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### Pandemic Federalism

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## PANDEMIC FEDERALISM

CARY COGLIANESE<sup>†</sup>

In the late 1950s, a Yale political scientist, Charles Lindblom, published an article extolling the virtues of incremental policy development—or what he called the “science of muddling through.”<sup>1</sup> Lindblom contrasted incrementalism with comprehensively rational decision-making.<sup>2</sup> The latter operates much as textbooks instruct decision-makers to solve problems: figure out what is wrong, identify all the possible solutions, and carefully assess each possible solution before choosing the one expected to work best at solving the problem. As much as that sounds sensible, even desirable, Lindblom, a former president of the American Political Science Association, observed that the real world does not operate that way. Rather, problems are only partially understood, solution sets are bounded to whatever comes to mind or seems workable, and decision-makers never fully analyze each option the way the textbooks recommend. In reality, policy-making proceeds through trial and error. We muddle through.

Over the decades since Lindblom wrote, political scientists have accepted his model of how the policy world operates.<sup>3</sup> It is a messy world indeed. But Lindblom went further than just deploying incrementalism as a model to describe how the policy world actually operates. He extolled the virtues of muddling through and argued that this was the better way to try to approach policy decision-making.<sup>4</sup> Trial and error, he put forward, allows for action to be taken more expeditiously, before everything can be studied and analyzed fully.<sup>5</sup> And if—or, really, when—things do not turn out exactly like they were intended, changes and mid-course corrections could be made. Muddling through might be muddy, but it was at least movement forward.

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1. Charles E. Lindblom, *The Science of “Muddling” Through*, 19 PUB. ADMIN. REV. 79-88 (1959).

2. *Id.*

3. See, e.g., Michael Howlett & Andrea Migone, *Charles Lindblom is Alive and Well and Living in Punctuated Equilibrium Land*, 30 POL’Y & SOC’Y 53, 56 (2011).

4. Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517-526 (1979).

5. *Id.*

Lindblom's theory has a lot in common with the virtues that have long been extolled for federalism and the vital role of states within the overall structure of governance within the United States.<sup>6</sup> Federalism, of course, reflects the historical development of the U.S. governmental system. As with muddling through, it does a good job of describing how governance emerged and operates in the United States. But federalism has its normative side too. From the founding of the Constitution to today, the states have had many adherents who have viewed them as the best units of government to exercise principal responsibility for public welfare.

Federalism's adherents see that it carries with it an underlying genius. As with incrementalism, it too allows for trial and error, experimentation with multiple solutions, and learning. Because ideas that are tried in one state can diffuse to others, states can serve as laboratories of democracy, as Justice Louis Brandeis put it.<sup>7</sup>

Yet what are virtues for some purposes are not necessarily virtues for all purposes. That is a point about incrementalism that Paul Schulman, a political scientist at a small liberal arts college in California, recognized in the mid-1970s.<sup>8</sup> Writing in the earliest days of his academic career, Schulman published an article in his profession's flagship journal, the *American Political Science Review*, that directly challenged the prevailing endorsement of Lindblom's incrementalism as a model form of policy decision-making.<sup>9</sup> Schulman argued for what he called "nonincremental policymaking."<sup>10</sup>

Certain problems, Schulman said, could not be solved through trial and error, simply because these problems did not leave much room for error. His Exhibit A: the space program.<sup>11</sup> For obvious reasons, NASA simply could not have managed to make it to the moon in 1969 by muddling through. To stand any hope of achieving its mission, NASA needed to approach decision-making as a comprehensively rational exercise.<sup>12</sup>

Schulman's argument amounted to the intellectual equivalent of David taking on Goliath. But Goliath still won out in the end. Lindblom

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6. Some legal scholars have lauded decentralized governance as a strategy for learning through trial and error. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

7. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, L., dissenting) (describing as "one of the happy incidents of the federal system that a [state may] serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

8. Paul R. Schulman, *Nonincremental Policy Making: Notes Toward an Alternative Paradigm*, 69 AM. POL. SCI. REV. 1354 (1975).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

remains one of the most cited political scientists of the last century.<sup>13</sup> By contrast, Schulman’s paper has garnered less than two hundred citations over the decades.<sup>14</sup> On the occasion of the fiftieth anniversary of Lindblom’s article, political scientists could (and did) ask themselves: “Are we all incrementalists now?”<sup>15</sup> The answer was, by and large, “yes.”

Today, one might well ask the same question about federalism, which has its ardent proponents on both the right and the left ends of the political spectrum in the United States. Those on the right often cling to the nostalgia of state’s rights from the bygone era of the nation’s founding.<sup>16</sup> Those on the left see Washington, D.C., as increasingly irrelevant for progressive social policy, which many advocates say emanates today more meaningfully and nimbly at the level of state and city government.<sup>17</sup> Still, the point that Schulman offered about incrementalism seems to be exactly the right one to make about federalism: Distributed and varied, state policy decision-making will be simply counterproductive in some circumstances. Federalism is simply not well-suited to solving some problems. And combating viral pandemics is surely one of these, as the COVID–19 pandemic has made evident.<sup>18</sup>

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13. Rune Premfors, *Review Article: Charles Lindblom and Aaron Wildavsky*, 11 BRIT. J. POL. SCI. 201 (1981) (describing Lindblom’s article on “muddling through” as “one of the most widely read pieces written by a contemporary social scientist”); Yale News, *In Memoriam: Charles Edward Lindblom, Helped Found ISPS at Yale* (Feb. 20, 2018), <https://news.yale.edu/2018/02/20/memoriam-charles-edward-lindblom-helped-found-isps-yale> [<https://perma.cc/VA9K-8E22>] (describing “muddling through” article as “one of the most frequently cited publications in political science literature”).

14. A search in Google Scholar yields a list of 193 sources citing to Schulman’s article.

15. Christine R. Allison & Denis Saint-Martin, *Half a Century of “Muddling”: Are We There Yet?*, 30 POL’Y & SOC’Y 1, 4 (2017).

16. See, e.g., Yuval Levin, *The Next Conservative Movement*, WALL ST. J. (Apr. 15, 2016), <https://www.wsj.com/articles/the-next-conservative-movement-1460741085> [<https://perma.cc/EZ69-H9FU>]; Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 882 (2006). See generally J.M. Balkin, *Federalism and the Conservative Ideology*, 19 URBAN L. 459 (Summer 1987).

17. See, e.g., BARRY G. RABE, *STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY* (2004); Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User’s Guide*, 44 DEM. J. (2017), <https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide> [<https://perma.cc/2KVJ-4QP2>]; Alexander A. Reinert, Joanna C. Schwartz & James E. Pfander, *To Reform Policing Accountability, States Need Not Wait on Supreme Court and Congress*, USA TODAY (Feb. 5, 2022), <https://www.usatoday.com/story/opinion/2022/02/05/police-reform-start-states-congress-supreme-court/9287751002/> [<https://perma.cc/WS4V-NWUT>]. See also Ilya Somin, *How Liberals Learned to Love Federalism*, WASH. POST (July 12, 2019), [https://www.washingtonpost.com/outlook/how-liberals-learned-to-love-federalism/2019/07/12/babd9f52-8c5f-11e9-b162-8f6f41ec3c04\\_story.html](https://www.washingtonpost.com/outlook/how-liberals-learned-to-love-federalism/2019/07/12/babd9f52-8c5f-11e9-b162-8f6f41ec3c04_story.html) [<https://perma.cc/B2KW-RFBP>].

18. ANDY SLAVITT, *PREVENTABLE: THE INSIDE STORY OF HOW LEADERSHIP FAILURES, POLITICS, AND SELFISHNESS DOOMED THE U.S. CORONAVIRUS RESPONSE* 45 (2021) (“There

This lesson from the COVID–19 pandemic—namely, that federalism complicates an effective national public health response to pandemics—needs to be learned so the United States will not be fated to muddle so tragically through the next pandemic as it has the one that broke out in 2020. What will ultimately be needed in future pandemics will be both stronger federal authority and more responsible national leadership exercising it. A pandemic, in other words, demands a matching *pandemic federalism*, in contrast with the federalism that operates during normal times, when muddling through can be tolerated better and time exists for policy experimentation. Pandemic federalism amounts to a temporary but responsive reconfiguration of authority and responsibility that aims for a decidedly non-incremental and nationally coordinated response that can meet society’s demands of the moment.<sup>19</sup>

### I.

Pandemics are inherently cross-jurisdictional problems. As long as people infected with a communicable virus travel from one jurisdiction to another, viral outbreaks will cross political and legal borders and become, in federal systems, problems for national governments. Acknowledging this reality is not to say that closing borders will be the best solution to a viral outbreak. Rather, it is simply to observe that, with cross-border movement, if one jurisdiction fails to respond adequately to a viral outbreak within its borders, a virus will inevitably spread to other jurisdictions. This will be especially likely when individuals infected by the virus show no signs or symptoms of infection, for then they will not even realize that they might be transmitting the virus and will have no reason to limit their interstate movement. This cross-border movement of infected individuals is exactly what the United States has experienced since the introduction of the SARS-CoV-2 virus—or coronavirus—in late 2019 or early 2020.<sup>20</sup>

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is no ‘commonsense’ or ‘instinctual’ way to respond to a pandemic. There are right moves that must be made in the right order, quickly . . .”).

19. In this respect, “pandemic federalism” can be contrasted with more chaotic terms used to describe modern federalism. See, e.g., Thomas A. Birkland, et al., *Governing in a Polarized Era: Federalism and the Response of U.S. State and Federal Governments to the COVID–19 Pandemic*, 51 *PUBLIUS* 650-672 (2021) (“kaleidoscopic federalism”); Heather K. Gerken, *Federalism 3.0*, 105 *CALIF. L. REV.* 1695 (2017) (“uncooperative federalism”); Jessica Bulman-Pozen, *Partisan Federalism*, 127 *HARV. L. REV.* 1077 (2014) (“partisan federalism”); Cynthia J. Bowling & J. Mitchell Pickerill, *Fragmented Federalism: The State of American Federalism 2012-13*, 43 *ANN. REV. FEDERALISM* 315 (2013) (“fragmented federalism”).

