

The Pandemic and Privacy: The Global Culture of Intrusion

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Abstract

COVID-19 changed everything. The global pandemic caused unparalleled intrusions and controls over individuals. Cities locked down, businesses closed, electronic tracking and tracing was implemented. Some governments wedded to surveillance took the opportunity to expand surveillance and intrusion. In emergencies, law takes a back seat to action. But, as Justice Gorsuch said, the pandemic “cannot become a sabbatical” for constitutional rights. The constitution and the courts are the guardrails to preserve individual rights during chaotic and controversial times.

COVID-19 was not the first pandemic the world has faced, but the interconnectivity of the modern world means we share everything, including disease. Although we shared the disease, nations dealt with the pandemic in different ways. In some places the pandemic enabled the ability of governments to expand an already advancing culture of intrusion.

Brazil and the United States have the highest death rates in the world. This article outlines reactions, policies, and actions taken on COVID-19 in these two nations. These measures are compared to other policies worldwide. The importance of national culture and legal distinctions has a dramatic effect on response and the limits of intrusions. In some countries the legal system is called on to balance emergency needs and personal rights. Emergency needs usually prevail which is consistent with public sentiment during and crisis: “Solve the problem and don’t let the law get in the way.” There will be another pandemic. Governments and cultures will react the same way. The top priority is safety and health. Without a plan, wildly inconsistent policies result in some health care disasters and some over intrusive actions. There are lessons to be taken from the COVID -19 pandemic. A pandemic requires leadership as well as established policies that provide a credible plan of action in the face of crisis and panic. This article suggests we learn from this global pandemic and create policies that protect public health and protect individual rights.

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I. Introduction: Crisis, Intrusion and the Constitution¹

In the year of the COVID-19 Pandemic, the world experienced a dramatic global disaster that did not respect ideologies or borders. Hospitals overflowed with patients in democracies and dictatorships around the world. In San Francisco, the mayor closed all non-essential businesses. In India bodies were burned in mass burials. In Brazil, the Federal Supreme Court endorsed compulsory vaccination.²

Because of the COVID-19 pandemic, millions of people died, businesses went bankrupt, and the whole world changed the way it lived.³ Cities locked down.⁴ Borders closed.⁵ Children

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² Like virtually all compulsory policies, this policy is specified as a condition for utilization of various facilities, spaces, or activities. FEDERAL SUPREME TRIBUNAL, *Court Decides That Compulsory Vaccination Against COVID-19 Is Constitutional*, December 17, 2020,

<https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=457462&ori=1>.

³ Lee Clifford and Phil Wahba, *A running list of companies that have filed for bankruptcy during the coronavirus pandemic*, FORTUNE, Oct. 8, 2020, <https://fortune.com/2020/08/04/companies-filing-bankruptcy-2020-due-to-covid-list-filed-chapter-11-coronavirus-pandemic>.

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

⁵ United States Department of Homeland Security, *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus*, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Oct. 19, 2020, <https://www.dhs.gov/news/2020/10/19/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>; U.S. Embassy and Consulates in France, *The Department of State has issued COVID-19 Traveler Information and advises all U.S. citizens to read the country-specific Travel Advisories and U.S. Embassy COVID pages for updates on the impact of COVID-19 worldwide*, U.S. EMBASSY & CONSULATES IN FRANCE, Jan. 19, 2021, <https://fr.usembassy.gov/covid-19-information/>.

could not visit their dying parents.⁶ Zoom became a verb.⁷ Business travel changed.⁸ Sports teams were excluded from national championships.⁹ Some aspects of life will go back to “normal,” and some will be permanently changed.

Governments need to do better next in the next pandemic. Government responses to emergencies generally have been chaotic,¹⁰ and the COVID crisis was no exception. Scholars have observed that governments are awkward in responding to crisis. This conclusion is unsurprising. Crises require governments to make difficult decisions under time pressures, public outcries, and constitutional limits.

One of the clear revelations that came out of this crisis was the vast new scope of intrusion into citizens’ personal lives. Intrusions are a part of a government’s response to most emergencies.¹¹ Whether it is a global pandemic or a forest fire, governments are empowered to make decisions to protect the safety and welfare of their citizens, and that often results in intruding

⁶ Katie Hafner, *A Heart-Wrenching Thing’: Hospital Bans on Visits Devastate Families*, THE NEW YORK TIMES, March 29, 2020, <https://www.nytimes.com/2020/03/29/health/coronavirus-hospital-visit-ban.html>.

⁷ *How coronavirus made ‘zoom’ a verb and other ways the pandemic has changed our language*, THE PHILADELPHIA INQUIRER, April 29, 2020, <https://www.inquirer.com/opinion/coronavirus-covid-zoom-pandemic-words-linguistic-20200429.html>.

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

⁹ The NCAA excluded North Carolina State University in the middle of the college world series. The NCAA required unvaccinated players and coaches to undergo testing every other day at championship sites. Testing and contact tracing decided that the team could not continue playing one game away from the finals. Steve Wiseman, *Positive COVID-19 tests knocked NC State baseball out of the CWS. What about Vanderbilt?*, THE NEWS & OBSERVER (June 27, 2021), <https://www.newsobserver.com/sports/college/acc/nc-state/article252391598.html>.

¹⁰ Hurricane Katrina was one of the most appalling governmental failures in recent history. The U.S. government has a tendency to shy away from disaster preparation in the name of flexibility, but “[w]hile information typically becomes more plentiful over time, other inputs to legal decisions, particularly decisional resources, often become scarcer.” David Super, *Against Flexibility*, 96 Cornell L. Rev. 1375, 1380 (2011).

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

on someone's rights. Because of the pandemic, governmental intrusions on individual liberties increased.¹² Those intrusions in this pandemic were different. In a global medical pandemic the vast capacity to observe and gather information through the internet, surveillance and new technology was justified.¹³

While many intrusions have been justified to save lives and to prevent the continued spread of COVID-19,¹⁴ we should focus on the long-term impacts of emergency policies. This article will examine the possible policy changes for the next pandemic that will protect constitutional rights while also protecting people from another lethal pandemic. This article will also propose a framework for more efficient and forward-thinking emergency responses, which will help protect individual rights. The response to the global pandemic could be viewed as the most widespread and comprehensive limitation on individuals in modern history. The world's population experienced lockdowns, mandatory closings, curfews, mask mandates, travel limitations, workplace restrictions, vaccination passports, and gathering of personal data on a grand scale.¹⁵ What are the long-term implications, particularly for democratic societies?

As with other historical emergencies and threats to health and security, legal issues will take a backseat to rapid responses to protect health and safety. For example, after the September 11 Terrorist Attacks, there was little public concern about electronic intrusion, but there was

¹² These intrusions will be discussed further throughout the article.

¹³ Rahul De ET AL., *Impact on digital surge during Covid-19 pandemic: A viewpoint on research and practice*, ELSEVIER PUBLIC HEALTH EMERGENCY COLLECTION (Jun. 9, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7280123>.

¹⁴ "According to media reports, drone surveillance has been deployed in the United States, Mexico, Malaysia, Spain, Italy and the UK." Tatsiana Ziniakova, *Privacy, Mass Electronic Surveillance, and the Rule of Law in Times of COVID-19*, WORLD JUSTICE PROJECT at 9, November 30, 2020.

¹⁵ Data shows that hacking was more frequent during the pandemic. Maggie Miller, *FBI Sees Spike in Cyber Crime Reports During Coronavirus Pandemic*, THE HILL (Apr. 16, 2020, 3:27 PM), <https://thehill.com/policy/cybersecurity/493198-fbi-sees-spike-in-cyber-crime-reports-during-coronavirus-pandemic>.

enormous concern about catching terrorists.¹⁶ The Government grounded all commercial flights in the United States for seven days, and it argued that its compelling state interest to prevent other planes from being used as weapons justified this measure.¹⁷ The Government also implemented intrusive surveillance strategies to oversee and monitor private communications of foreign and domestic individuals in the United States, costing all Americans some of their privacy.¹⁸

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

¹⁶ For instance, we can cite the Terrorist Surveillance Program created during the Bush Administration that authorized electronic surveillance without judicial approval as an effort to catch terrorists. Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV. 1259, 1293 (2007).

¹⁷ *All flights stopped nationwide*, CNN, Sept. 11, 2001, <https://www.cnn.com/2001/TRAVEL/NEWS/09/11/faa.airports/>.

¹⁸ *Supra* note 16.

¹⁹ The Center for Disease Control and Prevention's states, "Contact tracing is a key component of controlling transmission of infectious diseases. Contact tracing for the current COVID-19 pandemic." *Operational Considerations for Adapting a Contact Tracing Program to Respond to the COVID-19 Pandemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Dec. 9, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/operational-considerations-contact-tracing.html>.

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

Notably, there is a lack of universal agreement among government and health officials regarding the effectiveness of policies put in place to stop the spread of COVID-19. In order to balance the advantages and disadvantages of such measures, one must determine how dangerous a threat must be to justify restrictions on people's fundamental rights, including the right to privacy. There must also be a determination of the duration of the restrictions being enforced. In the context of the COVID-19 Pandemic, a determination must be made on whether a virus provides enough legal justification to allow governments restrictions on privacy and justification for the severity of the restrictions. After all, part of the legal test to restrict a fundamental right is to restrict that right by the least intrusive means.²⁰

The final determinations will vary greatly depending on the government regime and culture of a nation. Governments have a duty to make decisions for the common good of their citizens,²¹ but government action is not the only indicator of how a country will be affected in a pandemic. Culture is a central element to privacy invasions in the pandemic.²² Some cultures have already

²⁰ Stanley v. Georgia, 394 U.S. 557, 564-65 (1969).

²¹ The common good is an important concept of political philosophy discussed in the literature by many philosophers such as Plato, Aristotle, John Locke, J.J. Rousseau, Adam Smith, G.W.F. Hegel, John Rawls and Michael Walzer. Hussain Waheed, *The Common Good*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Feb. 26, 2018, <https://plato.stanford.edu/entries/common-good/>.

²² *Infra* Section III (these intrusions will be discussed further throughout the article).

experienced lost freedoms and reduced privacy rights before COVID-19.²³ The pandemic allows some governments to further their surveillance state under the guise of protecting public health.²⁴ Some citizens in various cultures have accepted government or health care guidance, and citizens have voluntarily restricted their personal lives and activities,²⁵ while others obey the governmental mandates to wear masks, avoid crowds, and social distance with no pushback.²⁶ Conversely, there are cultures that seem to inherently distrust government and revere individual freedom.²⁷

As data and the pandemic are borderless, so is this article. This article will analyze personal data violations through the lens of the legal frameworks of America, Europe, and Brazil. To accomplish this goal, this article will address (i) the Government's authority under state of emergency; (ii) the influence of culture on the enforcement of policies; (iii) the intrusive impact of the central medical responses to COVID (testing, treating and tracking); (iii) the use of tracking technologies through a privacy lens; and (iv) the strategy for addressing the next pandemic. The

²³ China is certainly the greatest example of mass surveillance by the government. Charlie Campbell, *'The Entire System Is Designed to Suppress Us.'* *What the Chinese Surveillance State Means for the Rest of the World*, TIME, Nov. 21, 2019, <https://time.com/5735411/china-surveillance-privacy-issues/>.

²⁴ In the wake of COVID-19, many apps that aimed to control the spread of COVID-19 were created. As reported by Privacy International, "the self-testing web app issued by Argentina's Secretariat of Public Innovation, asked for national ID number, email and phone as mandatory fields in order to submit the test, while the Android version required numerous permissions, including contacts, geolocation data (both network-based and GPS), and access to the microphone and camera." *There's an app for that: Coronavirus apps*, PRIVACY INTERNATIONAL, April 20, 2020, <https://privacyinternational.org/long-read/3675/theres-app-coronavirus-apps>.

²⁵ *How Taiwan, a non-WHO member, takes actions in response to COVID-19*, June 17, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7307800/>; *COVID-19 versus Japan's culture of collectivism*, May 22, 2020, <https://www.japantimes.co.jp/opinion/2020/05/22/commentary/japan-commentary/covid-19-versus-japans-culture-collectivism/>.

²⁶ *Response to COVID-19 in South Korea and implications for lifting stringent interventions*, October 9, 2020, <https://bmcmmedicine.biomedcentral.com/articles/10.1186/s12916-020-01791-8>; *Israel Exemplifies how to respond to the coronavirus*, March 12, 2020, <https://www.atlanticcouncil.org/blogs/menasource/israel-exemplifies-how-to-respond-to-the-coronavirus/>.

²⁷ For example, Brazilians demonstrated that they do not believe that health crises justify intrusions upon the privacy of their homes and bodies. In 1904, the Brazilian National Congress passed a law establishing mandatory vaccination, aiming to combat the smallpox outbreak in the country. Health authorities and police officers were authorized to enter homes and forcibly vaccinate members of the home. The people responded with violence. Because the people were not culturally accustomed to such intrusions, the response was so severe that the Government had to suspend the law and stop mandatory vaccinations. *What a 1904 Vaccine Effort Can Teach Brazil Today*, December 7, 2020, <https://www.usnews.com/news/best-countries/articles/2020-12-07/brazils-leader-ignores-deadly-virus-lessons-from-the-past>.

strategy for addressing the next pandemic includes the need to limit the time of government intrusions, to define permissible and impermissible state actions during emergencies, and to identify the severity of an emergency once it has arrived.

While addressing these issues, it is important to keep in mind that crises breed intrusion, whether the crisis is a terrorist attack or a global pandemic. The COVID-19 crisis is especially dangerous because the intrusions it breeds are universal. Everyone is affected. The intrusions are global. The global intrusion COVID-19 breeds make it different than any other crisis.

II. Crisis and the Law of Emergencies

Extraordinary times require extraordinary measures. In fact, most countries have policies for emergencies, and those policies prioritize swift action.²⁸ Because emergencies, by definition, require rapid action, emergency actions are most often granted to the Executive branches.²⁹ Legislatures are not inherently rapid response entities, and courts are more deliberative and reactive by design. The balance of power in emergencies is given or taken by the executive branches of government.³⁰ By design, Presidents, governors, and mayors are the focal point of emergency powers.³¹ David Super, a public welfare law professor at Georgetown University Law Center, suggests that multi-tiered governments are ill suited to emergencies because of jurisdictional uncertainty.³² Super identifies the Katrina disaster as emblematic of confusion and the failure of the federal government to exercise powers and capabilities.³³ Clarifying federal

²⁸ *COVID-19 Civic Freedom Tracker: Keep Civic Space Healthy*, February 11, 2021 <https://www.icnl.org/covid19tracker/?issue=5>.

²⁹ National Emergencies Act, 50 U.S.C. §§ 1601-51 (1976); Public Health Service Act, 42 U.S.C. 247(d) (1944); Robert T. Stafford Disaster Relief and Emergency Act, 42 U.S.C. §§ 5121 et. seq. (1988).

³⁰ *Infra* Section II (these aspects will be discussed further throughout the article).

³¹ *Id.*

³² David Super, *Against Flexibility*, 96 Cornell L. Rev. 1375, 1380 (2011).

³³ *Id.*

responsibility for large scale responses makes sense. In the case of COVID-19, the federal government should take responsibility for large scale multi state issues such as defining the threat level of the pandemic, funding large scale responses to unemployment or physical damage, and verifying and testing vaccines and treatments. National uniformity makes sense for issues like international and interstate travel policies. However, even in a global pandemic some issues are more local and benefit from state and local government policies.³⁴ Cities may have different levels of infection that require different responses. Because of the vast geographical areas countries like Brazil and the United States can benefit from a federal system that provides for varied responses at different levels of government. The challenge is to define the boundaries of federal, state and local authority.

The United States and Brazil are two countries that increase the power of the executive branch during emergencies.³⁵ Laws during emergencies may be certain regarding the enlargement of the executive power, but there is still great ambiguity and uncertainty regarding the exact definition of emergency and the extent of emergency powers.

This article will propose a legal framework for pandemic response that clarifies the constitutional authority possessed by each level of government during health emergencies.³⁶ The framework utilizes science to determine the extent of emergency, and it uses the resulting determination of extent to evaluate whether a compelling state interest exists.³⁷

³⁴ Fighting COVID-19 with Agility, Transparency, and Participation: Wicked Policy Problems and New Governance Challenges, May 20, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7267241/>.

³⁵ *Supra* note 81.

³⁶ *Infra* Section VI.

³⁷ *Infra* Section VI(b).

Ultimately this article suggests an approach to the next pandemic. An “approach” is more than a plan. The CDC and the WHO have plans for pandemics.³⁸ Plans include rational threat assessments and responses but they do not include guidance for how and when public officials at all levels of government implement emergency provisions. Guidance is possible but officials will make decisions based on their judgment, authority, legal limitations and public support.

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

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

³⁸ CENTERS FOR DISEASE CONTROL AND PREVENTION, *National Pandemic Strategy* (2017), <https://www.cdc.gov/flu/pandemic-resources/national-strategy/index.html>; WORLD HEALTH ORGANIZATION, *WHO Global Influenza Preparedness Plan* (2005), https://www.who.int/csr/resources/publications/influenza/WHO_CDS_CSR_GIP_2005_5.pdf.

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

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

This array of possible actions is affected by legal and constitutional restraints. A wide array of lawsuits challenging various actions are pending.⁴⁰ There are boundaries and limits to emergency authority being exercised by federal state and local governments. There are Constitutional boundaries related to free speech, freedom of religion, freedom of movement, due process, and right to travel. Even during a pandemic the constitution will apply.⁴¹ But facts and

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

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

⁴¹ “Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical.” Roman Catholic Diocese of Brooklyn v. Cuomo, No. 20-CV-4844, 2020 WL 6120167 at *4, 11 (E.D.N.Y. Oct. 16, 2020).

circumstances matter. A deadly and contagious virus provides a compelling government interest to justify emergency action.

A visual representation that shows all the options for levels of government considering legal limitations and the severity of the pandemic would be a dynamic three-dimensional matrix that defies chart making. The matrix below demonstrates how a matrix can help define the limits and severities of pandemics. For example, at given time a local government may be justified by the severity of the pandemic in mandating quarantines, business closings, curfews and mask wearing. At the very same time another local government would not be justified because the pandemic is not severe at that location. In December of 2020, San Francisco was on lockdown while Macon, Georgia was not. Both cities were doing the right thing. Keeping this chart in mind, this article will propose specific policies for defining a pandemic’s severity, defining proper actions governments can take based on the severity, defining the limits of government action, and creating a committee to review and classify pandemics as they emerge.

PROFILE OF ACTIONS TAKEN DURING COVID-19

	US	STATE	LOCAL	PRIVATE	BRAZIL	OTHER NATIONS
DETAIN INDIVIDUALS	⁴²					

⁴² Though the United States federal government did not forcibly detain individuals during the COVID-19 pandemic, it has previously indicated a willingness to do so “to prevent the entry and spread of communicable diseases.” CENTERS FOR DISEASE CONTROL AND PREVENTION, *Legal Authorities for Isolation and Quarantine*, <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

QUARANTINE	X ⁴³	X ⁴⁴	X ⁴⁵			X
CURFEW		X ⁴⁶	X ⁴⁷			X ⁴⁸
CLOSE BUSINESSES		X ⁴⁹	X ⁵⁰			X
LIMIT ACCESS TO BUSINESS		X ⁵¹	X ⁵²			X ⁵³
VACC MANDATE FOR ALL						X ⁵⁴
VACC PASSPORT		X ⁵⁵				X ⁵⁶

⁴³ The United States federal government recommended quarantine during the COVID-19 pandemic. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Quarantine and Isolation*, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html>.

⁴⁴ Many states issued quarantine orders during the COVID-19 pandemic; some states imposed penalties for violating these orders, and others did not. *See* State of Alaska COVID-19 Mandate 010 (July 14, 2020); Fla. Exec. Order No. 20-80 (March 23, 2020); State of California Travel Advisory, April 2, 2021, <https://www.cdph.ca.gov/programs/CID/DCDC/pages/COVID-19/Travel-Advisory.aspx>.

⁴⁵ Many local governments within the United States initiated quarantine orders. *See* County of Contra Costa Mass Quarantine Order No. HO-COVID19-50, July 23, 2021, https://813dcad3-2b07-4f3f-a25e-23c48c566922.filesusr.com/ugd/84606e_44a06b0178814954b916802e2e01e753.pdf.

⁴⁶ California Governor Gavin Newsom ordered a curfew from 10PM to 5AM in dozens of counties. Alix Martichoux, ABC News 7, *Gov. Newsom Orders Curfew for Most California Counties*, Nov. 20, 2020, <https://abc7.com/governor-newsom-california-curfew-gavin-los-angeles/8101518/>.

⁴⁷ The mayor of Pueblo, Colorado issued a curfew for the city. THE NEW YORK TIMES, *Why Are States Imposing Virus Curfews?*, Nov. 21, 2020, <https://www.nytimes.com/2020/11/21/us/coronavirus-curfew.html>.

⁴⁸ France, Italy, and Greece issued curfews. BBC NEWS, *How is Europe Lifting Lockdown Restrictions?*, June 25, 2021, <https://www.bbc.com/news/explainers-53640249>.

⁴⁹ Erin Schumaker, *Here are the states that have shut down nonessential businesses*, ABC NEWS, April 2, 2020, <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806>.

