Crisis and the Constitution: The Role of Civil Liberties in Times of National Security Threat

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ABSTRACT

In this Article, we contribute to the unfolding debate around civil liberties and civil rights in times of political, cultural, and health crises. As this Article was drafted, the National Guard was deployed in Los Angeles, California and Washington, D.C. by the President of the United States. In Oregon, a federal judge issued a final order barring the Trump administration from deploying troops to Portland. These events renew questions related to federalism, states' rights, individual civil rights, and civil liberties. As chaos unfolds, what is the rule of law and role of civil liberties in times of real or purported national security threats? The Article examines these questions in the realm of health crises, drawing upon this context to tease out meaning for a broader urgent discourse in law and society.

This Article uses the COVID-19 pandemic as a case study to shed new light on legal and political discourse. Even if scholars agree that the government possesses the legal or constitutional authority to intervene and limit civil liberties in times of health crisis, what are the limits? What are the checks on governmental authority? Should there be checks? As important—although distinctly different from the questions just enumerated—does the government have an obligation to provide basic services or protections to the public in times of disaster and crisis? This Article takes the position that it does.

These questions arise with new meaning and urgency in the wake of the COVID-19 pandemic and the troubling and dangerous amplification of medical and scientific misinformation. On one hand, rigorous empirical evidence warns that the next global health crisis may be only years rather than decades or a century away. On the other hand, political rhetoric downplayed the risks of contracting the virus, minimized its severity, and undermined protocols to protect against infection during the pandemic. Through a series of observations about the politicization of the COVID-19 pandemic and normative arguments regarding not only the

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government's authority, but obligation, to protect the public health, this Article sets the stage for preparing for and navigating future public health emergencies.

I. INTRODUCTION

On February 10, 2020, President Donald Trump asserted, "[y]ou know, a lot of people think that [COVID-19] goes away in April with the heat . . . ."[1] One month later, on March 10, 2020, as deaths from the virus began to surge, either not convinced of the virus's deadly consequences or afraid to confront scientific evidence, Trump announced, "[w]e're prepared, and we're doing a great job with it. And it will go away. Just stay calm. It will go away."[2] Researchers who study emergency preparedness, natural hazards, and homeland security would later conclude that the Trump Administration's failures and "missed opportunities" during the COVID-19 public health emergency contributed to the "mismanaged federal response."[3] However, the medical misinformation did not dissipate, nor did what we perceive as the dangerous politicized response to the medical crisis.

Four years later, in the spring of 2024, the Subcommittee on the Constitution and Limited Government of the U.S. House Committee on the Judiciary sponsored the *Hearing on Liberty, Tyranny, and Accountability: COVID-19 and the Constitution* ("the Hearing"). The Hearing addressed vaccine hesitancy, fraught political partisanship, and the growing attack on science in the United States.[4] The politically-divided Hearing, called by Republican Subcommittee members and framed as an examination of "the federal and state responses to the Covid-19 pandemic and the effects on the civil liberties of Americans,"[5] downplayed stark, unambiguous health consequences associated with COVID-19 and instead focused on allegations that federal and state responses to the pandemic amounted to excessive governmental overreach.[6]

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[1] Daniel Wolfe & Daniel Dale, *'It's Going to Disappear': A Timeline of Trump's Claims that COVID-19 Will Vanish*, CNN (Oct. 31, 2020), https://www.cnn.com/interactive/2020/10/politics/covid-disappearing-trump-comment-tracker/ [perma.cc/27VV-SL64].

[2] *Id.*

[3] Charles F. Parker & Eric K. Stern, *The Trump Administration and the COVID-19 Crisis: Exploring the Warning-Response Problems and Missed Opportunities of a Public Health Emergency*, 100 PUB. ADMIN. 616, 616 (2022).

[4] *Liberty, Tyranny, and Accountability: COVID-19 and the Constitution: Hearing Before the Subcomm. on the Const. and Ltd. Gov't of the H. Comm. on the Judiciary*, 118th Cong. (2024) [hereinafter *Liberty, Tyranny, and Accountability Hearing Transcript*].

[5] *Liberty, Tyranny, and Accountability: Covid-19 and the Constitution*, H. JUDICIARY COMM., https://judiciary.house.gov/committee-activity/hearings/liberty-tyranny-and-accountability-covid-19-and-constitution [perma.cc/MBE9-M4AM].

[6] *Id.*; *Liberty, Tyranny, and Accountability Hearing Transcript*, *supra* note 4.

By the week of the Hearing, there had been over seven million deaths associated with COVID-19 worldwide,[7] yet no Republican lawmaker acknowledged this basic fact. Instead, a line of questions from Representative Chip Roy (R-TX) on "massive restriction[s]" that were "[c]learly nonsense" and "irrationalities that we all tolerated"[8] dominated the discourse. By contrast, and illustrative of the political divide, Representative Mary Gay Scanlon (D-PA) noted "the dangers of perpetuating misinformation about vaccine safety, including unnecessary death, severe illness, and hospitalization."[9]

The COVID-19 pandemic brought to the forefront several questions related to the interaction between constitutional rights, state police powers, and federalism. These questions continue to have relevance five years later in the backdrop of a second Trump Administration that has sought to declare any number of issues threats to national security to advance certain policy goals.[10] First, what is the relevance and role of civil liberties in times of real or purported national security threats? Second, how are questions of federalism sorted out in times of national and global crisis? Third (and specific to our Article), what are the obligations of governments to protect public health during public health crises? In a nation that rejects the Good Samaritan principle in both policy and across doctrine,[11] *is* there even an obligation for the government to respond to a health crisis? Is there an obligation to protect the public? With discreet exceptions, the duty or obligation to rescue is not a feature in American law. *DeShaney v. Winnebago*[12] offers a chilling example of the U.S. Supreme Court underscoring that the state is not responsible when agents of the state fail to remove a child from the custody of a father, even after credible reports of violence and

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[7] *Coronavirus Death Toll*, WORLDOMETER (emphasis omitted), https://www.worldometers.info/coronavirus/coronavirus-death-toll/ [perma.cc/PLE6-NF4L] (last updated Apr. 13, 2024) ("7,010,681 people have died so far from the coronavirus COVID-19 outbreak as of April 13, 2024, 01:00 GMT.").

[8] *Liberty, Tyranny, and Accountability Hearing Transcript*, *supra* note 4, at 52.

[9] *Id.*

[10] *See, e.g.*, Elizabeth Goiten, *How the President Is Misusing Emergency Powers to Impose Worldwide Tariffs*, BRENNAN CTR. FOR JUST. (May 12, 2025), https://www.brennancenter.org/our-work/research-reports/how-president-misusing-emergency-powers-impose-worldwide-tariffs [perma.cc/69ZF-JFHD]; Paul Blumenthal, *Donald Trump Hopes Labeling Everything 'National Security' Is A 'Get Out of Court Free' Card*, HUFFPOST (Aug. 21, 2025), https://www.huffpost.com/entry/donald-trump-national-security_n_68a32e22e4b0b028bc35d20c [perma.cc/Z4YD-MM4K].

[11] *See, e.g.*, McFall v. Shimp, 10 Pa. D. & C.3d 90 (C.P. Allegheny County 1978); *see* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 119–21 (1978); Arthur A. Caplan, *Biomedical Technology, Ethics, Public Policy, and the Law: Am I My Brother's Keeper?*, 27 SUFFOLK U. L. REV. 1195, 1200 (1993).

[12] 489 U.S. 189 (1989).

abuse inflicted on the child.[13] Fourth, and turning to the crux of this Article, what is the role of science, misinformation, and disinformation in informing actions that may infringe on constitutional rights, either justly or unjustly?

