, *Toward A Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005) (“The federal government and the states have extensive areas of concurrent authority. In many realms, from narcotics trafficking to securities trading to education, federal and state laws regulate the very same conduct.”). Federalism provides each layer with its own base of constituents and voters, empowering each to disagree and compete with one another. See generally Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 40-41 (2010) (describing how government actors at different levels are responsible not only to the actors above them, but to the constituents below, and that independent source of authority can empower them to resist directives from above).

and thus move national policymaking forward.¹³⁹ Others have argued that it can unproductively and opaquely frustrate governmental aims.¹⁴⁰ Both of these dynamics were at work during the early months of the pandemic.

Upward undermining allowed lower-level governments (local and state) to publicly register disapproval with higher-level governments (state and federal) and push for policy change. In Georgia, for example, when the Governor sought to aggressively re-open the state, he was met with resistance from Keisha Lance Bottoms, the Mayor of Atlanta. “His authority as governor is what it is,” Bottoms stated, “and it certainly supersedes my authority as mayor on paper, but it doesn’t supersede my voice, and I will continue to use my voice to urge our communities, our business owners and our residents to stay in.”¹⁴¹

On the other side of the political aisle, the small county of Modoc, California, with no cases of COVID-19, resisted California’s slow re-opening plan by re-opening its businesses ahead of California’s schedule.¹⁴² Officials in that same county, as well as officials in Nevada City, Orange County, Sacramento County, Fresno County, Tulare County, and Placer County, have refused to enforce California’s mask requirement.¹⁴³ This upward

¹³⁹ See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

¹⁴⁰ See generally Weinstein-Tull, *State Bureaucratic Undermining*, *supra* note [] (arguing that states and local governments may quietly and sometimes unintentionally undermine federal laws in a way that both harms politically disempowered communities and quiets dissent).

¹⁴¹ James Hohmann, *The Daily 202: Reopening debate pits mayors against governors*. *Atlanta vs. Georgia is a preview.*, WASH. POST (Apr. 24, 2020, 10:40 AM), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2020/04/24/daily-202-reopening-debate-pits-mayors-against-governors-atlanta-vs-georgia-is-a-preview/5ea271f8602ff14af7434165>.

¹⁴² Victoria Colliver, *Small California county prepares to defy Newsom by opening bars, churches*, POLITICO (Apr. 30, 2020, 11:41 PM), <https://www.politico.com/states/california/story/2020/04/30/small-california-county-prepares-to-defy-newsom-by-opening-bars-churches-1281627>.

¹⁴³ See Leila Miller et al., *With no coronavirus cases, a California county defies Gov. Newsom and reopens*, LOS ANGELES TIMES (May 1, 2020), <https://www.latimes.com/california/story/2020-05-01/with-no-coronavirus-cases-california-county-defies-newsom-and-reopen-today>; Elita Goyer, *Modoc County Sheriff: ‘We Will Not Be Enforcing the Face-Mask Order,’* ACTION NEWS NOW (June 25, 2020, 5:25 PM), <https://www.actionnewsnow.com/content/news/Modoc-Co-Sheriff-We-will-not-be-enforcing-the-face-mask-order-571382711.html>; Alex Wigglesworth, *Mayor of Nevada City in Northern California lashes out at face coverings rule*, LOS ANGELES TIMES (June 21, 2020), <https://www.latimes.com/california/story/2020-06-21/mayor-of-nevada-city-in-northern-california-lashes-out-at-face-coverings-rule>. See also Ryan J. Foley, *Defying governor, Iowa City mayor mandates masks in public*, ASSOCIATED PRESS (July 21, 2020), <https://apnews.com/146dbfdb47167b0b824f5b44ec8f0697> (“Iowa City’s mayor on

undermining actually resulted in the state of California loosening restrictions on some smaller jurisdictions.¹⁴⁴

Downward undermining allowed states to press their local governments to come into step with state law. The Nebraska Governor, for example, threatened to withhold COVID-19 funding from local governments that required people using public services to wear masks.¹⁴⁵ The Texas Attorney General threatened Austin, San Antonio, and Dallas with lawsuits if they did not roll back their mask and shelter-in-place requirements to match the state's more relaxed laws.¹⁴⁶ Conversely, the California governor threatened to withhold funding to local police departments that refused to enforce the state's mask mandate.¹⁴⁷ Although some of these local governments were more in line with federal guidelines than their states, undermining nevertheless permitted states to assert downward control over their local governments.

Other times, undermining served no useful function and was aimed instead at political gaming and distraction. The federal government—and President Trump in particular—undermined actors at every level of government, including at the federal level, causing confusion and

Tuesday ordered people to wear masks in public to stop the spread of the coronavirus, defying Gov. Kim Reynolds' claim that cities cannot mandate face coverings.”)

¹⁴⁴ See Hannah Fry & Patrick McGreevy, *California allows 12 counties to reopen; 31 others lobby to join them*, LOS ANGELES TIMES (May 13, 2020), <https://www.latimes.com/california/story/2020-05-13/california-allows-12-counties-to-reopen-31-other-counties-are-lobbying-to-join-them>; Alexei Koseff & Erin Allday, *Gov. Gavin Newsom eases reopening requirements for California counties*, SAN FRANCISCO CHRONICLE (May 19, 2020, 9:42 AM), <https://www.sfchronicle.com/politics/article/Gov-Gavin-Newsom-eases-reopening-requirements-15278477.php>.

¹⁴⁵ See Paul Hammel, *Ricketts tells local governments they won't get federal COVID-19 money if they require masks*, OMAHA WORLD-HERALD (June 18, 2020), https://www.omaha.com/news/state_and_regional/ricketts-tells-local-governments-they-wont-get-federal-covid-19-money-if-they-require-masks/article_d15459b9-26df-527e-9899-9f579a3d8597.html (“[W]hen it comes to the state's 93 courthouses and other county offices, he doesn't want local officials to require masks. In fact, he's told counties that they won't receive any of the \$100 million in federal COVID-19 money if their “customers” are required to wear masks.”).

¹⁴⁶ See Emma Platoff, *Texas Attorney General Ken Paxton warns Austin, San Antonio, Dallas to loosen coronavirus restrictions*, TEX. TRIBUNE (May 12, 2020, 5:00 PM), <https://www.texastribune.org/2020/05/12/texas-attorney-general-warn-cities-coronavirus/>.

¹⁴⁷ Brian Mann, *More States Require Masks in Public as COVID-19 Spreads, But Enforcement Lags*, NPR (July 8, 2020, 5:00 AM), <https://www.npr.org/2020/07/08/888499285/more-states-requiremasks-in-public-as-covid-19-spreads-but-enforcement-lags> [<https://perma.cc/29ZP-6EXN>].

inconsistency. In an attempt to shift blame for the pandemic to the WHO, Trump engaged in upward undermining. He falsely accused the WHO of failing to investigate reports that conflicted with the Chinese government's accounts and "push[ing] China's misinformation about the virus."¹⁴⁸ He temporarily halted U.S. funding for the WHO, despite concerns from experts that doing so would undercut the WHO's ability to function,¹⁴⁹ and ultimately withdrew the United States from the WHO altogether.¹⁵⁰

President Trump also engaged in downward undermining of state pandemic responses, but unlike the above instances of downward undermining, Trump's undermining was not aimed at securing any kind of centralized approach. During the first re-open phase of the pandemic in April 2020, for example, Trump and his administration undermined the re-open schedule that certain states had set. Just a day after stating that he would leave the re-open schedule to the governors, Trump issued three tweets meant to undermine governors in three states: "LIBERATE MICHIGAN!"¹⁵¹ "LIBERATE MINNESOTA!"¹⁵² and "LIBERATE VIRGINIA . . . !"¹⁵³ These tweets sought to encourage people in each of these states who were protesting the shutdowns put in place by their state governments.¹⁵⁴ Rather

¹⁴⁸ Glenn Kessler, *Trump's false claim that the WHO said the coronavirus was 'not communicable,'* WASH. POST (Apr. 17, 2020, 2:00 AM), <https://www.washingtonpost.com/politics/2020/04/17/trumps-false-claim-that-who-said-coronavirus-was-not-communicable>.

¹⁴⁹ Daniel Victor & Christine Hauser, *What the W.H.O. Does, and How U.S. Funding Cuts Could Affect It,* N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/04/15/health/who-world-health-organization-coronavirus.html> ("President Trump's decision to halt funding for the World Health Organization, depriving it of its biggest funding source, could have far-reaching effects in efforts to fight diseases and make health care more widely available across the globe.").

¹⁵⁰ See Jason Hoffman & Maegan Vazquez, *Trump announces end of US relationship with World Health Organization,* CNN (May 29, 2020, 7:17 PM), <https://www.cnn.com/2020/05/29/politics/donald-trump-world-health-organization/index.html>.

¹⁵¹ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 17, 2020, 8:22 AM), <https://twitter.com/realDonaldTrump/status/1251169217531056130>.

¹⁵² Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 17, 2020, 8:21 AM), <https://twitter.com/realDonaldTrump/status/1251168994066944003>.

¹⁵³ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 17, 2020, 8:25 AM), <https://twitter.com/realDonaldTrump/status/1251169987110330372>.

¹⁵⁴ *Trump Foments Protests Against Governors; Experts Warn of Testing Shortages,* N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/17/us/coronavirus-cases-news-update.html> ("President Trump on Friday openly encouraged right-wing protests of social distancing restrictions in states with stay-at-home orders, a day after announcing guidelines for how the nation's governors should carry out an orderly reopening of their communities on their own timetables.").

than promote harmony with the CDC's response guidelines, these tweets seemed intended to politically harm three Democratic governors who had been critical of Trump.

In addition to political downward undermining, the federal government also engaged in administrative and legal downward undermining. On the administrative front, despite President Trump's admonitions to states that they should get their own equipment rather than rely on the federal government,¹⁵⁵ the federal government actually actively undermined that state effort. One report detailed that state leaders in Massachusetts,¹⁵⁶ Kentucky,¹⁵⁷ and Colorado¹⁵⁸ confirmed orders for personal protective equipment only to have the Trump administration take control of those shipments and redirect them to the federal government, costing weeks of delay.¹⁵⁹

On the legal front, the federal government threatened to sue states that did not open quickly enough. In an interview, U.S. Attorney General Bill Barr "explained that the Justice Department can try to intimidate governors into backing away from policies the Trump administration opposes. 'If we think one goes too far, we initially try to jawbone the governors into rolling them back or adjusting them,' he said. 'And if they're not and people bring lawsuits,

¹⁵⁵ See Quint Forgerly, *We're not a shipping clerk': Trump Tells Governors to Step up Efforts to Get Medical Supplies*, POLITICO (Mar. 19, 2020, 3:30 PM), <https://www.politico.com/news/2020/03/19/trump-governors-coronavirus-medical-supplies-137658>.

¹⁵⁶ Zolan Kanno-Youngs & Jack Nicas, *Swept Up by FEMA: Complicated Medical Supply System Sows Confusion*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-fema-medical-supplies.html>.

¹⁵⁷ *Id.* ("In Kentucky, the head of a hospital system told members of Congress that his broker had pulled out of an agreement to deliver four shipments of desperately needed medical gear after the supplies were commandeered by the Federal Emergency Management Agency.").

¹⁵⁸ *Id.* ("Gov. Jared Polis of Colorado thought his state had secured 500 ventilators before they were "swept up by FEMA.").

¹⁵⁹ These redirections of medical equipment from states to the federal government were a consequence of a federal administration working group headed by Jared Kushner. See Jonathan Allen et al., *Behind closed doors, Trump's coronavirus task force boosts industry and sows confusion*, NBC NEWS (Apr. 13, 2020, 8:05 PM), <https://www.nbcnews.com/politics/white-house/trump-s-coronavirus-task-force-amassed-power-it-boosted-industry-n1180786>. See also *id.* ("At the same time Trump and other White House officials are saying that it is up to states, cities and hospitals to find and acquire their own medical supplies, the task force is undermining those efforts by cutting deals with companies to re-route equipment away from lower-level buyers.").

we file statements of interest and side with the plaintiffs.”¹⁶⁰ These threats were particularly bizarre coming from the federal government, because they existed in tension with the CDC’s guidelines, which promoted many of the state policies that Barr hoped to quash.