20. The novel coronavirus, SARS-CoV-2, causes the disease known as COVID–19, although colloquially COVID–19 is sometimes referred to as both the virus and the disease.

The United States did cancel international airline flights for a period of time, and domestic air travel plummeted in the number of passengers in late March and April of 2020. Still, even at their lowest levels in the early months of the pandemic, the nation's airlines transported nearly 3 million passengers per month.<sup>21</sup> By mid-March 2020, researchers at the Yale School of Public Health could aptly declare that “[i]nterstate transmission of the novel coronavirus that causes COVID–19 is now a much greater public health threat in the United States than cases coming into the country via international travel.”<sup>22</sup>

That threat never diminished in 2020. On the contrary, by May, the number of domestic airline passengers increased to nearly 8 million passengers, and it doubled to 16 million in June.<sup>23</sup> By July, the number of passengers on domestic flights was back up to nearly 25 million passengers per month, a level at which it stayed for the rest of the year.<sup>24</sup> Admittedly, some of these flights occurred between cities within the same state, but most air travel flights cross state lines. Moreover, the movement of passengers across state lines by air travel constitutes only one means for the coronavirus to spread. Many people continued to move across borders using other modes of transportation. Researchers documented, for example, clear patterns of viral spread along areas served by major interstate highways.<sup>25</sup>

Analysts have also used cell phone location data collected during the pandemic to display patterns of interstate travel. A widely publicized heat map released in March 2020 showed how people who were present at just a single beach in Fort Lauderdale, Florida, diffused rapidly across large swathes of the nation in the following weeks.<sup>26</sup> A similar analysis of location data from 26,000 cell phones present in Las Vegas over a single

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21. Bureau of Transportation Statistics for Passengers on All Carriers at All Airports, DEP'T OF TRANSP., [https://www.transtats.bts.gov/Data\\_Elements.aspx?Data=1](https://www.transtats.bts.gov/Data_Elements.aspx?Data=1) [<https://perma.cc/X37C-XH74>].

22. Colin Poitras, *Interstate Transmission of COVID–19 is Now Most Urgent Threat*, YALE SCH. OF PUB. HEALTH (Apr. 3, 2022), <https://ysph.yale.edu/news-article/23678> [<https://perma.cc/L8KP-ZTQR>]. See also Joseph R. Fauver et al., *Coast-to-Coast Spread of SARS-CoV-2 during the Early Epidemic in the United States*, 181 CELL 990-996 (2020), [https://www.cell.com/cell/pdf/S0092-8674\(20\)30484-0.pdf](https://www.cell.com/cell/pdf/S0092-8674(20)30484-0.pdf) [<https://perma.cc/VTS7-9B3R>].

23. DEP'T OF TRANSP., *supra* note 21.

24. *Id.*

25. For example, it was possible in 2020 to observe a spread of COVID “along I-80 between central Illinois and Iowa.” David Rubin, Gregory Tasian & Jing Huang, *COVID–19 Outlook: A Pivotal Moment in the U.S. Fight Against Coronavirus*, CHILD. HOSP. OF PHILA. POLICYLAB (July 1, 2020), <https://policylab.chop.edu/blog/COVID–19-outlook-pivotal-moment-us-fight-against-coronavirus> [<https://perma.cc/467U-MRVJ>].

26. Tectonix (@TectonixGEO), TWITTER (Mar. 24, 2020, 9:44 PM), <https://twitter.com/TectonixGEO/status/1242628347034767361> [<https://perma.cc/E7AF-4L9G>].

four-day period in July 2020 documented how “those same smartphones also showed up in every state on the mainland except Maine in those same four days.”<sup>27</sup> Over 3,500 of the phones identified in Las Vegas in that four-day period in July could be found “in Southern California in the same four days.”<sup>28</sup> Roughly 2,700 of these cell phones made their way in a matter of days to Arizona, and about another 1,000 to Texas—with “more than 800 in Milwaukee, Detroit, Chicago and Cleveland ... and more than 100 in the New York area.”<sup>29</sup>

Clearly, interstate travel has been a “huge driving factor” in the spread of coronavirus.<sup>30</sup> Even at the height of public fear and adherence to social distancing in the spring of 2020, the coronavirus exploited the many opportunities people afforded it to spread across state lines. Indeed, various studies have documented the interstate transmission of coronavirus following various super-spreader events in 2020, including a business conference in Boston,<sup>31</sup> college spring break trips to Florida,<sup>32</sup> and a motorcycle rally in Sturgis, South Dakota.<sup>33</sup>

In a large nation with fifty states, where individuals possess a constitutional right to travel across state lines,<sup>34</sup> it should not be surprising that the fate of the residents in any given state during a pandemic will depend on how well other states manage to contain the virus. As one team of public health researchers has asked rhetorically: “How well can North

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27. Marshall Allen, *Cellphone Data Shows how Las Vegas is “Gambling with Lives” Across the Country*, PROPUBLICA (Aug. 18, 2020, 5:00 AM), <https://www.propublica.org/article/cellphone-data-shows-how-las-vegas-is-gambling-with-lives-across-the-country> [https://perma.cc/T8A9-BE64].

28. *Id.*

29. *Id.*

30. Rubin, Tasian & Huang, *supra* note 25.

31. Jacob E. Lemieux et al., *Phylogenetic Analysis of SARS-CoV-2 in the Boston Area Highlights the Role of Recurrent Importation and Superspreading Events* (forthcoming), MEDRXIV <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7457619/pdf/nihpp-2020.08.23.20178236.pdf> [https://perma.cc/ZC7S-7KNW].

32. Daniel Mangrum & Paul Niekamp, *JUE Insight: College Student Travel Contributed to Local COVID-19 Spread*, J. Urb. Econ. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3606811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606811) [https://perma.cc/F3KX-8EBK].

33. Melanie J. Firestone et al., *COVID-19 Outbreak Associated with a 10-Day Motorcycle Rally in a Neighboring State-Minnesota, August-September 2020*, 69 MORBIDITY AND MORTALITY WEEKLY REPORT 1771 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6947e1-H.pdf> [https://perma.cc/NFG2-JB77].

34. “The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.” *United States v. Guest*, 383 U.S. 745, 757 (1966). See also *Passenger Cases*, 48 U.S. 283 (1849); *Crandall v. Nevada*, 73 U.S. 35, 44 (1867); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

Carolina, for example, continue to mitigate transmission if South Carolina and Florida remain slow-footed in their response?”<sup>35</sup>

Just asking this question acknowledges, of course, the key role that states play in public health in the United States. Although the federal government has assumed many responsibilities in other domains over the years—and federal institutions such as the Centers for Disease Control do play a role in responding to pandemics—it remains the case that state and local institutions make up the nation’s principal public health infrastructure. Indeed, as counterintuitive as it may seem, in the face of a global public health crisis, the responses by state and local governments are crucial.<sup>36</sup> The needed on-the-ground resources such as hospitals and medical teams are physically distributed across the country and operate in a decentralized network of public and private institutions. In addition, subnational governments also have resources needed to enforce school and work closures as well as monitor compliance with other requirements, such as mask-wearing and vaccinations.

The differences in capacity across levels of government are evident just from comparing data on the key component of the nation’s public health infrastructure: people. Although the federal Veterans Health Administration employs about 370,000 health care workers,<sup>37</sup> this is only a tiny drop in the bucket of a health care sector in the United States that employs about 20 million workers overall<sup>38</sup>—most of whom are working in public or private hospitals or clinics that are licensed and regulated at the state level. Similarly, the number of personnel at federal public health agencies—about 10,000 employees at the Centers for Disease Control<sup>39</sup> and 6,500 commissioned officers in the U.S. Public Health Service<sup>40</sup>—

35. Rubin, Tasian & Huang, *supra* note 25.

36. Cary Coglianese & Neysun A. Mahboubi, *Administrative Law in a Time of Crisis: Comparing National Responses to COVID-19*, 73 ADMIN. L. REV. 1 (2021). Tribal governments’ responses are also crucial. For a helpful discussion of tribal actions in the wake of COVID-19, see Katherine Florey, *The Tribal COVID-19 Response*, REG. REV. (Mar. 17, 2021), <https://www.theregreview.org/2021/03/17/florey-tribal-covid-19-response/> [<https://perma.cc/46G4-Q4VZ>].

37. *About VHA*, VETERANS HEALTH ADMIN., [https://www.va.gov/health/aboutvha.asp#:~:text=VA%2C%20the%20nation%20largest%20health,complexity%20\(VHA%20outpatient%20clinics](https://www.va.gov/health/aboutvha.asp#:~:text=VA%2C%20the%20nation%20largest%20health,complexity%20(VHA%20outpatient%20clinics) [<https://perma.cc/H2AM-ACA4>] (last visited Apr. 7, 2022).

38. Lynda Laughlin, et al., *22 Million Employed in Health Care Fight Against COVID-19*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/2021/04/who-are-our-health-care-workers.html#:~:text=There%20were%2022%20million%20workers,American%20Community%20Survey%20> [<https://perma.cc/3JAG-XYCM>].

39. Adam Andrzejewski, *10,000 CDC Employees Earn \$1.1 Billion Annually*, FORBES (Feb. 29, 2020), <https://www.forbes.com/sites/adamandrzejewski/2020/02/29/10600-cdc-employees-earn-11-billion-annually/?sh=445582eb24da> [<https://perma.cc/F5KF-BH55>].