We predict that the politically polarizing and escalating disregard for health and science in the United States portends a serious threat to public health and safety. Simply put, science, scientific information, and scientists are under attack. Such matters are not lofty academic problems, but serious problems for law, society, and democracy. As such, two important observations guide this Article's ultimate normative argument and crystallize its thesis in dual parts. First, as an empirical matter, the government's response to the COVID-19 pandemic was dangerously politicized and mismanaged. Second, this politicization had serious, if not deadly, health consequences for Americans in states that exhibited significant denialism on the severity of the virus. It affected the government's willingness to respond with appropriate public health safety measures as well as the public's perception of the threat posed by the pandemic.

This leads us to argue that the government not only possesses the authority to intervene in times of public health crisis, but that it also has an obligation to protect and preserve health. The former is well-settled in U.S. Supreme Court jurisprudence predating the Court's 1905 decision in *Jacobson v. Massachusetts*.[14] The latter is more contested. Nevertheless, we argue that support for an affirmative governmental duty to protect the public's health can be found in the U.S. Constitution. Specifically, we point to Article IV, Section 4, which states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them* against invasion."[15] In leveraging this clause, we argue for a broad interpretation of the word "invasion" that acknowledges the devastation wreaked by novel pathogens or, more extreme, bioterrorism.

Critics of our thesis might respond to our argument in a couple of ways. First, they may suggest that protecting and safeguarding the public's health are neither novel nor controversial ideas. Second, they may assert that prior, centuries-old judicial precedent authorizing government intervention in times of health crisis will stand in the future and withstand aggressive medical misinformation filtering through political offices and social media. Third, they may argue that legislators will always act in the best health interests of the people they represent. Finally, they may claim that the American judiciary will

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[13] *Id.*

[14] 197 U.S. 11 (1905).

[15] U.S. CONST. art. IV, § 4 (emphasis added).

serve as bulwarks against antivaccination movements, political capture, and ignorance.

Such reductive propositions ignore empirical evidence and the political tides at hand. They naively suggest that contemporary divisions in social and political discourse on constitutionalism, civil liberties, and health can be ignored without serious public health and national security consequences. While we acknowledge these ideas and arguments for the sake of academic discourse, robust empirical evidence ultimately exposes them to be naïve and reductive. We caution against this misguided dismissal and explain why throughout the Article.

The more intellectually sturdy claims that challenge our thesis reside in the tradeoffs that flow from ceding individual rights and power to a government in times of crisis and threat. Thus, we are equally troubled by claims that civil liberties warrant only limited or no protection in times of public health or national security threat, and that the public should simply acquiesce whenever the government seeks to impose its authority under claims of such threats. This Article takes the position that implementation of such a framework would be dangerous, ignoring government abuse against vulnerable populations in times of crisis or the creation of crisis as a proxy for limiting civil rights and civil liberties.

The Article's observations and normative arguments set the stage for navigating and adjudicating future public health crises. The relevant inquiry is not whether a future pandemic will occur. Rather, epidemiological research urges preparedness for when the next global health crisis strikes. Unlike the nation's robust preparedness for matters of invasion addressed by the unleashing of troops across armed services that tackle air, sea, land, and space, the United States shows an incredible weakness, lack of preparedness, and absence of political cohesion on threats to public health through the invasion of disease.

At a time of deep political polarization where too many view the law in black and white, this Article takes up the important and nuanced areas of gray. Rather than hammer and nail, it offers thread and needle. In short, our first principle is that civil liberties and civil rights are essential features of American democracy and core protections for individuals against periods of unlawful and unrestrained government tyranny, abuse, and breaches in the rule of law. Nevertheless, some civil liberties may be limited in times of national and global crisis. The test, as a constitutional matter, is whether the crisis is real, and what response is justified in terms of scope and scale. We are particularly mindful of the nuance necessary to navigate this inquiry because civil rights and civil liberties are typically the first and last lines of defense

for the most marginalized in society against impermissible government intrusion.

This Article proceeds with this inquiry in four parts. In Part II, we cut through COVID-19 misinformation, offering a sobering account of the virus and its impacts. Part III turns to the COVID-19 political storm, addressing political chaos, denialism, attacks, and violence. We unpack the claims that COVID-19 was overblown, as well as recount the stunning threats against scientists. Part IV examines the current social and political storm involving vaccines, despite well-founded evidence that available vaccines are safe, effective, and have come to play an essential role in the government's ability to protect the life and liberty of its citizens. Part V concludes by arguing that the government has authority—and even the obligation—to respond in times of catastrophic health crisis, which COVID-19 represented. We explain, however, that the authority claimed by the government in times of crises must be real and cannot be abused or used as a proxy for unlawful discrimination. Importantly, at a time of unrelenting medical misinformation and denialism, the descriptive work of this Article in situating the past, present, and future destruction unleashed by the COVID-19 pandemic is as important as the normative arguments we put forth.

II. CONTEXTUALIZING COVID: HEALTH AND DEATH IMPACT

In this Part, we briefly resuscitate the COVID-19 pandemic, articulating health harms associated with the virus and memorializing the despair that continues to follow in its wake. We do so to record and preserve a more credible account of the social, cultural, and medical tragedies associated with the coronavirus. Such an account is particularly important given the alarming and inaccurate characterization of the virus as a typical flu, that its impacts were insignificant or lasted only a few weeks,[16] or that mitigation efforts such as social distancing and masking amounted to governmental overreach and the trampling of civil liberties. Our strong claim is that political peddling of misinformation in times of crisis or omission of accurate information from public discourse foments the conditions that lead to unlawful government abuse, harm to individuals, and impermissible constraints on civil liberties and civil rights.

Accurate, evidence-based accounting of the pandemic's consequences takes on even greater significance when viewed alongside

[16] Representative Armstrong explained, "there is a difference between the front end of COVID and after about six weeks, and we made the most ridiculous decisions on behalf of our citizens, and we allowed them to happen. People looked at it and they knew they were ridiculous." *Liberty, Tyranny, and Accountability Hearing Transcript*, *supra* note 4, at 68.

the second Trump Administration's removal of online COVID-19 information and resources, which were replaced with web pages attacking federal scientists and supporting the contentious "lab leak" theory.[17] Moreover, understanding the devastation wreaked by COVID-19 bolsters the argument that the government may, or even must, act to protect the public health, even if doing so results in temporary infringements on civil liberties.

Troublingly, it appears that some lawmakers, in the name of protecting civil liberties, want laws passed to *prevent* mitigation efforts if a future pandemic were to occur, despite long-standing Supreme Court precedent authorizing such measures. According to Republican Representative Kelly Armstrong (now governor of North Dakota),[18] such laws are needed so the restrictions imposed during the COVID-19 pandemic "never happen[] again."[19] Armstrong made clear that she doesn't "care about a Supreme Court case from 40 years ago, 50 years ago, or 70 years ago."[20] Erasure, denial, and downplay of the virus then and now do not align with the reality of the virus's devastation, and doing so in the name of protecting civil liberties is misleading at best, and deadly at worst.

A. COVID-19: The Biological Realities

Despite thousands of articles "spilling into journals" about the coronavirus, "a clear picture is elusive, as the virus acts like no pathogen humanity has ever seen."[21] Now, five years after President Trump claimed the coronavirus would simply disappear or could be treated with household disinfectants,[22] the reality of the virus and disturbing trends in deaths related to COVID-19 deserve reflection.

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[17] Alexander Tin, *Trump Administration Replaces COVID Websites, Takes Down COVID Signage*, CBS NEWS (Apr. 18, 2025), https://www.cbsnews.com/news/trump-administration-replaces-covid-websites/ [perma.cc/BLV6-W7HA].