Finally, the federal government engaged in self-undermining. President Trump often flouted his administration’s own guidance for reopening. For example, he refused to wear a mask, despite his administration’s guidance to the contrary¹⁶¹ (and ultimately contracted COVID-19 himself¹⁶²). He praised states that re-opened, even when those states did not meet the federal guidelines for re-opening.¹⁶³ He rejected draft CDC guidelines for reopening the economy.¹⁶⁴ And he criticized his own experts’ judgments on how and

¹⁶⁰ See James Hohman, *The Daily 202: Barr memo threatening lawsuits against coronavirus restrictions is a warning shot*, WASH. POST (Apr. 28, 2020, 9:28 AM), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2020/04/28/daily-202-barr-memo-threatening-lawsuits-against-coronavirus-restrictions-is-a-warning-shot/5ea7a78e88e0fa3dea9c4414/?utm_campaign=wp_the_daily_202&utm_medium=email&utm_source=newsletter&wpsrc=nl_daily202.

Barr specifically noted that one of his “point men” for this legal issue would be the United States Attorney for the Eastern District of Michigan, which is significant because President Trump had previously engaged in Twitter attacks with the Michigan Governor over her re-open policies. *Id.*

¹⁶¹ See Associated Press, *Trump tells allies his wearing a mask would ‘send the wrong message,’ make him look ridiculous*, NBC NEWS (May 7, 2020, 10:26 AM) <https://www.nbcnews.com/politics/donald-trump/trump-tells-allies-his-wearing-mask-would-send-wrong-message-n1202001> (“Within minutes of the CDC announcing its updated mask recommendations last month, the president said, ‘I don’t think that I’m going to be doing it.’”).

¹⁶² Peter Baker & Maggie Haberman, *Trump Tests Positive for the Coronavirus*, N.Y. TIMES (Dec. 21, 2020), <https://www.nytimes.com/2020/10/02/us/politics/trump-covid.html>.

¹⁶³ Toluse Olorunnipa et al., *Trump cheers on governors even as they ignore White House coronavirus guidelines in race to reopen*, WASH. POST (May 4, 2020, 9:10 PM), https://www.washingtonpost.com/politics/trump-cheers-on-governors-as-they-ignore-white-house-coronavirus-guidelines-in-race-to-reopen/2020/05/04/bedc6116-8e18-11ea-a0bc-4e9ad4866d21_story.html (“Trump and some of his aides have backed away from their own guidelines, opting instead to hail the broad economic reopening that health experts say has started too quickly.”).

Being in an election year, President Trump had political motivations for downplaying the severity of the pandemic, as well.

¹⁶⁴ See Abby Goodnough & Maggie Haberman, *White House Rejects C.D.C.’s Coronavirus Reopening Plan*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/05/07/us/politics/trump-cdc.html> (“White House and other administration officials rejected the [CDC’s] recommendations over concerns that they were overly prescriptive, infringed on religious rights and risked further damaging an economy that Mr. Trump was banking on to recover quickly.”).

when to reopen schools.¹⁶⁵

In sum, governments of all kinds undermined each other during the early pandemic response. In some cases, this allowed less powerful local governments to voice disagreement with higher level governments, and it allowed states to bring their local governments into check. In other cases, it allowed the federal government to diminish the effectiveness of state and local pandemic policies.

2. Passive: Abdication

Another prominent intergovernmental behavior during the early pandemic response was abdication of responsibility. Government officials at all levels declined to exercise their authority. We define abdication to occur in two situations. First, when one government has a legal obligation to act, and declines to. Second, and more commonly, when a problem can only be comprehensively addressed at one level of government, and that government declines to act.¹⁶⁶ Like undermining, abdication is a feature of multi-layered governance.¹⁶⁷ Our contemporary federal system is built such that each layer of government has responsibilities, but those responsibilities overlap in ways that allow for intergovernmental substitution.¹⁶⁸

¹⁶⁵ See Katie Rogers, *Trump Pointedly Criticizes Fauci for His Testimony to Congress*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/05/13/us/politics/fauci-trump-coronavirus.html> (“President Trump on Wednesday criticized congressional testimony delivered a day earlier by Dr. Anthony S. Fauci, the nation’s top infectious disease expert, who had warned against reopening the country too quickly and stressed the unknown effects the coronavirus could have on children returning to school.”).

For more examples, see Camacho & Glicksman, *Structured to Fail: Lessons from the Trump Administration’s Faulty Pandemic Planning and Response*, *supra* note [], at 23-25.

¹⁶⁶ This definition excludes situations where one level of government has the authority but not the obligation to act, and credibly believes the problem is best addressed at lower levels of government and makes the considered decision not to act.

¹⁶⁷ See generally Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839 (2017) (describing how states regularly abdicate their federal responsibilities to local governments).

¹⁶⁸ For example, the federal government abdicates when it imposes responsibilities onto states without providing funding. The Americans with Disabilities Act (ADA) is one example: the ADA prohibits governments from excluding persons with disability from programs and services. See 42 U.S.C. § 12132. In practice, this provision requires states and local governments to spend money making their public services accessible to persons with disabilities, but the federal government provides no money to assist states and local governments in complying. See Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1099 & n.92 (2018).

States abdicate when federal laws make them responsible for certain tasks—like

By far the most prominent abdicator during the early pandemic response was the White House. The porous nature of our states¹⁶⁹ joined with the highly infectious nature of COVID-19 and the resource-intensive treatment for the virus to make a purely state response to the pandemic inadequate.¹⁷⁰ Yet, as it became clear that the pandemic required national action to prevent widespread disease and inequality, the federal government “declined to pursue a unified national strategy”¹⁷¹ and instead abdicated its responsibilities to both slow the spread of the disease and prevent unequal burdens caused by the disease.¹⁷²

Although Congress enacted economic relief legislation and national border controls, neither Congress nor the President enacted public health laws or issued comprehensive guidance for states and local governments to follow during the early days of the pandemic. As a result, states and local governments were initially operating without adequate information about the nature of the disease. As one report detailed, “cities and counties wrestled with how to handle individuals who tested positive or were placed under mandatory quarantine, and in the end, who was going to pay for it all. With scant information about the virus and no warnings against large gatherings, cities such as New Orleans moved ahead in February with massive celebrations that may have turned them into hotspots for the virus.”¹⁷³

administering election laws, for instance—and they fail to fulfill their responsibilities, forcing local governments to pick up the slack. *See* Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 755-64 (2016) (describing federal election laws that impose election-related responsibilities onto states, which in turn abdicate those responsibilities, forcing local governments to fill in).

¹⁶⁹ *See* Noah Bierman et al., *Can Trump Reopen the Economy on May 1? Not Really*, LOS ANGELES TIMES (Apr. 10, 2020), <https://www.latimes.com/politics/story/2020-04-10/coronavirus-trump-reopen-economy-obstacles> (“Pulling back from a nationwide system of social distancing too soon could spur new hot spots. ‘The big challenge is that [state and local] borders are porous, no matter how much we talk about lockdowns,’ said Jeffrey Levi, a public health expert at George Washington University in Washington, D.C.” (alteration in original)).

¹⁷⁰ *See supra* Section I.A.1.

¹⁷¹ *See* Sarah Mervosh, Mike Baker, Patricia Mazzei & Mark Walker, *One Year, 400,000 Coronavirus Deaths: How the U.S. Guaranteed Its Own Failure*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/17/us/covid-deaths-2020.html>.

¹⁷² *See* David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT’L L. (forthcoming Oct. 2020), https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3649816 (noting that in the United States, “the national executive’s efforts to control the pandemic [has] been disastrously insubstantial and insufficient”).

¹⁷³ Nicole Dungca, et al., *As Trump Declared Coronavirus Under Control, Local Leaders Faced Confusion and Chaos As Cases Piled up*, WASH. POST (Mar. 29, 2020),

The federal government also abdicated by failing to provide adequate testing and medical equipment to states. Although the federal government began by spearheading efforts at developing and rolling out diagnostic tests, its early failures soon led federal agencies to lift restrictions on testing so that others could fill the gap.¹⁷⁴ Despite this additional flexibility, states simply lacked the resources to acquire sufficient tests and medical equipment to treat the onslaught of COVID-19 patients. The states hit hardest at the beginning of the pandemic made it clear that they did not have adequate treatment equipment—including ventilators for patients and masks to protect medical workers¹⁷⁵—and made specific requests to the federal government for these resources.¹⁷⁶ President Trump and his administration resisted these requests

https://www.washingtonpost.com/investigations/2020/03/29/coronavirus-local-officials-response/?arc404=true&utm_campaign=wp_politics_am&utm_medium=email&utm_source=newsletter&wpscsrc=nl_politics.

¹⁷⁴ For example, the CDC lifted all individual restrictions on testing on March 3, *U.S. Will Drop Limits on Virus Testing, Pence Says*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/world/coronavirus-live-news-updates.html#link-79b1dbc8> (“Vice President Mike Pence said the Centers for Disease Control and Prevention was lifting all restrictions on testing for coronavirus.”), and HHS granted states additional flexibility to approve diagnostic tests on March 13, *see* 85 Fed. Reg. 15,335 (Mar. 13, 2020) (“Should additional States request flexibility to authorize laboratories within the State to develop and perform tests used to detect COVID-19, the Secretary shall take appropriate action, consistent with law, to facilitate the request.”).

¹⁷⁵ *See, e.g., Luz Lazo et al., Maryland and Virginia Governors Blast Trump over Protests and Lack of Coronavirus Testing As Cases Continue to Rise in the Capital Region*, WASH. POST (Apr. 19, 2020), https://www.washingtonpost.com/local/maryland-and-virginia-governors-blast-trump-over-protests-and-lack-of-covid-19-testing-as-cases-continue-to-rise-in-the-capital-region/2020/04/19/0b878724-81d1-11ea-a3ee-13e1ae0a3571_story.html (“We are fighting a biological war, and we have been asked as governors to fight that war without the supplies we need,” [Virginia Governor Ralph] Northam said Sunday on CNN’s ‘State of the Union,’ . . . ‘Every governor in America has been pushing and fighting and clawing to get more tests, not only from the federal government, but from every private lab in America and from across the world,’ Hogan said. ‘It’s nowhere near where it needs to be.’”); Greg Sargent, *As Trump’s failures mount, one governor sounds an ominous warning*, WASH. POST (Apr. 9, 2020), <https://www.washingtonpost.com/opinions/2020/04/09/trumps-failures-mount-one-governor-sounds-an-ominous-warning> (“As dogged reporting has shown, the federal government’s handling of medical supply chains has left states and health-care providers scrambling in a state of confusion and without badly needed supplies.”).

California, on the other hand, quickly decided to work around the federal government and leverage its formidable economy in order to produce sufficient supplies. *See* Phil Willon, *California to get more than 200 million masks a month in coronavirus fight, Gov. Newsom says*, LOS ANGELES TIMES (Apr. 7, 2020), <https://www.latimes.com/california/story/2020-04-07/california-gavin-newsom-200-million-masks-coronavirus-rachel-maddow> (“Let’s use the power, the purchasing power of the state of California, as a nation-state,” Newsom told MSNBC host Rachel Maddow.”).

¹⁷⁶ *See, e.g., Robert Farley, Trump’s Misleading Ventilator Counter-Punch at Cuomo*,

for help from mayors and governors, stating that “[g]overnors are supposed to be doing a lot of this work The Federal government is not supposed to be out there buying vast amounts of items and then shipping. You know, we’re not a shipping clerk.”¹⁷⁷ Jared Kushner, Trump’s son-in-law and advisor, communicated a similar sentiment: “You have instances where in cities, they’re running out, but the state still has a stockpile, and the notion of the federal stockpile was it’s supposed to be our stockpile, it’s not supposed to be state stockpiles that they then use”¹⁷⁸

As the federal government abdicated, other actors stepped into the void. Individual states and local governments filled the gap as best they could. Some state and local orders “preceded federal directives by days or even weeks as local officials sifted through news reports and other sources of information to educate themselves about the risks posed by the coronavirus.”¹⁷⁹ Gavin Newsom, the Governor of California, announced California’s independence from the federal government and “declared that California [would] chart its own course, relying less on the White House and leveraging its considerable economic power as ‘a nation-state.’”¹⁸⁰ Michael Hancock, the mayor of Denver, Colorado, similarly noted how responsibility had fallen to state and local leaders: “Governors and mayors have had to make the tough decisions that Washington has refused to make It wasn’t the president who decided to shut cities, schools, businesses down, . . . [a]nd it won’t be his call to get

FACTCHECK.ORG (Mar. 26, 2020), <https://www.factcheck.org/2020/03/trumps-misleading-ventilator-counter-punch-at-cuomo/> (“Cuomo said at a press conference on March 24 that the state had an urgent need for more ventilators to deal with an anticipated peak in demand in two weeks for patients needing help to breathe. . . . ‘The only way we can obtain these ventilators is from the federal government. Period.’”).