⁵⁰ *Id.*

⁵¹ New York Governor Andrew Cuomo ordered bars, restaurants, and gyms to close by 10PM. THE NEW YORK TIMES, *As U.S. Breaks Hospitalization Records, N.Y. and Other States Add Restrictions*, Nov. 11, 2020, <https://www.nytimes.com/live/2020/11/11/world/covid-19-coronavirus-live-updates>.

⁵² *Supra* note 49.

⁵³ A 10PM curfew was enacted for pubs and restaurants in England. THE NEW YORK TIMES, *Uneasy Under Lockdowns, Pubs in England Count the Days Till Christmas*, Nov. 13, 2020, <https://www.nytimes.com/2020/11/13/business/coronavirus-uk-london-lockdown.html>.

⁵⁴ Multiple countries made vaccines mandatory. REUTERS, *Factbox: Countries Making COVID-19 Vaccines Mandatory*, Aug. 16, 2021, <https://www.reuters.com/world/countries-make-covid-19-vaccines-mandatory-2021-07-13/>.

⁵⁵ New York implemented a vaccine passport system. Sharon Otterman, *Will the Excelsior Pass, New York's Vaccine Passport, Catch On?*, THE NEW YORK TIMES, June 1, 2021, <https://www.nytimes.com/2021/06/01/nyregion/excelsior-pass-vaccine.html>.

⁵⁶ Other countries implemented a vaccine passport system. *What is a Green Pass?*, ISRAEL MINISTRY OF HEALTH, <https://corona.health.gov.il/en/directives/green-pass-info/>.

TRAVEL LIMITATIONS OR EXCLUSIONS	X ⁵⁷	X ⁵⁸	X ⁵⁹		X	X ⁶⁰
VACC OR TEST TO TRAVEL OR ARRIVE	X ⁶¹	X ⁶²	X ⁶³		X	X ⁶⁴
TESTING-MANDATORY		X ⁶⁵		X		X ⁶⁶
MANDATORY TRACKING				X	X	X
STAY AT HOME ORDER		X ⁶⁷	X ⁶⁸		X	X ⁶⁹
MANDATORY MASKING IN PUBLIC		X ⁷⁰	X ⁷¹			X

⁵⁷ CENTERS FOR DISEASE CONTROL AND PREVENTION, *COVID-19 Travel Restrictions by Destination*, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notice.html>.

⁵⁸ CNN, *COVID-19 Travel Restrictions State by State*, Aug. 4, 2020, <https://www.cnn.com/travel/article/us-state-travel-restrictions-covid-19/index.html>.

⁵⁹ *Id.*

⁶⁰ EUROPEAN COMMISSION, *Travel During the Coronavirus Pandemic*, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/travel-during-coronavirus-pandemic_en.

⁶¹ U.S. Department of State, *COVID-19 Testing Required for U.S. Entry*, https://travel.state.gov/content/travel/en/international-travel/before-you-go/covid-19_testing_required_US_Entry.html.

⁶² *Supra* note 58.

⁶³ *Id.*

⁶⁴ *Supra* note 60.

⁶⁵ THE GAINESVILLE SUN, *UF Says Students Will Be Virus-Tested Every Two Weeks in the Spring*, Nov. 20, 2020, <https://www.gainesville.com/story/news/2020/11/20/university-florida-mandates-covid-19-testing-students-spring-semester/6354201002/>.

⁶⁶ CNN HEALTH, *Europe Has Kept Its Schools Open for Much of the Pandemic, But Now Closures Loom*, Jan. 4, 2021, <https://www.cnn.com/2021/01/04/health/europe-school-closures-covid-19-gbr-intl/index.html>.

⁶⁷ *Supra* note 44.

⁶⁸ *Supra* note 45.

⁶⁹ *Supra* note 48.

⁷⁰ U.S. NEWS AND WORLD REPORT, *These States Have COVID-19 Mask Mandates*, Aug. 17, 2021, <https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates>.

⁷¹ City of Miami Order 20-20 of April 9, 2020.

MASKING FOR ACCESS TO SPACE	X ⁷²	X ⁷³	X ⁷⁴	X ⁷⁵		X
VACCINATE OR TEST FOR EMPLOYEES	X ⁷⁶			X ⁷⁷		X ⁷⁸
VACC PROOF OR TEST FOR ACCESS				X ⁷⁹		X ⁸⁰

a. United States

1. Federal Government

The Constitution of the United States does not expressly provide for emergency powers, but the enlargement of the federal executive powers during extraordinary times is recognized by statute.⁸¹ The National Emergencies Act provides that Congress is authorized to grant the President

⁷² CENTERS FOR DISEASE CONTROL AND PREVENTION, *Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs*, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html>.

⁷³ *Supra* note 70.

⁷⁴ CITY OF CHICAGO DEPT. OF PUBLIC HEALTH, *Chicago Department of Public Health Announces New Indoor Mask Mandate with Continued Increase in New COVID-19 Cases in Chicago*, Aug. 17, 2021, https://www.chicago.gov/city/en/depts/cdph/provdrs/health_protection_and_response/news/2021/august/CDPH-announces-new-mask-mandate.html.

⁷⁵ BUSINESS INSIDER, *Private Companies May Still Require Masks, Even as the CDC Relaxes Guidance for Fully Vaccinated Americans*, May 13, 2021, <https://www.businessinsider.com/cdc-masks-fully-vaccinated-private-companies-require-2021-5>.

⁷⁶ The Associated Press, *Biden Orders Tough New Vaccination Rules for Federal Workers*, July 29, 2021, <https://apnews.com/article/lifestyle-joe-biden-business-health-travel-a1670ffa08f1f2eab42c675d99f1d9ad>.

⁷⁷ Delta Airlines required all new employees to be vaccinated during the COVID-19 pandemic. The Associated Press, *Delta Will Require New Hires to Be Vaccinated Against Virus*, NEWS CHANNEL 8 (May 14, 2021), <https://www.wfla.com/community/health/coronavirus/delta-will-require-new-hires-to-be-vaccinated-against-virus/>.

⁷⁸ *Supra* note 54.

⁷⁹ ROYAL CARRIBBEAN CRUISES, *Vaccine-Required Cruises*, <https://www.royalcaribbean.com/faq/questions/do-i-need-a-covid-vaccine-to-cruise-what-counts-as-proof#:~:text=Some%20cruises%20departing%20Florida%20will,destinations%20on%20the%20ship's%20itinerary>.

⁸⁰ *Supra* note 54.

⁸¹ The National Emergencies Act, 50 U.S.C. §§ 1601-1651 (1976); The Public Health Service Act, §§ 319 - 361.

any special or extraordinary power during national emergencies,⁸² yet there is no detailed definition of emergency.

The Stafford Act provides an exceedingly broad definition of emergency. The Act defines emergency as:

[A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.⁸³

Pursuant to the law, the President has wide authority to use emergency powers as long as the measures aim to save lives, protect property, ensure safety and health, or lessen the threat of a catastrophe in the United States.⁸⁴ This language suggests the uncertainty related to the definition of emergency also applies to the extent of emergency powers. The President has discretion in defining an emergency as well as latitude in designing responses to the emergency.

The language of the Stafford Act is unclear regarding the extent of the emergency powers. First, the statute provides that the President is authorized to establish a program of disaster preparedness that utilizes services of “all appropriate agencies.”⁸⁵ The term “appropriate” is discretionary and allows the President to exercise control over any agency he or she deems “appropriate.”

The statute also provides that the President may coordinate federal programs of disaster preparedness, and programs run by State and local authorities.⁸⁶ Depending on the political

⁸² 50 U.S.C. §1621.

⁸³ 42 U.S.C. § 5122.

⁸⁴ *Supra* note 81.

⁸⁵ 42 U.S.C. § 5131.

⁸⁶ 42 U.S.C. § 5131(5).

philosophy of the President, this “coordination ” could result in highly centralized authority. That has not been the case in the current pandemic. In fact, it has been governors and mayors who have enacted the most severe measures, and there is substantial criticism for the national government not providing enough guidance or leadership.⁸⁷ But, based on the statutory structure, there must be an awareness that overreach by a different federal executive could be intrusive.

Finally, the statute expressly provides that the President has the authority to apply science and technology to address the emergency.⁸⁸ That statement seems rational, especially when dealing with a crisis that needs scientific answers. But does this broad authority facilitate potential abuses of technology like CCTV coverage with thermal imaging to detect individuals with elevated temperatures, drones to identify where crowds gather in violation of social distancing standards, and use of internet surveillance to identify geographical concentrations of the disease.⁸⁹ All of these uses could be reasonable, but each could be the basis for future intrusion concerns.

In addition to emergency powers, the Stafford Act provides powers to address a “major disaster.”⁹⁰ Major disaster means any natural catastrophe, which, “in determination of the President,” causes damage of sufficient severity and magnitude to warrant major disaster assistance.⁹¹ Like the definition of emergency, the definition of major disaster relies upon the determination of the President.⁹² Unlike the emergency powers, the extent of the major disaster

⁸⁷ Phillip A. Wallach and Justus Myers, *The Federal Government’s Coronavirus Response—Public Health Timeline*, BROOKINGS, March 31, 2020, <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/>.

⁸⁸ 42 U.S.C. § 5131(6).

⁸⁹ *Thermal Imaging Systems (Infrared Thermographic Systems / Thermal Imaging Cameras)*, January 12, 2021, <https://www.fda.gov/medical-devices/general-hospital-devices-and-supplies/thermal-imaging-systems-infrared-thermographic-systems-thermal-imaging-cameras>; *Drones Become Part of Local U.S. Responses to COVID-19*, April 22, 2020, <https://www.govtech.com/products/Drones-Become-Part-of-Local-US-Responses-to-COVID-19.html>; *Apps and COVID-19*, <https://privacyinternational.org/examples/apps-and-covid-19>.

⁹⁰ 42 U.S.C. §§ 5121 et. seq. (1988).

⁹¹ 42 U.S.C. § 5122,(2).

⁹² 42 U.S.C. § 5122.

powers is much more limited.⁹³ In a major disaster, the President is authorized to supplement efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused therein.⁹⁴ While emergency powers may affect the separation of powers between federal and state levels of government and impact fundamental rights, the major disaster powers exist primarily to provide federal support to the States, local authorities, and organizations.⁹⁵ The aid usually occurs through transferring of funds and/or providing tax benefits.⁹⁶

The Public Health Service Act also grants extraordinary powers to combat emergencies. The statute authorizes the Secretary of Health and Human Services (“Secretary”) to lead the federal public health and medical responses related to public health emergencies.⁹⁷ The Secretary is authorized to declare a public health emergency when a disease or disorder presents danger to the public health or when there are outbreaks of infectious diseases or bioterrorist attacks.⁹⁸ The statute also provides a wide range of measures to be taken by the Surgeon General upon the Secretary’s approval.⁹⁹ To prevent the introduction and spread of communicable diseases in the United States, the Surgeon General can order inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals and articles, suspension of entries and imports, creation of quarantine stations, and other measures, as he or she deems necessary.¹⁰⁰

⁹³ *Id.*

⁹⁴ 42 U.S.C. § 5121 (b).

⁹⁵ 42 U.S.C. § 5196.

⁹⁶ 42 U.S.C. § 5122.

⁹⁷ Public Health Emergency Act, Section 319.

⁹⁸ Public Health Emergency Act, Section 319(a).

⁹⁹ Public Health Emergency Act, Section 361.

¹⁰⁰ Public Health Emergency Act, Section 361, 362, and 364.

As a result of the confirmed cases of COVID-19, the Secretary declared a public health emergency exists.¹⁰¹ Subsequently, President Trump designated COVID-19 as an emergency and a major disaster.¹⁰² According to President Trump, the number of infections in the United States was sufficient to threaten the nation’s healthcare system, forming the circumstances necessary to declare a national emergency under the National Emergencies Act.¹⁰³ The President determined that the severity and magnitude of the impacts of COVID-19 support the declaration of a major disaster under the Stafford Act.¹⁰⁴

President Trump took a number of measures during the COVID-19 pandemic, utilizing the emergency and major disaster powers. Under the Social Security Act and the Health Insurance Portability and Accountability Act, the President authorized the Secretary to waive or modify certain requirements of Medicare, Medicaid, and Children’s Health Insurance programs.¹⁰⁵ Under the Stafford Act, the President encouraged States and local governments to activate their Emergency Operations Centers, to review emergency preparedness plans, and to request Federal assistance.¹⁰⁶ In voicing the Defense Production Act of 1950, the President prioritized the allocation of health and medical materials, services, and facilities deemed “necessary or appropriate to promote national defense.”¹⁰⁷

¹⁰¹ *Determination that a Public Health Emergency Exists*, January 31, 2020,

<https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

¹⁰² Proclamation No. 9994 Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID 19) Outbreak (2020).

¹⁰³ *Supra* note 81.

¹⁰⁴ Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act, issued on March 13, 2020.

¹⁰⁵ 42 U.S.C. § 1135 (b).

¹⁰⁶ 42 U.S.C. § 5131.

¹⁰⁷ Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19. Issued on March 18, 2020.

The protection over individuals' private health information was altered for the pandemic.¹⁰⁸ Under the Health Insurance and Accountability Act (HIPAA), a covered entity¹⁰⁹ may disclose protected health information without the individual's authorization (i) to a public health authority for the purpose of preventing or controlling disease¹¹⁰ and (ii) to a person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading.¹¹¹ Under the COVID-19 emergency, hospitals and clinics, for example, may disclose a broad range of medical information, including identifying information, of individuals who have been infected with, or exposed to the virus.¹¹²

There should be limitations on the exercise of emergency and disaster relief. After all, the powers granted are extraordinary and authorized for a specific purpose. Any emergency policy should be measured by the following three standards:

- (i) The measures taken must be taken within the defined and designated powers of the statutes.
- (ii) The measure must be taken to accomplish purposes of the act and should not engage in unnecessary excessive intrusions on personal rights. The measure should be limited in scope.
- (iii) The powers exercised should be of limited duration. Frequently, emergency measures require renewal of emergency declarations in the text of the legislation. Extraordinary powers must be legitimized only for as long as the conditions that

¹⁰⁸ 45 C.F.R. § 164.

¹⁰⁹ 45 C.F.R. § 160.103.

¹¹⁰ 45 C.F.R. § 164.512(b)(1)(i).

¹¹¹ 45 C.F.R. § 164.512(b)(1)(iv).

¹¹² *COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE FOR CIVIL RIGHTS, <https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf> (Retrieved January 14th, 2021).

formed the emergency or major disaster endure. The measures taken under emergencies or major disasters must have a time limit.

As an example, it appears that actions taken by President Trump at the beginning of the pandemic are consistent with these principles.¹¹³ The measures find support in the law, intend to increase the access to the health care system for the general population, and provide options for States to obtain federal monetary assistance. The measures also contained time limits that required renewal and in fact, because of the duration of the pandemic, were renewed.¹¹⁴ The justifications for renewal and time limits are an important element for establishing and defining governmental limits for future policies.

2. State and Local Government

Emergency powers are also granted to states and local authorities, and those powers are defined very broadly.¹¹⁵ The issue of local control has come into sharp focus during the pandemic because of the dramatic differences in approach by various states and local governments. Some localities, like San Francisco, went on almost total lockdown.¹¹⁶ Other areas imposed very few restrictions.¹¹⁷ There are rational reasons for different approaches based on the degree of outbreak, density of population, and other factors. The legal basis for these actions depends upon state laws and local ordinances as well as how the local actions interact with Federal policies. In some state

¹¹³ *Supra* note 104.

¹¹⁴ For example, Florida Statute § 252.36(2) requires the Florida Governor to renew a state of emergency every sixty days.

¹¹⁵ *Supra* Section II, A2.

¹¹⁶ Heather Kelly and Rachel Lerman, *San Francisco flattened the curve early. Now, coronavirus cases are surging*, THE WASHINGTON POST, Aug. 2, 2020, <https://www.washingtonpost.com/technology/2020/08/02/san-francisco-coronavirus-surge/>.

¹¹⁷ *I.g.* South Dakota, Utah and Oklahoma. Ayla Ellison. *10 states with the fewest, most COVID-19 restrictions*, September 15th, 2020, <https://www.beckershospitalreview.com/rankings-and-ratings/10-state-with-the-fewest-most-covid-19-restrictions-091520.html>.

constitutional structures, local governments are given substantial leeway in local policy making. However, most often, the state government is empowered to preempt local governments on state issues.¹¹⁸

Florida provides an example of a large state with multiple large municipalities and counties that take varied approaches. Florida defines emergency as “any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.”¹¹⁹ Florida Governor Ron DeSantis declared that COVID-19 justified a state of emergency.¹²⁰ Under the state of emergency, Governor DeSantis issued several state mandates, and initially some of the state measures were more intrusive than federal measures.

Under Chapter 252, Section 36 (5)(k) of the Florida Statutes, Governor DeSantis issued a “stay at home” measure, ordering senior citizens and individuals with fragile health to stay at home and take all measures to limit the risk of exposure.¹²¹ The measure required that all persons in Florida limit their movements to those necessary to obtain or provide essential services or conduct essential activities.¹²² Social gatherings were prohibited.¹²³

Generally, under Chapter 252 of the Florida Statutes, Governor DeSantis ordered vacation rental businesses to stop activities, including advertisement and the making of future reservations.¹²⁴ Governor DeSantis also ordered the suspension of mortgage foreclosures and

¹¹⁸ Federal and State Pre-emption Basics, NCSL, July 9, 2016, <https://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/webinar-federal-and-state-preemption-basics.aspx>.

¹¹⁹ Fla. Stat. § 252.36 (5)(k).

¹²⁰ Fla. Exec. Order No. 20-52, March 9, 2020.

¹²¹ Fla. Exec. Order No. 20-83, March 24, 2020.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Fla. Exec. Order No. 20-87, March 27, 2020.

evictions.¹²⁵ Each measure taken by Governor DeSantis may or may not be considered appropriate under the three-prong test.

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

In addition to any other powers conferred upon de Governor by law, he or she may (...) Take measures concerning the conduct of civilians, the movement and cessation of movement of pedestrian and vehicular traffic prior to, during, and subsequent to drills and actual or threatened emergencies, the calling of public meetings and gatherings, and the evacuation and reception of civilian population.¹²⁶

The statute explicitly grants the governor to power to control the movement of the population during a state of emergency.¹²⁷ Considering that the governor declared a state of emergency in reaction to COVID-19, the measure appears to be aligned with the law.

The second prong requires an evaluation of whether the measures taken justify the limitations and intrusions on personal liberties. In other words, do measures such as quarantining and social distancing help limit the spread of COVID? Part of what makes the issue of addressing the pandemic so difficult and controversial is the lack of certainty about COVID-19. In 2019, COVID-19 was new. Medical professionals and public health specialists had to determine how to stop the pandemic, how to reduce individual’s chances of exposure, and how to make the health system able to address the issues of a pandemic.¹²⁸ All of these complex health issues also had to be

¹²⁵ Fla. Exec. Order No. 20-94, April 2, 2020.

¹²⁶ Fla. Stat. 252.36(k).

¹²⁷ *Id.*

¹²⁸ *CDC’s Response: Preparing first responders, healthcare providers, and health systems*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Dec. 31, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/index.html>.

addressed and mitigated by governmental officials.¹²⁹ Government officials had to make decisions based on information from health professionals that was continually changing.¹³⁰ In retrospect, some of those decisions will look good and others will look bad. History will do the long-term assessment, but the legal system must evaluate the exercise of government powers during the pandemic as they are implemented and challenged

The third prong requires an analysis of whether the measures have a time limit. A state of emergency proclaimed by Florida's governor has a time limit of sixty days,¹³¹ but Governor DeSantis's state of emergency in response to COVID-19 has been extended eight times, extending to over 500 days.¹³² However, COVID-19 may justify these intrusions upon citizens' freedom of movement for long periods of time. There may also be conditions in place to justify the extension of quarantine and social distancing. Yet, the only justifications provided relate to the continuing threat to the health, safety, and welfare.¹³³

Florida provides an example of the legal boundaries of the COVID-19 response.¹³⁴ Challenges have been raised against local orders for business closings and mask orders.¹³⁵ Those challenges have been grounded in privacy and liberty arguments.¹³⁶ Florida courts have been reluctant to

¹²⁹ NPR interviewed three global leaders who shared how their countries are addressing COVID-19. Morning Edition, *The Global Leaders Who Have Been Effective During the Coronavirus*, NPR, April 16, 2020, <https://www.npr.org/2020/04/16/835710001/the-world-leaders-who-have-been-effective-during-the-coronavirus>.

¹³⁰ *Id.*

¹³¹ Fla. Stat. § 252.36(2).

¹³² Fla. Exec. Order 20-114, May 8, 2020; Fla. Exec. Order 20-166, July 7, 2020; Fla. Exec. Order 20-192, August 5, 2020; Fla. Exec. Order 20-213, September 4, 2020; Fla. Exec. Order 20-276, November 3, 2020; Fla. Exec. Order 20-316, December 29, 2020; Fla. Exec. Order 21-45, February 26, 2021; Fla. Exec. Order 21-94, April 27, 2021.