[18] *Governor Kelly Armstrong*, N.D. OFF. OF THE GOVERNOR, https://www.governor.nd.gov/governor-kelly-armstrong [perma.cc/9TZX-SEKA].

[19] *Liberty, Tyranny, and Accountability Hearing Transcript*, *supra* note 4, at 68.

[20] *Id*.

[21] Meredith Wadman et al., *A Rampage Through the Body*, 368 SCIENCE 356, 357 (2020).

[22] *Coronavirus: Outcry After Trump Suggests Injecting Disinfectant as Treatment*, BBC (Apr. 24, 2020), https://www.bbc.com/news/world-us-canada-52407177 [perma.cc/FMC6-JEHL]; Allyson Chiu et al., *Trump Claims Controversial Comment About Injecting Disinfectants Was 'Sarcastic'*, WASH. POST (Apr. 24, 2020), https://www.washingtonpost.com/nation/2020/04/24/disinfectant-injection-coronavirus-trump/ [perma.cc/V9QP-ZTNB]; Dartunorro Clark, *Trump Suggests 'Injection' of Disinfectant to Beat Coronavirus and 'Clean' the Lungs*, NBC NEWS (Apr. 23, 2020), https://www.nbcnews.com/politics/donald-trump/trump-suggests-injection-disinfectant-beat-coronavirus-clean-lungs-n1191216 [perma.cc/VUV2-CLGA]; Katie Rogers et al., *Trump's Suggestion that Disinfectants Could Be Used to Treat Coronavirus Prompts Aggressive Pushback*, N.Y. TIMES (Apr. 24, 2020), https://www.nytimes.com/2020/04/24/us/politics/trump-inject-disinfectant-bleach-coronavirus.html [perma.cc/CX3C-VH2Y].

Indeed, the disease and its potentially fatal consequences are now better understood. In our review of the scientific literature on the topic, a report published in *Science* compellingly captures the gravity of the disease and how it "rampage[s] through the body."[23] Ongoing research and information about COVID-19 make clear that past and present claims attempting to downplay the virus and inhibit a strong government response to protect the public health were misinformed, misleading, and misplaced.

COVID-19 is an attacker. It invades the nose and throat, embedding in the lining of the nose. Once inside the cells, the virus "hijacks the cell's machinery, making myriad copies of itself and invading new cells."[24] The virus rapidly multiplies after lodging within the body, causing dry throat, fever, body and head aches, and loss of taste of smell, among a host of other symptoms that evolve as the virus mutates.[25] If the virus is not stopped at this stage by a strong immunological response, it travels "to attack the lungs, where it can turn deadly."[26] The process shares a pattern and pathology with pneumonia and "its corresponding symptoms: coughing; fever; and rapid, shallow respiration."[27] More severe cases are plagued by acute respiratory distress syndrome (ARDS), when oxygen levels in the blood dramatically decrease, leading to breathing difficulties and leaving the lungs "riddled with white opacities where black space—air—should be."[28] At this stage, a patient's best hope for survival requires placement on a ventilator, which may not always be available.[29] Without such support, autopsies show that the virus invades lung cells, damages the heart, affects blood clotting, and ultimately causes organ failure.[30]

COVID-19 affected large swaths of the population, but it also revealed underlying and preexisting social and healthcare inequalities

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[23] Wadman et al., *supra* note 21.

[24] *Id.* at 357.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *ARDS Treatment and Recovery*, AM. LUNG ASS'N, https://www.lung.org/lung-health-diseases/lung-disease-lookup/ards/ards-treatment-and-recovery [perma.cc/T7E4-ZNCK] (last updated Oct. 23, 2024) ("All patients with ARDS will require extra oxygen. Oxygen alone is usually not enough, and high levels of oxygen can also injure the lung. A ventilator is a machine used to open airspaces that have shut down and help with the work of breathing."). During the pandemic, ventilator shortages plagued many healthcare institutions. *See, e.g.*, Paramjit Sandhu et al., *Emergency Department and Intensive Care Unit Overcrowding and Ventilator Shortages in US Hospitals During the COVID-19 Pandemic, 2020–2021*, 137 PUB. HEALTH REPS. 796, 796–97 (2022) ("A massive increase in patient demand led to shortages of key hospital resources, including . . . ventilators in intensive care units (ICUs) and emergency departments (EDs) needed to care for critically ill patients.").

[30] Wadman et al., *supra* note 21, at 357.

forged along patterns of race and socioeconomic status. Communities of color suffered a disproportionate burden of COVID-19 cases and deaths.[31] Dating back to 2022, "[t]otal cumulative data show Black, Hispanic, American Indian or Alaska Native (AIAN), and Native Hawaiian or Other Pacific Islander (NHOPI) people have experienced higher rates of COVID-19 cases and deaths compared to White people when data are adjusted to account for differences in age by race and ethnicity."[32] Ongoing assessment of COVID-19's health impacts by race and ethnicity remain "important for both identifying and addressing disparities and preventing against further widening of disparities in health going forward."[33] This is true because even "[w]hile disparities in cases and deaths have narrowed and widened over time, the underlying structural inequities in health and health care and social and economic factors that placed people of color at increased risk at the outset of the pandemic remain."[34] In other words, populations that bear a disproportionate incidence of the virus continue to bear greater post-COVID-19 burdens and "remain at increased risk" as the virus continues to spread and mutate.[35]

Our concern relates not only to the racial disparities associated with COVID-19 and the increased risks of infection among communities of color, but also to government attentiveness and response, or lack thereof. These concerns are amplified given radical shifts in the second Trump Administration, such as drastic funding cuts for research programs; the withholding of funds for government-based programs; the punitive targeting of grants that supported the study of epidemiological trends in healthcare along the lines of sex, gender, and race; and the withdrawal from international collaborations such as with the World Health Organization (WHO).[36] These shifts raise questions

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[31] Latoya Hill & Samantha Artiga, *COVID-19 Cases and Deaths by Race/Ethnicity: Current Data and Changes Over Time*, KFF (Aug. 22, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-cases-and-deaths-by-race-ethnicity-current-data-and-changes-over-time/ [perma.cc/58PM-79HJ].

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*; *see also* Kelli N. O'Laughlin et al., *Ethnic and Racial Differences in Self-Reported Symptoms, Health Status, Activity Level, and Missed Work at 3 and 6 Months Following SARS-CoV-2 Infection*, FRONTIERS PUB. HEALTH, Jan. 30, 2024, at 1; Brian Glassman, *Hispanic, Black Adults More Likely to Report Long COVID-19 Symptoms*, U.S. CENSUS BUREAU (May 1, 2023), https://www.census.gov/library/stories/2023/05/long-covid-19-symptoms-reported.html [perma.cc/DMF2-UFTR].

[36] *See, e.g.*, Withdrawing the United States from the World Health Organization, 90 Fed. Reg. 8361 (Jan. 29, 2025); Sarah Owermohle, *Trump's Diversity Purge Freezes Hundreds of Millions in Medical Research at Universities Across the Country*, CNN (May 8, 2025), https://www.cnn.com/2025/05/08/politics/universities-medical-research-funding-frozen-trump-diversity-purge [perma.cc/FG6H-8CYQ] ("Starting in February, the US National Institutes of Health terminated roughly 780 research grants that referenced equity, racial disparities, minority health, LGBTQ

about who might be prioritized in the wake of a new public health emergency. What remains clear, however, is that the past, present, and emerging data summarized in this Part indicate that attempts to downplay or even erase the reality of the havoc wrecked by COVID-19, often for political gain, are misinformed, misleading, and harmful to U.S. public health.