¹⁷⁷ Quint Forgy, *We’re not a shipping clerk’: Trump Tells Governors to Step up Efforts to Get Medical Supplies*, POLITICO (Mar. 19, 2020, 3:30 PM), <https://www.politico.com/news/2020/03/19/trump-governors-coronavirus-medical-supplies-137658>.

¹⁷⁸ Nolan D. McCaskill & Alice Miranda Ollstein, *Trump Administration Tells States to Step up As Governors Plead for Aid*, POLITICO (Apr. 5, 2020, 9:37 PM), <https://www.politico.com/news/2020/04/05/white-house-trump-funding-states-coronavirus-165783>.

¹⁷⁹ Nicole Dungca, et al., *As Trump Declared Coronavirus Under Control, Local Leaders Faced Confusion and Chaos As Cases Piled up*, WASH. POST (Mar. 29, 2020), https://www.washingtonpost.com/investigations/2020/03/29/coronavirus-local-officials-response/?arc404=true&utm_campaign=wp_politics_am&utm_medium=email&utm_source=newsletter&wpisrc=nl_politics.

¹⁸⁰ Noah Bierman et al., *Can Trump Reopen the Economy on May 1? Not Really*, LOS ANGELES TIMES (Apr. 10, 2020), <https://www.latimes.com/politics/story/2020-04-10/coronavirus-trump-reopen-economy-obstacles>.

everyone back to work in terms of our states and our cities.”¹⁸¹

In cases where no governmental actors at any level took action, people were left with corporate governance.¹⁸² Private corporations and universities filled gaps left by governments by voluntarily shutting down their physical workspaces and campuses,¹⁸³ helping to provide scarce PPE to hospitals,¹⁸⁴ giving COVID-19 tests to employees when governmental testing was not available,¹⁸⁵ and increasing the availability of vaccines.¹⁸⁶

Finally, governments also abdicated their responsibilities to fight COVID-related inequality. As others have described, the COVID-19 pandemic has affected us unequally.¹⁸⁷ African Americans, Latinos, and Native Americans have become infected with and died from COVID-19 at higher rates than Whites.¹⁸⁸ The pandemic has also had a disparate effect on

¹⁸¹ *Id.*

¹⁸² The Mayor of Las Vegas, Nevada, for example, stated that casinos should open and that they—and not the local government—were responsible for ensuring that they could open safely. Justin Wise, *Las Vegas mayor doubles down on push to reopen casinos, says it's not her job to do it safely: 'They better figure it out,'* THE HILL (Apr. 22, 2020, 5:07 PM), <https://thehill.com/homenews/state-watch/494193-las-vegas-mayor-doubles-down-on-push-to-reopen-casinos-says-its-not-her>.

¹⁸³ See Claire Duffy, *Big tech firms ramp up remote working orders to prevent coronavirus spread*, CNN BUSINESS (Mar. 12, 2020, 4:49 PM), <https://www.cnn.com/2020/03/10/tech/google-work-from-home-coronavirus/index.html>; Betsy Foresman, *Here are the U.S. universities that have closed due to coronavirus*, EDSCOOP (Mar. 13, 2020), <https://edscoop.com/universities-closed-due-coronavirus-2020/> (“Over the past week, nearly 300 U.S. universities have announced plans to move classes online in response to the coronavirus pandemic.”).

¹⁸⁴ See Office of the Mayor, Kamaria Hightower, *City Surpasses 700,000 Items in PPE Collection* (Apr. 29, 2020), <https://durkan.seattle.gov/2020/04/city-surpasses-700000-items-in-ppe-collection/> (“[C]ompanies, organizations, and individuals have contributed over 700,000 pieces of personal protective equipment (PPE) to the City of Seattle . . .”).

¹⁸⁵ See Noam Scheiber, *How Companies Are Getting Speedy Coronavirus Tests for Employees*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/15/business/economy/employers-coronavirus-testing.html>.

¹⁸⁶ See Gillian Friedman & Lauren Hirsch, *Help With Vaccination Push Comes From Unexpected Businesses*, N.Y. TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/business/vaccines-microsoft-amazon-starbucks.html>.

¹⁸⁷ See, e.g., Ruqaiyah Yearby & Seema Mohapatra, *Systemic Racism, the Government's Pandemic Response, and Racial Inequities in COVID-19*, 70 EMORY L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3763532.

¹⁸⁸ As of November 10, 2020, the CDC reported that African Americans were approximately 140% more likely to be infected with COVID-19 than Whites, Latinos were approximately 170% more likely, and Native Americans were approximately 180% more

women. The sectors of the economy that the pandemic has hit hardest are those that disproportionately employ women: restaurants, retail businesses, health care, and state and local governments.¹⁸⁹ And the closure of schools and daycare facilities has created another burden—childcare—that women disproportionately bear.¹⁹⁰ The pandemic has caused intersectional inequality as well.¹⁹¹ Women of color experienced not just the diminished health outcomes associated with communities of color broadly, but also the economic pressures the pandemic imposed on women.¹⁹²

likely. African Americans were 370% more likely than Whites to be hospitalized with COVID-19, and 280% more likely to die from it. Latinos were 400% more likely than Whites to be hospitalized with COVID-19, and 260% more likely to die from it. And Native Americans were 410% more likely than Whites to be hospitalized with COVID-19, and 280% more likely to die from it. Centers for Disease Control and Prevention, COVID-19 Hospitalization and Death by Race/Ethnicity, Nov. 30, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>. See also Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

Racial disparities continued into the later pandemic stages as well: African Americans and Latinos have been disproportionately under-vaccinated compared to their White counterparts. Abby Goodnough & Jan Hoffman, *The Wealthy Are Getting More Vaccinations, Even in Poorer Neighborhoods*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/02/health/white-people-covid-vaccines-minorities.html>. See also Emma G. Fitzsimmons, *Black and Latino New Yorkers Trail White Residents in Vaccine Rollout*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2021/01/31/nyregion/nyc-covid-vaccine-race.html>.

¹⁸⁹ See Patricia Cohen, *Recession With a Difference: Women Face Special Burden*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/17/business/economy/women-jobs-economy-recession.html>.

¹⁹⁰ See Titan Alon et al., *The impact of Covid-19 on gender equality*, COVID ECONOMICS 62, 63 (Apr. 14, 2020), https://faculty.wcas.northwestern.edu/~mdo738/research/Alon_Doepke_Olmstead-Rumsey_Tertilt_COVID_2020.pdf (“Based on the existing distribution of child care duties in most families, mothers are likely to be more affected [by increased childcare needs] than fathers.”).

¹⁹¹ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243 (1991) (describing how “intersecting patterns of racism and sexism . . . “tend not to be represented within the discourses of either feminism or antiracism”).

¹⁹² As Drs. Jackson and Peterson put it, “Black women sit squarely at the confluence of multiple systems of oppression, and are experiencing a disproportionate loss of life and livelihood in the era of COVID-19.” Brandi Jackson & Aderonke B. Pederson, *Facing both covid-19 and racism, Black women are carrying a particularly heavy burden*, WASH. POST (Sept. 4, 2020), <https://www.washingtonpost.com/opinions/2020/09/04/facing-both-covid-19-racism-black-women-are-carrying-particularly-heavy-burden/>. Multiple studies have also

Although addressing inequality may not seem like an intergovernmental problem, it is. The pandemic was superimposed atop all of our existing societal and economic inequalities. Without affirmative governmental intervention, inequality reproduces itself in new contexts—even without intentionally discriminatory action along racial or gender lines.¹⁹³ And given the infectious nature of COVID-19, poor outcomes and greater disease spread in some locations and communities is bound to spillover and threaten more effective disease control in others.

In other words: inequality in; inequality out. The pandemic was bound to reproduce a highly unequal society unless those in power took action to disrupt that reproduction. But local governments experiencing these inequalities did not have the resources to disrupt the kind of systemic inequality that COVID-19 unleashed, and at least in the early months, aid from states and the federal government for that purpose did not come.¹⁹⁴ Ignoring these forms of inequality was thus another form of intergovernmental abdication.

shown that Latinas have experienced greater COVID-related unemployment than either White women or Latinx men. See Economic Policy Institute, Elise Gould, Daniel Perez & Valerie Wilson, *Latinx workers—particularly women—face devastating job losses in the COVID-19 recession*, ECONOMIC POLICY INSTITUTE (Aug. 20, 2020), <https://www.epi.org/publication/latinx-workers-covid/>; Pew Research Center, Rakesh Kochhar, *Hispanic women, immigrants, young adults, those with less education hit hardest by COVID-19 job losses* (June 9, 2020), <https://www.pewresearch.org/fact-tank/2020/06/09/hispanic-women-immigrants-young-adults-those-with-less-education-hit-hardest-by-covid-19-job-losses/>.

¹⁹³ See DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* 4 (2014) (“[R]acial inequality reproduces itself automatically from generation to generation.”); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1852 (1994) (“[E]ven in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism.”).

¹⁹⁴ See Ruqaiyah Yearby & Seema Mohapatra, *Systemic Racism, the Government’s Pandemic Response, and Racial Inequities in COVID-19*, *supra* note [], at 2.

In later months, some governments began focusing on inequality. The federal American Rescue Plan Act, for example, which came a year into the pandemic, provided money for loans to businesses in “underserved areas, especially those that are minority-owned.” Jeanne Sahadi, *What’s in the \$1.9 trillion rescue plan for small businesses*, CNN BUSINESS (Mar. 25, 2021), <https://www.cnn.com/2021/03/10/success/rescue-plan-small-businesses-feseries/index.html>. California’s reopen plan, as another example, explicitly incorporates health equity measures. See Emily A. Largent et al., *Incorporating Health Equity Into COVID-19 Reopening Plans: Policy Experimentation in California*, AM. J. PUB. HEALTH, <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2021.306263>.

B. Coordination

Although the most visible intergovernmental behavior may have been conflict, the pandemic response also engendered intergovernmental coordination. Like conflict, intergovernmental coordination is a feature of our decentralized system of governance.¹⁹⁵ Without an existing blueprint for a coordinated governance response, two forms of impromptu coordination emerged. This Section provides an account of government officials actively coordinating through horizontal and vertical collaboration, as well as passively coordinating through bandwagoning. Whereas collaboration involves explicit efforts to work together, bandwagoning involves similar decisions cascading across the same or different levels of government as later actors follow in the footsteps of earlier actors.

1. Active: Collaboration

Lower levels of government sometimes filled the gaps created by the lack of comprehensive governance by engaging in horizontal and vertical collaboration. Horizontal collaboration occurred when lower-level authorities work with others at the same level, forming horizontal networks for sharing practices, harmonizing policies, and coordinating efforts. These networks were either created ad hoc or repurposed from pre-existing networks. Generally, horizontal networks are often regional in geography and include governments with similar political leanings, as adjacent jurisdictions take joint action to combat a common problem. But they may also form between far-flung jurisdictions that face similar challenges. These horizontal networks allowed states to share knowledge and can help to equalize resource differences between them.¹⁹⁶

Horizontal collaboration became increasingly prevalent as the pandemic persisted and effective higher-level governance failed to materialize. One of the earliest examples is the joint Bay Area order on March 16 requiring residents in seven adjacent counties to stay home and to limit activities and

¹⁹⁵ See Weinstein-Tull, *State Bureaucratic Undermining*, *supra* note [], at 1085 (noting that because our governments are fractured and varied, compliance with various federal laws requires extensive coordination between governments).

¹⁹⁶ See Ann O'M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RES. & THEORY 535, 544 (2004) (“[M]ore capable states cooperate by engaging in multistate legal action, and less capable states cooperate by adopting uniform state laws”). See also Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377 (2018) (discussing ways that states create both regional and non-regional networks with one another for various purposes).

businesses to those defined as “essential.”¹⁹⁷ The order pre-dated a similar California-wide order and resulted from the public health officers of Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara counties coordinating a unified strategy across the seven jurisdictions. The Bay Area counties also worked together to devise a unified set of reporting requirements for labs that test for COVID-19.¹⁹⁸ On April 2, they jointly recommended that residents use face coverings when performing essential activities.¹⁹⁹ On the east coast, Governor Cuomo announced on April 22 that New York would coordinate its contact tracing program with New Jersey and Connecticut.²⁰⁰

Horizontal collaboration has also been used to confront shortages in medical and personal protective equipment, given the federal government’s failure to act as a central supplier. In early April, California’s Governor Newsom ordered 200 million masks a month and noted that California was looking to coordinate rather than compete with other states in procuring them.²⁰¹ In mid-April, New York state gave a hundred ventilators to Michigan and fifty to Maryland.²⁰² By May, the governors of New York, New Jersey, Connecticut, Pennsylvania, Delaware, Rhode Island, and Massachusetts announced a multi-state agreement to create a regional supply

¹⁹⁷ See, e.g., Santa Clara County Public Health Press Release, *Seven Bay Area Jurisdictions Order Residents to Stay Home* (May 16, 2020), <https://www.sccgov.org/sites/phd/news/Pages/press-release-03-16-20.aspx>. This initial three-week order was subsequently extended by all seven counties. See, e.g., Order of the Health Officer of Santa Clara (Mar. 31, 2020), <https://www.sccgov.org/sites/covid19/Pages/order-health-officer-033120.aspx>.