40. *U.S. Public Health Service Commissioned Corps*, U.S. HEALTH & HUM. SERV. OFF. SURGEON GEN., <https://www.hhs.gov/surgeongeneral/corps/index.html> [<https://perma.cc/>



pales in comparison with estimates of the public health workforce at the state and local levels.<sup>41</sup> According to a McKinsey report, approximately 200,000 employees made up the total public health workforce nationwide in 2020.<sup>42</sup> The California Health and Human Services Agency has 30,000 employees,<sup>43</sup> while the Texas Health and Human Services Commission has about 36,000 employees.<sup>44</sup> The New York City Department of Health and Mental Hygiene alone has 6,000 employees.<sup>45</sup>

With the bulk of the public health infrastructure in the United States existing at the state and local levels, the cross-border nature of viral spread necessitates consistency and coordination in the substance and speed of public health measures across these jurisdictional units and their personnel.<sup>46</sup> That is why North Carolina will indeed be unable to manage a viral outbreak well if South Carolina or Florida—or any other state—turns out to be slow or inept to act in response to a communicable disease.<sup>47</sup> If a virus is to be contained, it needs swift, coordinated action to contain it. A pandemic is not a time for muddling.

## II.

Federalism faces inherent challenges in the face of pandemics. Any decentralized system will struggle in circumstances that call for a quick, coordinated response.

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5QJ3-U378] (last visited Apr. 7, 2022).

41. *How Does the Public Health Workforce Compare with the Broader Public Sector?*, CTR. FOR STATE & LOC. GOV'T EXCELLENCE (Mar. 2020), <https://slge.org/wp-content/uploads/2020/03/public-health-workforce.pdf#page=3> [<https://perma.cc/HYR2-ZB7N>].

42. Pooja Kumar, Emily Lurie & Ramya Parthasarathy, *Building the US public-health workforce of the future*, MCKINSEY & CO. (Feb. 2, 2022), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/building-the-us-public-health-workforce-of-the-future> [<https://perma.cc/K8EP-NBE8>].

43. *Remarks by Secretary Michael Wilkening at Office of National Coordinator 2018 Annual Meeting*, CAL. HEALTH & HUM. SERVS. AGENCY (Nov. 30, 2018), <https://www.chhs.ca.gov/blog/2018/11/30/remarks-by-secretary-michael-wilkening-at-office-of-national-coordinator-2018-annual-meeting/> [<https://perma.cc/J7CY-C5QY>].

44. STAFF COMPENSATION REPORT, TEX. HEALTH & HUM. SERV. 2 (Jan. 2020), <https://www.hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2020/staff-compensation-report-jan-2020.pdf> [<https://perma.cc/YC8M-SWRY>].

45. *About the NYC Department of Health and Mental Hygiene*, NYC HEALTH, <https://www1.nyc.gov/site/doh/about/about-doh>. (last visited Apr. 7, 2022) [<https://perma.cc/FJB9-2S8F>].

46. Alejandro E. Camacho & Robert L. Glicksman, *Structured to Fail: Lessons from the Trump Administration's Faulty Pandemic Planning and Response*, 10 MICH. J. ENV'T & ADMIN. L. 329 (2021).

47. This is also why individuals in different states can suffer disproportionate harms, as inequities exist across states in health care systems and other public health measures. See generally JENNIFER PRAH RUGER, GLOBAL HEALTH JUSTICE AND GOVERNANCE 5 (2018) (describing the health disparities that exist across different states in the United States).

This is not to say that all aspects of decentralization must be resisted, even during a pandemic. On the contrary, as noted, given the distributed nature of communicable diseases, along with geographical and demographic variation in disease patterns and the need to address individual behaviors and health care needs on a local basis, many public health responses must be delivered on the ground in some distributed fashion.<sup>48</sup> This will be true even in unitary systems of government.

In addition, the decentralization of a competitive marketplace can provide fertile ground for welfare-enhancing innovation and resource provision. Consider the decentralized process that led to the rapid development of a COVID-19 vaccine and which was one of the relatively few truly successful features of the U.S. response to the pandemic.<sup>49</sup> Or consider on the flip side, as a much less successful example, the debacle that occurred early in the pandemic when the federal Centers for Disease Control and U.S. Food and Drug Administration staked their hopes for too long on centrally created testing kits that turned out to be defective.<sup>50</sup>

These two examples reveal the importance of effective national response. It was, after all, the sluggishness of federal agencies—the CDC and the FDA—that delayed the approval of the use of private testing that

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48. Coglianesi & Mahboubi, *supra* note 36, at 9 (“Containing [a viral] spread and responding to the needs of infected individuals demands governance at the local level, where actions can be taken to respond to individual behaviors and needs.”). Public health policies need to take into account variation in people’s lives and this will necessitate adapting policies and their implementation to local circumstances. With respect to COVID-19, for example, government “leaders cost lives by issuing one-size-fits-all guidance without being attuned to the facts on the ground for Black people.” HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* 278 (2021). *But cf.* Olatunde C. Johnson & Kristen Underhill, *Vaccination Equity by Design*, 131 *YALE L. J. F.* 53 (2021) (acknowledging the states’ role in public health but recommending responses by federal agencies because they “have a comparative advantage in collecting and rapidly analyzing data, publicizing information with credibility, disseminating expertise through guidance, enforcing civil-rights violations, and supporting information networks.”).

49. See, e.g., *Operation Warp Speed: Accelerated COVID-19 Vaccine Development Status and Efforts to Address Manufacturing Challenges*, U.S. GOV’T ACCOUNTABILITY OFF. (Feb. 11, 2021), <https://www.gao.gov/products/gao-21-319> [<https://perma.cc/HFT9-H6M2>]; *Operation Warp Speed Contracts for COVID-19 Vaccines and Ancillary Vaccination Materials*, CONG. RES. SERV. (Mar. 1, 2021), <https://crsreports.congress.gov/product/pdf/IN/IN11560> [<https://perma.cc/5ESD-KZXZ>].

50. Alec Stapp, *Timeline: The Regulations—and Regulators—that Delayed Coronavirus Testing*, DISPATCH (Mar. 20, 2020), <https://thedispatch.com/p/timeline-the-regulationsand-regulatorsthat?s=r> [<https://perma.cc/92MW-VADH>]; Sheri Fink & Mike Baker, *‘It’s Just Everywhere Already’: How Delays in Testing Set Back the U.S. Coronavirus Response*, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/10/us/coronavirus-testing-delays.html> [<https://perma.cc/DT8J-TPFJ>].

was necessary to detect the virus.<sup>51</sup> And even though private pharmaceutical firms produced the rapid vaccine breakthroughs, their swift action was spurred by actions of the federal government's Operation Warp Speed, which provided needed incentives and coordination.<sup>52</sup>

Despite the benefits that decentralized private market actions can yield, they cannot be a complete substitute for governmental action. Given the public goods nature of viral control, and the kind of collective action such control demands, a decentralized market can never provide the optimal response to a pandemic.<sup>53</sup> Strong governmental action will always be needed—and that entails confronting the challenges that pandemics pose for federalist governments.

These challenges are borne out in the first instance by research on the overall effectiveness of federal systems of government. This research indicates that federal systems tend to perform less well than unitary or centralized systems, all other things being equal.<sup>54</sup>

Summarizing empirical research comparing federalist countries and unitary ones on a variety of measures of governmental performance, Malcolm Feeley and Aniket Kesari have explained that the available studies “almost all point in the same direction and to the same conclusion: unitary systems out-perform federal systems on almost all indicators of governmental effectiveness and efficiency, and quality of life.”<sup>55</sup> Feeley and Kesari's own analysis finds that unitary systems appear to be better equipped to manage the precise degree to which policies and their implementation need to be centralized or decentralized, depending on the nature of the problem at hand.<sup>56</sup> In other words, unitary systems appear more nimble and better able to coordinate.

It can thus hardly be surprising that the United States has faced difficulties in managing its response to the COVID-19 pandemic. A system comprising fifty-one major governing units (not to mention tens of thousands of local ones) is simply not built well for a swift, coordinated public health response.

The problems that federalism creates go beyond, though, just the inherent and understandable difficulties of undertaking coordinated action

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51. *Id.*

52. *See generally* CONG. RES. SERV., *supra* note 49.

53. For an account of limitations in the private health care marketplace during a pandemic, *see* SLAVITT, *supra* note 18, at 173–194.

54. Malcolm M. Feeley & Aniket Kesari, *Federalism as Compared to What? Sorting Out the Effects of Federalism, Unitary Systems, and Decentralization*, UC Berkeley Pub. Res. Paper 97-124 (2017). *See also* Michael Livermore, *The Perils of Experimentalism*, 126 *YALE L. J.* 636 (2017).

55. *Id.*

56. *Id.*

that can mean that viral contagion in one state can spread to others. In modern society, where information flows freely and instantaneously across borders, federalism can undermine effective risk communication with the public. For decades, social scientists and public health experts have emphasized the need for consistency in risk communication.<sup>57</sup> But federalism brings with it a great likelihood of inconsistencies, as different governments and their officials send different messages. With COVID-19, risk messaging became muddled when the federal government said masks were needed, and yet some major state officials said otherwise. People come to hear whatever message they want to hear, or they grow unsure of whether to listen to anyone. Behavioral compliance with the best public health practices inevitably suffers.<sup>58</sup>

In the United States, it is not merely that a federalist structure of government makes inconsistencies in policies and risk communication more likely, but the U.S. tradition of federalism almost seems to encourage it. That tradition provides ready justifications for state officials to resist the national government's efforts to promote an effective, coherent public health strategy. The experience with the COVID-19 pandemic revealed a fierce possessiveness by state officials when it came to protecting their turf. At least whenever state officials disfavored the federal government's efforts at coordination, they could, and did, revert to claiming their own sovereign authority when taking actions that frustrated an effective national response.

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57. NATIONAL RESEARCH COUNCIL, IMPROVING RISK COMMUNICATION 121 (1989) (emphasizing the importance of consistency to make risk communication credible); NATIONAL RESEARCH COUNCIL, ALERTING AMERICA: EFFECTIVE RISK COMMUNICATION: SUMMARY OF A FORUM 4 (2003) (noting that “[r]isk communication messages need to be consistent”); Deborah C. Glik, *Risk Communication for Public Health Emergencies*, 28 ANN. REV. PUB. HEALTH 38-40 (2007) (discussing the importance of consistency in risk communication).