B. Taking COVID-19 Variants and Future Threats Seriously

Even after widespread surges of COVID-19 in the United States dissipated, threats continued—and remain to this day—as new variants emerge. Today, over four thousand variants of SARS-CoV-2 "have been identified . . . since the beginning of the pandemic."[37] The variants or mutations have emerged throughout the globe and spread to other nations, raising concerns about transmissibility and the formation of antibodies to stem infection. Variants reaching the United States have spread from the United Kingdom, Brazil, South Africa, India, and other nations.[38] The global nature of the virus makes clear that combating its spread requires world leaders to "collaborate to build a global network of pathogen sequencing surveillance and diagnostic infrastructure."[39]

Yet despite the urgency of political cooperation to combat global public health concerns like COVID-19, bird flu, and other emerging threats, Trump announced the U.S. withdrawal from the WHO as soon as he took office for a second term in January 2025—a repeat from his first term in office.[40] For scholars of global health, this was a distressing mistake, particularly due to the risk that another global pandemic

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populations and Covid-19."); Mike Stobbe, *CDC Ordered to Stop Working with WHO Immediately, Upending Expectations of an Extended Withdrawal*, AP NEWS (Jan. 27, 2025), https://apnews.com/article/cdc-who-trump-548cf18b1c409c7d22e17311ccdfe1f6 [perma.cc/K3VD-VS3M] (reporting that John Nkengasong, a CDC official, sent a memo to senior leaders at CDC "telling them that all staff who work with the WHO must immediately stop their collaborations and 'await further guidance'").

[37] Ronak Rashedi et al., *Delta Variant: The New Challenge of COVID-19 Pandemic, An Overview of Epidemiological, Clinical, and Immune Characteristics*, ACTA BIOMEDICA, Mar. 2022, at 1, 2.

[38] *Id.* at 2.

[39] Press Release, Am. Soc'y for Microbiology, Omicron Variant Reiterates Need for Global Leadership and Genomic Surveillance to Contain COVID-19 Pandemic (Nov. 30, 2021), http://asm.org/press-releases/2021/november/omicron-variant-reiterates-need-for-global-leaders [perma.cc/FW7F-FQW8].

[40] Stefano Bertozzi, *U.S. Withdrawal from WHO Could Bring Tragedy at Home and Abroad*, BERKELEY PUB. HEALTH (Jan. 24, 2025), https://publichealth.berkeley.edu/news-media/opinion/withdrawal-from-who-could-bring-tragedy [perma.cc/87GJ-KP5K] (noting that "[t]he international agency, part of the United Nations, was founded in 1948 and includes 194 countries working together to fight the world's toughest public health problems. It is the cornerstone of global health efforts, with a multinational staff fighting both communicable diseases—like COVID-19, Zika, and HIV—and chronic conditions, such as heart disease, diabetes, and cancer").

might arise in the coming years.[41] As explained by Dr. Stefano Bertozzi, former dean and current professor of health policy and management at UC Berkeley School of Public Health, the "risks of leaving the international health organization" are catastrophic because "there is no way that you can isolate yourself from the world and be safe from the many health threats that don't respect borders—infectious diseases being just one of those."[42]

Deaths associated with the coronavirus are staggering and continue to unfold as new variants create lingering morbidities and chronic conditions. Researchers at Yale Medicine report that "one thing we know for sure about SARS-CoV-2, the virus that causes COVID-19, is that it is changing constantly."[43] In fact, "[s]ince the beginning of the pandemic, we've seen a number of prominent variants."[44] Variants continue to be efficient travelers, emerging in one nation and landing in another. As such, "[a]lthough new variants are an expected part of the evolution of viruses, monitoring each one that surfaces is essential" to national and global preparedness.[45] The trouble is, if lawmakers dismissed the seriousness of coronavirus during the peak of the first outbreak, are they responding or even attentive to the current variants, let alone new or reemerging infectious diseases? These concerns are particularly salient "if a new variant is more aggressive, highly transmissible, vaccine-resistant, able to cause more severe disease—or all of the above, compared with the original strain of the virus."[46]

The troubling death tolls associated with the coronavirus and the partisanship in responding to the pandemic bring to light two interrelated issues elaborated upon in later sections of this Article. First, they expose questions related to capacity, compassion, and competency in American leadership—from the federal government down to local officials. The failure to heed international warnings and develop effective viral test kits in December 2019 and January 2020 highlights serious weaknesses in pandemic preparedness and American leadership.[47] Hasty and imprudent political rhetoric in February and

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[41] *Id.*

[42] *Id.* ("Anything we do that diminishes our ability to not only collaborate, but collaborate efficiently with countries all over the world—regardless of whether we agree with them politically—to stop global health threats, is really important.")

[43] Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the Coronavirus Variants*, YALE MED. (Sept. 1, 2023), https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron [perma.cc/W9S7-WNYW].

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See, e.g.*, Allison M. Whelan, *Executive Capture of Agency Decision Making*, 75 VAND. L. REV. 1787, 1834–35 (2022) (discussing early failures and missteps in the development of diagnostic tests for COVID-19).

March 2020, comparing COVID-19 to the seasonal flu, was not only inaccurate and misguided, but also likely contributed to a sense of false security among Americans, some of whom came to believe the virus was no more infectious and no greater a threat than the seasonal flu. Sadly, this view endures not only among some Americans, but politicians responsible for public health and safety.

Second, fundamental questions of constitutional law have emerged, as discussed further in Part V. COVID-19 brought to the forefront a national debate related to the interaction between constitutional rights, state police powers, and federalism—debates which continue unabated. Namely, what are the *limits* of government action during a pandemic? Conversely, what are the *obligations*, if any, of governments during public health emergencies?

III. COVID-19 AND THE POLITICAL STORM

The devastation wreaked by COVID-19 all occurred during a broader political storm plagued by bungled government messaging, misinformation, and disinformation. The early months of the COVID-19 pandemic in the United States coincided with the beginning of a contentious presidential campaign, widespread racial unrest, and increasing political polarization.[48] This political storm worsened the pandemic, aggravated its consequences, and affected the government and public response to the pandemic. Using COVID-19 as a case study, this Part illuminates how in times of public health emergencies and other national or global crises, those in positions of power may abuse their authority through unnecessary and counterproductive politicization. In turn, such politicization impacts the government's ability or willingness to impose, as well as the public's willingness to abide by, measures to mitigate the spread of disease. This Part makes clear that discussions must continue to clarify and cement the government's rightful authorities and responsibilities to the public during public health emergencies. Our country's ability to survive future public health threats—which are a matter of when, not if—depends upon it.

A. Political Chaos at the Federal Level

As the virus emerged at the beginning of 2020, the Trump Administration's initial response set the United States on a dangerous path. Politicization of the public health emergency and government

[48] *United States Election 2020 – A Contentious Election in an Unusual Year*, SOLACE GLOB. (Oct. 20, 2020), https://www.solaceglobal.com/report/united-states-election-2020-a-contentious-election-in-an-unusual-year/ [perma.cc/3C6G-VKK3].

infighting engendered counterproductive public distrust in the government, as well as in experts in science, medicine, and public health.[49] Examples are many: in the early months of the pandemic, the Trump Administration engaged in a pressure campaign against the U.S. Food and Drug Administration (FDA), urging it to authorize unproven and even unsafe treatments; prohibited the Centers for Disease Control (CDC) from communicating transparently with the American public about how to slow the spread, such as to provide guidance about wearing masks; downplayed case numbers and deaths; and implemented other politically-motivated policies—such as instructing the CDC to alter its guidance on testing in an attempt to reduce documented cases—despite disagreement from expert public health officials.[50]

Yet even while the Trump Administration at times failed to act, it also sought to utilize the public health emergency to justify interference

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[49] For a thorough discussion of the Trump and Biden Administration's interference with federal health agency responses during the first two years of the COVID-19 pandemic, see Whelan, *supra* note 47.