¹⁹⁸ See, e.g., Joint Press Release, *Seven Bay Area Jurisdictions Order Laboratories Testing for COVID-19 to Report More Comprehensive Testing Data to State and Local Authorities* (Mar. 24, 2020), <https://cchealth.org/press-releases/2020/0324-Media-Statement-Lab-Reporting-Order.pdf>.

¹⁹⁹ See, e.g., Santa Clara County Public Health Press Release, *Bay Area Public Health Departments Recommend Non-Medical Face Coverings During Essential Outings* (Apr. 2, 2020), <https://www.sccgov.org/sites/phd/news/Pages/non-medical-face-coverings.aspx>.

²⁰⁰ *Amid Ongoing COVID-19 Pandemic, Governor Cuomo and Mayor Mike Bloomberg Launch Nation-Leading COVID-19 Contact Tracing Program to Control Infection Rate* (Apr. 22, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-and-mayor-mike-bloomberg-launch-nation-leading>.

²⁰¹ Jeremy B. White, Katy Murphy & Carla Marinucci, *Newsom: California’s Enormous Mask Order Won’t Disrupt Supply Chain for Others*, POLITICO (Apr. 8, 2020), <https://www.politico.com/states/california/story/2020/04/08/newsom-californias-enormous-mask-order-wont-disrupt-supply-chain-for-others-1274110>.

²⁰² *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Issues Executive Order Requiring All People in New York to Wear Masks or Face Coverings in Public* (Apr. 15, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-issues-executive-order-requiring-all-people-new>.

chain for personal protective and other medical equipment.²⁰³

The processes of loosening social distancing requirements and resuming economic activities were particularly shaped by horizontal collaboration. Several regional networks emerged. On the west coast, California, Oregon, and Washington entered into an agreement to devise a coordinated approach for reopening their economies.²⁰⁴ The states jointly developed a shared vision of when it was safe to reopen and worked together to ensure that there was enough testing supplies and contact tracing staff.²⁰⁵ Colorado and Nevada subsequently joined the Western States Pact, creating an alliance between the five Democratic governors.²⁰⁶ On the east coast, the governors of seven states—New York, New Jersey, Pennsylvania, Delaware, Rhode Island, Massachusetts, and Connecticut—created a multistate task force to reopen their economies in a coordinated way.²⁰⁷ New York, New Jersey, and Connecticut also coordinated the reopening of marinas and boatyards.²⁰⁸ In the Midwest, the governors of seven states—Michigan, Ohio, Wisconsin, Minnesota, Illinois, Indiana, and Kentucky—created a partnership to

²⁰³ States agreed to work together to aggregate their demand, reduce costs with greater purchasing power, stabilize the supply chain, and coordinate policies regarding stockpiling personal protective equipment. *Amid Ongoing COVID-19 Pandemic, Governor Cuomo, Governor Murphy, Governor Lamont, Governor Wolf, Governor Carney, Governor Raimondo & Governor Baker Announce Joint Multi-State Agreement to Develop Regional Supply Chain for PPE and Medical Equipment* (May 3, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-governor-murphy-governor-lamont-governor-wolf>.

²⁰⁴ *California, Oregon & Washington Announce Western States Pact* (Apr. 13, 2020), <https://www.gov.ca.gov/2020/04/13/california-oregon-washington-announce-western-states-pact/>.

²⁰⁵ Joseph O'Sullivan & Paul Roberts, *Washington, Oregon and California to Coordinate Reopening of West Coast Economies After Coronavirus is Contained*, SEATTLE TIMES (Apr. 13, 2020, 9:13 PM), https://www.seattletimes.com/business/economy/washington-oregon-and-california-to-coordinate-reopening-west-coast-economies-after-coronavirus-is-contained/?utm_source=marketingcloud&utm_medium=email&utm_campaign=BNA_041320210833+Gov.+Inslee+announces+West+Coast+partnership+to+work+on+reopening+economies_4_13_2020&utm_term.

²⁰⁶ *Inslee announces Colorado & Nevada will join Washington, Oregon & California in Western States Pact* (April 27, 2020), <https://www.governor.wa.gov/news-media/inslee-announces-colorado-nevada-will-join-washington-oregon-california-western-states>.

²⁰⁷ Ben Chapman and Jimmy Vielkind, *Seven Northeast States Start to Plan Reopening Coronavirus-Hit Economy*, WALL ST. J. (Apr. 13, 2020, 6:50 PM), <https://www.wsj.com/articles/new-york-officials-begin-planning-re-opening-of-regions-economy-as-coronavirus-cases-11586802819>.

²⁰⁸ *Amid Ongoing COVID-19 Pandemic, Governor Cuomo, Governor Murphy, Governor Lamont Announce Alignment of State Policies for Marinas and Boatyards* (Apr. 18, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-governor-murphy-governor-lamont-announce>.

coordinate the reopening of their regional economy.²⁰⁹ Republican governors also networked secretly on questions like mask wearing and business restrictions as they broke with the President's inaction.²¹⁰

Mayors and other municipal officials across the country and around the world have also connected formally and informally with each other to share their experiences facing similar challenges. C40, an existing network of over forty megacities formally committed to collaboratively addressing climate change,²¹¹ was temporarily repurposed to address the pandemic. Mayors convened over Zoom to share knowledge and best practices, reporting strong feelings of solidarity free of the geopolitical pressures that shaped interactions between their national counterparts.²¹² In April, C40 launched the Global Mayors COVID-19 Recovery Task force, which was led by the mayor of Milan and includes the Secretary for the Environment of Hong Kong and the mayors of Freetown, Lison, Rotterdam, Medellín, Melbourne, Montréal, New Orleans, Seattle, and Seoul.²¹³

The Deputy Mayor for International Affairs of Los Angeles, Nina Hachigian, also created a WhatsApp group of city leaders below the mayoral level, which proved useful for fast information exchange. Through the WhatsApp group, Hachigian connected with the heads of emergency management departments of other cities, providing each other with moral support, technical advice, and, occasionally, personal protective equipment.²¹⁴

²⁰⁹ *Midwest Governors Announce Partnership to Reopen Regional Economy* (Apr. 16, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-526088--,00.html.

²¹⁰ Alexander Burns, Jonathan Martin, & Maggie Haberman, *As Trump Ignores Virus Crisis, Republicans Start to Break Ranks*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/us/politics/republicans-contradict-trump-coronavirus.html>.

²¹¹ See C40 Cities, <https://www.c40.org/about> ("C40 is a network of the world's megacities committed to addressing climate change. C40 supports cities to collaborate effectively, share knowledge and drive meaningful, measurable and sustainable action on climate change.").

²¹² *Global city cooperation in the response to COVID-19*, BROOKINGS (Apr. 23, 2020), <https://www.brookings.edu/events/webinar-global-city-cooperation-in-the-response-to-covid-19/>.

²¹³ *11 Mayors Unite to Lead Global Mayors COVID-19 Recovery Task Force*, C40 CITIES (Apr. 29, 2020), https://www.c40.org/press_releases/11-mayors-unite-global-mayors-covid-19-task-force.

²¹⁴ The Director of International Affairs for Milan, Maria Vittoria Beria, noted that networking with other cities allowed Milan to receive shipments of medical and personal protective equipment from Chinese cities early in the pandemic. *Global city cooperation in the response to COVID-19*, BROOKINGS (Apr. 23, 2020),

Vertical collaboration occurs when authorities at different levels explicitly work together to share practices, align policies, and coordinate efforts. Like horizontal networking, vertical networking is a natural consequence of our federal system.²¹⁵ Vertical collaboration can benefit both more centralized and more decentralized governments: it allows centralized governments to expand their influence and provides more decentralized governments with resources they may lack.

Vertical collaboration occurred between the federal government and the states during the early pandemic response. In April, for example, Vice President Pence spoke with all fifty state governors and provided each with a list of laboratories with additional testing capacity within their respective states.²¹⁶ President Trump later promised to help both California²¹⁷ and New York²¹⁸ increase testing supplies. There was a general agreement that the federal government would be responsible for managing international supply chains and ensuring that manufacturers have sufficient materials, while the states would be responsible for running laboratories.²¹⁹

States and local governments cooperated vertically as well, particularly as

<https://www.brookings.edu/events/webinar-global-city-cooperation-in-the-response-to-covid-19/>.

²¹⁵ Sub-federal governments “cooperate with the federal government in many policymaking areas . . . [and] help implement federal policy in a variety of ways: by submitting implementation plans to federal agencies, by promulgating regulations, and by bringing administrative actions to enforce federal statutes.” See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 815 (1998).

²¹⁶ White House Press Briefing, *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing* (Apr. 20, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-29/>.

²¹⁷ *Gov. Newsom: President Trump Promises Hundreds Of Thousands More Coronavirus Testing Swabs For California*, LAIST (Apr. 23, 2020, 9:40 AM) <https://laist.com/latest/post/20200422/gov-newsom-coronavirus-reopening-california-covid-19-update> (“[Governor Newsom] said President Donald Trump had just directly promised him significant numbers of swabs over the next few weeks.”)

²¹⁸ Peter Baker & Jesse McKinley, *Trump and Cuomo Put Aside Disputes During White House Meeting*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/us/politics/trump-andrew-cuomo-meeting.html> (“Mr. Cuomo said that he secured a commitment from the president to try to increase the number of tests in New York for both the coronavirus and the antibodies to 40,000 a day.”)

²¹⁹ Kevin Breuninger et al., *Gov. Cuomo says Trump wants to help New York double coronavirus testing rate*, CNBC (Apr. 21, 2020, 11:39 AM), <https://www.cnn.com/2020/04/21/new-york-gov-cuomo-says-he-will-discuss-coronavirus-testing-with-trump-at-white-house-meeting.html>

overlapping jurisdictions instituted “shelter in place” policies. The city of Seattle, for example, aligned with King County and Washington state in early closures.²²⁰ Santa Clara County acknowledged Governor Newsom’s stay-at-home order, “urg[ing] all residents to comply with the restrictions in both the County and State orders.”²²¹ Ventura County’s shut down order on March 20 repeatedly referenced Governor Newsom’s executive order and emphasized that it should be “interpreted . . . to be consistent with and in furtherance of the Governor’s Executive Order.”²²² Meanwhile, Mississippi’s Governor Tate Reeves issued a supplement to the state-wide executive order, clarifying that local government shut downs instituted prior to the state’s order continued to be valid “so long as they provide the minimum applicable restrictions” set out in the state-wide order.²²³

2. Passive: Bandwagoning

As governments began to act, they often built off of and influenced each other, even when they were not explicitly collaborating. We call this behavior “bandwagoning,” a dynamic of passive coordination in which similar decisions cascaded across the same or different levels of government. This domino effect could be rapid, as authorities mimicked each other in quick succession and earlier actors made it easier for subsequent actors to follow. Bandwagoning is similar to the political science concept of policy *imitation*, “a sort of herding activity, wherein states are hesitant to be first movers but also do not desire to be left behind and appear out of sync with others, especially if doing so casts a negative light on elected policy makers.”²²⁴

²²⁰ Mayor Durkan aligned Seattle’s policies on the closure of facility and suspension of permits with Washington Governor Inslee’s statewide shut down order. Anthony Derrick, *Mayor Jenny Durkan Issues Executive Order to Align City Policies with Extended ‘Stay Home, Stay Healthy’ Order* (Apr. 6, 2020), <https://durkan.seattle.gov/2020/04/mayor-jenny-durkan-issues-executive-order-to-align-city-policies-with-extended-stay-home-stay-healthy-order/>

²²¹ *County of Santa Clara Statement on Governor Newsom’s Executive Order for All Californians to Stay at Their Home* (Mar. 19, 2020), <https://www.sccgov.org/sites/phd/news/Pages/press-statement-governors-executive-order.aspx>.

²²² Ventura County Health Officer, *Stay Well at Home* (Mar. 20, 2020), <https://s30623.pcdn.co/wp-content/uploads/2020/03/StayWellAtHomeOrder.pdf>.