58. Consistency in risk communication may be easier to achieve with unitary systems, but it is by no means guaranteed. Across different parts of the U.S. government, and at different points in time, messaging about COVID-19 varied in ways that compromised risk communication. For example, federal public health officials frequently saw their public messaging muddled, if not at times contradicted, by President Trump. *See, e.g.,* Yanbai Andrea Wang & Justin Weinstein, *Pandemic Governance*, 63 BOS. COLL. L. REV. (2022) (“The federal government—and President Trump in particular—undermined actors at every level of government, including at the federal level, causing confusion and inconsistency”). Moreover, even federal public health officials themselves struggled at times to maintain consistent messaging. In the earliest weeks, for example, they discouraged mask-wearing as they were concerned about ensuring that medical professionals would have enough protective gear and were unaware of the full extent of transmission occurring via infected but asymptomatic individuals. After shifting to recommending mask-wearing, the CDC then stated in the spring of 2021 that vaccinated individuals no longer needed to wear masks, only a few months later to recommend yet again that they wear them. Deborah Netburn, *A Timeline on the CDC's Advice on Face Masks*, L.A. TIMES (July 27, 2021), <https://www.latimes.com/science/story/2021-07-27/timeline-cdc-mask-guidance-during-covid-19-pandemic>.

Consider, for example, the reaction of numerous states to federal measures to require vaccinations. By executive order, President Biden required all federal workers and contractors to be vaccinated.<sup>59</sup> The U.S. Department of Health and Human Services required vaccinations of all workers at health care facilities receiving Medicare funding.<sup>60</sup> The federal Occupational Safety and Health Administration (OSHA) required all employers with more than 100 employees either to test their workers weekly or ensure that each employee was vaccinated.<sup>61</sup> In addition, the federal government mandated vaccinations for teachers in Head Start programs<sup>62</sup> along with those in schools operated by the Department of Defense and the Bureau of Indian Education.<sup>63</sup> The federal government also issued orders or guidance at various times for the collection of vaccination information, the wearing of masks, and self-isolation for individuals who tested positive for COVID-19.<sup>64</sup>

Despite these federal measures reinforcing the message of vaccinations and masking, not all state governments followed the federal government's lead. Some states, particularly in the South and West, even actively resisted the federal efforts. At least eight states enacted laws to prevent schools from requiring students to wear masks.<sup>65</sup> Florida's governor signed both an executive order<sup>66</sup> and legislation prohibiting vaccine mandates to be imposed on anyone by any public or private entity.<sup>67</sup> The Texas governor adopted an executive order prohibiting any governmental institution in the state from mandating that anyone receive a COVID-19 vaccine.<sup>68</sup>

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59. Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sep. 9, 2021).

60. *Biden-Harris Administration to Expand Vaccination Requirements for Health Care Settings*, CTRS. FOR MEDICARE & MEDICAID SERV. (Sep. 9, 2021), <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-expand-vaccination-requirements-health-care-settings>.

61. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021).

62. Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs, 86 Fed. Reg. 68,052 (Nov. 30, 2021) (to be codified at 45 C.F.R. 1302).

63. Order No. 3402 COVID-19 Vaccine Mandate for Educators at Bureau of Indian Education-Operated Schools, SEC. INTERIOR (Sep. 2, 2021), <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3402-COVID-19-vaccine-mandate-for-educators-vaccine-at-bureau-of-indian-education-operated-schools.pdf>.

64. *Id.*

65. Christine Vestal, *10 States Have School Mask Mandates While 8 Forbid Them*, PEW (Aug. 12, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/08/10/10-states-have-school-mask-mandates-while-8-forbid-them>.

66. Fla. Exec. Order No. 21-81 (Apr. 2, 2021).

67. 29 Fla. St. Title § 381.00317.

68. Tex. Exec. Order No. GA-38, 46 Tex. Reg. 4,913 (Aug. 13, 2021).

When officials in these and other states adopted policies in direct contradiction with the approach taken at the national level, they did so by embracing the rhetoric of state sovereignty. Florida’s Governor Ron DeSantis, for example, declared that “[t]he states are the primary vehicles to protect people’s freedoms, their health, their safety, their welfare, in our constitutional system.”<sup>69</sup> In enacting a law prohibiting state officials from enforcing federal COVID–19 vaccine mandates, the Wyoming legislature declared that “[t]he states are laboratories of good policy.”<sup>70</sup>

In upholding the states’ prerogative over public health, the federalist tradition in the United States gives state officials a readily available excuse to depart from, and even to resist, coordinated action by the federal government. These officials might have had self-interested reasons for resisting—such as playing to a different political base than national leaders—but they can nevertheless cover up those political reasons and couch their resistance in the language of federalism and appeals to constitutional law. And that they did. Twenty-seven states notably joined in taking to the Supreme Court a successful legal challenge to OSHA’s vaccine-and-test mandate.<sup>71</sup>

State officials’ rhetorical appeals to federalism have a definite grounding in constitutional doctrine. As early as the opening decades of the nineteenth century, the U.S. Supreme Court declared that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the *states* respectively.”<sup>72</sup> The Court declared in 1824 that “health laws ... are not within the power granted to Congress.”<sup>73</sup> In 1849, the Court specifically upheld states’ authority to “pass quarantine and health laws.”<sup>74</sup> In the 1905 case of *Jacobson v. Massachusetts*, the Court upheld states’ authority to require vaccinations, pronouncing that “[t]he safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect.”<sup>75</sup>

Constitutional recognition of states as the primary authorities on matters of public health and welfare remains intact today, even as the federal government has assumed greater authority to regulate private conduct under the Interstate Commerce Clause. As recently as 2012, the

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69. Jim Turner, *Florida Governor Signs Raft of Anti-Vaccine Mandate Bills*, ORLANDO WEEKLY (Nov. 18, 2021), <https://www.orlandoweekly.com/news/florida-gov-ron-desantis-signs-raft-of-anti-vaccine-mandate-bills-30331848>.

70. H.R. 1002, 66th Leg., Spec. Sess. 1 (Wyo. 2021).

71. *Nat’l Fed’n Indep. Bus. v. U.S. Dep’t Lab.*, 142 S. Ct. 661 (2022).

72. U.S. Const. amend. X.

73. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

74. *Smith v. Turner*, 48 U.S. 283 (1849).

75. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Supreme Court has noted that “[t]he States ... can and do perform many of the vital functions of modern government.”<sup>76</sup> The Court has praised the nation’s federal structure of government by noting that it ensures that “the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed.”<sup>77</sup>

The controversies that emerged during COVID–19 pandemic have revealed not only the fierce vitality of this constitutional rhetoric of federalism; they have also shown how this rhetoric allows government officials to disclaim responsibility for addressing a problem when it has clear cross-border effects.<sup>78</sup> President Donald Trump tried to shift responsibility to the states for responding to the pandemic.<sup>79</sup> Confronted with the risk of shortages of personal protective equipment and other medical supplies, he said that procuring these supplies was up to the states: “The federal government is not supposed to be out there buying vast amounts of items and then shipping . . . we’re not a shipping clerk.”<sup>80</sup> In April 2020, Trump described the national government as “merely a back-up for state government.”<sup>81</sup> As Andy Slavitt has described, this abdication of federal responsibility “was more of a political strategy than a public health strategy”:

Trump would announce that the country would be reopening at the end of the month, but states would have to solve the hard problems. This way, if things opened and went badly, Trump

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76. Nat’l Fed’n Indep. Bus. v. Sebelius, 567 U.S. 519, 535 (2012).

77. *Id.* at 536.

78. Jacob M. Grumbach & Jamila Michener, *American Federalism, Political Inequality, and Democratic Erosion*, 699 ANNALS AMER. ACAD. POL. & SOC. SCI. 143, 153 (2022) (“When everybody is responsible, nobody is responsible.”).

79. See, e.g., Lindsay F. Wiley, *Federalism in Pandemic Prevention and Response*, in PUBLIC HEALTH LAW WATCH, COVID–19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE (2021) (“In 2020, the president, Department of Health and Human Services (HHS) Secretary, and other officials frequently blamed, rather than partnered with states.”); SLAVITT, *supra* note 18, at 122–124 (discussing a strategy that he refers to as the “state authority handoff”). As Slavitt writes, “Deborah Birx offered a plan for success without federal involvement” that appealed to President Trump, but apparently “Birx didn’t consider that states might choose to treat the guidelines as optional—and certainly not that they would ignore them almost entirely.” *Id.* at 122.

80. Quint Forgey, *‘We’re Not a Shipping Clerk’: Trump Tells Governors to Step Up Efforts to Get Medical Supplies*, POLITICO (Mar. 19, 2020), <https://www.politico.com/news/2020/03/19/trump-governors-coronavirus-medical-supplies-137658> [<https://perma.cc/ZP5Z-AN5X>].