¹³³ *Id.*

¹³⁴ Erwin Chemerinsky, *Op-Ed: Yes, the government can restrict your liberty to protect public health*, LOS ANGELES TIMES, April 20, 2020, <https://www.latimes.com/opinion/story/2020-04-20/government-can-restrict-your-liberty-to-protect-public-health-courts-have-made-that-clear>; Stephanie Wylie, *The Supreme Court Should not Politicize Valid Public Health Orders*, CENTER FOR AMERICAN PROGRESS, Sept. 2, 2020, <https://www.americanprogress.org/issues/courts/reports/2020/09/02/489964/supreme-court-not-politicize-valid-public-health-orders/>. See also *infra* notes 137 and 161.

¹³⁵ *Green v. Alachua County*, No. 1D20-1661, 2021 WL 2387983 (Fla. 1st DCA June 11, 2021).

¹³⁶ *Supra* note 134, Chemerinsky.

overturn emergency actions in the middle of a pandemic,¹³⁷ and that has been true nationwide.¹³⁸ Overall, the quarantine and social distancing mandates issued by Governor DeSantis and other governors may be considered appropriate. These mandates appear to be within the statutory definitions of emergency powers and can be justified as reasonable methods to address the issues arising from COVID-19.

The legitimacy of government mandates depends on the actual circumstances of the pandemic and whether the measures continue to be justified by the facts. In some cities that had additional spread or spikes in COVID, quarantining, masking and social distancing mandates were reinstated.¹³⁹ However, these and other measures may be subject to severe scrutiny as they extend to longer periods. For example, the closure of restaurants and vacation rentals and the suspending mortgage foreclosures and evictions may be an overreach of emergency powers, particularly if the restrictions are extended.¹⁴⁰ Ordering business closures and suspending the rights of landlords over their own property are very serious measures. There are no specific provisions permitting governors to take such actions, although statutes do accord general emergency powers.

COVID-19 has had a dramatic effect on the economy. When “non-essential” businesses were temporarily shut down, millions of people lost their jobs, and the American economy took a

¹³⁷ *Machovec v. Palm Beach Cty.*, No. 4D20-1765, 2021 Fla. App. LEXIS 1088 (Dist. Ct. App. Jan. 27, 2021); *Jackson v. Orange County*, No. 48-2020-CA-006427-A001-OX (Fla. 9th Jud. Cir. Ct. 2020); *Power v. Leon County*, No. 37-2020-CA-001200 (Fla. 2d Jud. Cir. Ct. 2020); *County of Ventura v. Godspeak Calvary Chapel*, 2020 WL 6557826 (Cal. Sup. Ct. 2020); *4 Aces Enters., LLC v. Edwards*, No. 20-2150, 2020 U.S. Dist. LEXIS 147721 (E.D. La. Aug. 17, 2020).

¹³⁸ *Supra* note 134, Chemerinsky.

¹³⁹ Corky Siemaszko, *New Lockdowns and restrictions sweep across the country as COVID-19 cases continue to rise*, NBC NEWS, Nov. 16, 2020, <https://www.nbcnews.com/news/us-news/new-lockdowns-restrictions-sweep-across-country-covid-19-cases-continue-n1247919>.

¹⁴⁰ Fla. Exec. Order 20-87, March 27, 2020; Fla. Exec. Order 20-103, April 10, 2020; Fla. Exec. Order 20-94, April 2, 2020; Fla. Exec. Order 20-91, April 21, 2020.

downward turn.¹⁴¹ The government took steps to alleviate the economic hardships caused by the pandemic by suspending foreclosures and evictions and by issuing stimulus checks.¹⁴² The economic impact COVID-19 and government decisions had on the United States raises the question: how do leaders balance economic security with public health, and what authority do they have to make those calls?

While the federal and state governments enacted emergency policies, local governments took their own steps. Part of the ultimate legal story is the interaction of federal, state and local policies. In many ways, the national government has allowed local and state governments to make decisions for their communities without intervening.¹⁴³

One example of a local official using local authority to implement COVID-19 policies is Mayor Giménez of Miami Dade County in Florida. Under Section 8B 7(2)(f) of the Miami Code, Mayor Giménez ordered the closure of all non-essential retail and commercial establishments.¹⁴⁴ Without any specific legal authority, Mayor Giménez ordered the use of facial masks where social distancing was not possible.¹⁴⁵ Mayor Giménez also ordered the use of facial masks everywhere under the penalty of arrest and monetary penalties without a specific statutory provision giving him the authority to make this type of mandate.¹⁴⁶

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

¹⁴¹ Michael Ettlinger and Jordan Hensley, *COVID-19 Economic Crisis: By State*, UNIVERSITY OF NEW HAMPSHIRE CARSEY SCHOOL OF PUBLIC POLICY, January 13, 2021, <https://carsey.unh.edu/COVID-19-Economic-Impact-By-State>.

¹⁴² *Supra* note 134, Chemerinsky.

¹⁴³ *Infra* Section V.

¹⁴⁴ Order 07-20 of May 31, 2020.

¹⁴⁵ Order 20-20 of April 9, 2020.

¹⁴⁶ Order 20-16 of June 25th, 2020.

Once a Local State of Emergency has been declared, the Manager is authorized by the Mayor and the Board to order any or all of the following actions: (...) An order requiring any or all commercial establishments located in areas of imminent or actual danger to close and remain closed until further order.¹⁴⁷

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

The second issue is whether the severity of the specific measures was justified to address issues arising from COVID-19. At the time of Mayor Giménez’s closures, there were serious concerns about their efficacy in reducing the spread and the potential negative impact the closures would have on local businesses.¹⁴⁸ Studies have shown that business closure measures were effective in conjunction with stay at home orders and the prohibition of public gatherings, but the effectiveness of particular closings is still debated.¹⁴⁹ The limited proof of effectiveness seems to not justify the order of business closures at expense of property rights.

Conversely, Mayor Giménez’s facial mask measure may be appropriate. Studies suggest that masks are beneficial to reducing the spread of COVID-19, so facial mask measures are justifiable.¹⁵⁰ However, the measures require more scrutiny when “recommendations” become rules with penalties like civil fines¹⁵¹ or criminal penalties.¹⁵² Strict standards were implemented and justified by showing the need to protect public health and safety; however, criminal penalties

¹⁴⁷ Miami, Florida Municipal Code Chapter 8B, Section 8B – 7, (2020).

¹⁴⁸ Alexander W. Bartik, *et al*, *The impact of COVID-19 on small business outcomes and expectations*, July 28, 2020, <https://www.pnas.org/content/117/30/17656>.

¹⁴⁹ J.M. Braunder, *et al.*, *Inferring the effectiveness of government interventions against COVID-19*, SCIENCE, Dec. 15, 2020, <https://science.sciencemag.org/content/sci/early/2020/12/15/science.abd9338.full.pdf>, on January 17, 2021; Bundgaard Henning, *et al*, *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Wearers*, on February 6, 2021, <https://www.acpjournals.org/doi/10.7326/m20-6817>.

¹⁵⁰ Talib Dbouk and Dimitris Drikakis, *On respiratory droplets and face masks*, 32 PHYS FLUIDS 6 (1994).

¹⁵¹ City of Miami Order No. 20-16, June 26th, 2020.

¹⁵² Iván Espinoza-Madrigal, *Don’t Criminalize the Coronavirus*, WBUR, April 16, 2020, <https://www.wbur.org/cognoscenti/2020/04/16/police-coronavirus-ivan-espinoza-madrigal>.

were not widely supported and not enforced in most places.¹⁵³ Criminalizing an activity through executive order that is not based on a statute or ordinance raises legal and policy questions.¹⁵⁴

The third prong requires an analysis of the business closure and mask measures' time limit. Neither the business closure measure nor the mask measure specifies a time limit.¹⁵⁵ Instead, the executive orders establishing those measures provide that they shall expire upon the expiration of the existing Miami-Dade County State of Local Emergency.¹⁵⁶ In addition, when the State of Local Emergency is extended, those measures shall also be extended.¹⁵⁷ Because there is no defined time limit or limit on extensions of States of Local Emergencies, the business closures and facial mask measures issued by the Miami-Dade County Mayor may fail to meet the third prong of our analysis.

It is reasonable and necessary for freedoms to be temporarily limited during a pandemic.¹⁵⁸ Government at all levels has been confronted with an unprecedented crisis and compelled to make choices that affect public health, private rights, and the economic wellbeing of the states and the nation. COVID-19 demanded decisions be made while science and circumstances were evolving rapidly. For the future, measures taken in the United States should be analyzed thoroughly to identify serious intrusions upon freedoms of movement, property rights, and personal data rights that could be avoided in the next pandemic.

¹⁵³ Kristine Phillips, *Many face mask mandates go unenforced as police feel political, economic pressure*, September 16th, 2020, <https://www.usatoday.com/story/news/politics/2020/09/16/covid-19-face-mask-mandates-go-unenforced-police-under-pressure/5714736002/>.

¹⁵⁴ American Bar Association, *What is an Executive Order?* January 25, 2021, https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/.

¹⁵⁵ *Supra* notes 147 and 153.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Supra* Section II.

3. Judiciary

Inevitably, courts are drawn to high-level conflicts involving government actions and individual rights. United States courts have been asked to analyze and rule on various COVID-19 measures, and the courts are showing support for government policies.¹⁵⁹ The United States Supreme Court upheld the California Governor’s COVID-19 restrictions on religious gatherings in a suit filed by a church in California.¹⁶⁰ Following a similar path, in *Power v. Leon County*, the Second Judicial Circuit Court in Florida denied a motion to enjoin Leon County’s mask ordinance.¹⁶¹ The plaintiff had argued that the ordinance violated guarantees of privacy, due process, religious freedom, and equal protection under the Florida Constitution.¹⁶²

New York’s Governor, Andrew Cuomo, has been party to a number of cases that challenged his COVID-19 mandates. In *Page v. Cuomo*, The United States District Court upheld the New York Governor’s imposition of a two-week quarantine order on people entering New York from states that have high levels of coronavirus.¹⁶³ In upholding the governor’s order, the federal judge cited support from the 1905 Supreme Court case *Jacobson v. Commonwealth of Massachusetts*.¹⁶⁴ In *Jacobson*, the Court upheld the authority of states to enforce a compulsory vaccination order in Massachusetts when the government was combatting a smallpox outbreak.¹⁶⁵ At that time, the city government in Cambridge, Massachusetts, mandated that all adults be vaccinated against

¹⁵⁹ *Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic, 2020-2021*, BALLOTPEDIA, [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic), 2020.

¹⁶⁰ *County of Ventura v. Godspcak Calvary Chapel*, 2020 WL 6557826 (Cal. Sup. Ct. 2020).

¹⁶¹ *Power v. Leon County*, 2020 WL 4919774 (Fla. Cir. 2020).

¹⁶² *Id.*

¹⁶³ *Page v. Cuomo*, 2020 WL 4589329 (N.D.N.Y. 2020).

¹⁶⁴ *Id.* at *8 (citing *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)).

¹⁶⁵ 197 U.S. 11 (1905).

smallpox, and the failure to do so would result in a five-dollar fine.¹⁶⁶ Surprisingly, *Jacobson*, which has previously been considered obsolete, is back in the spotlight, and it is being used to address current issues more than a hundred years later, as some civil rights advocates fear a possible mandatory vaccine in the near future.¹⁶⁷

Roman Catholic Diocese v. Cuomo presents an array of issues suitable for a constitutional law exam, and it highlights how courts are handling COVID-19 and constitutional rights.¹⁶⁸ The issues include the authority of states, the use of executive authority, the deference of courts to the political branches in a technical setting, the definition of emergency, and the limits of free exercise of religion.¹⁶⁹ The battle between liberty interests and health policy is squarely joined. The majority said that restrictions on houses of worship violate the free exercise clause and said that the Constitution does not “take a sabbatical” during a pandemic.¹⁷⁰ The dissent argued that houses of worship are treated equally with the same kind of secular gatherings.¹⁷¹ The dissent claimed that indoor gatherings or large groups for extended periods of time are treated the same whether secular or religious;¹⁷² the majority’s comparison of religious services to bicycle shops and liquor stores misses the point entirely. Finally, the dissent says that on urgent technical medical issues the Court should defer to the branches with expertise and resources.

It is clear that courts are reluctant participants in the crisis but nonetheless may be necessary to provide boundaries. Even though courts defer to executive decisions and compelling interests

¹⁶⁶ *Toward a Twenty-First Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820 (2008).

¹⁶⁷ Jillian Kramer, *COVID-19 vaccines could become mandatory. Here’s how it might work*, NATIONAL GEOGRAPHIC, August 19, 2020, <https://www.nationalgeographic.com/science/2020/08/how-coronavirus-covid-vaccine-mandate-would-actually-work-cvd/>.

¹⁶⁸ *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-CV-4844, 2020 WL 6120167 at *4, 11 (E.D.N.Y. Oct. 16, 2020).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

of public health and safety, the courts and the Constitution cannot “take a sabbatical” as a growing number of cases about COVID-19 and governmental actions continue to make their way to the courts.

b. Brazil

Brazil and the United States have similar federal government systems, and both countries have been largely affected by COVID-19. In fact, Brazil has found itself at the center of the largest COVID-19 outbreak in the Southern Hemisphere.¹⁷³ An analysis of Brazilian history, government, and culture shows a striking similarity to the United States, and the country’s handling of the COVID-19 pandemic provides a look into another federal government’s approach to this pandemic.

Brazil’s Federal Constitution asserts that during extraordinary circumstances that threaten the health, peace, and safety of the Brazilian people, a state of emergency can be implemented.¹⁷⁴ Congress can declare one of the following situations: State of Calamity, State of Emergency, State of Siege, and State of Defense.¹⁷⁵

On March 20, 2020, Brazil’s Congress declared a State of Public Calamity due to COVID-19. The measure was taken for financial reasons¹⁷⁶ given that under a State of Public Calamity, the Federal Government can increase public spending to combat the spread of damage, and the Federal

¹⁷³ Manuela Andreoni, *Corona Virus in Brazil: What You Need to Know*, NEW YORK TIMES, January 10, 2021, <https://www.nytimes.com/article/brazil-coronavirus-cases.html>.

¹⁷⁴ Brazil, Constitution of the Federative Republic of Brazil art. 21, V. http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.html.

¹⁷⁵ *Id.*

¹⁷⁶ Congresso Nacional, Decreto Legislativo, No. 6 (2020).

Administration does not have to meet the fiscal target established for 2020.¹⁷⁷ In addition, emergency funds can be accessed, and States and municipalities can obtain assistance from the Federal Government.¹⁷⁸

Restrictions of individual rights, freedoms, and constitutional guarantees can occur temporarily during a State of Public Calamity.¹⁷⁹ Like American law, Brazilian law enlarges the executive powers during states of emergency,¹⁸⁰ and like American law, Brazilian law has an ambiguous definition of emergency and emergency powers.¹⁸¹

A great concern in Brazil is related to how long a State of Emergency should endure.¹⁸² The State of Calamity or State of Emergency should end immediately after the source of the emergency ceases to exist. After the emergency ends, the powers between branches of government should quickly be rebalanced. However, rebalancing may be hard when a threat to public health and safety seems to be more than just temporary. COVID continues to recur and the duration of strict controls gets more controversial the longer the pandemic lasts.

Judicial oversight of COVID-19 policies has been sought in both Brazil much like the United States. The courts have issued numerous rulings resolving disputes related to social gatherings,

¹⁷⁷ Redacao Migalhas, *Congresso aprova estado de calamidade pública*, Migalhas, May 20, 2020, <https://migalhas.uol.com.br/quentes/322271/congresso-aprova-estado-de-calamidade-publica>.

¹⁷⁸ *The CARES Act Provides Assistance for State, Local, and Tribal Governments*, U.S. DEPARTMENT OF THE TREASURY, <https://home.treasury.gov/policy-issues/cares/state-and-local-governments>.

¹⁷⁹ The State of public calamity is a legal measure, instituted by the Presidential Decree nº 7.257/2010 - through Legislative Decree 6, of March 20, 2020, President Bolsonaro officially instituted the state of public calamity in Brazil due to Covid-19. In addition to easing budget limits and allowing the exceptional allocation of more resources to health without committing a crime of fiscal responsibility, the measure also legitimizes the establishment of urgent and provisional legal regimes, in order to contain the impacts of the dire situation. Circulation rights can be suspended and curfews can be implemented for instance.

¹⁸⁰ *Infra* note 183.

¹⁸¹ That will be discussed further throughout the article as we state that there no clear definitions of what types of situations should be considered an emergency

¹⁸² Unlike the State of Emergency, State of Siege, and State of Defense, the State of Calamity has as undefined duration.

business closures, lockdowns, curfews, and face coverings and COVID-19 mandates.¹⁸³ A lawsuit was filed against Brazil's President. It sought to require him to wear a facemask while in public.¹⁸⁴ Although the district court had ruled in favor of the plaintiff, the decree was later overruled by the Court of Appeals, and the President was not required to wear a mask.

As Brazil, the United States and the rest of the world adapt to a “new normal,” companies are launching new technologies to address the pandemic. From contact-tracing apps to temperature sensing cameras, to social distancing and facemask detection technology, the ever-growing artificial intelligence has been relied on and adopted on a large scale by private and public organizations worldwide.¹⁸⁵ The dramatic impact of the pandemic is forcing a wide range of personal and technological intrusions on citizens.

Understandably, crisis may demand drastic measures. The September 11 terrorist attacks in the United States changed airport security measures worldwide.¹⁸⁶ The airport routine changed drastically, and highly intrusive surveillance became the norm.¹⁸⁷ The pandemic has caused government intrusions in Brazil that are not universally accepted. Like the United States, Brazil is a diverse country with different regions having widely ranging views of politics and government. The personality and culture of different regions and nations affects outcomes, enforcement and acceptance of governmental actions and policies. Culture is important. Laws matter but how individuals react to those laws may be even more critical.

¹⁸³ *Supra* notes 159 – 165.

¹⁸⁴ Mateus Silva Laves, *Liminar obriga Jair Bolsonaro a usar máscara de proteção contra a Covid-19*, CONSULTOR JURÍDICO, June 23, 2020, <https://www.conjur.com.br/2020-jun-23/liminar-obriga-bolsonaro-usar-mascara-protecao-covid-19>

¹⁸⁵ These intrusions will be discussed further in the topic “How the primary medical responses to Covid-19 facilitate government intrusion – The TTT Method: Testing, Treating and Tracking.”

III. Is Culture More Important than Law in Responding to a Pandemic?

The World Health Organization has stated that individual behavior is crucial to control the spread of COVID-19.¹⁸⁸ Individual behavior is affected by laws and by culture. The pandemic provides a global example of how individuals react to laws, leadership, and cultural practices. Some nations followed legal restrictions on personal conduct, and some resisted the restrictions. In certain countries there is a culture of compliance, and in other countries, there is a culture of defiance. Some of the explanation for defiance is rooted in failures of governmental leadership to persuade individuals to comply,¹⁸⁹ but more explanation can be found in a nation's culture.

As a pandemic-response, governments worldwide implemented similar restrictions such as limiting private business hours of operation and capacity, imposing travel bans, restraining school attendance, imposing face coverings in public and private places, prohibiting large social gatherings, developing tracing applications, and forcing mandatory quarantines. All of these measures restrict personal autonomy.

Because COVID-19 was a new virus and there was no ready cure, public health officials and governments followed the playbook used for other pandemics to combat COVID-19. The focus was to isolate and limit human contact with the goal of “flattening the curve.”¹⁹⁰ Flattening the

¹⁸⁸ The World Health Organization stated on its Covid-19 Strategy Update virtual booklet that “Individuals must protect themselves and others by adopting behaviors such as washing hands, avoiding touching their face, practicing good respiratory etiquette, individual level distancing, isolating in a community facility or at home if they are sick, identifying themselves as a contact of a confirmed case when appropriate, and cooperating with physical distancing measures and movement restrictions when called on to do so.” https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf?sfvrsn=29da3ba0_19

¹⁸⁹ The United States and Brazil are examples of countries where there has been a culture of defiance. In contrast 한승범 (“Seungbum Han”), a South-Korean citizen, stated that high compliance rate to government guidelines is a great characteristic of Korean culture, and he attributes that to one of the main reasons why the country was able to control the COVID-19 pandemic. Interview with Seungbam Han Oct. 25, 2020.

¹⁹⁰ *Covid-19 Strategy Update*, WORLD HEALTH ORGANIZATION, April 14, 2020, https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf?sfvrsn=29da3ba0_12; *infra* note 193.

curve is not curing the disease—it is buying time by preventing large spikes in infection.¹⁹¹ It reduces the burden on the healthcare system.¹⁹²

Culture and governments provide different explanations of how places and individuals comply with restrictive safety measures. Some political structures are based on centralized authority or dictatorial imposition of restrictions. If a governmental system has already achieved a level of suppression of dissent and limited civil liberties, there is reason to believe it will achieve a high level of compliance in pandemic restrictions. The populace is used to government intrusion and the consequences of noncompliance have been observed. Fear is a motivator. Governments that celebrate and support civil liberties have a different issue. In a pluralistic society with a history of individualism, compliance with broad government intrusions is not welcomed.

University of Maryland Professor of Psychology Michele Gelfand states that the world can be divided into tight and loose cultures.¹⁹³ In a tight culture, social norms are clearly defined and reliably imposed, leaving little room for individual improvisation and interpretation.¹⁹⁴ Loose cultures have social norms that are flexible and informal. Loose cultures propose expectations but permit individuals to define the range of tolerable behavior within which they may exercise their own preferences.¹⁹⁵

A recent study funded by University of Economics Ho Chi Minh City and published by *Safety Science* reveals that cultural determinants play an important role in controlling infection

¹⁹¹ Kara Gavin, *Flattening The Curve for COVID-19: What Does It Mean and How Can You Help?* Michigan Health March 11, 2020, <https://healthblog.uofmhealth.org/wellness-prevention/flattening-curve-for-covid-19-what-does-it-mean-and-how-can-you-help>.