²²³ Office of the Mississippi Governor, *Supplement to Executive Order No. 1463* (Mar. 26, 2020), <https://www.sos.ms.gov/Education-Publications/ExecutiveOrders/SupplementEO1463.pdf>.

²²⁴ See Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 842-43 (2008); Craig Volden, *Policy Diffusion in Polarized Times: The Case of the Affordable Care Act*, 42 J. OF HEALTH POLITICS, POLICY, AND LAW 363, 367-68 (2017) (“Imitation involves the copying of a policy found elsewhere without regard to its effectiveness.”).

Bandwagoning occurred at both the international and domestic levels. It operated both in defiance of as well as in the absence of policy guidance from higher levels of government. Bandwagoning was particularly striking when it occurred across jurisdictions at different stages of the outbreak, suggesting that it was less about putting in place an appropriate response to the pandemic than it was about joining an emerging crowd and gaining political cover.

Internationally, bandwagoning describes how countries responded to the WHO's characterization of COVID-19. The WHO declared COVID-19 a public health emergency of international concern on January 30 and a pandemic on March 11.²²⁵ At the March 11 declaration, WHO's Director-General urged countries to "strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights" and emphasized that describing the outbreak as a pandemic "doesn't change what countries should do."²²⁶ The WHO recommended phased measures based on the extent of disease spread. Depending on each country's assessment of its outbreak severity, WHO suggested considering restricting social gatherings, closing workplaces and schools, and quarantining asymptomatic contacts.²²⁷ Yet, a study of over 160 national responses to COVID-19 found that most countries around the world enacted much stricter measures during a two-week period around mid-March, reflecting herd behavior rather than WHO's guidance.²²⁸ There is little correlation between indicators of disease spread, such as when the first case or first death occurred in a country, and policy action.²²⁹

Within the U.S., bandwagoning has also been a defining feature of pandemic governance behaviors. Just as stricter measures were enacted around the world during a two-week period around mid-March, many U.S. jurisdictions enacted similar measures in that timeframe despite experiencing different extent of disease spread.

²²⁵ *Archived: WHO Timeline – COVID-19* (Apr. 27, 2020), <https://www.who.int/news-room/detail/08-04-2020-who-timeline---covid-19> (visited July 19, 2020).

²²⁶ *WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020*, (Mar. 11, 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (visited July 19, 2020).

²²⁷ See World Health Organization, *COVID-19 Strategy Update* (Apr. 14, 2020), https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf?sfvrsn=29da3ba0_19.

²²⁸ Thomas Hale et al., *Pandemic governance requires understanding socioeconomic variation in government and citizen responses to COVID-19*, at 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3641927.

²²⁹ *Id.* at 3.

The decision to issue emergency declarations was one example of this dynamic. Jurisdictions issued states of emergency in a cluster, beginning around March 7. Of the states we focus on, New York, Michigan, Arizona, Texas, Vermont, and Mississippi all declared emergencies within a ten-day period,²³⁰ and a large number of local governments within those states did the same. Although these declarations cascaded one after another, each jurisdiction was differently situated with the pandemic at the time. Rural Modoc County, California, declared an emergency two days after the state of Michigan, for example. But Modoc County did not register its first case of COVID-19 until early August 2020,²³¹ whereas Michigan had reported nearly 400 cases by mid-March 2020.²³²

The decision to issue shelter-in-place orders followed a similar dynamic. On March 16, seven Bay Area jointly issued an order requiring all individuals to shelter at their place of residence except when engaging in essential business.²³³ A cascade of similar orders from Democratic jurisdictions followed suit over the next few days. The City of Fresno enacted a similar

²³⁰ N.Y. Exec. Order No. 202, *Declaring a Disaster Emergency in the State of New York* (Mar. 7, 2020), <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york> (New York); Mich. Exec. Order No. 2020-4, *Declaration of State of Emergency* (Mar. 10, 2020), <http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-04.pdf> (Michigan); *Gov. Ducey declares public health emergency in Arizona due to coronavirus*, AZ FAMILY (Mar. 11, 2020), https://www.azfamily.com/news/gov-ducey-declares-public-health-emergency-in-arizona-due-to/article_b6984d36-63c4-11ea-97ae-577cf8e7a46e.html (Arizona); Office of the Texas Governor, *Governor Abbott Holds Press Conference On Coronavirus, Declares State Of Disaster For All Texas Counties* (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-holds-press-conference-on-coronavirus-declares-state-of-disaster-for-all-texas-counties> (Texas); Vt. Exec. Order No. 01-20 (Mar. 13, 2020), <https://governor.vermont.gov/sites/scott/files/documents/EO%2001-20%20Declaration%20of%20State%20of%20Emergency%20in%20Response%20to%20COVID-19%20and%20National%20Guard%20Call-Out.pdf> (Vermont); Office of the Mississippi Governor, *Proclamation* (Mar. 14, 2020), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-03/2.%20Original%20Mississippi%20State%20of%20Emergency.pdf> (Mississippi).

²³¹ See Thomas Fuller & Jill Cowan, *The Last California County Without a Coronavirus Case*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/us/california-coronavirus-modoc-county.html> (“For five months, officials in Modoc had hoped that the county’s isolation in the northeastern corner of the state would spare it from the virus. And until last week, when a couple in Alturas tested positive, Modoc had been the last county in California without any confirmed cases.”).

²³² See The COVID Tracking Project, <https://covidtracking.com/data/state/michigan>.

²³³ See, e.g., Order of the Health Officer of the County of Santa Clara (Mar. 16, 2020), <https://www.sccgov.org/sites/covid19/Pages/order-health-officer-031620.aspx>.

order on March 18,²³⁴ followed by the City of Los Angeles,²³⁵ the County of Los Angeles,²³⁶ and the State of California all on March 19,²³⁷ the state of New York on March 22,²³⁸ and the state of Washington on March 23.²³⁹ A number of local governments in Texas issued shelter-in-place orders on March 23 and 24.²⁴⁰ These orders came close together, despite the fact that the state of the pandemic differed dramatically across jurisdictions at that time. The imposition of mask-wearing requirements followed similar bandwagoning dynamics.²⁴¹

²³⁴ City Manager of the City of Fresno, *Emergency Order 2020-02* (Mar. 18, 2020), https://www.fresno.gov/wp-content/uploads/2020/03/EMERGENCY-ORDER-2020-02_SHELTER-IN-PLACE-3.18.20.pdf.

²³⁵ City of Los Angeles, *Public Order Under City of Los Angeles Emergency Authority: Safer At Home* (Mar. 19, 2020), <https://www.lamayor.org/sites/g/files/wph446/f/-page/file/20200527%20Mayor%20Public%20Order%20SAFER%20AT%20HOME%20ORDER%202020.03.19%20%28REV%202020.05.27%29.pdf>.

²³⁶ County of Los Angeles Department of Public Health Order of the Health Officer, *Safer at Home Order for Control of COVID-19* (Mar. 19, 2020), http://file.lacounty.gov/SDSInter/lac/1070029_COVID-19_SaferAtHome_HealthOfficerOrder_20200319_Signed.pdf.

²³⁷ Cal. Exec. Order N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf>.

²³⁸ See *New York State on PAUSE, New York State Forward*, <https://coronavirus.health.ny.gov/new-york-state-pause>.

²³⁹ State of Washington, Office of the Governor, *Proclamation by the Governor Amending Proclamation 20-05, Stay Home – Stay Healthy* (Mar. 23, 2020), <http://mrsc.org/getmedia/e04ae29f-bd01-4394-803d-0232afa7d6d8/w3stayhome.pdf.aspx>.

²⁴⁰ See Joshua Fetcher & Lauren Caruba, San Antonio, *Bexar County residents ordered to stay home as local coronavirus cases climb*, SAN ANTONIO EXPRESS NEWS (Mar. 24, 2020), <https://www.expressnews.com/news/local/article/Shelter-in-place-order-to-slow-coronavirus-15151183.php> (San Antonio and Bexar); Alex Samuels, *Texas' largest counties are issuing stay-at-home orders as coronavirus spreads*, TEX. TRIBUNE (Mar. 24, 2020), <https://www.texastribune.org/2020/03/23/austin-travis-county-issue-stay-home-order-tuesday/> (Harris County, Collin County, El Paso County, and Forth Worth); Philip Jankowski, *Coronavirus shelter-in-place order will be issued Tuesday for Travis, Williamson counties*, STATESMAN (Mar. 23, 2020), <https://www.statesman.com/news/20200323/coronavirus-shelter-in-place-order-will-be-issued-tuesday-for-travis-williamson-counties> (Travis and Williamson Counties); Hayat Norimine, *Dallas mayor issues emergency stay-at-home regulations in response to county's order*, DALLAS NEWS (Mar. 24, 2020), <https://www.dallasnews.com/news/public-health/2020/03/24/dallas-mayor-issues-emergency-stay-at-home-regulations-in-response-to-countys-order/> (Dallas).

²⁴¹ For example, the state of Mississippi, and the jurisdictions of Palo Alto, California, Los Angeles, California, Jackson, Mississippi, and King County, Washington, all enacted mask regulations in the span of a one week. See, e.g., Miss. Exec. Order No. 1483, (Mar. 14, 2020), <https://mcusercontent.com/08cb3e52aa1308600f84d49ea/files/e1a29a19-5bea>

III. EXPLANATIONS AND PROPOSALS

These intergovernmental behaviors—undermining and abdication, collaboration and bandwagoning—emerged from the policy gaps created by inadequate international, federal, state, and local public health laws that we described in Part I. In this Part, we argue that the form these behaviors took, although appearing fairly chaotic at first glance, follows a deep logic. The absence of policy guidance opened space for preexisting pressures, allowing the well-worn dynamics of American public life to shape pandemic behaviors. We focus on the two dynamics we believe to be the most fundamental and influential here: structure and politics. Each dynamic explains aspects of the behaviors that emerged, but each also interacts with the other. Where structural considerations—in the form of our decentralized mode of government—created role confusion and pushed governments toward conflict, politics—in the form of partisanship—provided a set of underlying relationships that shaped those conflicts.

Understanding these underlying dynamics is crucial for ensuring that, when the next pandemic hits, we are able to respond in a way that encourages effective pandemic management. Although this is not primarily a prescriptive paper, for each explanation in this Part, we provide a high-level proposal that mitigates the potential for unproductive conflict and passivity. These proposals are not meant to represent comprehensive, pandemic-preparedness statutes; they are meant to be approaches for addressing governance concerns specifically.

A. Structure

Pandemic policy lies uncomfortably on two poles of the federal-state division of responsibilities. Our system of federalism creates ambiguous hierarchies and overlapping roles, permitting—and at times, encouraging—governments to abdicate to and undermine one another.²⁴² Yet, during a pandemic that required authorities to operate in concert, this ambiguity has

4df4-a30f-4a7d35418af2/Executive_Order_1483_County_Specific.pdf (Mississippi mask rules); City of Palo Alto, *An Order by the Director of Emergency Services of the City of Palo Alto Requiring the Wearing of Face Coverings* (May 12, 2020), <https://www.cityofpaloalto.org/civicax/filebank/documents/76636> (Palo Alto, California, mask rules); King County, *Statewide requirement to wear face coverings* (July 7, 2020), <https://kingcounty.gov/depts/health/covid-19/care/masks.aspx> (King County, Washington, mask rules).

²⁴² See generally PETER SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER (2014).

systematically pushed intergovernmental interactions toward conflict, both in its active and passive forms. By enabling governmental abdication, it has also allowed inequality to take hold.

To address this problem, we propose a federal pandemic statute that clarifies roles, prevents as much intergovernmental conflict as possible, safeguards against passivity, and disrupts inequality, while still operating within the framework of federalism and state independence.

1. Explanation: Federalism and Role Confusion

Pandemic policies implicate deep tensions in the federal organization of government. Neither the Constitution nor statutes enacted over the past few decades clearly spell out the proper roles for federal, state, and local governments during a widespread and protracted outbreak. As described in Part I, pandemic policies are at once a matter of local health, addressable by well-trod state police power, and a matter of national and international concern that require federal and WHO involvement. States and local governments have historically taken primary responsibility for responding to public health crises, employing their police power to “enact quarantine laws and ‘health laws of every description.’”²⁴³ But the police power is limited to those problems solely existing within state borders,²⁴⁴ leaving the federal government, through its enumerated powers, to take the lead on problems that spill beyond those borders.²⁴⁵ Multiple sovereigns within our system thus lay claim to pandemic governance, and this role confusion permeated the pandemic response. Public opinion data demonstrate this lack of consensus: 37% of Americans believed that state governments were responsible for

²⁴³ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25, (1905) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824)); *see also supra* Section I.B.1 (describing laws relating to disease and public health enacted by states using their police power).