81. Letter to Senate Minority Leader Charles E. Schumer on the Federal Coronavirus Response (Apr. 2, 2020) (on file with The American Presidency Project at UC Santa Barbara); see also 11<sup>th</sup> Hour, *Trump Calls States ‘Complainers,’ Says Federal Govt. is Just a ‘Backup,’* MSNBC (Apr. 2, 2020), <https://www.msnbc.com/11th-hour/watch/trump-calls-states-complainers-says-federal-govt-is-just-a-backup-81574469576> [<https://perma.cc/SZ9F-RFJU>].

could point to the governors. If there weren't enough diagnostic tests, the states could be blamed. ... Many states wouldn't have enough tests for months. The combination of opening by the end of the month, a lack of tests, and the White House's efforts to avoid blame seemed like a surefire way for cases to grow. ... [T]he states would be helpless without the support of the federal government.<sup>82</sup>

Around the same time, President Trump's advisor and son-in-law, Jared Kushner, declared that "[t]he states have to own the testing."<sup>83</sup> He said "[t]he federal government should not own the testing...it's got to be up to the governors."<sup>84</sup> Kushner notoriously distinguished between "our stockpile" of medical supplies—referring to what the federal government had in store—and claimed that "the federal stockpile was ... not supposed to be states' stockpiles that they then use."<sup>85</sup>

Even President Joseph Biden—who successfully campaigned for office on a promise to bring the coronavirus under control—once acknowledged in a White House meeting with governors that "[t]here is no federal solution" and that "[t]his gets solved at a state level."<sup>86</sup> In a certain respect, that claim is factually accurate, given the distribution of public health capacities at the state and local levels and the need for on-the-ground implementation of response efforts. But focusing only on the importance of states also discounts the extreme cross-border nature of viral outbreaks and the fundamental need for strong national leadership and coordinated response.<sup>87</sup> Perhaps that is why Biden immediately followed

82. SLAVITT, *supra* note 18, at 113-114.

83. William A. Haseltine, *Kushner Comments Suggest Are Politically Motivated*, FORBES (Nov. 2, 2020), <https://www.forbes.com/sites/williamhaseltine/2020/11/02/kushner-comments-confirm-19-decisions-are-political-motivated/?sh=9e437601ff67> [<https://perma.cc/U22E-7YG5>].

84. *Id.*

85. Nicholas Wu, *Jared Kushner Makes Coronavirus Briefing Appearance, Draws Backlash for 'Our Stockpile' Comment*, USA TODAY (Apr. 3, 2020), <https://www.usatoday.com/story/news/politics/2020/04/03/coronavirus-jared-kushner-draws-backlash-our-stockpile-comment/2938648001/> [<https://perma.cc/2KUS-AN2C>]; Franco Ordonez, *Jared Kushner's Role In Coronavirus Response Draws Scrutiny, Criticism*, NPR (Apr. 4, 2020), <https://www.npr.org/2020/04/04/826922646/jared-kushners-role-in-coronavirus-response-draws-scrutiny-criticism> [<https://perma.cc/R33B-7EPT>].

86. *Remarks by President Biden at COVID-19 Response Team's Regular Call With the National Governor's Association*, WHITE HOUSE (Dec. 27, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/27/remarks-by-president-biden-at-Covid-19-response-teams-regular-call-with-the-national-governors-association/> [<https://perma.cc/8JH4-N68Z>].

87. Crisis situations, such as viral outbreaks, call for a coordinated response and a type of "meta-leadership" that brings people together in joint action. JUDITH RODIN, *THE RESILIENCE DIVIDEND: BEING STRONG IN A WORLD WHERE THINGS GO WRONG* (2014).



up his statement to the governors with a request to them that “if you need something, say something,” offering them the assurance that “we’re going to have your back in any way we can.”<sup>88</sup>

### III.

In a time of a pandemic, how exactly does the national government better “have the backs” of the states and—more importantly—the entire nation’s public? Fiscal authority has clearly been crucial in the federal response to COVID–19. Massive recovery packages have funded vaccines, paid for health care costs, and provided much-needed support for the economy.<sup>89</sup> Although much can be accomplished with spending, it probably can never fully resolve the difficulties that emerge over conflicting requirements for mask-wearing, vaccinations, and other public health measures. The federal government was unable to provide needed coordination over regulatory responses in the face of a hodge-podge of state and local requirements (and non-requirements) generating confusion and permitting contagion to spread.

In this respect, the United States proved to be far from the “perfect union” that the Constitution was intended to help propel the nation toward.<sup>90</sup> The experience with the COVID–19 pandemic might even be said to be reminiscent of the kinds of problems from lack of coordination that the United States experienced in its budding years under the Articles of Confederation. Just as the Constitution’s framers recognized the need for stronger central governing authority more generally,<sup>91</sup> the cross-border spread of a viral outbreak reveals a comparable need for a pandemic federalism comprising the strong, coordinated national measures appropriate to a time of a national public health emergency.<sup>92</sup>

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88. *Remarks by President Biden, supra* note 86.

89. *See, e.g.*, Coronavirus Aid, Relief, and Economic Security Act (CARES Act), 15 U.S.C. §§ 9001-9034, 26 U.S.C. §§ 6428, 21 U.S.C. § 356j, 360b-1, 355h, 360fff-8, 379j-71-379j-73, 15 U.S.C. § 9041-9080, 42 U.S.C. 801, 33 U.S.C. § 2238b-1, 2 U.S.C. § 5548, 17 U.S.C. § 710, 22 U.S.C. § 284cc, 282p, 290i-12, 290g-25 (2020); American Rescue Plan Act of 2021, 15 U.S.C. §§ 9034, 9058b-9058d, 9009c, 9013, 9121, 9131, 9132, 9141; 26 USCA §§ 139I, 3131-3134, 6428B, 6432, 6720C, 7527A, 7530; 29 USCA § 1432; 42 U.S.C. §§ 711a, 802-805, 1320b–26, 1396w–6, 1397i, 3020g (2021). *See generally* John Kincaid & J. Wesley Leckrone, *COVID–19 and American Federalism*, in *FEDERALISM AND THE RESPONSE TO COVID–19: A COMPARATIVE ANALYSIS*, (Rupak Chattopadhyay, Felix Knüpling, Diana Chebenova, Liam Whittington & Phillip Gonzalez eds., 2021).

90. U.S. CONST. pmb1.

91. THE FEDERALIST NO. 16 (Alexander Hamilton).

92. These measures, of course, ought to be deployed nonarbitrarily and with full respect to individuals’ due process rights. *See, e.g.*, James G. Hodge, Jr., Lawrence O. Gostin, Wendy E. Parmet, Jennifer B. Nuzzo, & Alexandra Phelan, *Federal Powers to Control*

The substantial cross-state economic consequences associated with the pandemic—not to mention the cross-border spread of the virus itself—clearly provide the federal government with sufficient constitutional authority to step in and impose common standards for individual behavior. Nevertheless, the longstanding primacy of state authority over public health necessarily limited and complicated the federal government’s ability to respond with coordinated regulatory measures as needed in the face of COVID–19.<sup>93</sup>

Current statutory law does give federal officials authority to act in the face of public health emergencies.<sup>94</sup> Under Section 361 of the Public Health Service Act, for example, the Secretary of the U.S. Department of Health and Human Services can approve regulations that “in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States ... or from one State ... into any other State.”<sup>95</sup> Lower federal courts have upheld the exercise of federal authority under this provision—such as to require a mandatory 14-day isolation for an individual who was traveling from overseas without proof of smallpox vaccination<sup>96</sup> and to ban the sale of certain kinds of animals out of concern for the spread of disease.<sup>97</sup> But by and large, the federal government’s use of Section 361 has been rather limited throughout the nation’s history. Moreover, although federal agencies have relied on Section 361 and other statutory authority in important ways in the wake of COVID–19, some of the most significant federal regulatory measures adopted under Section 361 have generated litigation, producing results that have tended to weaken rather than strengthen federal agencies’ ability to respond to future pandemics.

The Centers for Disease Control, for example, relied on Section 361 with the approval of the U.S. Secretary of the Department of Health and Human Services to issue a national moratorium on housing evictions

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*Communicable Conditions: Calls for Reforms to Assure National Preparedness and Promote Global Security*, 15 HEALTH SEC. 123 (2017).

93. Donald F. Kettl, *States Divided: The Implications of American Federalism for COVID–19*, 80 PUB. ADMIN. REV. 595–602 (2020); Nicole Huberfield, Sarah H. Gordon & David K. Jones, *Federalism Complicates the Response to the COVID–19 Health and Economic Crisis: What Can Be Done?*, 45 J. HEALTH POL. POL’Y L. 951–965 (2020).

94. *Legal Authority of the Secretary*, U.S. DEP’T HEALTH & HUM. SERVS. (last visited Apr. 11, 2022), <https://www.phe.gov/Preparedness/support/secauthority/Pages/default.aspx#:~:text=The%20HHS%20Secretary%20has%20legal,and%20the%20Social%20Security%20Act> [<https://perma.cc/9EK9-2LBE>].

95. Public Health Service Act § 361, 42 U.S.C.S. § 264(a).

96. *U.S. ex rel. Siegel v. Shinnick*, 219 F.Supp. 791 (E.D.N.Y. 1963) (holding that the Public Health Service could mandate 14-day isolation to prevent the spread of smallpox).

97. *Indep. Ass’n Turtle Farmers of La., Inc. v. U.S.*, 703 F.Supp 620 (W.D. La. 2010) (holding the FDA had the power to uphold a thirty-five-year ban on the sale of baby turtles).

during the COVID–19 pandemic. In the wake of the economic dislocation the pandemic wrought, the moratorium was needed to reduce the viral spread associated with people pursuing transient housing options. But the Supreme Court held that the federal agency exceeded its statutory authority. The Court concluded that the agency could not rely on a “decades-old statute that authorizes [the federal government] to implement measures like fumigation and pest extermination”—not to set housing policy.<sup>98</sup> Congress would have to pass new legislation if the CDC were to be able to impose anything like its eviction moratorium: “Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”<sup>99</sup>

The Court reached much the same result with respect to a vaccine-or-test mandate that OSHA had adopted under its powers delegated via the Occupational Safety and Health Act. The *per curiam* opinion of the six-member majority on the Court described OSHA’s action as “no everyday exercise of federal power.”<sup>100</sup> Because OSHA’s statute authorizes it to regulate occupational hazards, and COVID–19 pervades all facets of life (not merely the workplace), the Court reasoned that this meant a vaccination requirement exceeded OSHA’s authority.<sup>101</sup> The Court emphasized that, because the OSHA rule does not distinguish between occupational risk and risk more generally, it took on the character of a general public health measure, which the Court said OSHA was not sufficiently clearly authorized to take under its statute.<sup>102</sup> For the Court’s majority, the vaccine-or-test mandate raised a “major question” requiring greater specificity and clarity by Congress before the Court could find OSHA had been given authority to issue its rule.<sup>103</sup>

The justices in the OSHA case were fully cognizant that more than half the states had challenged OSHA’s rule<sup>104</sup>—and the opinion of the Court even made a point to note that OSHA’s rule preempted contrary state laws.<sup>105</sup> Furthermore, three Justices—Gorsuch, Alito, and Thomas—signed a concurring opinion that explicitly noted that “state and local authorities possess considerable power to regulate public health,” and that

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98. *Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021).