[50] Press Release, Select Subcomm. on the Coronavirus Crisis, At Hearing, GAO and Experts Detail Trump Administration's Unprecedented Political Interference in Coronavirus Response (Apr. 29, 2022), https://coronavirus-democrats-oversight.house.gov/news/press-releases/hearing-gao-and-experts-detail-trump-administration-s-unprecedented-political [perma.cc/65S3-KVJB] (discussing the Trump Administration's efforts to interfere with the COVID-19 response); Press Release, Select Subcomm. on the Coronavirus Crisis, Clyburn Demands Answers from Redfield on Trump Administration Officials' Interference with CDC's Pandemic Response (Nov. 12, 2021), https://coronavirus-democrats-oversight.house.gov/news/press-releases/clyburn-demands-answers-redfield-trump-administration-officials-interference-cdc [perma.cc/Y6C7-RUAS] (detailing the Trump Administration's prevention of CDC public briefings); *The Trump Administration's Pattern of Political Interference in the Nation's Coronavirus Response*, H. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS (July 26, 2021), https://www.congress.gov/117/meeting/house/114552/documents/HHRG-117-VC00-20220330-SD005.pdf [perma.cc/F65L-MB9S] (describing how the Trump Administration altered the CDC testing guidelines); *Excerpts from Transcribed Interview of Dr. Robert Redfield*, H. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS (Apr. 29, 2022), https://coronavirus-democrats-oversight.house.gov/sites/evo-subsites/coronavirus-democrats-oversight.house.gov/files/Redfield%20TI%20excerpts%20final.pdf [perma.cc/SKN8-8FCK] (detailing the Trump Administration's refusal to allow CDC briefings); Ryan Chatelain, *Pandemic Officials Say Trump Administration Marginalized Them, Interfered, Could Have Prevented Many Deaths*, SPECTRUM NEWS, https://spectrumlocalnews.com/us/national/health/2021/03/29/pandemic-officials-say-trump-administration-marginalized-them--interfered--could-have-prevented-many-deaths [perma.cc/9PTL-SFC4] (last updated Mar. 30, 2021) ("Brett Giroir, the nation's coronavirus testing czar, admitted the administration repeatedly lied to the public in March 2020 when it said anyone who wanted a test could get one."); Apoorva Mandavilli, *C.D.C. Testing Guidance Was Published Against Scientists' Objections*, N.Y. TIMES (Sept. 17, 2020), https://www.nytimes.com/2020/09/17/health/coronavirus-testing-cdc.html [perma.cc/2VFD-C638] ("Some experts also said the recommendation appeared to be motivated by a political impetus to make the number of confirmed cases look smaller than it is."). For examples involving the FDA specifically, see Whelan, *supra* note 47, at 1834–51; and *A "Knife Fight" with the FDA: The Trump White House's Relentless Attacks on FDA's Coronavirus Response*, H. SELECT SUBCOMM. ON THE CORONAVIRUS (Aug. 2022) [hereinafter *A "Knife Fight" with the FDA*], https://coronavirus-democrats-oversight.house.gov/sites/evo-subsites/coronavirus-democrats-oversight.house.gov/files/2022.08.24%20The%20Trump%20White%20House%E2%80%99s%20Relentless%20Attacks%20on%20FDA%E2%80%99s%20Coronavirus%20Response.pdf [perma.cc/C525-JKDM].

with federal agencies and to advance other controversial policies, such as crackdowns on immigration. As one attorney explained:

> President Donald Trump has been using the epidemic to try to retroactively legitimize unrelated immigration policies. The White House has elevated on its official web page an article from a conservative tabloid, crowing that "150,000 illegal immigrants from 72 nations with cases of the coronavirus have been apprehended or deemed inadmissible from entering the United States since November." Trump has also repeatedly tried to justify the continued construction of a border wall on the basis of coronavirus, despite the assessment of his own CDC director that a border wall will do nothing to stop spread of the disease. And Trump has sought to whip up anti-Chinese sentiment by referring to the coronavirus as the "Chinese virus," again in contravention of the advice of the CDC. This framing has undoubtedly contributed to a spate of racially motivated incidents against persons of Asian ethnicity in the United States.[51]

These, and many other examples from the beginning of the COVID-19 pandemic, highlight how the federal government's response was marred by political chaos and missteps ranging from underuse, misuse, and overuse of various legal authorities triggered during public health emergencies.[52] As we later argue, appropriate use of these authorities during public health emergencies "can help facilitate a coordinated and efficient government response;" yet, "when taken too far," can give rise to "lasting harms to public health" and civil liberties.[53]

And while some of the more egregious failures and abuses emerged from the Trump Administration, they are not isolated to one political party. On the contrary, both the Trump and Biden Administrations exacerbated the politicization of an international public health emergency.[54] Throughout the pandemic, claims about treatments and

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[51] Andrew Boyle, *Keeping an Eye on the Civil Liberties Impact of Trump's Coronavirus Response*, JUST SEC. (Mar. 26, 2020), https://www.justsecurity.org/69358/keeping-an-eye-on-the-civil-liberties-impact-of-trumps-coronavirus-response/ [perma.cc/X5U2-VD7W].

[52] For examples and brief explanation of such emergency powers and when they become available, see *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (Dec. 5, 2018), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [perma.cc/RY3E-SXPY] (last updated July 1, 2025). According to the Brennan Center for Justice, 137 statutory powers become available to the president when the president declares a national emergency, with an additional 13 statutory powers becoming available when Congress declares a national emergency. *Id.*

[53] Whelan, *supra* note 47, at 1834.

[54] *See id.* at 1847–50 for examples of the Biden Administration's missteps with respect to COVID-19 vaccine policies.

preventions for COVID-19, many of which were not backed up by reliable scientific evidence, became a form of political opportunism for both parties.[55]

As a prime example, consider the development and roll-out of vaccines. Vaccines are a key tool to mitigate the spread and health consequences of viruses. Both Republicans and Democrats sought to capitalize on the development, rollout, and uptake of COVID-19 vaccines to their political benefit. This resulted in the further politicization of vaccines in ways that ultimately deepened existing divides between pro-vaccine and anti-vaccine groups.

Throughout the vaccine development process, President Trump turned to Twitter (now X) to pressure the FDA to make the vaccines available and accuse the Agency of delaying the authorization of vaccines for political reasons, such as until after the 2020 election.[56] In addition to President Trump's overt pressure, he also exerted covert pressure in an attempt to make good on his promise to the public that a vaccine might be available by October or November 2020.[57] For

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[55] *See, e.g.*, *id.* at 1845–51 (discussing controversial vaccine-related decisions of both the Trump and Biden Administration); Fabio Silvia Taccone et al., *From Hydroxychloroquine to Ivermectin: How Unproven "Cures" Can Go Viral*, 28 CLINICAL MICROBIOLOGY & INFECTION 472, 472–73 (2022) (discussing the hydroxychloroquine and ivermectin controversies); *Ivermectin and COVID-19*, FDA, https://www.fda.gov/consumers/consumer-updates/ivermectin-and-covid-19 [perma.cc/DL4L-SQV7] (last updated Apr. 4, 2024) (stating that "[t]he FDA has determined that currently available clinical trial data do not demonstrative that ivermectin is effective against [COVID-19] in humans," that "the safety of these products is not known," and that "[t]aking large doses of ivermectin can be dangerous").