²⁴⁴ *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 28 (1905) (“[T]his court recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, health, or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders. But, as the laws there involved went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid.”).

²⁴⁵ *See supra* Section I.B.1 (describing the various constitutional provisions that empower the federal government to respond to pandemics); *Jacobson*, 197 U.S. at 25 (“A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.”).

testing availability, and 61% believed it was a federal responsibility.²⁴⁶

Ambiguity surrounding proper pandemic roles pressed governments toward conflict. Without clear guidelines dictating when each government should act or forego action, role confusion made it easier for authorities to abdicate their responsibility under the presumption that another authority would take the reins. Role confusion also caused multiple authorities to clash, leading to intergovernmental undermining.²⁴⁷ In other words, abdication and undermining were facilitated by the intergovernmental division of responsibility for enacting public health measures,²⁴⁸ even as an unfolding crisis demanded clarity.

Role confusion caused abdication and undermining at all levels of government.²⁴⁹ At the federal level, President Trump and the executive branch had difficulty defining their own roles in relation to the states. After initially leaving the first re-open phase of the pandemic to states (abdication), for example, Trump claimed “total authority” to re-open the country in April 2020.²⁵⁰ This assertion was met with state objections (undermining)—all 50 states had begun their own re-opening processes by the time the Trump administration published its re-opening guidelines.²⁵¹ Trump ultimately

²⁴⁶ See Pew Research Center, *Most Americans Say Federal Government Has Primary Responsibility for COVID-19 Testing* (May 12, 2020), <https://www.pewresearch.org/politics/2020/05/12/most-americans-say-federal-government-has-primary-responsibility-for-covid-19-testing/>.

²⁴⁷ Erin Ryan calls policy areas that implicate both federal and local concerns “interjurisdictional gray areas,” and has chronicled how federalism-based role confusion led to an ineffective and disastrous response to Hurricane Katrina. See generally Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007).

²⁴⁸ See, e.g., Polly J. Price, *Epidemics, Outsiders, and Local Protection: Federalism Theatre in the Era of Shotgun Quarantine*, 19 UNIV. P A. J. CONST. L. 369, 372 (2016) (“The federal government’s quarantine authority remains ambiguous today.”); Stephanie Cooper Blum, *Federalism: Fault or Feature—An Analysis of Whether the United States Should Implement a Federal Pandemic Statute*, 60 WASHBURN LAW JOURNAL (forthcoming 2021) (“It is unclear if the PHS would be broad enough to cover mask mandates, stay-at-home orders, or other public health measures.”).

²⁴⁹ Though we provide new examples here to illustrate the role structure played, so as not to be repetitive with earlier sections, the same analysis could be applied to those earlier examples.

²⁵⁰ Jeremy B. White, *Trump Claims ‘Total authority’ over State Decisions*, POLITICO (Apr. 13, 2020), <https://www.politico.com/states/california/story/2020/04/13/trump-claims-total-authority-over-state-decisions-1275506> (“‘When somebody’s president of the United States, the authority is total,’ Trump said at a press briefing Monday when asked about the governors’ plans. ‘And that’s the way it’s got to be. It’s total. It’s total. And the governors know that.’”).

²⁵¹ Arian Campo-Flores, Rebecca Ballhaus & Valerie Bauerlein, *Behind New Covid-19*

announced that governors would decide how and when to re-open.²⁵²

Putting aside President Trump's own conflicting messaging,²⁵³ the executive branch more broadly struggled to understand who was in charge of the pandemic response. The debate around mask-wearing is an example. CDC recommended "that people wear masks in public settings when around people outside of their household, especially when other social distancing measures are difficult to maintain."²⁵⁴ Vice President Pence, however, asked individuals to adhere to *state and local* guidance: "We just believe that what's most important here is that people listen to the leadership in their state and the leadership in their local community and adhere to that guidance whether it has to do with facial coverings or whether it has to do with the size of gatherings."²⁵⁵ In providing this advice, Pence was drawing from the traditional understanding of states and local governments as the primary originators of health policy.

Role confusion is similarly present at the state level because states and local governments have complicated relationships,²⁵⁶ with the latter occupying no set place in the Constitution.²⁵⁷ As Richard Thompson Ford

Outbreaks: America's Patchwork of Policies, WALL. ST. J. (July 9, 2020, 2:27 PM), <https://www.wsj.com/articles/us-policy-covid-19-coronavirus-outbreaks-california-texas-florida-arizona-11594134950>.

²⁵² See Peter Baker and 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> ("President Trump told the nation's governors on Thursday that they could begin reopening businesses, restaurants and other elements of daily life by May 1 or earlier if they wanted to, but abandoned his threat to use what he had claimed was his absolute authority to impose his will on them.").

²⁵³ See, e.g., Eliza Relman, *Trump claims he's 'all for masks' after refusing to publicly wear one himself for months*, BUSINESS INSIDER (July 1, 2020), <https://www.businessinsider.com/trump-claims-hes-all-for-masks-after-refusing-to-wear-one-himself-2020-7>.

²⁵⁴ Centers for Disease Control and Prevention, *Your Guide to Masks* (Feb. 22, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>.

²⁵⁵ Aamer Madhani, *What to wear: Feds' mixed messages on masks sow confusion*, ASSOCIATED PRESS (June 27, 2020), <https://www.fox19.com/2020/06/27/what-wear-feds-mixed-messages-masks-sow-confusion/>.

²⁵⁶ See, e.g., Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361 (2020) (describing ways that states interfere with local governance).

²⁵⁷ See, e.g., Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 85 (1986) ("This Article's basic thesis concerning the constitutional vulnerability of cities begins from the fact that cities—unlike the states or federal government—have no set place in the American constitutional

notes, “[l]ocal government exists in a netherworld of shifting and indeterminate legal status.”²⁵⁸ This ambiguous netherworld made it easy for states to abdicate to local governments or, when it was politically advantageous, for both states and local governments to undermine each other.

These forms of governmental conflict were rampant during the early months of the pandemic. In South Carolina, for example, Governor Henry McMaster imposed a late and short stay-at-home mandate from April 7 to May 4, saying that it was the responsibility of local governments to enact further restrictions and that a statewide mask mandate would not be enforced (abdication).²⁵⁹ Next door in North Carolina, Governor Roy Cooper imposed a statewide mask order only to have a dozen local sheriffs refuse to enforce it (undermining).²⁶⁰ In Florida, Governor Ron DeSantis left shutdown and reopening decisions to local officials (abdication), but local governments lacked the technical expertise and healthcare professionals to make those decisions.²⁶¹ In both Arizona and Texas, governors initially blocked local officials from implementing their own measures (undermining), only to reverse course when the outbreak exacerbated.²⁶²

Reopening the economy was influenced by role confusion as well. In California, “there has been an on-again, off-again patchwork of enforcement on everything from business closures to wearing face masks.” Enforcement fell to local officials “to both interpret and enforce rapidly evolving rules, with state and local orders often at odds.”²⁶³ As one California police chief put it: “The orders are changing, you have a national narrative, you have the state, you have other parts of the state that are opening up and people, some people are confused about everything that’s going on.”²⁶⁴ Small businesses, in

structure.”).

²⁵⁸ Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1864 (1994); *see id.* at 1886 (“Localities are neither sovereigns nor delegates, neither freely chosen nor wholly imposed; rather they are altogether distinct political agents, and as such require a distinct theory of law and justice.”).

²⁵⁹ Campo-Flores, Ballhaus & Bauerlein, *supra* note [].

²⁶⁰ *Id.*

²⁶¹ *Id.* (“Miami Beach Mayor Dan Gelber, a Democrat, said, “I’ve literally been on the phone with the [Florida] Department of Health and said, ‘What should I do?’ and the response has been, ‘We have to check with supervisors.’”)

²⁶² *Id.*

²⁶³ Don Thompson, *Is This Allowed? Confusing California Rules, Enforcement*, NBC LOS ANGELES (May 10, 2020), <https://www.nbclosangeles.com/news/coronavirus/is-this-allowed-confusing-california-rules-enforcement/2359786/>.

²⁶⁴ *Id.*

particular, have struggled with the multitude of regulations and restrictions coming from both states and local governments.²⁶⁵ This is a sharp contrast to the “whole-of-government” and “whole-of-society” approach prescribed by the crisis and pandemic literatures.²⁶⁶

2. Proposal: Role Clarity Legislation

The dysfunctional intergovernmental behaviors that arose during the pandemic were facilitated by the absence of a clear blueprint for coordinated government action. Enacting federal pandemic legislation that contains such a blueprint in advance of the next pandemic is therefore critical,²⁶⁷ and should have twin goals. First, it should mitigate the role confusion that federalism and decentralized government causes. Second, it should seek to preserve the values of federalism and allow for limited, productive forms of state-federal disagreement.

To achieve these aims, our preferred constitutional approach is to rely on Congress’s Spending Power. This form of federal law—akin to a federal contract with states²⁶⁸—is constitutional under most circumstances,²⁶⁹ well-

²⁶⁵ See Ryan Fish, “We’re incredibly shaken”: Changing bar guidelines create confusion, frustration for owners, KCOY (July 9, 2020), <https://keyt.com/health/2020/07/09/were-incredibly-shaken-changing-bar-guidelines-create-confusion-frustration-for-owners/> (“Confusion over state and local health guidelines have left some Santa Barbara bar owners rattled, as they attempt to modify operations in order to stay open.”).

²⁶⁶ See *supra* Part I.A.

²⁶⁷ See Hodge, *National Legal Paradigms for Public Health Emergency Responses*, *supra* note [] (“Vital to the development of a revamped U.S. national response plan for the Twenty-first century is a determination of which level of government—federal or state—should be ‘calling the shots’ during pandemics.”).

²⁶⁸ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576-77 (2012) (describing Spending Clause legislation as operating “much in the nature of contract”)(quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)).

²⁶⁹ Some questions exist about the extent of federal authority to issue something like a national lockdown. See Maryam Jamshidi, *The Federal Government Probably Can’t Order Statewide Quarantines*, U. CHI. L. REV. ONLINE, Apr. 2020, <https://lawreviewblog.uchicago.edu/2020/04/20/statewide-quarantines-jamshidi/>. But there is little question that Congress could have enacted a law pursuant to its Spending Clause powers. See Lawrence O. Gostin et al., *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, JAMA NETWORK (Apr. 10, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2769440> (arguing that “[a] well-crafted use of federal spending powers” to induce states to enact mask requirements “would likely be constitutional”).

There are some constitutional limits to Spending Power statutes – most importantly the requirement that the legislation not coerce states into accepting the deal offered by the federal government. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576, 580-81 (2012)

established in policy areas ranging from Medicaid to Food Stamps, and relies on buy-in from the states.²⁷⁰ It thus preserves many of the benefits of federalism, while curbing federalism's costs for pandemic governance.

First, to achieve role clarity, the legislation should obligate the federal government to lead a coordinated national response and incentivize states to cooperate by offering an exchange: in exchange for health care and pandemic-related funding provided by the federal government, the states would agree to regulate in specific, role-prescribed ways. For example, states accepting the exchange could agree to enforce guidelines set by the CDC, thus preventing conflicting state-federal regulations. Rather than fight with the federal government over testing and PPE procurement, states could agree to cooperate with the federal government to ensure an equitable distribution of those resources. And where states delegate public health responsibilities to local governments, states would be required to take responsibility for the compliance of their local governments with federal guidelines.²⁷¹ The legislation should also mandate a role for international governance in a domestic response. For example, it could require the CDC to consider and incorporate any guidance from the WHO into its own in regulations where possible. Such a requirement would minimize concerns surrounding the U.S. reservation to the 2005 IHR, asserting the right to assume obligations consistent with principles of federalism described above.

Legislation in the form of an exchange with the states would also allow the federal government to affirmatively disrupt inequality, thereby preventing that form of abdication. For example, the federal government could provide additional funding to states for hospitals in low-income communities and fund research that examines the effect of underlying medical conditions (more commonly experienced by minority populations) on the course of infection and the effectiveness of treatments. It could increase unemployment benefits during the pandemic, much of which would go to unemployed women. And it could make sure to fund vaccination sites located in communities of color

(holding that Congress may not *coerce* states to take action by threatening to withdraw existing federal funding). Any Spending Clause statute therefore should not threaten to withdraw existing funding, but instead offer only new funding.

²⁷⁰ See Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2336, 2339-43 (2020).