¹⁹² *Id.*

¹⁹³ Michele Gelfand, *Rule Makers Rule Breakers: How Tight and Loose Cultures Wire Our World* (2018).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

behavior.¹⁹⁶ According to that study, countries with higher a “Uncertainty Avoidance Index” will have the lower proportion of people gathering in public such as retail and recreation, grocery and pharmacy, parks, transit stations, and workplaces.¹⁹⁷

Previous studies indicate that a tight culture is associated with success during natural disasters, invasions, population density, and pathogen outbreaks.¹⁹⁸ Therefore, these countries will form the group to coordinate as well as collaborate to keep people together during a crisis. For example, China, a country with a tight culture, was the first country to report a COVID-19 outbreak, and they were also one of the first countries to have the virus under control. A great compliance rate with the government recommendations seems to be the main reason why China was able to “flatten the curve” of the first wave of COVID-19 faster than most nations.¹⁹⁹

Chinese society is an example of living in a tight culture, in which government surveillance and privacy-invasive measures have become a commonplace.²⁰⁰ Its highly regulated culture plays an important role in pandemic times when the government is trying to enforce health measures. Certainly, there are the factors connecting culture and compliance such as cultural heritage of a community and reliance on government. The Chinese government exercises dictatorial powers that make rule compliance absolutely mandatory. China provides an example of a combination of

¹⁹⁶ Toan Luu Duc Huynh, *Does culture matter social distancing under the COVID-19 pandemic?*, ELSEVIER PUBLIC HEALTH EMERGENCY COLLECTION, June 10, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7284251/>.

¹⁹⁷ *Id.*

¹⁹⁸ Harrington J.R., Gelfand M.J. Tightness–looseness across the 50 United States. *Proc. Natl. Acad. Sci.* 2014;111(22):7990–7995.

¹⁹⁹ Dan Chen, *China’s coronavirus response could build public support for its government*, THE WASHINGTON POST, March 27, 2020, <https://www.washingtonpost.com/politics/2020/03/27/chinas-coronavirus-response-could-build-public-support-its-government/>.

²⁰⁰ Ronald Goldfarb, et. al., *After Snowden: Privacy, Secrecy, and Security in the Information Age*, THOMAS DUNNE BOOKS (2015).

authoritarian government as well as a cultural heritage of accepting rules and complying with the government's orders.

In contrast, a loose culture will prioritize the privacy and freedom of each individual. Many nations find themselves struggling to control the virus outbreak, even after months since their first-identified cases. There is evidence that the spread of COVID-19 began in the United States in January of 2020.²⁰¹ Yet months later, the country was still setting daily records of new cases while the country's citizens debate about whether or not the government's measures to control the spread of a pandemic are undermining their privacy and civil rights. For example, in May of 2020, armed protesters took the streets of Michigan to protest the Governor's order to extend the stay-at-home and social distance mandate.²⁰² This order forced businesses to remain closed, which protestors argued directly affected people's freedom.²⁰³

A lack of a unified approach is one of the main reasons why COVID-19 numbers keep rising.²⁰⁴ A decentralized decision-making process is part of federalism, which is fundamental to the system of government established by the United States Constitution. The result of government decentralization in a pandemic is dramatically different policies in different jurisdictions. In 2020,

²⁰¹ *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Jan. 21, 2020, <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

²⁰² Lois Beckett, *Armed protesters demonstrate against Covid-19 lockdown at Michigan capitol*, THE GUARDIAN, June 2, 2020, <https://www.theguardian.com/us-news/2020/apr/30/michigan-protests-coronavirus-lockdown-armed-capitol>.

²⁰³ *Coronavirus: Armed protesters enter Michigan statehouse*, BBC NEWS, May 1, 2020, <https://www.bbc.com/news/world-us-canada-52496514>.

²⁰⁴ See Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to COVID-19*, The New England Journal of Medicine, May 28, 2020, <https://www.nejm.org/doi/full/10.1056/NEJMp2006740> (highlighting how the United States' failure to have a unified approach to COVID-19 caused more harm and confusion during the pandemic).

some cities were completely shut down and quarantined²⁰⁵ while other states had virtually no restrictions.²⁰⁶

In addition, decentralized decision-making causes jurisdiction issues. Can states supersede cities' determinations of mask ordinances? Can the federal government order a state to lift restrictions on business? Can the federal government order a state to implement a stay-at-home order? These legal issues are important to address as we consider how future pandemics might be handled. The critical policy issue is whether this type of diverse decision-making works during a pandemic. Diverse decision making may be suitable for certain issues such as public education, drinking laws, or other localized issues. But for a pandemic that crosses state borders, a bad policy in one state can infect the neighboring state and cause a virus spike in certain regions that were otherwise containing the spread of COVID-19.

State borders do not stop COVID-19 from spreading. Without uniform, national consensus or direction, the virus will continue to spread across governmental boundaries because individuals will react differently depending on the States rules. A study published in 2009 stated that British and American citizens are unlikely to stay at home to work if they think that the risk of illness transmission is uncertain.²⁰⁷ Loose cultures with a commitment to individual liberty are a stark contrast to “tight” cultures with dictatorial governments. This reality is not an endorsement of dictatorships as the best means to address pandemics. Rather, it is recognition that a national

²⁰⁵ San Francisco Bay Area can be noted as one of the places with stricter and longer lockdown in the United States with the most stringent isolation orders in the country taking effect on March 17, 2020. As of February 10th, 2021 the Bay Area is not fully reopened as data shows on San Francisco's government website <https://sf.gov/step-by-step/reopening-san-francisco>.

²⁰⁶ The North Dakota the Governors held off on imposing stay-at-home orders in the beginning of the COVID-19 contamination in the U.S. and later took very few restrictive measures to control the spike of the virus - Sarah Mervosh, Denise Lu and Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home* <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>

²⁰⁷ *Supra* note 196, *Does Culture Matter Social Distancing under COVID-19 Pandemic?*.

emergency capable of crossing state boundaries requires national policies and guidance. In addition to the national need, there is also a need for a mutual understanding of policies across jurisdictions and how they should be shaped depending on each population. The policy appropriate to a densely populated urban environment may be quite different from the policy in a small rural city.

Latin America is full of countries with loose cultures, and they have also been heavily struck by COVID-19, and strict lockdown measures have been enacted. In Honduras, the government instituted a nationwide centralized, militarized lockdown, devoid of oversight.²⁰⁸ The lockdown allocated specific days in which people could leave their homes to get food.²⁰⁹ Similarly, Chile has instituted a strict curfew, and its residents must obtain a permit to leave home for very specific reasons.²¹⁰ In Brazil, numerous local governments have placed travel barriers on the borders of the cities, restricting the circulation of people as a response to COVID-19.²¹¹ Additionally, interstate private transportation buses have been restricted, and interstate roads have been closed.²¹² Many citizens have also protested the face-covering impositions and movement-restrictions measures.²¹³

²⁰⁸ See Lisa Haugaard, *Honduras: Repression in the Time of COVID-19*, <https://www.lawg.org/honduras-repression-in-the-time-of-covid-19-2/>

²⁰⁹ Lisa Haugaard, *Honduras: Repression in the Time of COVID-19*, April 22, 2020, <https://www.lawg.org/honduras-repression-in-the-time-of-covid-19-2/>.

²¹⁰ Lidia Casas Becerra, *The Novel Coronavirus and Civil Rights: A Snapshot from Chile*, HARVARD LAW PETRIEFLOM CENTER BILL OF HEALTH, May 14, 2020, <https://blog.petrieflom.law.harvard.edu/2020/05/14/chile-global-responses-covid19/>

²¹¹ GOVERNO DO ESTADO MATO GROSSO DO SUL, *Ações nas barreiras sanitárias são intensificadas no combate à Covid-19*, <http://www.ms.gov.br/acoes-nas-barreiras-sanitarias-sao-intensificadas-no-combate-a-covid-19/>

²¹² Folha de São Paulo, *Governadores fecham estradas e vetam ônibus de outros Estados*, FOLHA DE S.PAULO, March 24, 2020, <https://www1.folha.uol.com.br/cotidiano/2020/03/governadores-fecham-estradas-e-vetam-onibus-de-outros-estados.shtml>.

²¹³ Por Da Redação Atualizado, *Coronavírus: durante quarentena, manifestantes fazem buzinação em São Paulo* VEJA, April 11, 2020, <https://veja.abril.com.br/brasil/coronavirus-durante-quarentena-manifestantes-fazem-buzinaco-em-sao-paulo/>; *Contrariando orientações da OMS, apoiadores de Bolsonaro protestam em SP contra isolamento social*,

Compare the Latin American countries' responses to the response of Asian countries' responses. For residents in many Asian countries, some of which are tight-cultured countries, wearing a mask and government's privacy-invasive measures are not unusual and they comply.²¹⁴ There is a pressure to conform. However, residents of loose-cultured countries have shown they are less likely to abide to government rules that implicate a limitation of privacy, freedom, or civil rights.

Government trustworthiness plays a crucial role in how countries deal with the pandemic. Tight cultures have strong social norms, little tolerance for deviance and people have more trust in the government, but loose cultures are more permissive to varying social norms. In loose cultures people there can be political polarization, which causes a divide in their society and the society's reaction to government policies.²¹⁵ Moreover, studies show that tight cultures have "more law enforcement per capita, desire greater media restriction and endorse the use of any force necessary to maintain law and order, . . . and have higher conscientiousness."²¹⁶ Conversely, looser cultures are more open and tolerate other culture's values, beliefs, and experiences.²¹⁷

Therefore, when companies like Google, Facebook, and Apple announced in loose culture countries that they teamed up to create a contact tracing software applications that could be used by governments around the world, privacy fears arose almost immediately.²¹⁸ It is uncertain how

O GLOBO, November 4, 2020, <https://oglobo.globo.com/brasil/contrariando-orientacoes-da-oms-apoiadores-de-bolsonaro-protestam-em-sp-contra-isolamento-social-24366136>.

²¹⁴ Uri Friedman, *Face Masks Are In*, THE ATLANTIC, April 2, 2020, <https://www.theatlantic.com/politics/archive/2020/04/america-asia-face-mask-coronavirus/609283/>.

²¹⁵ Thomas Carothers, Andrew O'Donohue, How to Understand the Global Spread of Political Polarization (October 10, 2020, 6:30 pm), <https://carnegieendowment.org/2019/10/01/how-to-understand-global-spread-of-political-polarization-pub-79893>.

²¹⁶ Michele J. Gelfand, *Universal and culture-specific patterns of tightness-looseness across the 31 Chinese provinces*, in RAPID ADAPTATION AND TRANSPOSABLE ELEMENTS, 6522-6524 (PNAS 2019).

²¹⁷ *Id.*

²¹⁸ Mike Feibus, *Are coronavirus contact tracing apps doomed to fail in America?*, USA Today, June 25, 2020, <https://www.usatoday.com/story/tech/columnist/2020/06/24/apple-google-contact-tracing-apps->

governments will use the data collected, for how long the data will be stored, and if governments will use it only for COVID-19 controlling measures.

IV. How the Primary Medical Responses to COVID-19 Facilitate Government Intrusion – The TTT Method: Testing, Treating and Tracking

While there is not a political consensus, there appears to be a medical consensus on how to react to the COVID-19 pandemic. Public health specialists have used the Testing, Treating, and Tracking Method (“The TTT Method”) in pandemics for decades, including the 1918 flu pandemic.²¹⁹ Of course the medical community accepts vaccines as a means of stopping the pandemic, issues such as mandatory vaccinations and vaccine passports are subject of political and legal controversy that we will discuss in another section.²²⁰ There is not political consensus about masks. Before there is a vaccine that prevents infection,²²¹ the logical method is to identify disease through testing, treat those who are sick, and track contacts to reduce the further spread of the disease. Each of these activities entails some intrusion. The public seems more accepting of testing. Almost everyone who is sick wants to be treated, and individuals are likely to want to know if they were exposed to the virus. Each of these actions involves the use of information.

After the smallpox outbreak of 1904, Brazilian authorities decided the TTT Method would be used to combat the next outbreak.²²² The TTT Method is a result of practices developed during

privacy/3253088001/; Geoffrey A. Fowler, *A covid-fighting tool is buried in your phone. Turn it on*, THE WASHINGTON POST, Jan. 22, 2021, <https://www.washingtonpost.com/technology/2020/11/18/coronavirus-app-exposure-alerts/>.

²¹⁹ Douglas Jordan, *The Deadliest Flu: The Complete Story of the Discovery and Reconstruction of the 1918 Pandemic Virus*, Centers for Disease Control and Prevention, <https://www.cdc.gov/flu/pandemic-resources/reconstruction-1918-virus.html>.

²²⁰ *Infra* Section V(d).

²²¹ Even with the successes of Pfizer and Moderna Vaccines for COVID-19, testing will play a critical role in any future pandemic.

²²² *Id.*

other historical disease outbreaks.²²³ Examples of serious outbreaks include cholera, typhoid, influenza, tuberculosis, diphtheria, polio, measles, HIV, and the former coronavirus.²²⁴ Some of these diseases have been controlled, and some of them still cause thousands of deaths annually. The TTT Method promises to mitigate the impacts of the outbreaks, as it is seen as the epidemic gold standard.²²⁵

The effectiveness of the TTT Method may vary significantly depending on the political regime and culture of a nation. For example, the TTT Method should be very effective in China. In China, the Government controls people's freedoms.²²⁶ Some cultures are inclined to accept limitations on freedom as expected. But others, like the US are grounded in principles such as the unalienable rights of life, liberty, and the pursuit of happiness.²²⁷ Americans are culturally inclined to reject authoritarian measures and question governmental authority. Cultural tendencies combined with legal structure largely define the success and acceptance of the TTT Method.

Regardless of the laws and culture of a nation, the fight against disease outbreaks usually starts with quarantine and social distancing measures. Studies carried out during the 1918 Spanish Influenza, the deadliest pandemic in history, suggested that quarantine and social distancing might help ease the strain on the public health care system.²²⁸ These measures may also provide time for

²²³ *History of Quarantine*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/quarantine/historyquarantine.html>.

²²⁴ *CDC Current Outbreak List*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/outbreaks/index.html>.

²²⁵ *Supra* note 219.

²²⁶ Human Rights Watch, *China's Global Threat to Human Rights*, <https://www.hrw.org/world-report/2020/country-chapters/global#>.

²²⁷ U.S. CONST. amend. XIV.

²²⁸ NATIONAL GEOGRAPHIC, *How Some Cities 'Flattened the Curve' During the 1918 Flu Pandemic*, March 27, 2020, <https://www.nationalgeographic.com/history/article/how-cities-flattened-curve-1918-spanish-flu-pandemic-coronavirus>.

the development of a vaccine. The general belief is that isolation can help.²²⁹ Once isolation policies begin, at that point governments begin implementation of the basic three elements of the TTT Method: testing, treating, and tracking.

Testing. Public health officials have pressed for increased testing from the beginning of the pandemic.²³⁰ Testing not only identifies individuals who need treatment but can identify geographical outbreaks that may require more general controls and emergency measures.²³¹

COVID testing has garnered less enthusiasm because of skepticism about the disease itself. Not all people who have COVID-19 have symptoms of COVID-19, which makes getting people to take tests harder.²³² An individual can be infected and asymptomatic. That individual may not feel ill but he or she may spread the virus to others.²³³ Many COVID cases have mild symptoms, so the need for the test may not be apparent to the individual, but widespread testing of the population is essential to finding where the disease is spreading.²³⁴ While other COVID cases are severe and require hospitalization. Therefore, mass testing is about more than just the individual health of a person—it is a priority to prevent spread of the virus.

Testing identifies individuals who are infected. An individual who is infected should quarantine and is necessarily required to identify individuals who may have exposed to the virus.²³⁵

²²⁹ John M. Barry, *THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY* (Penguin Books, 2018)

²³⁰ World Health Organization, *WHO publishes new Essential Diagnostics List and urges countries to prioritize investments in testing*, January 29th, 2021, <https://www.who.int/news/item/29-01-2021-who-publishes-new-essential-diagnostics-list-and-urges-countries-to-prioritize-investments-in-testing>.

²³¹ U.S. Department of Health and Human Resources, *Why COVID-19 testing is the key to getting back to normal*, September 4th, 2020, <https://www.nia.nih.gov/news/why-covid-19-testing-key-getting-back-normal>.

²³² Nature, *What the Data Say About Asymptomatic COVID Infections*, November 23, 2020, <https://www.nature.com/articles/d41586-020-03141-3>.

²³³ *Id.*

²³⁴ *Overview of Testing for SARS-CoV-2 (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, March 17, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>.

²³⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Contact Tracing Slows the Spread of COVID-19*, February 25, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/contact-tracing.html>.

Therefore, once diagnosed there are significant intrusions into the infected individual's life. The person will be restricted in personal movements. The individual's health care records will be examined. Health authorities will want to know all contacts with other persons.

Treating. After receiving a positive result, an individual will be encouraged to initiate treatment. The seriously ill will seek treatment and the high numbers of seriously ill stresses health care systems.²³⁶ However, many individuals with the disease do not require extensive treatment. As a legal matter, the government cannot force treatment. There is an established constitutional right to refuse treatment²³⁷ that is consistent with the international human right to bodily integrity.²³⁸

The rules of confidentiality change during a pandemic because of the need-to-know characteristics of the individuals affected, how the virus affects different groups, and the mortality rate among different demographics.²³⁹ Privacy gives way to the emergency needs of a pandemic. The personal information about those treated is part of a database used to predict impacts, inform treatments, and control the spread of the virus.²⁴⁰ There can and should be rational limits. Health professionals should have limited access to some information while other information could be anonymized.

²³⁶ Sean Mcminn, *et al*, Many Hospitals Are Still Overwhelmed By COVID-19 Patients. Is Yours?, February 8th, 2021; <https://www.npr.org/sections/health-shots/2020/12/09/944379919/new-data-reveal-which-hospitals-are-dangerously-full-is-yours>.

²³⁷ Also known as bodily integrity. *See Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

²³⁸ *Bodily Integrity*, CHILD RIGHTS INTERNATIONAL NETWORK, <https://archive.crin.org/en/home/what-we-do/policy/bodily-integrity.html#:~:text=The%20principle%20of%20bodily%20integrity,as%20a%20human%20rights%20violation>.

²³⁹ U.S. Department of Health and Human Resources, *HIPAA, Health Information Exchanges, and Disclosures of Protected Health Information for Public Health Purposes*, <https://www.hhs.gov/sites/default/files/hie-faqs.pdf>.

²⁴⁰ *Id.*

Tracking. Tracking and contact tracing have always been a part of pandemic response. A traditional tracking practice would involve a health care official filling out forms with patient's information.²⁴¹ Tracking involves questions regarding that patient's whereabouts, home and work addresses, people contacted in the past few days, allergies, infirmities, and sampling.²⁴² However, in the digital age, new tracking methods are now available through technology.

Ever since COVID-19 became a global pandemic, there has been a staggering number of surveillance technologies launched and accepted across the world.²⁴³ Even before the pandemic pervasive use of technology has diminished individual privacy, and much of that diminution has been voluntary as people increasingly live their lives on social media and on their smart phones.²⁴⁴

Tracking might be technically easy with the current technology, but a question arises: what are the limits to it? For instance, a major personal privacy concern is the disclosure of personal activities and locations.²⁴⁵ The government cannot track an individual's movements without a warrant.²⁴⁶ However, tracking people's personal data is a necessary part of fighting a virus. After all, what is the effectiveness of testing without tracking?

China is one of the countries taking full advantage of technology in fighting the pandemic. For instance, its residents are assigned a QR code based on a combination of big data consistent of

²⁴¹ *Supra* note 234.

²⁴² *Id.*

²⁴³ Adam Schwartz, *COVID-19 and surveillance Tech: Year in Review 2020*, January 5, 2021, <https://www.eff.org/deeplinks/2020/12/covid-19-and-surveillance-tech-year-review-2020>.

²⁴⁴ Laura Silver, *et al*, *Use of smartphones and social media is common across most emerging economies*, March 7, 2019, <https://www.pewresearch.org/internet/2019/03/07/use-of-smartphones-and-social-media-is-common-across-most-emerging-economies/>.

²⁴⁵ PEW RESEARCH CENTER, *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, <https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/>.

²⁴⁶ *United States v. Jones*, 565 U.S. 400 (2012).

information submitted by the users themselves and by third parties.²⁴⁷ Moreover, the country utilizes thermal cameras that can identify individual's body temperatures from a distance and immediately notify authorities in case abnormalities are detected.²⁴⁸ Other cameras verify whether people are obeying social distance policies in public spaces.²⁴⁹ Drones verify the proper use of masks as well as detect different types of coughing.²⁵⁰ Contact tracing apps can trace our movements constantly, relying on the GPS embedded in all cell phones.²⁵¹ There is also comprehensive health monitoring using phones, facial recognition and CCTV.