[56] *See, e.g.*, Donald Trump (@realDonaldTrump), TWITTER (Dec. 11, 2020, 6:11 AM), https://x.com/realDonaldTrump/status/1337369403638362114 [perma.cc/4FHN-VG7J] (calling the FDA a "big, old, slow turtle" and telling it to "[g]et the dam vaccines out NOW"); Donald Trump (@realDonaldTrump), TWITTER (Nov. 30, 2020, 8:46 AM), https://x.com/realDonaldTrump/status/1333422192261013504 [perma.cc/F4C3-8EWL] (directing the FDA to act quickly after Moderna applied for an Emergency Use Authorization); Donald Trump (@realDonaldTrump), TWITTER (Sept. 23, 2020, 7:08 AM), https://x.com/realDonaldTrump/status/1308740116643491842 [perma.cc/2CQN-FF4T] (telling the FDA to "move quickly"); Donald Trump (@realDonaldTrump), TWITTER (Nov. 9, 2020, 6:43 PM), https://x.com/realDonaldTrump/status/1325962203346972678 [perma.cc/SE8R-69G6] ("The @US_FDA and the Democrats didn't want to have me get a Vaccine WIN, prior to the election, so instead it came out five days later – As I've said all along!"); Donald Trump (@realDonaldTrump), TWITTER (Nov. 9, 2020, 6:40 PM), https://x.com/realDonaldTrump/status/1325961445062938625 [perma.cc/XDK7-HS28] ("As I have long said, @Pfizer and the others would only announce a Vaccine after the Election, because they didn't have the courage to do it before. Likewise, the @US_FDA should have announced it earlier, not for political purposes, but for saving lives!"); Donald Trump (@realDonaldTrump), TWITTER (Oct. 6, 2020, 9:09 PM), https://x.com/realDonaldTrump/status/1313647605134614529 [perma.cc/MK73-FU2F] ("New FDA Rules make it more difficult for them to speed up vaccines for approval before Election Day. Just another political hit job! @SteveFDA"); Donald Trump (@realDonaldTrump), TWITTER (Aug. 22, 2020, 6:49 AM), https://x.com/realDonaldTrump/status/1297138862108663808 [perma.cc/M8ZP-JCY2] ("The deep state, or whoever, over at the FDA is making it very difficult for drug companies to get people in order to test the vaccines and therapeutics. Obviously, they are hoping to delay the answer until after November 3rd.").

[57] *See* Sarah Owermohle, *Trump Contradicts Health Officials, Says 'Probably' a Covid-19 Vaccine in October*, POLITICO (Sept. 4, 2020), https://www.politico.com/news/2020/09/04/trump-

example, the *New York Times* reported that Jared Kushner, President Trump's senior advisor, pressured Alex Azar, then Secretary of the Department of Health and Human Services (HHS), to accelerate vaccine development and insisted that a vaccine be made available before Election Day 2020.[58] Reports also suggest that Secretary Azar considered firing Dr. Stephen Hahn, then Commissioner of the FDA, after Dr. Hahn "defied President Trump and Secretary Azar by supporting stricter standards for vaccine [Emergency Use Authorizations] and for 'aggressively and publicly push[ing] back on the idea of approving a vaccine prematurely.'" [59] Dr. Hahn would later acknowledge that the FDA faced "a substantial amount of pressure" from the White House, stating that he "heard loud and clear from the White House—President Trump and others—that they wanted FDA to move faster."[60]

After a vaccine was authorized for emergency use in December 2020, President Trump sought to take credit and capitalize on the authorization for political gain. He claimed: "[*M*]*y Administration and I* developed a vaccine many years ahead of wildest expectations."[61] He urged Americans to not let President-elect Biden "take credit for the vaccines because the vaccines were *me*, and *I pushed people* harder than they've ever been pushed before."[62] After his first presidential term

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coronavirus-vaccine-october-409248 [perma.cc/ZWD4-65MS] (reporting that President Trump "again suggested" that a vaccine would be available by the end of the year, and would "probably" be available in October). Trump's claims contradicted statements by some experts, including Moncef Slaoui, the scientific lead of "Operation Warp Speed," the federal effort to accelerate the development of COVID-19 vaccines. At the time of Trump's claims, Slaoui reported that the FDA was "very unlikely" to authorize a vaccine by early November. *Id. See also* U.S. GOV'T ACCOUNTABILITY OFF., GAO 21-319, OPERATION WARP SPEED: ACCELERATED COVID-19 VACCINE DEVELOPMENT STATUS AND EFFORTS TO ADDRESS MANUFACTURING CHALLENGES (2021) (explaining Operation Warp Speed).

[58] Sharon LaFraniere et al., *Scientists Worry About Political Influence Over Coronavirus Vaccine Project*, N.Y. TIMES (Aug. 2, 2020), https://www.nytimes.com/2020/08/02/us/politics/coronavirus-vaccine.html [perma.cc/L5TU-246B].

[59] Whelan, *supra* note 47, at 1845.

[60] Sarah Owermohle, *Outgoing FDA Chief: The Agency Fought 'Substantial' Pressure Under Trump*, POLITICO (Jan. 19, 2021), https://www.politico.com/news/2021/01/19/fda-trump-pressure-coronavirus-vaccine-460402 [perma.cc/V2V6-7LAK]; *see also A "Knife Fight" with the FDA*, *supra* note 50 (describing testimony of Dr. Hahn and other evidence suggesting inappropriate pressure on the FDA to influence decisions relating to COVID-19 treatments and vaccines); *cf.* Deidre McPhillips & Devan Cole, *Outgoing NIH Director Says Trump and Other Republicans Pressured Him to Endorse Unproven Covid-19 Remedies and to Fire Fauci*, CNN, (https://www.cnn.com/2021/12/19/politics/francis-collins-trump-political-pressure-republicans/index.html [perma.cc/8VBE-LPQJ] (last updated Dec. 19, 2021) (noting that the outgoing NIH director reported facing political pressure to endorse unproven COVID-19 remedies and to fire Fauci).

[61] Statement on the President's Intention To Sign the Consolidated Appropriations Act, 2021, 2020 DAILY COMP. PRES. DOC. 908 (Dec. 27, 2020) (emphasis added).

[62] Remarks During a Video Teleconference With United States Servicemembers and Exchange With Reporters, 2020 DAILY COMP. PRES. DOC. 864 (Nov. 26, 2020) (emphasis added); *see also Statement by Donald J. Trump, 45th President of the United States of America*, OFF.

ended, he continued to claim he did not get the credit he "deserved" for his management of the pandemic.[63]

When President Biden took office in January 2021, the controversies and mismanaged federal response to the pandemic did not end, and vaccines again became tools in the Administration's attempt to curry political and public favor. For example, public health experts and others questioned the Biden Administration's August 2021 announcement of its plan to offer booster shots to all Americans beginning in September 2021.[64] Despite stating that the availability of booster shots was subject to the FDA's and CDC's independent evaluations, his public statements "created a clear public expectation that boosters would be available in September 2021, and the decision to make the announcement prior to the FDA's and CDC's reviews and recommendations raised concerns about the potential influence on the agencies' decisions."[65]

As evidence of the controversial nature of President Biden's statements, two high-level vaccine officials announced their retirements shortly after they were made—Dr. Marion Gruber, Director of the FDA's Office of Vaccine Research and Review (OVRR), and Dr. Philip Krause, Deputy Director of OVRR.[66] Their decisions to retire were reportedly due in part to "frustration with the Biden Administration's booster shot announcement and feeling that the Administration sidelined the FDA."[67] At the time of Biden's announcement, many questioned whether booster shots were truly needed and noted that things happened "in reverse—typically, the Administration's announcement would come after the FDA and CDC made their decisions."[68]

DONALD J. TRUMP (Mar. 11, 2021) (emphasis added), https://www.45office.com/news/statement-by-donald-j-trump-45th-president-of-the-united-states-of-america_3 [perma.cc/2C5J-VFA7] ("I hope everyone remembers when they're getting the COVID-19 (often referred to as the China Virus) Vaccine, that if I wasn't President, you wouldn't be getting that beautiful 'shot' for 5 years, at best, and probably wouldn't be getting it at all. I hope everyone remembers!").