²⁷¹ Other federal laws accomplish role clarity in a similar way. Medicaid, for example, imposes responsibilities onto states, and those states may delegate those responsibilities downward. Federal regulations, however, ensure that that delegation does not become abdication by imposing monitoring requirements on states that do delegate those responsibilities to local governments. See 42 C.F.R. § 435.903. The Food Stamp Act accounts for decentralization as well. See 7 U.S.C. § 2012(s) (broadly defining “state agency” under the statute to include “the local offices thereof, which ha[ve] the responsibility for the administration of the federally aided public assistance programs within such State.”).

and open during nonwork hours.

Second, the legislation should promote the values of federalism by giving states the power of both exit and voice.²⁷² In particular, the statute should promote two values of federalism most relevant to pandemic governance²⁷³: it should allow states to tailor their regulations to their localized needs²⁷⁴ and it should give states some space to push back against the federal government in the case of federal government overreach.²⁷⁵

To achieve these aims, states should be able to negotiate the details of their statutory responsibilities with the federal agency overseeing the program.²⁷⁶ This kind of state-specific negotiation has precedent in the Affordable Care Act, where federal bureaucrats made locally tailored concessions to states in exchange for increasing the reach of federal policy.²⁷⁷ In the context of pandemic policy, negotiations should be quite flexible: the point is not to force states to act or refrain from action, it is to decide ahead of time what role each state intends to take so that when the time comes, federal, state, and local roles can be pre-determined. The result of this process would be a federal government and states (minus those that decline to participate, as discussed below) all committed to a coordinated and tailored

²⁷² See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970); Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013).

²⁷³ For a description of these values, see generally Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987).

²⁷⁴ See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (arguing that federalism “assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society”) (citing Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987) and Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988)).

²⁷⁵ *Id.* at 459 (“In the tension between federal and state power lies the promise of liberty.”). Allowing states to resist federal policies also provides a kind of insurance policy against an authoritarian federal government. See David Landau, Hannah J. Wiseman, & Samuel Wiseman, *Federalism, Democracy, and the 2020 Election*, 99 TEX. L. REV. ONLINE (forthcoming 2021), at 16, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744530; see also David Landau, Hannah J. Wiseman, & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187 (2020).

²⁷⁶ Negotiation of this sort of common in American federalism. See Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 24 (2011) (“[S]tate-federal bargaining is endemic to American governance and pervasive in many substantive areas of law. Negotiations take place over both the allocation of policy or decisionmaking authority and the content of policies made pursuant to that authority.”).

²⁷⁷ See Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare for?*, 70 STAN. L. REV. 1689, 1733-57 (2018) (describing the ways that states negotiated with the federal government to tailor the Medicaid expansion to their state-specific needs).

response.

Some states, however, will decline to participate. As we have seen with the Affordable Care Act's Medicaid expansion, most states will accept significant federal funding in exchange for enacting federal priorities, but not all will.²⁷⁸ Presumably, a similar outcome would result from a federal pandemic policy. That result would ultimately defeat perfect uniformity in pandemic response. But allowing states to decline federal intervention has its own benefits: it will allow states on the outside of the federal statute to push back against federal overreach or bad judgment and ensure robust debate about the wisdom of the federal policy.

B. Politics

Intense political polarization has transformed nearly every governance decision, even those that should be clear from the science, into symbolic two-sided national battles. When federalism and decentralization created role confusion, politics stepped in to fill that gap. Party-based battle lines provided a default set of relationships and positions that became organizing principles for each of the four intergovernmental behaviors—pressing, pulling, and licensing leaders to make decisions that aligned with their respective parties. Partisanship provided clarity to governments where federalism provided ambiguity and confusion.

To address this problem, we advocate for the creation of decentralized, inclusive, and nonpartisan governance networks to lessen the pull of politics. These networks should be both horizontal and vertical and they should be intentionally inclusive to prevent exclusion of lower-income or less politically connected governments.

1. Explanation: Partisan Tribalism

America is more divided by politics than ever in recent history.²⁷⁹ According to a Pew Research Center survey, our political divisions “dwarf[]

²⁷⁸ See KFF, *Status of State Medicaid Expansion Decisions: Interactive Map* (Feb. 22, 2021), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> (demonstrating that twelve states have not accepted federal funding in exchange for increasing their Medicaid eligibility requirements).

²⁷⁹ See Pew Research Center, *The Partisan Divide on Political Values Grows Even Wider* (Oct. 5, 2017), <https://www.pewresearch.org/politics/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> (“The divisions between Republicans and Democrats on fundamental political values—on government, race, immigration, national security, environmental protection and other areas—reached record levels during Barack Obama’s presidency. In Donald Trump’s first year as president, these gaps have grown even larger.”).

other divisions in society, along such lines as gender, race and ethnicity, religious observance or education.”²⁸⁰ In addition, the pandemic hit during the lead-up to the 2020 presidential election, when partisanship was at its peak²⁸¹ and the political parties distrusted each other more than ever.²⁸²

We define partisan tribalism as the tendency for politics to co-opt governance decisions. Whatever the policy issue, once it becomes wrapped up in partisanship, it taps into the deep reservoir of resentment that exists between the parties. Nearly all aspects of the pandemic response have been touched by partisan tribalism, from aid to states²⁸³ to unemployment insurance²⁸⁴ to mask usage.²⁸⁵

Partisan tribalism drives behavior in multiple ways. As a matter of party politics, partisan tribalism instills in politicians fear of reprisal from intraparty ideological disagreement. Political parties are not only more polarized than they have been in the past, they are also more ideologically consistent.²⁸⁶ Fear

²⁸⁰ *Id.*

²⁸¹ Partisanship is even more salient during election years. See James E. Campbell, *Presidential Election Campaigns and Partisanship*, in *AMERICAN POLITICAL PARTIES: DECLINE OR RESURGENCE?* 11-29 (Jeffrey E. Cohen et al., eds.) (2001).

²⁸² Lee Drutman, *How Hatred Came To Dominate American Politics*, FIVETHIRTYEIGHT (Oct. 5, 2020), <https://fivethirtyeight.com/features/how-hatred-negative-partisanship-came-to-dominate-american-politics/>.

²⁸³ See Tami Luhby, *Partisan divides over federal aid play out in battleground states*, CNN (May 21, 2020), <https://www.cnn.com/2020/05/21/politics/state-budget-deficits-covid/index.html> (“Democrats and Republicans are increasingly at odds over whether Congress should provide more fiscal relief to states facing devastating budget shortfalls or speed up reopening -- a partisan split that's playing out in several key battleground states.”).

²⁸⁴ See Carl Hulse, *Jobless Aid Fuels Partisan Divide Over Next Pandemic Rescue Package*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/05/07/us/coronavirus-stimulus-package.html> (“Democrats hope to extend a program that increased unemployment benefits by \$600 a week. Republicans have criticized it as overly generous, creating a disincentive to work.”).

²⁸⁵ See Lauren Aratani, *How did face masks become a political issue in America?*, THE GUARDIAN (June 29, 2020), <https://www.theguardian.com/world/2020/jun/29/face-masks-us-politics-coronavirus> (“A recent Pew Research Center poll found Democrats were more likely to say they wear masks than Republicans. This is in line with messaging from leaders within the two parties.”); Will Weissert & Jonathan Lemire, *Face masks make a political statement in era of coronavirus*, ASSOCIATED PRESS (May 7, 2020), <https://apnews.com/7dce310db6e85b31d735e81d0af6769c> (“The decision to wear a mask in public is becoming a political statement — a moment to pick sides in a brewing culture war over containing the coronavirus. While not yet as loaded as a “Make America Great Again” hat, the mask is increasingly a visual shorthand for the debate pitting those willing to follow health officials’ guidance and cover their faces against those who feel it violates their freedom or buys into a threat they think is overblown.”).

²⁸⁶ See *id.* (describing how changes in party beliefs have resulted in the parties becoming

of straying from the party fold was especially prevalent among lawmakers in the Republican party, who faced potentially politically devastating attacks from Trump. As one journalist stated, “Trump’s grip on the Republican Party remains so strong that only a handful of GOP elected officials have publicly criticized him, fearful of bringing down the wrath of the president or his supporters.”²⁸⁷

Partisan tribalism also drives behavior through the psychological phenomenon of cultural cognition, or “the tendency of individuals to conform their beliefs about disputed matters of fact . . . to values that define their cultural identities.”²⁸⁸ Changing one’s opinion about politically charged facts threatens one’s social and political identity. Partisan tribalism created political polarization on even questions of science, and polarized polling data bears this observation out. It suggests that Republicans are overall less concerned about COVID-19 than Democrats are,²⁸⁹ that 60% of Democrats compared to 12% of Republicans are “extremely concerned,”²⁹⁰ and that Democrats are twice as likely as Republicans to believe that masks should always be worn.²⁹¹ Public health protections such as social distancing and masking have become political acts that “signal which side you’re on”²⁹² and impinge on

“more ideologically consistent and, as a result, further from one another”).

²⁸⁷ Janet Hook, *Donald Trump’s iron grip on the GOP: Why Republicans stick with him*, LOS ANGELES TIMES (June 12, 2020), <https://www.latimes.com/politics/story/2020-06-12/republican-officials-fear-trump>.

Daryl Levinson and Richard Pildes have argued that partisanship is so powerful that the true separation of powers now occurs between political bodies governed by divergent political parties, not simply individual branches of the federal government. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006). Jessica Bulman-Pozen describes a similar dynamic that she calls “partisan federalism,” in which “political actors’ use [] state and federal governments in ways that articulate, stage, and amplify competition between the political parties.” Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014).

²⁸⁸ See Cultural Cognition Project at Yale Law School, (January 11, 2016, 8 AM), <http://www.culturalcognition.net>.

²⁸⁹ Quinn Scalan, *Partisanship in a pandemic: Democrats more concerned about virus than Republicans, but increasing concern for all: Polls*, ABC NEWS (Mar. 26, 2020, 1:38 PM), <https://abcnews.go.com/Politics/partisanship-pandemic-polling-shows-democrats-coronavirus-republicans-parties/story?id=69781489>.

²⁹⁰ *Coronavirus: Outbreak concern*, CIVIQS (Feb. 25, 2020 – Feb. 23, 2021) https://civiqs.com/results/coronavirus_concern?annotations=true&uncertainty=true&zoomIn=true.

²⁹¹ *Republicans, Democrats Move Even Further Apart in Coronavirus Concerns*, PEW RESEARCH CENTER, (June 25, 2020), <https://www.pewresearch.org/politics/2020/06/25/republicans-democrats-move-even-further-apart-in-coronavirus-concerns/>.

²⁹² McKay Coppins, *The Social-Distancing Culture War Has Begun*, THE ATLANTIC (Mar.

“core [political] beliefs.”²⁹³

Finally, partisanship heightens the cognitive herding bias, which describes the tendency of decision-makers to look to others for guidance and act in groups.²⁹⁴ As decisions become more complex, and time and information more limited, decision-makers increasingly rely on heuristics or cognitive shortcuts.²⁹⁵ Rather than reinventing the wheel, those following the herding instinct tie their political fortunes to those of first movers.²⁹⁶ Doing so both reduces the cognitive demands of difficult pandemic decisions by piggybacking on the cognitive work of others, and transforms the unknowable risk of taking action into the more comfortable risk of being part of a collective.²⁹⁷ Once a governmental official jumps onto a partisan bandwagon, the risk associated with the action is no longer the deep uncertainty about the effectiveness of the action, it is the comfortable risk of advocating a joint position.

Ultimately, partisan tribalism operated through these mechanisms to provide a default set of relationships and positions that became organizing principles for the four intergovernmental behaviors. In the case of undermining, partisan tribalism placed Republican and Democratic authorities in opposition as they sought to frustrate each other’s policies and messaging. This dynamic was particularly evident when Trump used undermining to diminish the effectiveness of actions taken by lower-level Democratic authorities. Trump’s tweets encouraging people in Michigan, Minnesota, and Virginia to protest state shutdowns, and the Justice Department’s threats to sue states that did not open quickly enough²⁹⁸ all served to reinforce party-based battle lines.

In the case of abdication, partisan tribalism both constrained the decisions of authorities who feared straying from the party fold and gave them license to delay or forego necessary action. Republican governors in southern states

30, 2020), <https://www.theatlantic.com/politics/archive/2020/03/social-distancing-culture/609019/>.

²⁹³ Campo-Flores, Ballhaus & Bauerlein, *supra* note [].

²⁹⁴ MEYER & KUNREUTHER, *supra* note [], at 59-68.

²⁹⁵ For an introduction to decision-making heuristics, *see generally* DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011).

²⁹⁶ *See supra* Section II.B.