Other countries are also relying on different technologies to collect and process personal data as a way to combat the pandemic. In that sense, Contact Tracing Apps and Contact Notification Apps have been developed. With them, individuals can upload their personal information, including their live location, through applications downloaded on their cellphones and the apps may send an "exposure notification" if the individual has come in contact with someone carrying the virus.²⁵²

The developer of the Contact Tracing App is able to identify the user of the app, and the developer of the Contact Notification App pseudonymizes the use.²⁵³ Thus, the developer of the

²⁴⁷ Joana Molgaard, who lives in Shanghai and with I had the pleasure to speak with, informed me that a few days ago she had cough and went to a private hospital that -technically- has no relationship with the government and her medical condition was immediately uploaded on the QR code, which she noticed only a few days later.

²⁴⁸ Claudia Glover, *China to Roll Out Temperature-Taking Infrared Cameras*, March 31st, 2020, <https://www.cbronline.com/news/china-to-roll-out-temperature-taking-infrared-cameras>.

²⁴⁹ Lydia Khalil, *Digital Authoritarianism, China and COVID*, November 2020, <https://www.lowyinstitute.org/publications/digital-authoritarianism-china-and-covid>.

²⁵⁰ *Westport Police to Test 'Pandemic Drone' that can Sense Fevers, Coughing*, NBC CONNECTICUT, April 23, 2020, <https://www.nbcconnecticut.com/news/local/westport-police-to-test-pandemic-drone-that-can-sense-fevers-coughing/2258746/>.

²⁵¹ *Mobile Location Data and COVID-19: Q&A*, HUMAN RIGHTS WATCH, May 13, 2020, <https://www.hrw.org/news/2020/05/13/mobile-location-data-and-covid-19-qa>.

²⁵² Apple and Google partnered to create a Privacy-Preserving Contact Tracing technology. It is argued that the two tech giants aim to help governments and health agencies reduce the spread of the virus, with user privacy and security as central to the design. <https://covid19.apple.com/contacttracing>.

²⁵³ Proper pseudonymization should be done in such a way that it is impossible (or extremely impractical) to identify the data subject. GDPR Article 4 and Recital 26.

Contact Notification App will arguably have access to an individual’s personal information, but it will not be able to identify the individual. Another difference between Contact Tracing Apps and Contact Notification Apps relates to the device utilized to verify the exposure. Contact Tracing Apps utilize the GPS embedded in cellphones.²⁵⁴ By knowing a phone’s current location, the app should be able to identify whether the owner has come in contact with an individual who has tested positive for COVID-19.²⁵⁵ On the other hand, Contact Notification Apps utilize Bluetooth.²⁵⁶ An owner’s phone and the phone of the individual close to him or her will exchange information.²⁵⁷ If the individual close to the owner has tested positive and has informed the app, the owner will receive an “exposure notification.”²⁵⁸

Apple and Google advocate for Contact Notification Apps.²⁵⁹ The two tech giants argue that the method is privacy protective because the user will be pseudonymized and because individuals would not be traced constantly.²⁶⁰ Instead, their personal information would be exchanged with cellphones of individuals they are proximate to for a certain period of time.

There is also a concern about what information is considered COVID-related and should be collected. Apple and Google would define what information is COVID-19 related for their technology.²⁶¹ The definition will probably be crafted in complicated terms and injected into

²⁵⁴ HUMAN RIGHTS WATCH, *Mobile Location Data and COVID-19: Q&A*, May 13, 2020, <https://www.hrw.org/news/2020/05/13/mobile-location-data-and-covid-19-qa>.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Governor Murphy and Governor Cuomo Launch Exposure Notification Apps to Help Stop the Spread of COVID-19*, STATE OF NEW JERSEY DEPARTMENT OF HEALTH, October 1, 2020, <https://www.nj.gov/health/news/2020/approved/20201001a.shtml>.

²⁵⁹ THE WASHINGTON POST, *Apple and Google Expand Coronavirus Warning Software*, September 1, 2020, <https://www.washingtonpost.com/technology/2020/09/01/apple-google-exposure-notification-express/>.

²⁶⁰ *Id.*

²⁶¹ *Id.*

digital terms of agreement. Usually, users tend not to read through before clicking “I agree,”²⁶² but the next “I agree” may put the users privacy at increased risk.

Moreover, apprehension concerning where the data will be stored is also a factor. In terms of data storage, we may categorize apps as centralized and decentralized. Centralized apps will concentrate all the information collected into one single database that is controlled by the government.²⁶³ The United Kingdom, France, and Norway implemented centralized apps.²⁶⁴

On the other hand, the decentralized apps promise to keep personal information stored on the individual’s phone.²⁶⁵ Countries such as Austria, Croatia, Denmark, Ireland and Italy implemented decentralized apps in order to track the spread of COVID-19.²⁶⁶

Considering the United States, it is important to note that The Fourth Amendment protection does not apply to the private sector.²⁶⁷ The private surveillance industry has the ability to gather personal information without the Fourth Amendment restrictions placed on the government restrictions.²⁶⁸ The industry may end up sharing the personal information collected with anyone consistent with terms of service, including, in certain circumstances, with the government.²⁶⁹ Decentralized apps might be more privacy intrusive than they appear.

²⁶² David Berreby, *Click to agree with what? No one reads terms of service, studies confirm*, THE GUARDIAN, March 3, 2017, <https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print>; Caroline Cakebread, *You're not alone, no one reads terms of service agreements*, BUSINESS INSIDER, November 15, 2017, <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11>.

²⁶³ Cristina Criddle and Leo Kelion, *Coronavirus contact-tracing: World split between two types of app*, May 7th, 2020, <https://www.bbc.com/news/technology-52355028>.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Mobile applications to support contact tracing in the EU's fight against COVID-19: Progress reporting June 2020*, EUROPEAN COMMISSION (June 2020).

²⁶⁷ *United States v. Miller*, 152 F.3d 813, 815 (8th Cir. 1998); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

²⁶⁸ Jon L. Mills, *PRIVACY: THE LOST RIGHT*, 271 (Oxford University Press, 2008)

²⁶⁹ *Infra* note 294, Chapter III, § A-2.

Mass collection of data and analyzing that data is a major focus of governments and industry. Information provides the ability to predict conduct and to even identify individuals who are considered threats. An evaluation of the new surveillance society is beyond the scope of this article. What we intend is to identify how the pandemic has justified increased surveillance, information gathering and monitoring. The purposes are noble. However, it is necessary to be aware of the potential for abuses and misuses of information.

The European Union (“EU”) leads the way towards emphasizing informed consent among other privacy protections²⁷⁰ in the Global Data Protection Regulation (“GDPR”).²⁷¹ Although leading in global privacy protections, even EU members authorized the use of technologies to collect and process individuals’ personal information during the pandemic.²⁷²

The ability to undermine privacy rights is proportional to the importance that society gives to privacy. Privacy and individual liberty are among the accepted rights in the United States and internationally. Legally, privacy and individual liberty can be a fundamental right. As a fundamental right, government must show the highest level of justification—a compelling state interest for the intrusion. There is no doubt that tracking can be an intrusion, as can other issues raised by COVID. The legal issue is whether tracking is justified by a compelling state interest in this case fighting a deadly pandemic.

V. Legal Issues in a Pandemic – The Basis of Government Authority and the Effect on Individual Rights

Protecting safety, security and health is a fundamental element of the social contract. Individuals give up certain liberties to be part of an ordered society. Restrictions range from

²⁷⁰ See GDPR Article 8.

²⁷¹ (EU 2016/679).

²⁷² *Id.*

prohibiting using cell phones while driving to making assisted suicide unlawful. We pay taxes with the expectation that we receive government services like education, national security and police protection. There are constitutional limits that are designed to prevent government from inordinately invading civil liberties. In the United States, due process and liberty interests are constitutionally protected as they are in most democratic societies.²⁷³ Emergencies like COVID-19 stress the balancing of liberties and governmental duties to protect the health and welfare of the entire community.²⁷⁴

a. Executive Authority

Because emergencies by their nature demand quick action, governments turn to executive actions. That has been the case during the pandemic. Presidents, governors and mayors are granted emergency powers within their jurisdictions to protect the health and welfare of their constituents. There are limitations on duration and limitation of authority as was discussed above.²⁷⁵ The mode of policy making is through executive orders or proclamations as authorized by law. In the pandemic these executive policies clashed with individual rights on a regular basis.²⁷⁶

At the federal level, the issue of extraordinary powers is supported by the executive power through the Vesting Clause,²⁷⁷ the Stafford Act,²⁷⁸ and the Public Health Service Act.²⁷⁹ The

²⁷³ U.S. CONST. Amend. XIV.

²⁷⁴ Humans Rights Watch, *Human Rights Dimensions of COVID-19 Response*, March 19th, 2020, <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>.

²⁷⁵ *Supra* Section II.

²⁷⁶ Anthony F. DellaPelle, *Constitutional Implications of COVID-19 and its Impact on Property Rights and Personal Liberties*, THE AMERICAN BAR ASSOCIATION, July 27, 2020, <https://www.americanbar.org/groups/litigation/committees/real-estate-condemnation-trust/articles/2020/covid-19-constitutional-impact-property-rights-personal-liberties/>.

²⁷⁷ U.S. CONST. Art. II, Section 1.

²⁷⁸ *Supra* Section II (a), (A1).

²⁷⁹ Public Health Service Act, <https://www.govinfo.gov/content/pkg/COMPS-8773/pdf/COMPS-8773.pdf>.

Constitution makes it clear that general welfare is a pillar of the Government. Considering that the executive power is vested in the President, arguably the Vesting Clause grants the President the authority to issue extraordinary measures aimed to protect the people.²⁸⁰ Scholars refer to these extraordinary powers as inherent powers of the President.²⁸¹ The Stafford Act provides legislative authorization that grants the President wide authority to execute measures in order to save lives, protect property, and ensure safety and health.²⁸² The Public Health Service Act authorizes the Surgeon General, upon approval of the Secretary of Health and Human Services, to make and enforce measures in his judgment necessary to prevent the introduction, transmission, or spread of communicable diseases.²⁸³

The Commerce Clause²⁸⁴ provides a constitutional basis for Congress to regulate emergencies because they tend to affect interstate commerce or commerce with foreign nations.²⁸⁵ According to the Constitution, Congress can regulate “commerce with foreign nations, and among the several states, and with the Indian tribes.”²⁸⁶ The Constitution also recognizes the residual power of the states and the states have exercised significant authority during the pandemic.²⁸⁷

In Brazil, the Federal Constitution asserts that during extraordinary circumstances that threaten the health, peace, and safety of the Brazilian people, a state of exception can be implemented, and Congress can declare one of the following situations: State of Calamity, State of Emergency, State

²⁸⁰ Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power To Execute the Laws*, *The Yale Law Journal* Vol 104: 541, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7593&context=yjlj>.

²⁸¹ *Id.*

²⁸² *Supra* Section II (a).

²⁸³ Public Health Service Act, Section 361.

²⁸⁴ U.S. CONST. ART. I, Section 8.

²⁸⁵ American Bar Association, *Two centuries of law guide legal approach to modern pandemic*, April 2020, <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/>.

²⁸⁶ U.S. CONST. Art. I, Section 8.

²⁸⁷ William N. Eskridge, Jr. and Neomi Rao, *Common Interpretation: Article I, Section 1: General Principles*, <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/749>.

of Siege, or State of Defense.²⁸⁸ Similarly, the United States government also grants exceptional power provisions in States of Emergency.²⁸⁹

The exceptionality and the time limit are the main characteristics of Brazil's State of Exception measures, as restrictions of individual rights, freedom, and constitutional guarantees can temporarily occur during its effectiveness.²⁹⁰ Moreover, when there is a declaration of a State of Emergency, the extraordinary administration of power is concentrated in the Federal branch and its authority becomes very broad.²⁹¹ The concentration of power leads to a fear of possible abuses based on a presidential decision made during a State of Emergency. In that scenario, the judiciary will be the only organization capable of challenging the executive decision.

As explained above, statutes, supported by jurisprudence, have shown that governments across the world can be granted additional power to temporarily curtail constitutional rights when dealing with a public-health emergency.²⁹² Courts have shown support to the broad authority given to government, which leaves the populations of loose-cultured democratic countries in similar situation as the residents of tight-cultured nations.²⁹³ Therefore, the legal issues caused by a lasting global pandemic need to be carefully analyzed. Intrusions are part of the response to most emergencies. COVID-19 is showing the world that a microscopic virus is capable of affecting billions of lives.

Constitutions and human rights laws are not suspended during a pandemic. However, as the COVID-19 virus spread around the world, executive branches of governments gained power to

²⁸⁸ Constituição da Republica Federativa do Brasil de 1988.

²⁸⁹ National Emergencies Act, 50 U.S.C. §§ 1601-1651.

²⁹¹ *Id.*

²⁹² *Supra* Section II.

²⁹³ *Supra* notes 159-163.

implement privacy-restrictive measures.²⁹⁴ When society faces emergencies and disasters, the interests of the individuals tend to be drastically diminished. The collective interests will prevail over individual interests during emergencies and disasters. At present, numerous scientists say that COVID-19 has no sign of ending and future pandemics are a virtual certainty.²⁹⁵ Nonetheless, limits must be in place to guarantee a proper protection of fundamental rights.

b. Restrictions on Personal Movement: Quarantine, Lockdown, and Travel Restrictions

Restriction of personal movement is a basic strategy to fight a pandemic. Events that bring people into closer contact increase the odds of transmitting the virus. That fact seems to be confirmed by “super spreader events” that have resulted in the outbreak of multiple cases of the virus.²⁹⁶ Quarantines have long been held legal in the realm of infectious disease.²⁹⁷ However, quarantining has been more controversial during the COVID outbreak because of the rampant skepticism about the dangers of the disease.

One strategy implemented to stop the rapid spread of COVID-19 in communities was establishing lockdowns.²⁹⁸ The term “lockdown” entails various practices like requiring mandatory quarantines, recommending individuals stay at home, maintaining social distancing,

²⁹⁴ *Territorial Impact of COVID-19: Managing the Crisis Across Levels of Government*, OECD, November 20, 2020, <http://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government-d3e314e1/>.

²⁹⁵ Daily Briefing, *Why the coronavirus may never “go away”*, ADVISORY BOARD, August 6, 2020, <https://www.advisory.com/daily-briefing/2020/08/06/coronavirus-future>.

²⁹⁶ Angela Laguipo, *Genomic sequence of the White House “superspreader” event*, <https://www.news-medical.net/news/20201102/Genomic-sequence-of-the-White-House-superspreader-event.aspx>;

²⁹⁷ Ethen Lieser, *Study: 2020 Mardi Gras Was a Coronavirus Super-Spreader Event*, February 11th, 2021 <https://nationalinterest.org/blog/coronavirus/study-2020-mardi-gras-was-coronavirus-super-spreader-event-178078>.

²⁹⁸ Stacey Lastoe, *What quarantining around the world really looks like*, September 1, 2020, CNN TRAVEL, <https://www.cnn.com/travel/article/quarantining-around-the-world-reader-images/index.html>.

closing businesses, and banning events and gatherings.²⁹⁹ At the end of 2019, when the first cases of COVID-19 were detected in China, a lockdown seemed like an unlikely scenario.³⁰⁰ Four months later, lockdowns were the most common strategies to slow down the outbreak, forcing millions of people across the world to isolate.³⁰¹

While some dispute the effectiveness of lockdowns,³⁰² it is certain that the lockdowns raise legal issues. The government has a duty to protect people's health and security. However, the current practices implemented represent a direct intrusion upon freedom of movement, which has been found to be a fundamental right.³⁰³ Balancing constitutional rights with public health requirements is difficult but necessary.

Constitutional scholars argue that because disasters affect interstate commerce, there is a constitutional basis to regulate emergencies found in the Commerce Clause.³⁰⁴ It is undeniable that COVID-19 generated profound impacts on commerce among the several states.³⁰⁵ The pandemic also compromised commerce with foreign nations.³⁰⁶ The rapidly increasing number of people infected and sudden deaths produced fear. As a result, the exchange of goods and commodities

²⁹⁹ World Health Organization, *Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19*, December 31, 2020, <https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19>.

³⁰⁰ Berkeley Lovelace Jr and Noah Higgins-Dunn, *Trump says nationwide lockdown would 'ultimately inflict more harm than it would prevent'*, *CNBC*, August 3, 2020, <https://www.cnn.com/2020/08/03/trump-says-nationwide-lockdown-would-ultimately-inflict-more-harm-than-it-would-prevent.html>.

³⁰¹ Global COVID-19 Lockdown Tracker, as of February 11, 2021, <https://auravision.ai/covid19-lockdown-tracker/>.

³⁰² Vincenzo Alfano and Salvatore Ercolano, *The Efficacy of Lockdown Against COVID-19: A Cross-Country Panel Analysis*, June 3, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7268966/>.

³⁰³ *Crandall v. Nevada*, 73 U.S. 35 (1867) (finding that movement is a fundamental right of the people, so a state cannot tax people entering or exiting state borders).

³⁰⁴ Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power To Execute the Laws*, *The Yale Law Journal* Vol 104: 541, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7593&context=yjl>.

³⁰⁵ Lauren Bauer, *et al*, *Ten facts about COVID-19 and the U.S. economy*, September 17, 2020, [https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/#:~:text=The%20pandemic%20has%20disrupted%20lives,\(Johns%20Hopkins%20University%20n.d.\)](https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/#:~:text=The%20pandemic%20has%20disrupted%20lives,(Johns%20Hopkins%20University%20n.d.)).

³⁰⁶ United Nations, *Impact of COVID-19 Pandemic on Trade and Development*, https://unctad.org/system/files/official-document/osg2020d1_en.pdf.

had a sharp downturn both nationally and internationally.³⁰⁷ Economies took a downward turn, the stock market dropped, and thousands of laborers were fired.³⁰⁸

The freedom of movement is a recognized fundamental constitutional right under the Privileges and Immunities Clause, which states, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”³⁰⁹ In *Paul v. Virginia*, the Supreme Court defined freedom of movement as “right of free ingress to other States, and egress from them.”³¹⁰ The COVID-19 lockdowns operate directly against the freedom of movement. By being ordered to self-isolate, an individual’s right to free ingress and egress from other states was directly limited.

According to the United States Code, individuals may be apprehended or detained for the purpose of preventing the introduction, transmission, or spread of a communicable disease.³¹¹ The order depends on the decision of the President upon the recommendation of the Secretary of Health and Human Services, in consultation with the Surgeon General.³¹² The law gives permission to the Government to apprehend and forcibly examine individuals reasonably believed to be infected in a qualifying stage and reasonably believed to be moving or about to move from one State to another or to be a probable source of infection to individuals who are moving or are about to move to other State.³¹³ Therefore, in a pandemic, the government may have the authority to apprehend and forcibly examine a contaminated individual.

³⁰⁷ *Supra* note 304.

³⁰⁸ *Supra* note 305.

³⁰⁹ U.S. CONST. Article IV, Section 2; *see also* *Corfield v. Coryell*, 6 Fed. Cas. 546 (1823).

³¹⁰ 75 U.S. 168 (1869).

³¹¹ 42 U.S.C. § 264.

³¹² 42 U.S.C. § 264, (b)

³¹³ *Supra* note 310.

However, the United States Code does not define the communicable disease. Based on the vague text, any communicable disease could justify an executive order permitting apprehension and forced examination. Some diseases would certainly justify such measures. Medical literature has demonstrated, for instance, that Ebola is one of the deadliest diseases on the planet³¹⁴ Ebola is understood to be incredibly severe and often fatal.³¹⁵ An executive order allowing the apprehension and forced examination of a person suspected to have Ebola might be issued. Although the order would affect several constitutional rights, including the right of movement, the lethal nature of Ebola provides a compelling state interest for the intrusion. Conversely, detaining a person contaminated with a seasonal flu would be excessive. Future pandemics may provide tougher questions about whether detaining infected individuals advanced a compelling state interest.

Thus far there is no movement to detain COVID-19 patients although an infected individual is expected to quarantine. Could the US government require universal testing for COVID-19?³¹⁶ The federal government did not require mandatory examinations for the general public, but perhaps it could have based on current laws.³¹⁷ The federal government did require more extensive action for government employees, who were required to either sign a form attesting that they have received the COVID-19 vaccine or comply with strict rules on mandatory masking, weekly testing, distancing, and more.³¹⁸ Other nations have implemented mandatory testing or conditioned travel

³¹⁴ *History of Ebola Virus Disease*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/vhf/ebola/history/summaries.html>.

³¹⁵ *Ebola Virus Disease*, WORLD HEALTH ORGANIZATION, Feb. 23, 2021, <https://www.who.int/news-room/fact-sheets/detail/ebola-virus-disease>.

³¹⁶ The exam involves a six-inch cotton swab being inserted into a patient's nose. The nurse practitioner inserts the swab in both sides of a person's nose and twists for about fifteen seconds. *Coronavirus (COVID-19) testing: What you should know*, UC DAVIS HEALTH, November 23, 2020, <https://health.ucdavis.edu/coronavirus/coronavirus-testing.html>.

³¹⁷ By utilizing the Vesting Clause, Commerce Clause and current statutes on emergencies and disasters. *Supra* notes 258 and 262, and Section II.