[63] Sarah Fortinksy, *Trump: 'I Never Got . . . the Credit That I Deserved on COVID'*, HILL (Sept. 14, 2023), https://thehill.com/policy/healthcare/4204154-trump-i-never-got-the-credit-that-i-deserved-on-covid/ [perma.cc/G36G-KCJ5].

[64] Press Release, U.S. Food & Drug Admin., Joint Statement from HHS Public Health and Medical Experts on COVID-19 Booster Shots (Aug. 18, 2021), https://www.fda.gov/newsevents/press-announcements/joint-statement-hhs-public-health-and-medical-experts-covid-19-booster-shots [perma.cc/5SG4-ZNL].

[65] Whelan, *supra* note 47, at 1847.

[66] Zachary Brennan, *In a Major Blow to Vaccine Efforts, Senior FDA Leaders Stepping Down*, ENDPOINT NEWS, https://endpoints.news/breaking-in-a-major-blow-to-vaccine-efforts-senior-fda-leaders-stepping-down-report/ [perma.cc/26F4-E4T4] (last updated Sept. 1, 2021, 5:54 AM).

[67] Whelan, *supra* note 47, at 1848.

[68] *Id.*

The chaotic response to and politicization of the COVID-19 pandemic have long-lasting consequences, particularly for public trust in the government during times of public health emergencies, and on issues of public health generally. As Professor Allison Whelan explains, "[t]ensions between the Administration and government scientists, along with bungled messaging, further confused a public exasperated by a seemingly never-ending pandemic and entrenched skepticism amongst the vaccine hesitant." [69] These lasting consequences—including the government's and public's response to the pandemic and for vaccine acceptance generally—are further explored in Part IV.

B. COVID Denialism

Many scholars and commentators have noted the increasing politicization of health in the United States and its potentially deadly consequences. [70] During COVID-19 and beyond, President Trump demeaned public health experts, contradicted medical science, and downplayed the risks associated with the pandemic. He also helped sow the seeds of COVID-19 denialism, which influenced the public's trust in and adherence to federal and state actions to mitigate the spread of the virus. Just as we express concern for undue interference and misuse of federal authorities in times of emergencies, we are likewise troubled by the government's underuse of authorities where appropriate and necessary to promote and protect public health. In times of public health emergencies or other national crises, denial or skepticism can result in behaviors (or lack of behaviors, such as refusals to mask or isolate) that worsen the emergency at hand.[71]

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[69] *Id.* at 1849.

[70] *See, e.g.*, Valerie A. Yeager, *The Politicization of Public Health and the Impact on Health Officials and the Workforce: Charting a Path Forward*, 112 AM. J. PUB. HEALTH 734, 735 (2022) (noting the "recent politicization of public health protections"); Marianne Udow-Phillip, Peter D. Jackson & Marisa C. Eisenberg, *Public Health: From Politicization to a Path Forward*, 17 J. OF HOSP. MED. 665, 666 (commenting on how misinformation and politicization "undermine the aims of public health"); Jillian McKoy, *New Politics and Health Lab Aims to Depolarize Public Health*, BOS. UNIV. SCH. OF PUB. HEALTH (Feb. 7, 2025), https://www.bu.edu/sph/news/articles/2025/new-politics-and-health-lab-aims-to-depolarize-public-health/ [perma.cc/VG39-KX26] ("Over the past several years, we've observed a growing politicization of public health topics, with individuals increasingly making health decisions based on partisanship." (quoting Timothy Callaghan, associate professor of health law, policy, and management at Boston University)).

[71] *See, e.g.*, Sarah Denford et al., *Understanding Patterns of Adherence to COVID-19 Mitigation Measures: A Qualitative Interview Study*, 43 J. PUB. HEALTH 508, 513 (2021) ("In some situations, participants justified breaking social distancing rules because they did not consider themselves or their household to be vulnerable."); Mark Evans, *Public Trust in the Government's COVID Response is Slowly Eroding. Here's How to Get it Back on Track*, CONVERSATION (July 11, 2021), https://theconversation.com/public-trust-in-the-governments-covid-response-is-slowly-eroding-heres-how-to-get-it-back-on-track-163722 [perma.cc/EWW2-Q5V3] ("Public trust is critically important during the pandemic. Without it, the changes to public behaviour that are necessary to contain and ultimately prevent the spread of infection are slower and more difficult

In the first few months of the pandemic, the Trump Administration initially minimized the deadly severity of the virus, despite clear evidence to the contrary.[72] The following provides a non-exhaustive sampling of these early attempts to downplay the virus:

- January 22, 2020: On the same day that the CDC confirmed what it believed to be the first case of COVID-19 in the United States, President Trump stated: "We have it totally under control. It's one person coming in from China, and we have it under control. It's going to be just fine."[73]
- February 2, 2020: In an interview with Fox News, President Trump stated that "[w]e pretty much shut it down coming in from China."[74]
- February 10, 2020: At a campaign rally, President Trump stated that "by April, you know, in theory, when it gets a little warmer, it miraculously goes away. . . . I think it's going to all work out fine."[75]
- February 11, 2020: In an interview, Trump stated, "In our country, we only have, basically, 12 cases and most of those people are recovering and some cases fully recovered. So it's actually less."[76]
- February 24, 2020: On Twitter, Trump posted: "The Coronavirus is very much under control in the USA. We are in contact with everyone and all relevant countries. CDC & World Health have been working hard and very smart. Stock Market starting to look very good to me!"[77]
- February 27, 2020: During a meeting with Black leaders, at a time when U.S. health officials warned that the pandemic may last for some time, President Trump stated: "It's going to disappear. One day – it's like a miracle – it will disappear."[78]

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to achieve.").

[72] Parker & Stern, *supra* note 3, at 617 ("Once China informed the world of a disease outbreak on December 31, 2019, the Trump Administration's response was marked by downplaying the threat, inaction or partial measures, confusion, and inaccurate public statements. As a result, opportunities to slow the spread by facilitating a vigorous public health response of containment and suppression based on testing, contact tracing, and isolation were missed following the confirmation of the first US case on January 21, 2020.").

[73] Juana Summers, *Timeline: How Trump Has Downplayed the Coronavirus Pandemic*, NPR (Oct. 2, 2020), https://www.npr.org/sections/latest-updates-trump-covid-19-results/2020/10/02/919432383/how-trump-has-downplayed-the-coronavirus-pandemic [perma.cc/54CB-XQWT].

[74] Tamara Keith, *Timeline: What Trump has Said and Done About the Coronavirus,* NPR (Apr. 21, 2020), https://www.npr.org/2020/04/21/837348551/timeline-what-trump-has-said-and-done-about-the-coronavirus [perma.cc/L99D-DDKY].

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Summers, *supra* note 73.

- March 10, 2020: President Trump tells reporters at the U.S. Capitol that "we're prepared, and we're doing a great job with it. And it will go away. Just stay calm. It will go away."[79]
- March 11, 2020: During an Oval Office address, Trump stated that for "the vast majority of Americans, the risk is very, very low."[80] On the same day, Dr. Anthony Fauci, then Director of the National Institutes of Allergy and Infectious Diseases (NIAID) at the National Institutes of Health (NIH), told members of Congress that "bottom line, it's going to get worse."[81]
- April 15, 2020: During a task force meeting, as cases and deaths continued to climb, Trump said that "[w]e think some of the states can actually open up before the deadline of May 1," claiming that there were at least twenty states "in extremely good shape."[82]

In fact, in an interview on March 19, 2020, Trump said that he "wanted to always play it down" because he did not "want to create a panic."[83] Trump's claims belied reality. By the time of President Trump's statement on April 15, 2020, 637,974 cases and 34,304 deaths had been recorded in the United States.[84] His claims also contradicted those articulated by highly respected public health officials, including Dr. Fauci and Dr. Deborah Birx, the White House coronavirus task force coordinator.[85] Moreover, in an attempt to prevent "panic," Trump helped sow the seeds for further government and public denialism, inaction, and willingness to adhere to disease mitigation practices.