99. *Id.* at 2489 (quoting *United States Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837 (2020)).

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

101. *Id.*

102. *Id.* at 666.

103. *Id.*

104. *Id.* at 665, 667 (Gorsuch, N., concurring).

105. *Id.* at 662.

the states “enjoy the ‘general power of governing’ ... [while] [t]he federal government’s powers ... are not general but limited and divided.”<sup>106</sup>

Several months after the Supreme Court’s decisions in the OSHA vaccine and CDC eviction moratorium cases, a federal district court struck down a separate CDC mandate for mask-wearing by passengers on public transportation.<sup>107</sup> The judge followed the main logic in the Supreme Court’s earlier cases, declaring that the CDC lacked statutory authority to effectuate a requirement with major economic and social implications. In her ruling, the judge reasoned that the CDC’s interpretation of Section 361 would have effectuated a shift in public health authority vis-à-vis the states:

[I]n this statute, the CDC finds a power over public health that was “traditionally understood—and still is understood—as a function of state police power.” That is so because it is an “ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”<sup>108</sup>

With these principles in mind, the judge concluded that Section 361 “has no ‘unmistakably clear’ language indicating that Congress intended for the CDC to invade the traditionally State-operated arena of population-wide, preventative public-health regulations.”<sup>109</sup> Although the federal government filed an appeal, the decision of this single federal judge in Tampa, Florida resulted in the lifting of masking requirements across the nation for passengers using commercial airlines, trains, and buses as well as associated airports and terminals.

Other lower court decisions have similarly impeded the federal government’s ability to impose needed public health measures. Invoking federalism and other arguments, a district court judge issued a preliminary injunction barring the CDC from enforcing public health requirements it imposed on cruise ships.<sup>110</sup> The same district court judge, and others, enjoined enforcement of the federal vaccine requirement for federal contractors.<sup>111</sup> Another district court judge invoked the Tenth Amendment,

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106. *Id.* at 667 (Gorsuch, N., concurring).

107. *Health Freedom Defense Fund, Inc. v. Biden*, No. 8:21-cv-1693-KKM-AEP (Apr. 18, 2022).

108. *Id.* at 29-30 (citations omitted).

109. *Id.* at 30.

110. *Florida v. Becerra*, 544 F. Supp. 3d 1241 (2021) (noting *inter alia* that “the public health power, including the power to quarantine, was traditionally understood—and still is understood—as a function of state police power”).

111. *See, e.g., Fla. v. Nelson*, 2021 U.S. Dist. LEXIS 246185 (Dec. 22, 2021) (“By requiring the vaccination of employees of contractors and subcontractors, Executive Order

among other arguments, to justify enjoining enforcement of the federal vaccine mandate for Head Start teachers.<sup>112</sup>

Overall, judicial decisions rejecting federal exertions of authority in response to COVID–19 reveal not merely federalism’s rhetorical and political power but also its consequential vitality as a matter of law. That legal vitality will only continue to hamper effective responses to public health threats in the future unless Congress enacts legislation clearly authorizing federal action. Federal officials who possess a reluctance to act will continue to have an excuse for failing to take responsibility. States will continue to enjoy the license to go their own way and even actively resist coordinated federal measures. Whenever the federal government does step in and seeks to effectuate nationwide policies related to public health, the Supreme Court can now be expected to approach the exercise of federal authority with considerable skepticism.

This does not mean that the federal government must remain bereft of national regulatory authority in a future viral outbreak. On the contrary, the logic underlying the Supreme Court’s decisions in the OSHA and CDC cases actually endorses Congress’s ability to empower federal agencies to adopt public health mandates to respond to pandemics.<sup>113</sup> In invoking the major questions doctrine, the Court merely said that Congress needed to be clearer, which implies that had Congress implemented more precise legislation, then OSHA and the CDC could have imposed their requirements.<sup>114</sup> In fact, in a separate case decided on the same day as its OSHA ruling, the Supreme Court in a 5-4 *per curiam* opinion upheld the authority of the Centers for Medicare and Medicaid Services (CMS) to require vaccinations of health care workers.<sup>115</sup> It found that vaccines fit better with CMS’s traditionally exercised rulemaking authority, even

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14042 intrudes into a matter traditionally committed to the state.”). *See generally* Richard Arnholt, *Injunctions May Only Pause Gov’t Contractor Vaccine Mandate*, LAW360 (Dec. 22, 2021).

112. *Louisiana v. Becerra*, 2022 U.S. Dist. LEXIS 1333 (Jan. 1, 2022) (“The States have broad authority to enact legislation for the public good (“police power”), but the federal government has no such authority ... The Supreme Court is unlikely to assume Congress has meant to effect a significant change into the sensitive state and federal relations. ... Absent a clear statement of intention from Congress, there is a presumption against statutory construction that would significantly affect the federal-state balance.”).

113. In his concurrence in the OSHA case, Justice Gorsuch even pointed to legislation where Congress—in the context of immigration requirements—has specifically required vaccinations. *Nat’l Fed’n of Indep. Bus. v. U.S. Dept’t of Labor*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J. concurring) (referring expressly to 8 U.S.C. § 1182(a)(1)(A)(i)).

114. Again, Justice Gorsuch, in concurring in the OSHA case, expressly acknowledged that Congress has the power to respond to the pandemic—but then he suggested, perhaps somewhat ominously, that his acknowledgement only applies “under the law as it stands today.” *Id.* at 670.

115. *Biden v. Missouri*, 142 S.Ct. 647 (2022).

though the legislation authorizing CMS's action never spoke specifically of vaccines but only authorized in the most general terms requirements that were deemed "necessary in the interest of health and safety."<sup>116</sup>

Despite a majority's acceptance of CMS's authority under this highly general statutory delegation, it would be unwise to assume that federal agencies will be able to act flexibly in the future on the basis of such general authority. Not only did the Supreme Court reject a similar assertion under the flexible terms of the Occupational Safety and Health Act, but it is also clear that the Court is increasingly inclined to demand statutory specificity under the so-called major questions doctrine, if not eventually also under a reinvigorated nondelegation doctrine.

To prepare the nation for the next serious outbreak—and there will be another one, whether of a mutation of the SARS-CoV-2 virus or eventually another virus altogether<sup>117</sup>—Congress can act prospectively to adopt legislation that specifically overturns the court decisions that have rejected the federal government's assertion of public health regulatory authority. Congress can act to make clear that federal agencies possess the needed authority—exercised on a temporary basis during public health emergencies—to impose the kinds of behavioral mandates that courts have struck down, such as those related to workplace vaccination and testing, mask-wearing in public transportation, and bans on housing evictions.<sup>118</sup> Congress, in other words, can restructure public health authority to create

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116. Although cited by the Court as a basis of authority, the quoted terms actually come from the definition of a covered hospital in the Medicare statute, which includes among its defining criteria an institution's compliance with relevant health and safety requirements. 2 U. S. C. §1395x(e)(9). The actual delegation of rulemaking authority dates to the 1935 Social Security Act, the relevant provision of which the Court also cited but which is even more general in that it does not even refer to health and safety. 42 U.S.C. §1302(a) ("[T]he Secretary of Health and Human Services . . . shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter."). In arguing that Congress did not speak clearly enough to give CMS authority to mandate health workers be vaccinated, the four dissenters in this case made a point to note that "[v]accine mandates . . . fall squarely within a State's police power." 142 S.Ct. 655, 658 (Thomas, J. dissenting).

117. After all, as Juliette Kayyem insightfully reminds us, the devil never sleeps. JULIETTE KAYYEM, *THE DEVIL NEVER SLEEPS: LEARNING TO LIVE IN THE AGE OF DISASTERS* (2022).

118. For related suggestions, see Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to Covid-19*, 22 N. ENGL. J. MED. 382 (2020) (urging Congress to "leverage its interstate-commerce powers to regulate economic activities that affect the interstate spread of SARS-CoV-2"); SLAVITT, *supra* note 18, at 256 (recommending that Congress provide authority for "[m]andatory public health measures" in compliance with CDC recommendations while also "requiring continual reauthorization by Congress").

a *pandemic federalism* when normal federalism stands in the way of needed action.<sup>119</sup>

Congress can also consider going further by enacting legislation to ensure that other reasonable federal regulatory interventions would be authorized during a future pandemic—actions that the federal government might have taken in response to COVID-19 but did not do so, perhaps out of uncertainty over its authority. This could include, for example, measures to ensure that federal agencies could implement a robust, national vaccination registration system. This might also include legislation specifically authorizing the imposition of vaccination mandates for domestic air passengers.<sup>120</sup> Given that nursing homes have experienced a significant loss of life, future legislative action could further provide authority for increased federal intervention and oversight of nursing homes and assisted living centers as needed during times of a public health emergency.<sup>121</sup> New federal legislation should also tackle the racial inequities that the coronavirus has laid bare and require that future nationwide vaccination and other public health campaigns actively avoid perpetuating such inequities.<sup>122</sup>

One of the most foundational steps for Congress to take would be to adopt legislation authorizing the federal government to establish regulations imposing consistent and mandatory standards for viral testing and reporting of test results.<sup>123</sup> From the pandemic's earliest days, the United States has suffered from a shortage of testing data, which has greatly impeded public health officials' ability to trace and contain viral

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119. For a thoughtful and especially promising proposal for “role clarity” legislation, see Wang & Weinstein, *supra* note 58. Part of any legislative restructuring should include consideration of mechanisms for accountability and oversight. See Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (2020–2021).