³¹⁸ The Associated Press, *Biden Orders Tough New Vaccination Rules for Federal Workers*, July 29, 2021, <https://apnews.com/article/lifestyle-joe-biden-business-health-travel-a1670ffa08f1f2eab42c675d99f1d9ad>.

on testing. For example, a test may be required to travel by plane.³¹⁹ Conditioning travel on testing is far different than compelling a physical intrusion.

COVID created an unprecedented global emergency. Medical professionals prescribed restrictions on personal movement to reduce the spread of the disease.³²⁰ The challenge is to balance individual rights to gather, travel, and freely move with the need to employ medically necessary standards. The standards and definitions must be established.

c. Restrictions on Business Operations: Closures, Regulated Occupancy, Regulated Operations

Limitations and closing of businesses have been a frequent feature of pandemic remedies. In some locations, closing and quarantines totally closed businesses.³²¹ The effect on individual businesses has been devastating. Some estimates suggest 17% of restaurants may be permanently out of business.³²²

There are limitations on business closings and a general executive order mandating complete business closure is likely unconstitutional.³²³ The federal government did not issue any executive order directing business closure during COVID-19 but there are arguments against general federal authority to close businesses. The general due process language that provides that “no person shall

³¹⁹ Center for Disease Control and Prevention - CDC, *Requirement for Proof of Negative COVID-19 Test or Recovery from COVID-19 for All Air Passengers Arriving in the United States*, February 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>.

³²⁰ *Preventing the Spread of the Coronavirus*, HARVARD HEALTH PUBLISHING: HARVARD MEDICAL SCHOOL, Feb. 12, 2021, <https://www.health.harvard.edu/diseases-and-conditions/preventing-the-spread-of-the-coronavirus>.

³²¹ Proceedings of the National Academy of Sciences of the United States of America, *The Impact of COVID-19 on Small Business Outcomes and Expectations*, July 28, 2020, <https://www.pnas.org/content/117/30/17656>.

³²² *Restaurant Industry in Freefall; 10,000 Close in Three Months*, National Restaurant Association, December 7, 2020, <https://restaurant.org/news/pressroom/press-releases/restaurant-industry-in-free-fall-10000-close-in>.

³²³ Notably, it would not be unconstitutional if the business violated a valid U.S law or an order from the Center for Disease Control and Prevention to implement certain safety measures.

[...] be deprived of life, liberty, or property, without due process of law,”³²⁴ is a clear protection of personal property. The federal government is prohibited from issuing orders taking away individuals’ property without proper process.³²⁵ Both the businesses *per se* and the incomes from businesses constitute property. However, if there is a compelling interest or if a business has violated a federal law, a business could be penalized or closed. A business affecting interstate commerce that directly affected welfare and safety would be subject to regulation. For example, airlines could have passenger limits imposed.³²⁶

Even in exceptional circumstances, the authority of the President has limits. In *Youngstown Sheet & Tube v. Sawyer*,³²⁷ President Truman issued an executive order directing the Secretary of Commerce Sawyer to seize and operate most of the nation’s steel mills.³²⁸ The act was issued during the Korean War, and its objective was to avert the expected effects of a strike by the United Steelworkers of America.³²⁹ The Supreme Court of the United States held that the President did not have the authority to issue such an order.³³⁰ The holding is a strong statement for the importance of private property and business even in times of crisis.³³¹ The Court added, “The President’s power to see that the laws are faithfully executed [Article II, Section 3] refutes the idea that he is to be a lawmaker.”³³² The holding is a limitation on executive powers, even when based

³²⁴ U.S. CONST. Amend. V.

³²⁵ Henry Brannon, *Due Process of Law*, TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, 138 (1901).

³²⁶ During the COVID-19 pandemic, the Federal Aviation Administration chose not to require airlines to limit capacity on flights, but such regulation could be an option in future health emergencies. Associated Press, *U.S. Officials Recommend—But Don’t Require—Masks on Planes*, LOS ANGELES TIMES (July 2, 2020), <https://www.latimes.com/business/story/2020-07-02/airlines-rules-coronavirus-social-distancing>.

³²⁷ 343 U.S. 579 (1952).

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

on war powers.³³³ Certainly there may be federal policies on business practices and policies based on the effect on interstate commerce, but a general closing seems beyond the enumerated or inherent powers of the federal government.

At the state level, however, business closure measures were widely utilized. During COVID-19, at least forty-six out of the fifty states ordered non-essential businesses to close.³³⁴ Different states approached business closures differently. In New York, it was a total shutdown, but in Florida, restaurants were open indoors. Depending on what your closure rules were, it affected you economically. The restrictions imposed by the states have ranged from closure³³⁵ to limitations on capacity. Unquestionably, limitations and closures have caused economic hardship, but this hardship was also caused by COVID-19 health issues and general public fear.

Even though states have broad authority under police powers, lengthy or total closings may be subject to constitutional issues such as takings or due process arguments under the fifth and fourteenth amendments. *In 4 Aces Enters. LLC v. Edwards*,³³⁶ ten Louisiana bar owners filed a motion to enjoin Louisiana Governor John Bel Edwards and Louisiana State Fire Marshal H. “Butch” Browning Jr. from enforcing orders banning the on-site consumption of food and drinks at bars and determining closure of “non-essential” businesses.³³⁷ The plaintiffs argued they were denied substantive due process because the ban prevented them from profiting from their businesses.³³⁸ They argued they were denied procedural due process because the bans were issued

³³³ There are takings of property for imminent domain, etc.

³³⁴ Erin Schumaker, *Here are the states that have shut down nonessential businesses*, ABC NEWS, April 2, 2020, <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806>.

³³⁵ The state of New York mandated business closures. Executive Order 202.6, March 18, 2020, <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.6.pdf>.

³³⁶ *4 Aces Enters., LLC v. Edwards*, No. 20-2150 (E.D. Louisiana 2020).

³³⁷ *Id.*

³³⁸ *Id.*

without notice, and they argued their equal protection rights were violated because the ban singled out their type of businesses.³³⁹

Utilizing the precedents in *Jacobson*³⁴⁰ and *Abbott*³⁴¹ the court noted that the police power precludes the judiciary “from second-guessing the wisdom or efficacy of measures taken by state officials in response to the COVID-19 pandemic.”³⁴² The court recognized that the bar owners have a constitutionally protected property interest in the profits of their own business, but the presence of great danger like a pandemic justifies the ban.³⁴³ The court noted that the bar owners did not have the opportunity to be heard, but found no due process violation because of the circumstances created by the COVID-19 pandemic.³⁴⁴ Finally, the court found the singling-out of plaintiffs’ businesses to be justified during the COVID-19 pandemic, citing TTT data and information from the White House Coronavirus Task Force.³⁴⁵

Courts have also rejected the argument that temporary business closure orders during COVID-19 constitute regulatory takings of private property.³⁴⁶ In *Friends of DeVito v. Wolf*,³⁴⁷ a group of Pennsylvania businesses and an individual filed a lawsuit against the Governor of Pennsylvania, seeking to vacate an executive order determining the closure of all “*non-life-sustaining*” businesses. Petitioners argued that prohibiting the use of their property constitute a taking of private property for public use without just compensation, in violation of the Fifth

³³⁹ *Id.*

³⁴⁰ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905).

³⁴¹ *In re Abbott*, 954 F.3d 772 (5th Cir. 2020).

³⁴² *4 Aces*, No. 20-2150.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Friends of DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020).

³⁴⁷ *Id.*

Amendment of the Constitution.³⁴⁸ Petitioners asserted that the principle governing their claim is found in *Lucas v. S.C. Coastal Council*.³⁴⁹

In *Lucas*, the state of South Carolina enacted a law preventing the plaintiff from erecting permanent habitable structures on his land.³⁵⁰ The law aimed to protect erosion and destruction of barrier islands.³⁵¹ The issue was whether the law’s “dramatic effect on the economic value of Lucas’ lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of ‘just compensation.’”³⁵² According to the Court, “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”³⁵³ The Court held that the law rendered Lucas’ property valueless, constituting a taking, thus requiring just compensation³⁵⁴ pursuant to the Fifth and Fourteenth Amendments.

However, the *Friends of DeVito* court found that *Lucas* did not apply to COVID-19 business closures.³⁵⁵ According to the court, while the law litigated in *Lucas* imposed a permanent ban on Lucas’ property, the measures implemented during COVID-19 were temporary.³⁵⁶ Following precedent from *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*,³⁵⁷ the Court held that temporary restrictions do not constitute regulatory takings.³⁵⁸ In *Tahoe*, the Tahoe Regional Planning Agency imposed two moratoria, totaling thirty-two months, on development in

³⁴⁸ *Id.*

³⁴⁹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ In the amount of \$1,232,387.50

³⁵⁵ *Friends of DeVito v. Wolf*, 141 S. Ct. 239 (2020).

³⁵⁶ *Id.*

³⁵⁷ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002)

³⁵⁸ *Id.*

the Lake Tahoe Basin while formulating a land-use plan for the area.³⁵⁹ The Court held that the mere enforcement of the moratoria did not constitute *per se* a regulatory taking of private property.³⁶⁰ Rather, whether a taking occurred required an evaluation of a set of standards such as landowners' expectations, actual impact, public interest, and reasons behind the action.³⁶¹

Notwithstanding the decision in *Friends of DeVito*, the holding in *Tahoe* demonstrates that is not the length of the restrictions that determine whether a taking occurred, but the assessment of a set of standards. The same rationale can be observed in *Arkansas Game & Fish Commission v. United States*.³⁶² The Supreme Court evaluated whether a government action was a Taking under the Fifth Amendment by weighing a number of factors including the length of the taking, the severity of the taking's interference, the intention behind the taking, and the foreseeability of the taking.³⁶³ The Court also noted that the assessment of a taking would also depend on its duration. If a taking is permanent, the main concern of the Court will be the economic impact on the property taken. However, if the taking is temporary, the Court will conduct a general analysis. It will look at the length, severity, economic impact, intention and foreseeability of the government action to determine if there was a taking.³⁶⁴

The majority of the COVID-19 implemented measures are temporary, lasting as long as the virus poses a threat for the public health. Therefore, the analysis for whether a business closure order constitutes a regulatory taking should be determined using the factors the Supreme Court provided in *Tahoe* and *Arkansas Game*. Business closure orders during COVID-19 have produced

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012).

³⁶³ *Id.*

³⁶⁴ *Id.*

severe financial impacts, causing the highest unemployment rate observed since 1948.³⁶⁵ The financial sacrifices imposed onto individuals during COVID-19 must have a limit. *Tahoe and Arkansas Game* provide those limits and help provide a roadmap for courts to determine whether business closures during COVID-19 are, in fact, temporary government takings under the Fifth and Fourteenth Amendments.

Eviction moratoriums triggered the Contract Clause. The Contract Clause states, “No State shall . . . make any . . . Law impairing the Obligation of Contracts, or grant any Title of Nobility.” The denial of evictions affected a number of contracts by denying landlords the ability to collect rent from paying tenants and evicting tenants that refused to pay. There are other historic instances of emergencies that justified the government’s impairment of contracts. For example, during the Great Depression, mortgage foreclosures were suspended.³⁶⁶ The Supreme Court found that the policy for suspending mortgage foreclosures was necessary for public policy.³⁶⁷ However, even if foreclosures and evictions are suspended, their suspension cannot be indefinite. They cannot be perpetual. They must be reasonable, which means they must terminate.

The Supreme Court has already held that the current eviction moratorium terminates on July 31, 2021. In *Alabama Association of Realtors, et al. v. United States Department of Health and Human Services, et al.*, two landlords, the business they use to manage their properties, and two trade associations, challenged the nationwide ban on evictions implemented by the CDC in district

³⁶⁵ *Unemployment Rates During the COVID-19 Pandemic* (June 2020), CONGRESSIONAL RESEARCH SERVICE, <https://fas.org/sgp/crs/misc/R46554.pdf>.

³⁶⁶ Geoff Walsh, *Analysis of Constitutional Issues Related to Foreclosure Crisis-Driven State Relief Laws*, NATIONAL CONSUMER LAW CENTER (Feb. 2009), https://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/model-foreclosure-crisis-driven.pdf.

³⁶⁷ *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934).

court,³⁶⁸ claiming the eviction moratorium exceeds CDC’s authority, constitutes unlawful taking of property in violation of the Taking Clause, violates the Due Process Clause and deprives plaintiffs of their right of access to courts.³⁶⁹

The District Court for the District of Columbia held that the CDC exceeded the authority provided in § 361 of the Public Health Service Act.³⁷⁰ As a result, the District Court granted the plaintiff’s motion for expedited summary judgment, thus vacating the nationwide eviction moratorium.³⁷¹ The CDC sought to stay the vacation order pending appeal.³⁷² The District Court granted the motion to stay.³⁷³ According to the Court, the CDC failed to show likelihood of success on the merits, but it has made a showing of (i) irreparable injury related to the lifting of state-implemented eviction moratoriums; (ii) possibility to recover landlord’s financial losses; and (iii) public interest weighing in favor of the stay due to the extraordinary public moment.³⁷⁴

Plaintiffs appealed to the Supreme Court. The Court determined whether the CDC, “exceeded its existing statutory authority by issuing a nationwide eviction moratorium.”³⁷⁵ The justices unanimously agreed that the CDC lacked authority to implement a nationwide eviction moratorium.³⁷⁶ However, the Court decided to keep the moratorium in effect until July 31, 2021.³⁷⁷ According to Justice Kavanaugh’s concurring opinion, the decision to allow the moratorium to naturally expire rather than immediately terminate was because “those few weeks will allow for

³⁶⁸ *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55,292, 55,297 (Sept. 4, 2020).

³⁶⁹ *Id.*

³⁷⁰ 42 U.S.C. § 264(a)

³⁷¹ *Infra* note 391.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Infra* note 391.

³⁷⁷ *Id.*

additional and more orderly distribution of the congressionally appropriated rental assistance funds.”³⁷⁸ Nevertheless, “clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.”³⁷⁹ This decision sets the precedent that the CDC cannot issue or extend nationwide eviction moratoriums without congressional authorization.

However, even though the Court noted the CDC lacked the authority to issue or extend a nationwide eviction moratorium, the Court deliberately decided not to address the constitutional grounds alleged by the plaintiffs in *Alabama Association of Realtors*. The Supreme Court did not address the claims on unlawful taking of private property and violation of due process.³⁸⁰ This avoidance perpetuates the judicial limbo related to COVID-19 litigation, suggesting the courts are still on sabbatical.

d. Restrictions on Personal Conduct: Masking Requirements and Administrating Vaccines

Two issues that have generated great controversy are masks and vaccines. Since the beginning of the pandemic, medical authorities have endorsed masking as a means of reducing the spread of the virus. As vaccines became available and more broadly utilized, vaccinated individuals were privileged to not wear masks. In some jurisdictions, identification proving vaccination was

³⁷⁸ *Id.*

³⁷⁹ After this moratorium expired, President Joe Biden partially reinstated the federal moratorium on evictions. When asked about the constitutionality of this, he replied that “[t]he bulk of the constitutional scholarship says that it’s not likely to pass constitutional muster . . . [b]ut at a minimum, by the time it gets litigated, it will probably give some additional time while we’re getting [money] out to people who . . . don’t have the money.” Joseph Biden, President, United States of America, *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Aug. 3, 2021) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/>).

³⁸⁰ *Infra* note 391.

required to have access to certain public places and commercial establishments.³⁸¹ For example, the Israeli green passport, which can be downloaded to a smart phone, serves many purposes including access to gyms, hotels, theaters, and workplaces.³⁸² In March 2021, New York launched a similar system through its Excelsior Pass, a government-issued vaccine passport.³⁸³

Masking was a common measure utilized globally in public settings where social distancing measures were difficult to maintain.³⁸⁴ Many health professionals argue that masking is fundamental to contain COVID-19 from spreading because masks block droplets coming from the mouths and noses of infected individuals.³⁸⁵ The same argument was utilized to require the population to wear facial masks as the influenza pandemic raged across the United States in 1918 and 1919.³⁸⁶ After a century, governments continue to argue for masks³⁸⁷ and individuals argue against them, claiming violation of personal freedom and social control.³⁸⁸

There are three arguments that have been used to resist mask wearing: freedom of speech, freedom of movement and violation of privacy.³⁸⁹ The first is based on a violation of the First Amendment's freedom of speech.³⁹⁰ Under this theory, masks create a barrier to sharing ideas,

³⁸¹ *Governor Cuomo Announces Launch of Excelsior Pass to Help Fast-Track Reopening of Businesses and Entertainment Venues Statewide*, New York State Press Office, <https://www.governor.ny.gov/news/governor-cuomo-announces-launch-excelsior-pass-help-fast-track-reopening-businesses-and-entertainment-venues-statewide>.

³⁸² *What is a Green Pass?*, ISRAELI MINISTRY OF HEALTH, <https://corona.health.gov.il/en/directives/green-pass-info/>.

³⁸³ Sharon Otterman, *Will the Excelsior Pass, New York's Vaccine Passport, Catch On?*, THE NEW YORK TIMES, June 1, 2021, <https://www.nytimes.com/2021/06/01/nyregion/excelsior-pass-vaccine.html>.

³⁸⁴ Elaine He and Lionel Laurent, *The World is Masking Up, Some are Opting Out*, BLOOMBERG OPINION, July 17, 2020, <https://www.bloomberg.com/graphics/2020-opinion-coronavirus-global-face-mask-adoption/>.

³⁸⁵ Talib Dbouk and Dimitris Drikakis, *On respiratory droplets and face masks*, 32 PHYS FLUIDS 6 (1994).

³⁸⁶ Christine Hauser, *The Mask Slackers of 1918*, THE NEW YORK TIMES, December 10, 2020, <https://www.nytimes.com/2020/08/03/us/mask-protests-1918.html>.

³⁸⁷ Congressional Research Service, *Could the President or Congress Enact a Nationwide Mask Mandate?* August 6, 2020, <https://crsreports.congress.gov/product/pdf/LSB/LSB10530>.

³⁸⁸ Jonathan Jerry, *Why some people choose not to wear a mask*, September 3, 2020, <https://www.mcgill.ca/oss/article/covid-19-health/why-some-people-choose-not-wear-mask>.

³⁸⁹ *Id.*

³⁹⁰ U.S. CONST. Amend. I.

thereby abridging the freedom of speech.³⁹¹ As of this writing, several courts have addressed and rejected this argument.

In *Koa v. Hogan*,³⁹² Plaintiffs ask the Federal District of Maryland court to enjoin the governor's executive orders mandating use of facial masks. The court denied the request to enjoin.³⁹³ Quoting *Jacobson v. Commonwealth of Massachusetts*,³⁹⁴ the court argued that "real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."³⁹⁵ This analysis embodies reasoning that policies during the pandemic can impair individual freedoms to protect the welfare of the general public. According to the court, "To overturn the Governor's orders, those who disagree with them must show that they have no real or substantial relation to protecting public health, or that they are beyond all question, a plain, palpable invasion of rights secured by the fundamental law."³⁹⁶

The court recognized the freedom of speech as a fundamental right, but it did not interpret the mandatory use of masks as "plain, palpable invasion of rights secured by the fundamental law."³⁹⁷ The court concluded that the orders at issue regulated conduct, not speech³⁹⁸ and that the executive orders do not restrain the speech of a certain group of people or of certain content; it merely regulates a conduct aiming to protect public health.³⁹⁹

³⁹¹ Polly J. Price and Patrick C. Diaz, *Face-Covering Requirements and the Constitution*, EXPERT FORUM LAW AND POLICY ANALYSIS, June 3, 2020, <https://www.acslaw.org/expertforum/face-covering-requirements-and-the-constitution/>.

³⁹² *Antietam Battlefield Koa v. Hogan*, 461 F. Supp. 3d 214 (D. Md. 2020), appeal dismissed, 20-1579, 2020 WL 6787532 (4th Cir. July 6, 2020).

³⁹³ *Supra* note 391.

³⁹⁴ 197 U.S. 11, 26 (1905).

³⁹⁵ *Supra* note 391.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

The second argument related to the violation of freedoms involves the freedom of movement.⁴⁰⁰ Individuals argue that mandating masks compels a person to make a decision to either wear a facial covering or stay home.⁴⁰¹ No case has upheld this argument yet. In comparison to the lockdown and business closure measures, mandatory masking is less restrictive. Some people argue wearing masks is uncomfortable,⁴⁰² but COVID-19 is a disease transmitted through the air.⁴⁰³ Masks reduce the amount of virus particles in the air,⁴⁰⁴ which reduces the number of individuals infected. Moreover, the mandatory masking measures will end as the pandemic fades away. Based on our three-prong test,⁴⁰⁵ mandatory masking orders are constitutional if there is a serious communicable disease that poses a severe risk to the public health.

The impact of vaccinations has added another issue to the discussion of personal intrusions. Despite the global effort to develop a vaccine able to combat the SARS-CoV-2 infection and end the pandemic, some of the challenges that countries face are vaccine skepticism and privacy concerns. A survey⁴⁰⁶ conducted by KFF in the U.S. from November 30- December 8, 2020 revealed that 27% of the public is vaccine hesitant, saying they probably not or definitely would not get a COVID-19 vaccine even if it were available for free and deemed safe by scientists.⁴⁰⁷

⁴⁰⁰ *Supra* note 391.

⁴⁰¹ *Arguments against mask requirements during the coronavirus (COVID-19) pandemic, 2020*, BALLOTPEDIA, [https://ballotpedia.org/Arguments_against_mask_requirements_during_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Arguments_against_mask_requirements_during_the_coronavirus_(COVID-19)_pandemic,_2020).