²⁹⁷ Social psychologists have examined how people react to times of instability and fear by taking actions that convert deep uncertainty to ordinary risk. *See generally* Tom Pyszczynski, *et al.*, *Experimental existential psychology: Coping with the facts of life*, in HANDBOOK OF SOCIAL PSYCHOLOGY (Susan T. Fiske, Daniel T. Gilbert, & Gardner Lindzey eds., 2010).

²⁹⁸ *See supra* Part II.A.1.

were among the last to order lockdowns and then were quick to lift them.²⁹⁹ As journalist Ron Brownstein wrote at the time, the fact that conservative governors in Texas, Florida, and Georgia only “tightened statewide restrictions immediately after Trump finally let his advisers frame the full risk . . . underscores how much his earlier minimizing contributed to the critical delays in those states.”³⁰⁰ The desire to be faithful to the partisan tribe, in other words, overwhelmed other considerations.

In the case of collaboration, partisan tribalism influenced the composition of horizontal networks that formed to fill the gaps created by the lack of comprehensive governance. Members of the same party tended to engage in active efforts to work together. Democratic states on the west coast—California, Oregon, Washington, Colorado, and Nevada—frequently worked together.³⁰¹ The same goes for Democratic states on the east coast—New York, New Jersey, Connecticut, Delaware, Rhode Island, and Massachusetts.³⁰² Republican governors also actively collaborated when they broke ranks with Trump’s inaction, though they did so in secret for fear of reprisal.³⁰³

Similarly, in the case of bandwagoning, partisan tribalism made it more likely for members of the same party to imitate each other’s policy decisions. Craig Volden has written that “[p]olarization adds a wrinkle to the classic imitation model. No longer are policy makers solely looking to do what is popular or widely accepted. Now they are looking to do what is widely accepted within their (potentially isolated) ideological community.”³⁰⁴ Accordingly, it was only after Trump finally publicly acknowledged the reality of the pandemic³⁰⁵ that Republican governors in Florida and Georgia issued

²⁹⁹ Campo-Flores, Ballhaus & Bauerlein, *supra* note [].

³⁰⁰ Ronald Brownstein (@RonBrownstein), TWITTER (Apr. 1, 2020, 2:35 PM), <https://mobile.twitter.com/RonBrownstein/status/1245464860621598725>.

³⁰¹ See *supra* Part II.B.1.

³⁰² The swing state of Pennsylvania sometimes also participated in the eastern Democratic network. *Id.*

³⁰³ *Id.*

³⁰⁴ Craig Volden, Policy Diffusion in Polarized Times: The Case of the Affordable Care Act, 42 J. HEALTH, POLITICS, POLY, & L. 363, 368 (2017) (“If most other Democratic governments are adopting state health exchanges and Medicaid expansions, it becomes very difficult and politically dangerous for other Democratic policy makers to seek a different course. Likewise, a potentially treacherous road lies ahead for Republican governors and legislators who wander in such a liberal direction.”).

³⁰⁵ See Peter Baker, *Trump Confronts a New Reality Before an Expected Wave of Disease and Death*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/01/us/politics/coronavirus-trump.html?searchResultPosition=26> (describing how, after weeks of dismissing COVID-19

stay-at-home orders in decisions that were directly correlated with Trump's acknowledgement.³⁰⁶

2. Proposal: Inclusive Intergovernmental Networks

While we cannot eliminate partisanship, we can lessen its influence in future pandemics. As we have described, politics had an outsized influence on pandemic governance in part because it provided a clear set of governance relationships that filled the gap left by the absence of pandemic statutes and governmental role clarity. Enacting federal pandemic legislation therefore begins the work of rising above partisanship. As further counterweights to politics, we propose the creation of alternative networks that deepen the grooves of the intergovernmental relationships that encourage an effective pandemic response. This suggestion is not purely a legislative one, as these networks are not necessarily the result of a federal statute. They could also arise through decentralized and inclusive networking efforts at all levels.

These networks should be both subject-matter and managerial in nature, as well as both horizontal and vertical in orientation. Vertically, we should borrow from the idea of “picket fence federalism,” which is the observation that subject-matter officials at local, state, and federal levels often have more in common with one another than with other officials in their own governments.³⁰⁷ It is often the case that state and local officials are alienated from one another,³⁰⁸ but for pandemic purposes, local health officials must be well-connected to state health officials, and both must be well-connected with federal health officials. These kinds of networks could encourage intergovernmental coordination in a number of subject-specific areas, like stay-at-home orders, the distribution of medical equipment, and vaccine dissemination. Some vertical networks should include international authorities as well, so that even if one level is resistant to international

as “like a flu,” President Trump finally admitted that COVID-19 was more “vicious” than the flu, and that “[w]e’re going to go through a very tough two weeks”).

³⁰⁶ See Patricia Mazzei & Maggie Haberman, *Florida Governor, at Long Last, Orders Residents to Stay Home to Avoid Coronavirus*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/us/coronavirus-florida-de-santis-trump.html?searchResultPosition=3> (“Gov. Ron DeSantis said the decision corresponded with the ‘national pause’ effectively recommended by the White House.”); Rick Rojas, *In Georgia, Shelter-in-Place Order Closes Businesses and Reopens Beaches*, N.Y. TIMES (Apr 4, 2020), <https://www.nytimes.com/2020/04/04/us/coronavirus-georgia-beaches.html>.

³⁰⁷ See Roderick M. Hills, Jr., *The Eleventh Amendment As Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001).

³⁰⁸ See Weinstein-Tull, *State Bureaucratic Undermining*, *supra* note [], at 1108-10 (describing ways that state and local officials may be alienated from one another).

collaboration (like the national level, for example), other levels (like state and local levels) still have access to international officials.³⁰⁹

Horizontally, government officials should be able to easily share with other similarly situated officials their experiences and lessons learned while fighting the pandemic. State and local government leaders should be able to share model ordinances and innovative approaches. These networks should exist at the administrator level as well: hospital officials should be able to share their best practices with one another, public assistance officials should be able to share their experiences working with people who need help, and so on.

As described above in Part II, some networks did arise out of necessity during the pandemic. But these networks were ad hoc and, as a consequence, not fully thought through or inclusive. The mayoral networks that sprung up during the early months of the pandemic, for example, should be systematized and expanded so that all mayors, or those in certain regional areas, can be involved, not just those in the know or those that are politically aligned. These networks would serve as counterweights to pre-existing partisan networks: when faced with uncertainty, government officials would have multiple networks to fall back on. One might provide political cover, but others would provide policy-specific knowledge and, if the networks were broad and strong enough, could provide strength in numbers.

Formalizing these networks and making them intentionally inclusive would also combat inequality. When jurisdictions collaborated during the early pandemic response, they reinforced existing inequality by falling back on default political networks³¹⁰ and informal groupings of mayors and governors.³¹¹ But professional networks, unless they are intentionally desegregated, create inequality by entrenching existing power hierarchies.³¹² Take the WhatsApp group established for health professionals below the mayoral level described in Section II.B.1 as an example: that was an ad hoc group formed through personal connections, and almost certainly excluded—even if unintentionally—local officials in less well-connected jurisdictions. Intentionally inclusive networks, created prior to a future pandemic, would ensure that all jurisdictions, whether well-resourced or not, could enjoy the

³⁰⁹ See generally Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) (describing ways in which international priorities can enter the American legal culture through local governments, despite a resistant federal government).

³¹⁰ See *supra* Section II.B.2.

³¹¹ See *supra* Section II.B.1.

³¹² See ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE, *supra* note [], at 83-84.

network's support.

CONCLUSION: PANDEMIC GOVERNANCE REDUX

The pandemic has evolved. Daily COVID-19 deaths in the United States are a fraction of what they were at their peak.³¹³ But we have new worries: unvaccinated and vaccine-resistant populations, countries that lack access to vaccines, and vaccine-resistant virus variants. Each of these problems gives rise to new governance challenges.

In addition, President Biden's pandemic policies differ dramatically from his predecessor's. Biden has unambiguously embraced mask-wearing³¹⁴ and signed an executive order mandating mask usage on transportation hubs and federal property.³¹⁵ He has also signed other executive orders that adopt a more proactive role for the federal government,³¹⁶ and signed legislation that funnels money from the federal government to state and local governments for pandemic-related costs.³¹⁷

Despite these changes, the dynamics that we describe in this Article are so deeply rooted in our public lives that they will continue to shape the pandemic even as the country transitions from one variant to another, one president to another. While there may be less federal abdication under President Biden, the polarized nature of our politics ensures ample political tribalism and state undermining of federal policy along party lines. When

³¹³ See Christina Morales & Isabella Grullón Paz, *Coronavirus cases and deaths in the United States drop to lowest levels in nearly a year*, N.Y. TIMES (May 23, 2021), <https://www.nytimes.com/2021/05/23/us/covid-cases-vaccinations-united-states.html>.

³¹⁴ Alexandra Jaffe, *Among first acts, Biden to call for 100 days of mask-wearing*, ASSOCIATED PRESS (Dec. 4, 2020) ("Joe Biden said Thursday that he will ask Americans to commit to 100 days of wearing masks as one of his first acts as president The move marks a notable shift from President Donald Trump, whose own skepticism of mask-wearing has contributed to a politicization of the issue.").

³¹⁵ See William Wan & Michael Laris, *FAQ: How do Biden's new mask orders work?*, WASH. POST (Jan. 22, 2021), <https://www.washingtonpost.com/transportation/2021/01/22/coronavirus-biden-mask-mandate/>.

³¹⁶ See Sheryl Gay Stolberg, *Biden Unveils National Strategy That Trump Resisted*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/us/politics/biden-coronavirus-response.html>.

³¹⁷ See U.S. Dep't of the Treasury, *FACT SHEET: The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, Mar. 18, 2021, <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families> ("The American Rescue Plan provides \$350 billion dollars in emergency funding for state, local, territorial, and Tribal governments to remedy this mismatch between rising costs and falling revenues.").

President-Elect Biden proposed his mask mandate, one Republican representative tweeted in response that “on day one . . . I will tell you to kiss my ass.”³¹⁸ Within days of Biden signing his mask regulation, Republican operatives warned that states would begin undermining the regulations by filing lawsuits against it.³¹⁹ And because of role ambiguity and uncertainty surrounding federal constitutional authority over national mask regulations,³²⁰ President Biden’s regulations will in part need to be “enforced by cooperating state and local authorities,”³²¹ which will empower *non-cooperating* jurisdictions to undermine the federal law by refusing to enforce it.

Even beyond this pandemic, this Article’s insights provide a framework for governance during future crises. Many of the governance challenges created by the pandemic apply to other problems that are large in scope and require action from a multitude of overlapping authorities. Climate change, for example, implicates governance at international, federal, state, and local levels. It affects different jurisdictions differently, but requires a coordinated governance response.³²² Governments can and do abdicate their climate change responsibilities, and undermine the efforts of others.³²³ Although climate change will not take us by surprise the way COVID-19 did, it may cause damage that we are not prepared for, like deadly hot summers, devastating weather systems, and unpredictable human migration. And when we finally do decide to take climate change seriously, the governance lessons that we learned from the pandemic response—including role-clarity legislation and governance networks that lessen the pull of politics—will be necessary aspects of policy changes.

³¹⁸ Natasha Korecki, *Biden says his mask mandate is common sense. Republicans say ‘kiss my ass,’* POLITICO (Jan. 22, 2021), <https://www.politico.com/news/2021/01/22/biden-mask-mandate-461533>.

³¹⁹ *Id.* (stating that the federal government should “expect lawsuits from our state, private lawsuits”).

³²⁰ *See supra* Section III.A.

³²¹ Michael Laris, *CDC issues sweeping mask mandate for planes, public transportation in U.S.*, WASH. POST (Jan. 29, 2021), https://www.washingtonpost.com/local/trafficandcommuting/cdc-issues-sweeping-mask-mandate-for-planes-public-transportation-in-us/2021/01/30/db31f364-6197-11eb-9061-07abcc1f9229_story.html.

³²² *See, e.g.*, United Nations Framework Convention on Climate Change, Fact sheet: Why climate change requires an internationally coordinated financial response, https://unfccc.int/files/press/backgrounders/application/pdf/press_factsh_financing.pdf.

³²³ *See, e.g.*, Umair Irfan, *Trump White House issues climate change report undermining its own policy*, VOX (Nov. 26, 2018), <https://www.vox.com/2018/11/26/18112505/national-climate-assessment-2018-trump>.

COVID-19 has changed us and killed us, but it has also presented an opportunity: it has allowed us to observe our governance responses at work. We can use these observations to ensure that when the next crisis comes—and it will—we are able to respond in a way that accounts for and works with our underlying governmental values and structures, rather than being limited by them.