120. Richard J. Pierce, Jr., *Vaccine Mandates and Roads Not Taken*, REGUL. REV. (Jan. 24, 2022), <https://www.theregreview.org/2022/01/24/pierce-vaccine-mandates-roads-not-taken/>.

121. For a similar suggestion in the Canadian context, see Sara Allin, Tiffany Fitzpatrick, Gregory P. Marchildon & Amélie Quesnel-Vallée, *The Federal Government and Canada’s COVID-19 Responses: From “We’re Ready, We’re Prepared” to “Fires are Burning,”* HEALTH ECON., POL. & LAW 1, 10-12 (2021).

122. See, e.g., Monita Karmakar, Paula M. Lantz, & Renuka Tipirneni, *Association of Social and Demographic Factors with COVID-19 Incidence and Death Rates in the US*, JAMA NETWORK OPEN, Jan. 2021, at 10; Johnson & Underhill, *supra* note 48, at 76-77.

123. See, e.g., DEBORAH BIRX, SILENT INVASION: THE UNTOLD STORY OF THE TRUMP ADMINISTRATION, COVID-19, AND PREVENTING THE NEXT PANDEMIC BEFORE IT’S TOO LATE 452 (2022) (discussing the importance of sound data in trying to manage a viral outbreak); Sarah H. Gordon, Nicole Huberfeld, & David K. Jones, *What Federalism Means for the US Response to Coronavirus Disease 2019*, JAMA HEALTH FORUM (May 2020) (emphasizing the important role for the federal government in ensuring standardized data).

spread. Slowness in testing at the outset of the pandemic stemmed from tentativeness at the federal level and a failed attempt at centralized testing kits.<sup>124</sup> But throughout the pandemic, public health officials have lacked the kind of data needed to inform effective decision-making and risk communication.<sup>125</sup> Access to testing has also not been evenly distributed, and data collection and reporting have been inconsistent across the nation.<sup>126</sup> The absence of consistent data on individuals' race and ethnicity has been described as “[t]he most glaring hole” in COVID-19 reporting.<sup>127</sup> Congress might even consider authorizing public health authorities to encourage random testing nationwide—a kind of public health “census”—that could give a more reliable portrait of disease transmission and opportunities for assessing the efficacy of public health interventions.

Overall, the backbone of any improved overall public health infrastructure to address pandemics must begin with an improved data infrastructure.<sup>128</sup> Without better data, combined with clearer statutory authority and stronger national leadership, the United States is destined to continue to muddle through whatever remains of the COVID-19 pandemic, not to mention other pandemics in the years ahead.<sup>129</sup>

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124. See *supra* note 50 and accompanying text.

125. Eric C. Schneider, *Failing the Test—The Tragic Data Gap Undermining the U.S. Pandemic Response*, NEW ENG. J. MED. (July 2020), <https://www.nejm.org/doi/full/10.1056/nejmp2014836> [<https://perma.cc/QL6U-XU3R>]; Jennifer B. Nuzzo & Emily N. Pond, *Covid Vaccines Aren't Enough. We Need More Tests*, N.Y. TIMES (Mar. 12, 2021), <https://www.nytimes.com/2021/03/12/opinion/need-covid-tests.html> [<https://perma.cc/BQP2-ABPZ>]; see also Kathleen McLaughlin, *Growing Use of Home COVID-19 Tests Leaves Health Agencies in the Dark About Unreported Cases*, PBS (Dec. 9, 2021), <https://www.pbs.org/newshour/health/growing-use-of-home-Covid-19-tests-leaves-health-agencies-in-the-dark-about-unreported-cases> [<https://perma.cc/K48X-H2UA>].

126. Beth Blauer & Jennifer Nuzzo, *Covid-19 Data Is a Mess. We Need a Way to Make Sense of It*, N.Y. TIMES (Nov. 23, 2020), <https://www.nytimes.com/2020/11/23/opinion/coronavirus-testing.html> [<https://perma.cc/YJ2Z-7FRT>].

127. Deidre McPhillips, *The US Still Isn't Getting Covid-19 Data Right*, CNN, <https://www.cnn.com/2022/02/10/health/covid-data-problems/index.html> [<https://perma.cc/98VS-QR3V>] (last updated Feb. 21, 2022).

128. Cf. Haffajee & Mello, *supra* note 118 (noting that an effective response to a pandemic must be “not only national, but also rational”).

129. In his discussion of the paucity of genetic analysis of COVID-19 test results in the United States, Michael Lewis quotes molecular biologist Joe Derisi as follows: “Our federal government should be doing this in a coordinated way. . . . That’s what you do in a rational society. But the system is broken. It’s *so* broken.” MICHAEL LEWIS, *THE PREMONITION* 268 (2021). For recommendations that include calls for new federal legislation on disease-related data collection, see NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *INTERGOVERNMENTAL DIMENSIONS OF THE COVID-19 RESPONSES AND CONSEQUENCES* 51-52 (Mar. 2022).



## IV.

Some degree of muddling may be the best that the United States or any country can ever do in responding to pandemics. A highly contagious virus is exceedingly difficult to contain under any circumstances, and even countries with unitary governments have struggled during the COVID–19 pandemic. But a nation can muddle through more efficaciously or less efficaciously—and with more or less information and with better or worse coordination. This much is evident by looking at the experiences of other countries.

Legal scholar Richard Parker, for example, has compared the United States' COVID–19 response to the response of New Zealand.<sup>130</sup> He has recounted how, from the earliest days, New Zealand followed the “public health playbook,” adopting robust testing and tracing and enforcing social distancing requirements.<sup>131</sup> Instead of being content to muddle through, New Zealand's governmental leaders pursued a synoptically rational approach and generally followed the public health strategies known to work in the face of an outbreak of a respiratory virus. They put behavioral measures in place immediately which, when combined with a ban on international entry to New Zealand, succeeded remarkably well in keeping the virus at bay and protecting the New Zealand public.

Admittedly, by early 2022 New Zealand did begin to show palpable signs of social strain from the weight of that nation's public health requirements. Protests broke out urging the government to lift its stringent controls. And as New Zealand did eventually start to lift restrictions in 2022, the spread of the omicron variant increased throughout the country's two islands. Still, as of the spring of 2022, New Zealand had only incurred about seven hundred fatalities in total.<sup>132</sup> On a per capita basis, that is a level of mortality about twenty times smaller than that experienced by the United States. In other words, had the United States been able to keep its mortality rates that low, it would have incurred a total of only about 46,000 fatalities, as opposed to the nearly one million deaths experienced by spring of 2022.

New Zealand's track record does make the profound extent of fatalities suffered in the United States look avoidable. One might thus be tempted to point to New Zealand's governmental structure—a unitary,

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130. Richard Parker, *Why America's Response to the COVID–19 Pandemic Failed: Lessons from New Zealand's Success*, 73 ADMIN. L. REV. 77 (2021).

131. *Id.*

132. *New Zealand*, Johns Hopkins University Coronavirus Resource Center, <https://coronavirus.jhu.edu/region/new-zealand> [<https://perma.cc/DY85-TFH7>] (reporting 697 fatalities from COVID–19) (last accessed Apr. 29, 2022).

rather than federal, government—and conclude that federalism is what explains the difference. That conclusion might even seem strengthened by comparing New Zealand’s experience to that of its island neighbor—Australia—which, like the United States, also has a federal structure of government. As of late April 2022, Australia had experienced a per capita rate of COVID–19 cases that was 30 percent higher than New Zealand’s and a death rate that was twice as large.<sup>133</sup>

One must be careful, of course, about drawing too much from such comparisons, as many factors beyond federalism plausibly explain how well different nations have fared in the pandemic. Not all federal systems fared as badly as some unitary governments, and some federal systems fared better than other federal systems. For example, Germany, a federal system, experienced lower rates of both COVID–19 cases and fatalities than did its neighbor, France, with a unitary system of government.<sup>134</sup> Still, Germany’s fatality rate of 163 per 100,000 residents has been nearly half that of the United States, which has experienced about 300 deaths per 100,000 residents.<sup>135</sup> Canada—another federal system—has fared even better than Germany, with rates of viral spread (10,800 per 100,000) and fatalities (104 per 100,000).<sup>136</sup>

Most other developed economies, whether with unitary or federal systems, have managed to do better than the United States.<sup>137</sup> Although it

133. All data on COVID–19 reported in this article are from the Johns Hopkins University Coronavirus Resource Center, <https://coronavirus.jhu.edu/region> [<https://perma.cc/C6CX-K9ZQ>] (last accessed Apr. 29, 2022). Population data are for 2020 from the World Bank, <https://data.worldbank.org/indicator/SP.POP.TOTL> [<https://perma.cc/C2VS-78SG>] (last accessed Apr. 28, 2022). Status of governance structure as federal is drawn from the Forum of Federations, <http://forumfed.org/federal-countries/> [<https://perma.cc/S9Q8-DD2E>] (last accessed Apr. 29, 2022).

134. As of April 29, 2022, France had experienced 42,582 cases and 218 fatalities per 100,000 residents. By comparison, Germany had experienced 29,688 cases and 163 fatalities per 100,000 residents.

135. Brazil is among the few countries to have fared even worse than the United States—with a death rate of about 312 per 100,000. Experts point as much to atrocious leadership failures of President Jair Bolsonaro as to Brazil’s federal structure of government.