⁴⁰² *Considerations for Wearing Masks*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>.

⁴⁰³ *Supra* note 391.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ Liz Hamel, Ashley Kirzinger, Calley Muñana, and Mollyann Brodie, *KFF COVID-19 Vaccine Monitor: December 2020*, KFF, December 15, 2020, <https://www.kff.org/report-section/kff-covid-19-vaccine-monitor-december-2020-methodology/>.

⁴⁰⁷ *Id.*

Vaccine hesitancy is highest among Republicans (42%), those ages 30-49 (36%), and rural residents (35%).⁴⁰⁸

Brazil initiated a mandatory vaccination program during the smallpox outbreak of 1904.⁴⁰⁹ Intense debate and strong opposition preceded the passage of the mandatory vaccination law in October 1904. The publication of the proposed law in the newspapers set off a popular rebellion, known as *Vaccine Revolt*.⁴¹⁰ A variety of groups with different motivations⁴¹¹ were brought together against the measures instituted by the new law – popularly referred to as the “*Torture Code*.”⁴¹² The new law contained severe penalties, including fines for non-compliance, and it required a person have vaccination certificate to have access to public education and employment in public institutions.⁴¹³ Vaccination certificates were even required to get married and for travel.⁴¹⁴ Additionally, the law authorized sanitary officials and police officers to enter private residences to vaccinate the residents.⁴¹⁵ Add a sentence about how things like this are being considered now.

The invasion of homes and forced application of vaccines were measures well beyond what was considered acceptable in Brazil.⁴¹⁶ From November 10 to 16, 1904, Brazilian citizens responded with violence, causing a state of siege to be declared in the state of Rio de Janeiro. To restore order in the city, the Government suppressed the rioters and suspended the obligatory

⁴⁰⁸ *Id.*

⁴⁰⁹ Gilberto Hochman, *Priority, Invisibility and Eradication: The History of Smallpox and the Brazilian Public Health Agenda*, 53 *MEDICAL HISTORY* 2 (2011).

⁴¹⁰ *Id.*

⁴¹¹ Anti-vaccinationists, military, civil monarchists, positivists, trade unionists, clergy, and political elite.

⁴¹² *Supra* note 409, Hochman.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

nature of the vaccination program.⁴¹⁷ The smallpox vaccination continued to be recommended and was slowly incorporated into the daily life of Rio de Janeiro and other main cities of Brazil.⁴¹⁸ While there was considerable opposition to the forced vaccinations in Brazil, the government did ultimately succeed in reducing mortality rates, reaching near zero in 1906.⁴¹⁹

Brazil also experienced resistance to compelled vaccinations during the COVID-19 pandemic. A legal challenge regarding compelling vaccinations was filed in the Brazil Supreme Court even before the vaccine was approved in the country.⁴²⁰ The Supreme Court upheld the constitutionality of mandatory vaccination and held that it is constitutional for the State to impose restrictive measures such as fines, prohibitions to be in certain places, or requirements to enroll children in school.⁴²¹ However, the State cannot forcibly immunize its citizens.⁴²² According to Justice Luís Roberto Barroso, although the Brazilian Federal Constitution protects the right of every citizen to maintain their philosophical, religious, moral and existential convictions, society's rights must prevail over individual rights.⁴²³ Therefore, the State can, in exceptional situations, protect people, even against their will.⁴²⁴ United States courts use similar logic when upholding intrusions during the COVID-19 pandemic.

⁴¹⁷ *The Vaccination Riots and the Difficulty of Modernization in Rio de Janeiro*, BROWN UNIVERSITY, <https://library.brown.edu/create/fivecenturiesofchange/chapters/chapter-5/modernization-in-rio/>.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ Emergency use of COVID-19 vaccine was approved in Brazil on January 17, 2021, and Brazil's Supreme Court case's decision was published on December 17, 2020.

⁴²¹ Footnote needed

⁴²² Democratic Labor Party x Brazil, "Ação Direta De Inconstitucionalidade 6.586 Distrito Federal" <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6586vacinaobrigatoriedade.pdf>.

⁴²³ *Constitution of the Federative Republic of Brazil*, SUPREME FEDERAL COURT, http://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf.

⁴²⁴ *Id.*

The United States Supreme Court ruled on compulsory vaccination in 1905 in *Jacobson v. Massachusetts*.⁴²⁵ However, scholars argue that *Jacobson* is not a strong precedent for broad compulsory vaccination policies because the penalty in that case was a small fine, and other manners of compulsory vaccination—such as those that limit children’s access to public schools—involve more significant deprivations of liberty.⁴²⁶ These arguments suggest that a nationwide compulsory vaccination would likely be challenged on constitutional grounds.

The COVID-19 pandemic has reached every corner of the globe, limiting people’s ability to move, work, and play. Vaccinations were expected to be the key to defeating COVID-19 and gaining back freedom. However, as hesitancies to get the vaccine increase and as certain parts of the world struggle to get enough vaccine doses, a new question arises: Will only those with the vaccine be able to move and work freely again?

Employers have been permitted to require that their employees be vaccinated. For example, Delta Airlines has been permitted to require new employees be vaccinated.⁴²⁷ The District Court for the Southern District of Texas allowed a hospital to require all employees—regardless of tenure—be vaccinated.⁴²⁸ These decisions were bolstered by a release by the Equal Employment Opportunity Commission, which said that federal equal employment opportunity laws do not

⁴²⁵ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

⁴²⁶ Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 YALE J. HEALTH POL’ S L. & ETHICS 39 (20120).

⁴²⁷ Delta Airlines required all new employees to be vaccinated during the COVID-19 pandemic. The Associated Press, *Delta Will Require New Hires to Be Vaccinated Against Virus*, NEWS CHANNEL 8 (May 14, 2021), <https://www.wfla.com/community/health/coronavirus/delta-will-require-new-hires-to-be-vaccinated-against-virus/>.

⁴²⁸ *Bridges v. Houston Methodist Hosp.*, No. CV H-21-1774, 2021 WL 2399994 (S.D. Tex. June 12, 2021)

prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as they provide reasonable accommodations.⁴²⁹

Public entities have required vaccinations in the past. For example, smallpox vaccinations were required for entry in public schools.⁴³⁰ More recently, a county in New York was permitted to exclude from attendance any student who could not provide proof of measles vaccination.⁴³¹ If mandatory vaccination is upheld, it seems likely that mandatory testing would be, too, as testing appears to be less intrusive than vaccination. Tests are typically shorter in duration and involve participants providing fluids from their body.⁴³² In contrast, vaccines are designed to have lasting effects as recipients are adding the vaccine to their bodies.

While lockdowns, business closures, and mandatory masking orders are likely to disappear, the intrusions enforced upon privacy rights may remain intact as society moves into the new normal. Because people tend to accept privacy intrusions to address emergencies⁴³³ it is critical to prevent short-term acceptance during an emergency from becoming long-term privacy intrusions.

e. Obtaining Personal Information: Medical Information, Tracking Movement Information, Tracing Information

⁴²⁹ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (June 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

⁴³⁰ The Supreme Court has upheld laws requiring vaccination for entry to schools. *Zucht v. King*, 260 U.S. 174 (1922).

⁴³¹ *W.D. v. Rockland County*, WL 707065 (S.D.N.Y. 2021).

⁴³² The most common COVID-19 tests were conducted through nasal swabs and saliva collections. *Coronavirus Disease 2019 Testing Basics*, U.S. Food & Drug Administration (Apr. 7, 2021), <https://www.fda.gov/consumers/consumer-updates/coronavirus-disease-2019-testing-basics>.

⁴³³ *Id.*

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

The September 11 terrorist attacks created an ongoing and permanent threat to the United States, and privacy-invasive measures were permanently adopted. The airport routine has changed drastically since the attacks, and highly intrusive surveillance became commonplace.⁴³⁴ The COVID-19 outbreak in 2020 is not the last dangerous virus or pandemic, so it is reasonable to fear that intrusive policies in this emergency will survive the emergency.

Artificial intelligence with data from contact-tracing apps, temperature-sensing cameras, and location detection technology is now a significant tool to fight to pandemic.⁴³⁵ The heightened sense of danger to public health supports using more intrusive new technology. How long will data collected and produced to fight the pandemic be maintained? Clearly governments must address the public health emergency and generally the public sentiment is to protect health risks while there is limited public outcry to protect privacy. Ultimately, policy for the next pandemic must address limitations on data use and storage.

Some countries, including China, South Korea, and Singapore quickly began using advanced technology to impose quarantine measures and maintain social distancing.⁴³⁶ Google and Apple

⁴³⁴ David P. Pekoske, Administrator, *Preventing the Next Attack: TSA's Role in Keeping Our Transportation Systems Secure*, TRANSPORTATION SECURITY ADMINISTRATION, Nov. 8, 2017, <https://www.tsa.gov/news/press/testimony/2017/11/08/preventing-next-attack-tsas-role-keeping-our-transportation-systems>; *See also After Snowden: Privacy, Secrecy and Security in the Information Age*, p 210-2017.

⁴³⁵ Kayleigh Shooter, Artificial Intelligence vs Covid-19, HEALTHCARE, September 22, 2020, <https://www.healthcareglobal.com/technology-and-ai-3/artificial-intelligence-vs-covid-19>.

⁴³⁶ Gov Tech Singapore, *Responding to COVID-19 With Tech*, <https://www.tech.gov.sg/products-and-services/responding-to-covid-19-with-tech>; Government of Korea, *All about Korea's Response to COVID-19*, <http://www.korea.net/Government/Current-Affairs/National-Affairs/view?articleId=56914&subId=6&affairId=2034&pageIndex=1>; June Ko, *How China used technology to*

also partnered to create an exposure notification API that can be used by different apps for contact tracing. More than forty countries launched Google and Apple’s API apps.⁴³⁷ A central element of contact tracing is location monitoring. Location monitoring is potentially highly intrusive. Contact tracing can be used to define political leanings, religious beliefs or personal habits. In fact, China uses location information combined with artificial intelligence to gather this type of information.

In the United States, governmental monitoring of individual movement without a warrant is unconstitutional.⁴³⁸ In *United States v. Jones*,⁴³⁹ the Supreme Court held that, under the Fourth Amendment, “longer term GPS monitoring in investigations of most offenses impinges on expectation of privacy.”⁴⁴⁰ The case involved the warrantless installation of a GPS on the defendant’s vehicle in order to produce evidence of the investigated crime.⁴⁴¹

In a concurrence, Justice Sotomayor discussed privacy expectations under the current stage of technological development.⁴⁴² According to her, “New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile.”⁴⁴³ But general public acceptance does not forgive unwarranted government surveillance. The reasoning of the privacy under the Fourth Amendment should inform the analysis of government surveillance for other purposes such as public health.

combat COVID-19 – and tighten its grip on citizens, <https://www.amnesty.org/en/latest/news/2020/04/how-china-used-technology-to-combat-covid-19-and-tighten-its-grip-on-citizens/>.

⁴³⁷ Mishaal Rahman, *Here are the countries using Google and Apple’s COVID-19 Contact Tracing API*, QXDA, December 28, 2020, <https://www.xda-developers.com/google-apple-covid-19-contact-tracing-exposure-notifications-api-app-list-countries>.

⁴³⁸ *United States v. Jones*, 565 U.S. 400 (2012).

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 412.

⁴⁴¹ *Jones*, 565 U.S. at 427, (2012).

⁴⁴² *Id.*

⁴⁴³ *Id.*

During COVID-19, the world has opted for the security and convenience provided by contact-tracing apps at the expense of privacy.⁴⁴⁴ With the growing use of contact-tracing apps, individuals potentially forfeit their protected right to privacy in their movement. The convenience of the apps provides for an excellent way to slow the spread of COVID-19. In the long term, future policies should assure that contact-tracing data is only used for medical purposes and that when the data is no longer valuable for that purpose, it should be destroyed

The number of personal privacy breaches in recent years demonstrates the dangers of private data collection. In 2018, the Facebook-Cambridge Analytica data breach showed the world how companies can harvest valuable personal information without an individual's knowledge.⁴⁴⁵ Lawsuits have been filed against big tech companies for improper data collection, demonstrating a growing distrust of large companies and their handling of personal data.⁴⁴⁶ It only makes sense to set policies to assure that data gathered in health emergencies cannot be abused.

VI. The Next Pandemic: Blueprint to Protect Health and Individual Rights

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

⁴⁴⁴ Patrick Howell O'Neill, Tate Ryan-Mosley, and Bobbie Johnson, *A flood of coronavirus apps are tracking us. Now it's time to keep track of them.*, MIT TECHNOLOGY REVIEW, May 7, 2020, <https://www.technologyreview.com/2020/05/07/1000961/launching-mittr-covid-tracing-tracker/>.

⁴⁴⁵ Carole Cadwalladr and Emma Graham-Harrison, *50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, BENTON INSTITUTE FOR BROADBAND & SOCIETY, March 18, 2020, <https://www.benton.org/headlines/50-million-facebook-profiles-harvested-cambridge-analytica-major-data-breach>.

⁴⁴⁶ Clare Duffy, *Google agrees to pay \$13 million in Street View privacy case*, CNN BUSINESS, July 25, 2019, <https://www.cnn.com/2019/07/22/tech/google-street-view-privacy-lawsuit-settlement/index.html>

a. Define the Threat Level of a Pandemic with a Credible and Scientifically Sound Process

Misunderstanding, lack of information, disinformation, lies, and social media created a level of misunderstanding and confusion that harmed the response to COVID-19. The exact nature of COVID-19 was initially a matter with some scientific uncertainty and therefore was subject to different responses from government leaders. Unfortunately, initial ambiguity established a platform for continuing confusion.⁴⁴⁷ A major goal in addressing a future pandemic is establishing a credible means of defining the threat level of a disease and thereby establishing justification for making certain policy decisions.

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

⁴⁴⁷ For example, see the CDC's initial guidance that wearing a mask is unnecessary for healthy individuals - <https://www.nbcnews.com/health/health-news/do-you-need-mask-science-hasn-t-changed-public-guidance-n1173006>.

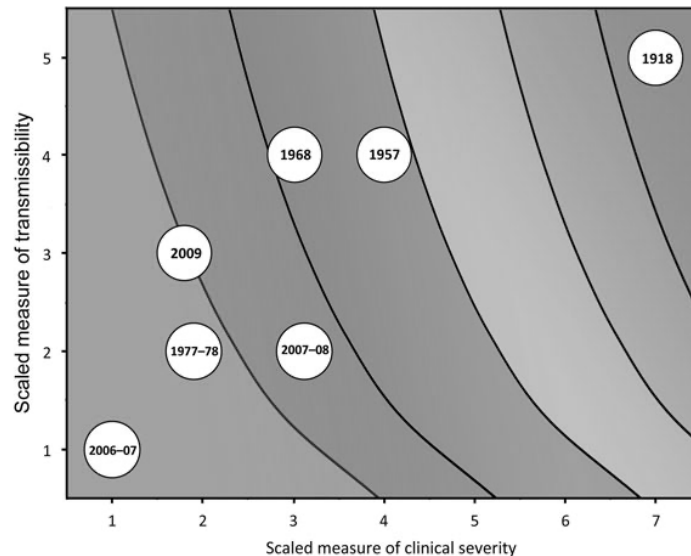
a threat before the threat occurs, it is more likely that the emergency responses that follow will be readily accepted.

The following standards, which are utilized by the World Health Organization when assessing the existence of a Public Health Emergency of International Concern,⁴⁴⁸ could be the basis for assessing public health emergencies: Is the number of cases and/or deaths for this type of event large for the given place, time or population? Has the event potential to have a high public health impact? Is cooperation among states needed to detect, investigate, respond and control the current event, or prevent new cases?⁴⁴⁹ To assess whether the event has the potential to have a high public health impact, the following criteria identified by medical experts may be applied: The event is caused by a pathogen with high potential to cause an epidemic (infectiousness, fatality, multiple transmission routes or carriers); there is an indication of treatment failure (new or emerging antibiotic resistance, vaccine failure, antidote resistance or failure); there are cases reported among health staff; the event is in an area with high population density; the population at risk is especially vulnerable (refugees, low level immunization, children, elderly, low immunity,

⁴⁴⁸ *International Health Regulations (2005)*, <https://www.who.int/publications/i/item/9789241580496>.

⁴⁴⁹ *Id.*

undernourished).⁴⁵⁰ The classification system could sort pandemics into “levels,” as we do with hurricanes,⁴⁵¹ earthquakes,⁴⁵² and tornadoes.⁴⁵³ The pandemic classification system should rely on specific, measurable data points.



The chart above shows how the CDC utilizes transmissibility and severity to classify pandemics.⁴⁵⁴ The commission should evaluate these metrics for use in their pandemic scale and report.

Transmissibility addresses the disease’s ability to spread, and severity addresses the damage the disease inflicts.⁴⁵⁵ A disease with high transmissibility but low severity, such as the common cold, does not warrant exercise of emergency powers, but a disease with low transmissibility but high severity could warrant the exercise of emergency powers in localized

⁴⁵⁰ *Id.*

⁴⁵¹ *Saffir-Simpson Hurricane Wind Scale*, <https://www.nhc.noaa.gov/aboutsshws.php>.

⁴⁵² *Earthquake Magnitude Scale*, <http://www.geo.mtu.edu/UPSeis/magnitude.html>.

⁴⁵³ *The Enhanced Fujita Scale*, <https://www.weather.gov/oun/efscale>.

⁴⁵⁴ *Pandemic Severity Assessment Framework (PSAF)*, <https://www.cdc.gov/flu/pandemic-resources/national-strategy/severity-assessment-framework.html>.

⁴⁵⁵ *Id.*

settings.⁴⁵⁶ As the CDC chart shows, the 1918 Spanish Flu Epidemic was highly dangerous. There are other pandemics and epidemics that would be categorized as a high threat level. For instance, a pandemic like Ebola is extremely transmissible and severe. The Ebola virus disease is rare, yet severe, and has a death rate of up to 90% in humans. The danger provided by Ebola made it easier for society to accept intrusions upon individuals with the disease.⁴⁵⁷ The public is likely to accept the application of quarantine, mandatory use of masks, and tracking measures if a threat as severe as Ebola arose and the existence of the threat was credibly described. If we can generally accept the concept of a Category 5 hurricane, a category 4.5 Earthquake, or a category F5 tornado, then the public can accept a category 9 pandemic.

1. A Standing Pandemic Commission

As we have recently seen with COVID-19, a pandemic can strangle the recovery resources,⁴⁵⁸ the rule of law,⁴⁵⁹ and the will of even the most technologically advanced countries.⁴⁶⁰ To mitigate these concerns, we suggest the United States create a standing pandemic commission with the goal of appointing twenty non-partisan members. So that the commission can have the greatest possible acceptance from the people, the conscious effort to avoid partisan imbalance is a critical aspect of its formation.

⁴⁵⁶ *Novel Framework for Assessing Epidemiologic Effects of Influenza Epidemics and Pandemics* Figure 3, <https://wwwnc.cdc.gov/eid/article/19/1/12-0124-F3>.

⁴⁵⁷ American Civil Liberties Union, *Fear, Politics, and Ebola*, December 2015, https://www.aclu.org/sites/default/files/field_document/aclu-ebolareport.pdf.

⁴⁵⁸ Marisa Iati, *More experts now recommend medical masks. Good ones are hard to find*, Washington Post, February 2, 2021, <https://www.washingtonpost.com/health/2021/02/02/medical-mask-shortage>.

⁴⁵⁹ Ted Piccone, *COVID-19 has worsened a shaky rule of law environment*, Brookings Institution, April 15, 2021, <https://www.brookings.edu/blog/order-from-chaos/2021/04/20/covid-19-has-worsened-a-shaky-rule-of-law-environment>.

⁴⁶⁰ Paola Perenznieto & Ilse Oehler, *Social Costs of the COVID-19 Pandemic*, The Independent Panel for Pandemic Preparedness & Response, May 2021, <https://ycsg.yale.edu/sites/default/files/files/Social%20Costs%20of%20Covid-19.pdf>.

The commission's initial task would be to connect the medical community's assessment framework for grading pandemics⁴⁶¹ with a potential response matrix the government could legally implement to mitigate likely consequences. A pandemic scale of 1-10 might be a good starting place, as it would likely allow enough gradations between the common flu, COVID-19, and diseases with greater lethality such as Ebola/hemorrhagic fevers. However, after the commission has evaluated historical epidemic/pandemic data, they can set the most logical pandemic scale. The commission's ultimate goals would be to create a pandemic scale, and potential response matrix, that is legally rational, medically defensible, and publicly understandable.

Public acceptance of this committee's decrees will likely depend upon the committee's credibility. Therefore, the make-up of the advisory group is essential to its success and health scientists, experts in emergency response, legal privacy experts, and members of the military and intelligence community should make up this group – hopefully these experts would be taken from an equal balance of academia, private sector, public government, and military personnel.

Science should be the controlling factor, and the group should be non-partisan and credible. The total commission would be sixteen members. Accordingly, we suggest that three-members are selected each by the majority party of the Senate, the minority party of the Senate, the majority party of the House of Representatives, and the minority party of the House of Representatives – totaling twelve members. The President would then appoint two members and the Chief Justice of the Supreme Court would appoint two members. Each of whom will serve a four-year term.