136. See *supra* note 133 for the sources of data reported in this paragraph.

137. In a comparison of COVID–19 fatality rates in the 15 federal and 15 unitary countries with the highest per capita GDPs, only Brazil had a worse record than the United States. Two federal systems—Argentina (283 per 100,000) and Belgium (273)—came next closest, while two unitary systems—Italy (270) and the United Kingdom (261)—followed. See generally Benjamin Mueller & Eleanor Lutz, *U.S. Has Far Higher COVID Death Rate Than Other Wealthy Countries*, N.Y. TIMES (Feb 1, 2022), <https://www.nytimes.com/interactive/2022/02/01/science/COVID-deaths-united-states.html> [<https://perma.cc/J26C-9LXF>]; John Agnew, *Failing Federalism? U.S. Dualist Federalism and the 2020-22 Pandemic*, 9 REG. STUD., REG. SCI. 149 (2022); Mark J. Rozell & Clyde Wilcox, *Federalism in a Time of Plague: How Federal Systems Cope with Pandemic*, 50 AM. REV. PUB. ADMIN. 519-525 (2020).

cannot be said that the federal nature of the U.S. public health infrastructure is the sole factor behind the United States' abysmal performance in addressing the COVID-19 pandemic, it has undoubtedly not helped either. With 50 state governments and a deep partisan divide among them, the United States federal system has arguably proven a greater hindrance than it has in other countries, such as Canada (with 10 provinces) and Germany (with 16 Länder).<sup>138</sup> The legal solicitude that U.S. courts have given to states' prerogative over public health has surely not helped either.

The United States can do better next time—but doing so will require that government officials learn from the many mistakes made in the wake of COVID-19. After all, the fundamental problem is not going to disappear. As long as people continue to move across state borders, a virus will move with them. One of the lessons that must be learned is how to reconfigure public health governance to give the national government greater clarity about its responsibility and authority to act in a time of a pandemic. National public health agencies need to be able to collect reliable data and ensure that basic behavioral guidelines can be more consistently followed and sustained across all states. The nation's policymakers should take steps now to create legal structures that will be needed to ensure more effective risk communication, more widespread testing and data collection, and greater vaccine uptake whenever the next pandemic strikes.

## V.

In revealing the need to find ways to enable the nation's public health infrastructure to adapt quickly when the next pandemic occurs, the COVID-19 crisis also helps illuminate how the law of federalism ought not to be conceived as static. In some instances, the need for greater coordination and clarity about federal authority in response to major, even existential, problems requires reconfiguring governance and allocating more authority to the national government.<sup>139</sup> Other problems are like a

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138. *Canada*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/countries/canada/#government> [<https://perma.cc/JEJ7-Q6CD>] (last updated Apr. 28, 2022); *Germany*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/countries/germany/#government> [<https://perma.cc/FP4K-SYFZ>] (last updated May 3, 2022).

139. The basic idea here is called *subsidiarity*—or identifying the correct level of government that matches the particularities of the governance challenge. KALYPSO NICOLAÏDIS AND ROBERT HOWSE, EDs., *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* (2001). For a related approach to institutional design at the international level, see Cary Coglianese,

pandemic in that they demand more national coordination—and less muddling through.

Not all cross-border problems, of course, fall into this category. Many problems, whether related to the environment or to physical infrastructure, cut across state lines, but in ways that often are limited to a relatively few states. When water quality declines in the Great Lakes, for example, this affects all the states that border on the Great Lakes and the tributaries connected to it—but not the entire nation. As challenging as some cross-border problems may be in their own right, they still leave room for the tolerance of variability in response and can be handled reasonably well with normal federalism. In these cases, ad hoc interstate compacts might suffice to handle coordination, or states may well even go their own way, serving as laboratories of democracy but without risking a nationwide catastrophe.

A pandemic is different. It is a mega–interstate problem. Just as a gas expands to fill whatever space it finds itself in, a respiratory virus will spread to fill the entire nation. That is why what happens in North Carolina depends on what happens in other states.

Other interstate problems have similarly extreme interdependencies as a pandemic, such that they are impossible to solve without effective national intervention. We can hardly expect these problems to be solved absent standardized or coordinated federal action.<sup>140</sup>

Consider, for example, airport security. Terrorists can exploit a weakness in airport screening at an airport in one city and then find their way to any other city, or hijack a plane to crash it into buildings in another city.<sup>141</sup> It makes sense, of course, that airport security has been assigned clear responsibility and authority at the national level.<sup>142</sup>

Or take electricity transmission as another example. With the main exception of Texas, the rest of the nation’s electricity distribution network is interconnected, creating a need to balance load across vast swathes of the country.<sup>143</sup> A power outage or imbalance at one node of the network

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*Globalization and the Design of International Institutions*, in GOVERNANCE IN A GLOBALIZING WORLD (Joseph S. Nye, Jr. & John D. Donohue eds., Brookings 2000).

140. See Beverly A. Cigler, *Fighting COVID–19 in the United States with Federalism and Other Constitutional and Statutory Authority*, 51 PUBLIUS: J. FEDERALISM 673–692 (2021).

141. For discussion of the interdependencies underlying both airport security problems and pandemics, see Geoffrey Heal & Howard Kunreuther, *Modeling Interdependent Risks*, 27 RISK ANALYSIS 621 (2007).

142. Aviation & Transportation Security Act, 49 U.S.C. § 114.

143. Alexandra Klass, Joshua Macey, Shelley Welton & Hannah Wiseman, *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. (forthcoming). See also *Learn More About Interconnections*, U.S. DEP’T ENERGY (last visited Apr. 11, 2022), <https://www.>

holds the potential to pass quickly along the entire system.<sup>144</sup> Without careful regional and federal coordination, the grid cannot reliably function. It thus makes sense that the Federal Energy Regulatory Commission has been given clear responsibility and authority at the national level to handle this complex coordination problem in conjunction with large regional grid operators.<sup>145</sup>

And most consequential of all, consider climate change.<sup>146</sup> When it comes to reducing greenhouse gases, the interdependencies are perhaps just as pronounced as with a viral pandemic.<sup>147</sup> One can easily ask: “How well can North Carolina stave off climate change if South Carolina and Florida, and the rest of the country, remain slow-footed in reducing greenhouse gas emissions?” Although scholars and policy leaders have lauded state and local climate mitigation efforts<sup>148</sup>—and they are certainly better than doing nothing—it remains the case that uncoordinated local and state efforts can only go so far toward solving climate problems in the absence of national measures.<sup>149</sup> For this reason, the absence of federal

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energy.gov/oe/services/electricity-policy-coordination-and-implementation/transmission-planning/recovery-act-0 [https://perma.cc/GK6D-KNUJ].

144. William W. Hogan, *Electricity Is a Federal Issue*, WALL ST. J. (Aug. 18, 2003, 12:01 AM), <https://www.wsj.com/articles/SB106117150594288000> [https://perma.cc/4V-GW-KJYH].

145. See, e.g., Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 16 U.S.C. and 42 U.S.C.); The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 16 U.S.C. and 42 U.S.C.).

146. Efforts to adapt to climate change and promote resilient infrastructure will often have interstate implications too, but usually in regionally limited ways and not with the extreme transborder interdependencies of climate change itself. The methods needed to adapt infrastructure to make it resilient to climate will vary considerably from place to place, depending on whether the climate-related risks take the form of floods, fires, or other hazards.

147. Cary Coglianese & Jocelyn D’Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CT. L. REV. 1411 (2008).

148. See, e.g., Cinnamon Carlarne, *Notes from a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351 (2008); BARRY G. RABE, STATEHOUSE AND GREENHOUSE THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY (2004). For an illuminating consideration of options that might accommodate state innovation while also providing national coordination in the regulation of energy-consuming appliances used in buildings, see Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 HARV. ENVTL. L. REV. 335 (2010).

149. Cary Coglianese & Shana Starobin, *Let’s Be Real About State and Local Climate Action*, REG. REV. (Feb. 20, 2018), <https://www.theregreview.org/2018/02/20/coglianese-starobin-state-local-climate-action/> [https://perma.cc/3W8U-RUS5].

legislation directly addressing climate change is a notable one that leaves the nation to continue to muddle through.<sup>150</sup>

## VI.

Political scientist Paul Schulman was right to raise questions about the universal applicability of Charles Lindblom's decided preference for incremental approaches to governance.<sup>151</sup> Some public problems cannot be readily solved by the ordinary process of muddling through nor through the normal system of federalism. Climate change is one of these problems, and pandemics are another. These mega-interstate problems necessitate a nationally coordinated response if they are to be managed well. And with pandemics, the need for this coordinated response must occur quickly—within days or at most weeks before a virus or its variants can spread. Yet the very federalist structure of government in the United States, combined with courts' use of federalism to reject public health agencies' use of general statutory authority, places tragic obstacles in the path of needed national responses to public health emergencies.

To recognize the need for federal authority to address some problems is not to suggest that the U.S. must repudiate its tradition of federalism. On the contrary, recognizing that Congress must do more to empower and fund federal public health agencies is actually to embrace one of the oldest constitutional traditions in the United States, namely, that state prerogatives must sometimes give way for the greater good of the nation. In some instances, and to address some problems, the federal government needs clear authority to be able to “promote the general welfare.”<sup>152</sup>

When it comes to public health infrastructure, there will always remain a rationale in normal times for maintaining governmental capacity at the lower levels of government—for that is where people live, get sick, and need help. But maintaining a state- and local-based public health infrastructure for normal times does not preclude creating a pandemic federalism structure by adopting legislation that gives federal officials clear authority—and responsibility—for taking swift, if temporary, action to contain a deadly pathogen's ravaging consequences.

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150. For illuminating comparisons between climate change and COVID-19, see Howard C. Kunreuther & Paul Slovic, *Learning from the COVID-19 Pandemic to Address Climate Change*, MGT. & BUS. REV. (2021), <https://mbrjournal.com/2021/01/26/learning-from-the-Covid-19-pandemic-to-address-climate-change/> [<https://perma.cc/AM88-QL7R>]; Derrick Z. Jackson, *Nearly One Million U.S. Deaths from COVID-19—The Grim Consequences of Sidelining Science*, ENVTL. HEALTH NEWS (Apr. 1, 2022), <https://www.ehn.org/covid-climate-change-science-2657051201/beyond-partisan-politics> [<https://perma.cc/244P-YCLG>].

151. See Schulman, *supra* note 8 and accompanying text.

152. U.S. CONST. pmb1.