This commission would likely be housed in the Executive Branch, so they can respond more quickly to emerging threats, but would issue reports to both the Legislative and Executive

⁴⁶¹ *Pandemic Severity Assessment Framework (PSAF)*, <https://www.cdc.gov/flu/pandemic-resources/national-strategy/severity-assessment-framework.html>.

Branch. In a further attempt to escape partisan messaging during an election cycle, it might also be wise to have this initial appointment process occur eleven months prior to the federal government's mid-term elections.

One possible distribution of the commission would be even members from the following categories: 1) privacy, constitutional, or health law experts; 2) mental health experts in long-term disasters from the ranks of psychiatry, sociology, or psychology; 3) experts from epidemiology, critical care or infectious disease physicians; 4) emergency response or infectious disease experts from the CDC, NIH, or FEMA; 5) experts in biological warfare or logistics division from the military or intelligence community.

This commission's first task, to establish standards of evaluation, and a decision-making process, for future pandemics, would likely take many months of service. After creating this initial classification framework for assessing health crises, such an organization would respond in an as-needed capacity when public health crises arise and evolve. Once a significant disease appears, the commission would be tasked with (i) assessing the severity and transmissibility of the threat and classifying it in accordance with the predetermined set of standards; (ii) informing the Secretary of Health and Human Services ("HHS") whether a public health emergency exists; and if so, (iii) providing the extent of the threat through use of its classification framework. The commission's determinations would be advisory in nature and directed toward administrative actions. By justifying these administrative actions and saying that they are being taken for compelling reasons, the commission would aid in judicial review without directly suggesting judicial results. Such a function is reminiscent of that served by the National Council of Justice of Brazil, which issues

non-binding recommendations to the Brazilian judiciary system.⁴⁶² Over the last ten years, this Council has proposed over one-hundred recommendations addressing health litigation; though its determinations are not binding, they are useful in increasing confidence and efficiency in judicial decision making.

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

Of course, an advisory authority cannot be expected to answer all questions. In an emergency, leaders at all levels are asked to make difficult decisions with dramatic consequences. Even with the established threat levels, decisions will be difficult. As we have learned, delays can be disastrous, and making no decision is a decision. For example, when a pilot of an aircraft is confronted with a spin,⁴⁶³ they only have few seconds to decide and act. In that case, making no decision is a fatal decision.⁴⁶⁴ The pilot has only moments to take the necessary steps to avoid a fatal crash and will only be capable of doing so if they have evaluated and practiced their available

⁴⁶² SUPERIOR TRIBUNAL DE JUSTIÇA, *National Council of Justice*, <https://international.stj.jus.br/en/Brazilian-Judicial-Branch/National-Council-of-Justice>.

⁴⁶³ Spins are very dangerous and require a quick application of rudder to avoid full development. Spins typically require a four-step process to avoid crashing into the ground at thousands of feet per minute, and at certain low altitudes, spins are almost never recoverable because of time to impact.

⁴⁶⁴ *Id.*

options ahead of the emergency. Similarly, in order to save the lives of those at risk, making decisions about how to address a growing pandemic also must be made in short windows of time, and with conscientious prior evaluation. By having defined threat levels (understanding the emergency), tied to likely responses (understanding the options to mitigate the danger), and having a trained and competent group designated to provide advice on a pandemic (having a qualified “pilot” at the controls) might help expedite decision making and ensure public safety.

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

b. Define and Limit “Emergency Authority” to Specify Pandemic Emergencies based on Threat Level

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

Defining emergencies must recognize that emergencies take different forms. Earthquakes, hurricanes, and pandemics are very different types of emergencies, and each one of these extraordinary occurrences affects people in different ways. For example, while earthquakes and hurricanes end in hours, pandemics may last months or years; while earthquakes and hurricanes depend on quick evacuations, pandemics may require people to stay at home as much as possible. Emergencies are different and the federal law should treat them differently. The public is acquainted with the concept of a Category 5 hurricane and a 4.5 Earthquake.⁴⁶⁵ Based on the process described in section A above, we can promote a public understanding of a level 9 pandemic with an understanding of what responses should be made.

An important component of limiting emergency authority is the duration of the existence of emergency powers. Time limits are currently part of many emergency measures and, in the case of COVID-19, emergency powers were repeatedly renewed to bypass those time limits. The time limits are appropriate for limiting the expansion of power to impose extraordinary measures. The time limits should be defined by the nature of the emergency. For example, natural disasters may require a shorter duration than a pandemic does; natural disasters typically happen quickly, and a consolidated and efficient response is possible. In contrast, pandemics may require longer states of emergency: they are longer in duration, and response efforts are often necessarily ongoing.

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

⁴⁶⁵ *Supra* Section VII(A).

emergency and threat level. Following are examples of some of the policies implemented during COVID-19

- **Travel Restrictions:** During the coronavirus pandemic, the federal government issued bans on international travel, which were easily upheld. States were more equipped to limit travel between states as part of their police power. Though outright bans on entry were not enacted, states were able to implement quarantine requirements for entry because of health and safety justifications.
- **Business Closures:** Complete business closures nationwide are likely unconstitutional at the federal level.⁴⁶⁶ However, at the state level, these closures are more viable because of the broad authority granted by police powers.⁴⁶⁷ Temporary closures and limits on occupancy require a less compelling state interest than a lengthy closure would, and lengthy or complete closures could be subject to takings or due process arguments.⁴⁶⁸
- **Masking:** Though masking requirements restrain personal liberty, masking is one of the least invasive pandemic prevention measures available, and countless studies have demonstrated its effectiveness at limiting the transmission of disease.⁴⁶⁹ As such, state and local governments possess authority to require masking when diseases reach a high level of classification. The disease would have to have an even higher transmissibility and severity for the federal government to gain this authority, but in these instances, some federal mask mandates would also be possible.
- **Vaccination:** Vaccination is significantly more invasive than masking and constitutes a more severe intrusion on personal liberty. Because of this, it is questionable whether federal government would ever gain the right to mandate nationwide vaccination. If the federal government ever assumes this power, it would have to be under the extremely severe circumstances, such as the Ebola crisis. Statewide conditional vaccination requirements, initiated by state governments, are more likely to be upheld.⁴⁷⁰ Multiple states already mandate vaccination to attend public school.⁴⁷¹ However, these existing vaccine mandates are usually accompanied by justification that citizens can opt out of the vaccine by foregoing one of their privileges.⁴⁷²

Emergency statutes at the state and federal level should establish a definition of public health emergency based on the declaration of a pandemic under an established process described

⁴⁶⁶ *Supra* note 267.

⁴⁶⁷ *Supra* note 278.

⁴⁶⁸ *Supra* note 280.

⁴⁶⁹ The Washington Post, *There's No Reason Not to Wear a Mask*, <https://www.washingtonpost.com/outlook/2021/07/28/masks-inside-cdc-delta-variant/>.

⁴⁷⁰ *Klaassen v. Trustees of Indiana Univ.*, 21-2326, 2021 WL 3281209 (7th Cir. Aug. 2, 2021), *cert. denied*.

⁴⁷¹ *Supra* note 341.

⁴⁷² In these states, citizens who do not want their child to receive a vaccine can elect to homeschool their child to avoid the requirement.

above. Based on the characteristics of a pandemic, emergency powers can be more clearly defined and limited. Only in the most severe health crisis should the most draconian measures be authorized. It is possible for policy makers to make authorize future decisions based on threat level. For example, if there is a category 10 Ebola outbreak, it will have been worthwhile establishing that certain travel restrictions, quarantining, business closures, masking, and vaccination policies would be necessary during that kind of emergency. The benefit of making these policies in advance is that they will not seem or be arbitrary under the general category of an emergency. Further, with established standards, courts could stop overreaches beyond established policy.

c. Define Authority and Limits of Levels of Government to Act--Make Federalism Work

In addition to defining threat level of the pandemic and defining and limiting emergency powers, future policies should contemplate the advantages and challenges of the federal system. Both Brazil and the United States are federalist nations. A federalist country divides power between multiple vertical layers of government.⁴⁷³ In the time of a pandemic, that can be an advantage and it can also a source of confusion and disparate treatment.

The COVID-19 virus highlighted the difficulty that federalist countries face when determining authority to act on a subject that has national collective interest. For instance, Sao Paulo, Brazil's most populous State, went into lockdown for several months⁴⁷⁴ after both the Mayor and the

⁴⁷³ Lumen, *Federalism: Basic Structure of Government*, <https://courses.lumenlearning.com/american-government/chapter/introduction-3/>.

⁴⁷⁴ Lisandra Paraguassa, *Major Brazilian cities set lockdowns as virus spreads*, REUTERS, May 5, 2020, <https://www.reuters.com/article/us-health-coronavirus-brazil-lockdown/major-brazilian-cities-set-lockdowns-as-virus-spreads-idUSKBN22H2V3>.

Governor announced stay at home orders, but the President of Brazil continuously attacked the lockdowns and social distance measures that were adopted amid the pandemic.⁴⁷⁵

In fact, when Brazil's President had COVID-19, he was seen outside without a mask, talking to people.⁴⁷⁶ Most states were enforcing strict quarantine at this time, so the President's actions created a very confusing message to Brazilian citizens about how to act during the pandemic and what policies to follow.⁴⁷⁷ The lack of a uniform measure to fight the spike of the virus has been identified as one of the causes for the high number of people infected in Brazil.⁴⁷⁸

The misalignment in policy making throughout the country extended to vaccine distribution. In September of 2020, Sao Paulo's Governor signed an agreement with the Chinese pharmaceutical Sinovac Biotech for the supply of 46 million doses of the vaccine named Coronovac.⁴⁷⁹ The vaccine was to be manufactured by Instituto Butanta—a Sao Paulo-based research institute. However, while the governor was working to get vaccines, Brazil's President has started a “vaccine war” against Sao Paulo's Governor, announcing that the Federal Government would purchase a vaccine developed by the pharmaceutical Astrazeneca and the Oxford University.⁴⁸⁰ Sao Paulo was also the only State to take steps to obtain a COVID-19

⁴⁷⁵ Maria Carolina Marcello and Leonardo Benassatto, *Brazil' Bolsonaro attacks coronavirus lockdowns as supporters take to streets*, REUTERS, April 19, 2020, <https://www.reuters.com/article/us-health-coronavirus-brazil/brazils-bolsonaro-attacks-coronavirus-lockdowns-as-supporters-take-to-streets-idUSKBN2210V1>.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ Juliana Gagnan, iBBC News, *Coronavírus: os sete erros que põem Brasil na rota do 'lockdown', segundo especialistas*, <https://www.bbc.com/portuguese/brasil-52551974>

⁴⁷⁹ SÃO PAULO, SP assina acordo por 46 milhões de doses de vacina contra o coronavírus até dezembro <https://www.saopaulo.sp.gov.br/ultimas-noticias/governo-do-estado-apresenta-informacoes-sobre-o-combate-ao-coronavirus-8/>.

⁴⁸⁰ Tom Hennigan, *COVID-19: Bolsonaro caught up in 'vaccine war' with Brazil's institutions*, THE IRISH TIMES, November 3, 2020, <https://www.irishtimes.com/news/world/covid-19-bolsonaro-caught-up-in-vaccine-war-with-brazil-s-institutions-1.4398936>.

vaccine.⁴⁸¹ Meanwhile, the President repeatedly questioned Coronavac, publicly saying he had no intentions to purchase it⁴⁸². However, when the Coronavac vaccine was cleared, the Federal Government claimed the vaccine for national distribution.⁴⁸³

The United States faced similar challenges because of the lack of uniformity in federal, state, and local approaches to COVID-19. On May 4, 2020, Florida restaurants were allowed to offer outdoor dining at 25% capacity and retailers could operate at 25% of indoor capacity.⁴⁸⁴ The Governor's reopening order gradually increased until the state's stay-at-home order ended on April 30, 2020.⁴⁸⁵ Walt Disney World parks reopened in Orlando on July 11, 2020 and July 15, 2020.⁴⁸⁶ Meanwhile, California's governor issued a stay-at-home order on March 19, 2020 that lasted until January 25, 2020, and Disneyland California remained closed until April 30, 2021.⁴⁸⁷

Compare the United States and Brazil to New Zealand, a unitary country. New Zealand has been praised for its success in controlling COVID-19 as a result of strict nationwide measures.⁴⁸⁸ Thus, a question is raised: Should federalist countries take early and unified measures in case of a

⁴⁸¹ *Should a coronavirus vaccine be mandatory? In Brazil's Most Populous State, It Will Be*. THE WASHINGTON POST, https://www.washingtonpost.com/world/the_americas/virus-mandatory-vaccine-brazil-bolsonaro/2020/12/06/31767b4a-33e5-11eb-8d38-6aea1adb3839_story.html.

⁴⁸² UOL, *Bolsonaro desautoriza acordo de Pazuella e diz que não comprará CoronaVac*, <https://noticias.uol.com.br/politica/ultimas-noticias/2020/10/21/bolsonaro-responde-a-criticas-sobre-vacina-chinesa-nao-sera-comprada.htm?cmpid=copiaecola>.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ Alaa Elassar, CNN, *This is where each state is during its phased reopening*, <https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/>

⁴⁸⁶ Walt Disney World, <https://www.wdwinfo.com/disney-world/reopening-information-updates.htm#:~:text=EPCOT%20and%20Disney's%20Hollywood%20Studios,extended%20to%20September%2026%2C%202021>.

⁴⁸⁷ *Disneyland California Just Announced that Vaccinated Guests No Longer Need Masks*, CONDÉ NAST TRAVELER, <https://www.cntraveler.com/story/disneyland-california-reopening>.

⁴⁸⁸ World Health Organization, *New Zealand takes early and hard action to tackle COVID-19*, <https://www.who.int/westernpacific/news/feature-stories/detail/new-zealand-takes-early-and-hard-action-to-tackle-covid-19>.

pandemic? Should legislation be taken in place in place to allow federal policies to be taken in place in event of global crises that hits an entire country?

To assess whether cooperation among states is required, the following factors may be evaluated: locally insufficient human, financial, or technical resources; insufficient laboratory and epidemiological capacity to investigate the event; insufficient antidotes, drugs and/or vaccine and/or protective equipment, decontamination equipment, or supportive equipment to cover estimated needs; existing surveillance system is inadequate to detect new cases in a timely manner.⁴⁸⁹ For example, it makes sense for the federal government to support research on and facilitate the acquisition of treatments and vaccines. To encourage states to execute the measures, federal funds can be granted to the states for implementing elements of the plan.⁴⁹⁰

The federal government is best equipped to compile data and issue widespread health recommendations. However, state and local governments still play a role in effective health information and guidance. State and local governments are critical for data collection and implementation of health measures, but equally importantly, they are best equipped to make determinations based on local situations.⁴⁹¹

d. Define and Limit Data Collection to Protect Individual Privacy

⁴⁸⁹ *Id.*

⁴⁹⁰ Power of the Purse. See U.S. Const. Article I, Section 7, clause 1 and Section 9, clause 7; See also *South Dakota v. Dole*, 483 U.S. 203, 205, 107 S. Ct. 2793, 2795 (1987); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012).

⁴⁹¹ A small town in Idaho may have different health needs than New York City, based on the percentage infection rate of its population.

The consequences of data privacy from the worldwide pandemic have been profound.⁴⁹² Gathering and using medical data in a medical emergency is entirely necessary.⁴⁹³ Privacy laws gave way to the medical emergency.⁴⁹⁴ Countries of the European Union suspended its landmark privacy policies in the GDPR for the emergency.⁴⁹⁵ When the emergency is over, it is unlikely privacy protections will return to normal immediately.⁴⁹⁶ Therefore, it makes sense to create a data policy for pandemics, so they do not have to be made during an emergency. A thoughtful data privacy plan will avoid unnecessary intrusions and will provide more comfort to citizens who are already afraid and potentially skeptical of government intrusions. The following policy points are ones that should be kept in mind when forming the best data privacy plan in preparation for the next pandemic:

1. **Minimize collection.** Privacy is best served when only needed data is collected, but in a pandemic sensitive health data must be collected. Limits on collection limit intrusion. During a pandemic, government does not need to collect health care information on every citizen and monitor every citizen's movement. The nature of data collected during a pandemic is intrusive: health data, location data and personal association data. Before the emergency starts, establish the limits.
2. **Define use of data.** Data collected for health care purposes should not be used for any other purpose.⁴⁹⁷ In some countries, there are massive amounts of information being collected and maintained. A government in a surveillance state could abuse the ability to gather deeply personal healthcare information, increasing the already expansive amount of data it has on individuals.

⁴⁹² Benjamin Bourdeaux, *et al*, Data Privacy During Pandemics: A Scorecard Approach for Evaluating the Privacy Implications of COVID-19 Mobile Phone Surveillance Programs, RAND, https://www.rand.org/content/dam/rand/pubs/research_reports/RRA300/RRA365-1/RAND_RRA365-1.pdf.

⁴⁹³ Centers for Disease Control and Prevention, Monitoring and tracking the disease, July 1st, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/about-epidemiology/monitoring-and-tracking.html>.

⁴⁹⁴ *Supra* note 371.

⁴⁹⁵ Article 9 (2) (i) of the GDPR authorizes the temporary suspension of data-protection rights in times of public health emergencies. To cope with the COVID-19 pandemic, countries like Italy, France, Germany and Hungary lifted restrictions on processing and sharing personal data. Axel Spies, *Corona Virus: Whatever Happens, The Crisis Has an Impact on Data Protection Rights*, <https://www.aicgs.org/2020/02/corona-virus-whatever-happens-the-crisis-has-an-impact-on-data-protection-rights/>; *Hungarian government suspends some aspects of GDPR*, PRIVACY INTERNATIONAL, May 9th, 2020, <https://privacyinternational.org/examples/3837/hungarian-government-suspends-some-aspects-gdpr>; Clara Hainsdorf, *COVID-19 and Data Protection Compliance in France*, WHITE & CASE, April 20th, 2020, <https://www.whitecase.com/publications/alert/covid-19-and-data-protection-compliance-france>.

⁴⁹⁶ *Supra* Section V(e).

⁴⁹⁷ *e.g.* marketing.

3. **Anonymize Data.** Not all data needed during a pandemic needs to be individualized. There were examples in this pandemic where programs assessed community wide compliance with stay-at-home orders without identifying individuals.⁴⁹⁸
4. **Destroy data when no longer needed.** While there may be long term uses for health data on individuals and demographic groups, the retention of individualized data should be limited or anonymized.⁴⁹⁹ Potential misuses can be avoided if data is not individualized.
5. **Be transparent about data collection.** Data collection is important in fighting against a pandemic. Testing and contact tracing are necessary weapons for fighting a pandemic, but they gather sensitive information. The more transparent government is about data collection, the higher the level of citizen cooperation. Except where government can dictate citizens' conduct, good faith and cooperation are keys to success.

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

VII. Conclusion

It is undeniable that communicable diseases like COVID-19 cause harm to the public health and safety. Therefore, governments need a process for defining emergency pandemics and their severity. Governments also need legislation that clearly defines the exercise of governmental authority and scope on the federal, state, and local levels. There must also be a governmental understanding of timelines and how time affects governmental takings and contracts interference.

Emergencies and pandemics like COVID-19 require courts to do more. National policies grant substantial authority to executives during emergencies, including presidents, governors, and mayors. During past emergencies, individual rights have been constrained—COVID-19 is no different. The severe consequences of lockdowns, closings and quarantines are undeniable. So are the social, community, and individual consequences of a pandemic that kills millions worldwide.

⁴⁹⁸ *Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak*, EUROPEAN DATA PROTECTION BOARD, April 21, 2020, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf.

⁴⁹⁹ *Id.*

Balancing government authority to constrain individuals and the need to protect the greater good with individual liberties and freedoms is a necessity. The Constitution and the courts should not take a sabbatical. They must work together to create balance. Therefore, the courts are asked to play the uncomfortable role of medical policy arbiter.

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

During COVID-19, countries have required business closure and limited hours of operation, issued mandates, and required long-term isolation. There has also been an excessive collection of sensitive personal data. These measures drastically affect individual's rights such as property, self-determination, movement, and privacy. These are critical rights for maintaining democratic societies.

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

The overall response to the COVID crisis cannot be considered a success. Some failures were based on poor leadership, some successes were a result of cultural characteristics, but generally there is a vacuum of policy. Now is the time to define a policy that does three things: First, define the authority to implement emergency powers (state, federal and local). In the United States there are constitutional limits and rational policy reasons to divide the duties and authority. The national government has authority under the commerce clause to make substantial overall policy decisions. Because a pandemic will have different impacts in different places, local governments and state governments should be empowered as well. Second, the nature of emergencies is that they are urgent and time sensitive. Therefore, there should be time limits on delegation of power, as there are in many statutes now. The limits may be different for different policies. Third, the policies must recognize and provide limits for personal freedom and privacy. Rather than let policy be made by happenstance and random court decisions, it is critical to develop emergency policies with standards to be met and reviewed.

The policies must describe the personal liberties under protection; make explicit the issues of property rights and business closures; address the issues of individual data intrusions for testing and tracking; deal with the issue of limitation on personal freedom of movement for quarantine and travel bans; and determine the limits of intrusion on personal bodily control for testing and vaccination. These questions are difficult. But it is far better to address them comprehensively with the experience of the COVID pandemic and before the next international health emergency.