Troublingly, the COVID-19 pandemic gave rise to a new era of denialism and conspiracy theories.[86] COVID denialism and conspiracies

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[79] Keith, *supra* note 74.

[80] Summers, *supra* note 73.

[81] *Id.*

[82] Keith, *supra* note 74.

[83] *Id.*

[84] *Id.*

[85] *Id.* (showing conflicting statements).

[86] *See* Iwona Młoźniak et al., *Manifestation of Health Denialism in Attitudes Toward COVID-19 Vaccination: A Qualitative Study*, 11 VACCINES 1822, 1822 (2023) (noting that COVID-19 was "a subject of many denialistic opinions, from denying the existence of the epidemic challenge to claims that questioned the safety and effectiveness of the COVID-19 vaccines."). Denialism is not unique to COVID-19. On the contrary, denialism (or negationism) has emerged in response to a number of issues throughout history. The term "historical negationism" is thought to have been coined by French historian Henry Rousso in a study of the Vichy France regime to distinguish between historical revisionism and outright denial. TOMMY GUSTAFFSON, HISTORICAL MEDIA MEMORIES OF THE RWANDAN GENOCIDE: DOCUMENTARIES, FILMS, AND TELEVISION NEWS 167 (2024). Revisionism, which Rousso describes as "a normal phase in the evolution of historical scholarship," differs from denialism, which is a "system of thought, an ideology, and not a scientific or even critical approach to the subject." HENRY ROUSSO, THE VICHY SYNDROME: HISTORY AND MEMORY IN FRANCE SINCE 1944, at 151 (Arthur Goldhammer trans., 1991). Negationism is

have taken various forms. These include outright denial that the virus was real; belief that the fatality rate or case numbers were exaggerated; belief in conspiracy theories about the origins of the virus; the spread of false information about the development, safety, and effectiveness of drugs and vaccines; and denial of "long COVID."[87] According to one mid-2020 survey, four percent and nine percent of American respondents believed that COVID-19 was "definitely" or "probably" "[a] myth created by some powerful forces and . . . does not really exist," respectively.[88]

Less extreme, but more common, forms of COVID denialism and conspiracism include (1) that the fatality, severity, and pervasiveness of the virus were exaggerated; [89] (2) beliefs about the origins or government involvement in the disease; [90] and (3) skepticism about mechanisms to slow the spread of the virus, including masking and vaccines.[91] These forms of conspiracism were more widespread and thus

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common after mass crimes or situations involving mass casualties and generally consists of "denying scientifically proven historical facts by deliberately concealing them and spreading misleading information." Agnieszka Bieńczyk-Missal, *The Causes and Consequences of Negationism*, *in* RESPONSIBILITY FOR NEGATION OF INTERNATIONAL CRIMES 19, 19 (Marta Mazur ed., Mateusz Matuszczak trans., 2020). Denialism often involves "the employment of rhetorical tactics to give the appearance of . . . legitimate debate, when in actuality there is none." Mark Hoofnagle & Chris Hoofnagle, *What is Denialism?*, DENIALISM BLOG (Apr. 30, 2007), https://www.denialism.com/about/ [perma.cc/LD95-7TXD]. "Science" and "health" denialism represent subsets of denialism, and are "characterized by the refusal to accept existing consensus and available evidence. Młoźniak et al., *supra*, at 1.

[87] *See, e.g.*, *Globalism 2020*, YOUGOV CAMBRIDGE, https://docs.cdn.yougov.com/msvke1lg9d/Globalism2020%20Guardian%20Conspiracy%20Theories.pdf [perma.cc/9S22-4W4V]; Młoźniak et al., *supra* note 86, at 11; Maureen Tkacik, *Why is NIH Perpetuating Long COVID Denial?*, AM. PROSPECT (June 6, 2024), https://prospect.org/health/2024-06-06-nih-perpetuating-long-covid-denial/ [perma.cc/QY3Z-WUCK] (quoting an emergency medicine physician who said that the "consensus" among those on an NIH panel on long COVID was that the condition was "psychological"); Ed Yong, *Long COVID is Being Erased—Again*, ATLANTIC (Apr. 19, 2023), https://www.theatlantic.com/health/archive/2023/04/long-covid-symptoms-invisible-disability-chronic-illness/673773/ [perma.cc/8TTW-JYSY].

[88] *Globalism 2020*, *supra* note 87.

[89] In a 2020 global survey, when presented with the statement: "the fatality rate of Coronavirus has been deliberately and greatly exaggerated," seventeen percent of American respondents said the statement was "definitely true" and twenty-one percent said the statement was "probably true." *Id.*

[90] In a 2020 global survey, when presented with the statement: "Coronavirus was deliberately created and spread by some powerful forces in the business world," nine percent of American respondents said the statement was "definitely true" and nineteen percent said it was "probably true." *Id.* When presented with the statement, "Coronavirus was deliberately created and spread by the U.S. Government," six percent of American respondents said the statement was "definitely true" and eleven percent said it was "probably true." *Id.* When presented with the statement, "Coronavirus was deliberately created and spread by the Chinese Government," thirteen percent of American respondents said the statement was "definitely true" and twenty-four percent said it was "probably true." *Id.* When presented with the statement, "[t]he symptoms of Coronavirus are caused or enhanced by the direct, physical effects on the human body of 'fifth generation' wireless communications networks, also known as '5G,'" six percent of American respondents said the statement was "definitely true" and nine percent said it was "probably true." *Id.*

[91] For example, in a 2020 global survey, when presented with the statement: "Coronavirus can be cured by drinking water to flush the virus down the throat and into the stomach, where it

potentially more harmful than outright denial of the existence of the disease. The culture of denial and conspiracy at the highest levels trickled down to the general public, with serious implications for the public's response to the pandemic.

President Trump, and others, [92] were particularly guilty of furthering the narrative that the fatality, severity, and pervasiveness of the virus were exaggerated—during the early months of the pandemic, as discussed *supra*.[93] The culture of denial and conspiracy at the highest levels trickled down to the general public, with serious implications for the public's response to the pandemic. Unsurprisingly, when individuals were skeptical about the seriousness or pervasiveness of the pandemic, they were more likely to reject public health mitigation strategies such as masking, social distancing, and vaccine uptake.[94]

Denialism and conspiracism about COVID-19's origins, including government involvement in its origins or spread, emerged early in the pandemic and continue today. A number of theories have been promulgated, some more sensationalistic than others. And while the origins of the virus may be impossible to ever "prove" with certainty,[95]

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will be killed by stomach acid," four percent of American respondents said the statement was "definitely true" and nine percent said it was "probably true." *Globalism 2020*, *supra* note 87. *See also* Jill Stachowski et al., *Personal Protective Beliefs and Behaviors During the COVID-19 Pandemic at a Large, Multi-Campus Public University in Pennsylvania: A Cross-Sectional Survey*, MEDRXIV PREPRINT (Sept. 24, 2024), https://doi.org/10.1101/2024.09.23.24314227 [perma.cc/5WBH-ECT9] (reporting the results of a study evaluating beliefs about and occurrence of face masking, social distancing, and handwashing behaviors, including that twenty-one percent and 17.5 percent of respondents did not feel that facemasks or social distancing, respectively, prevented the transmission of COVID-19).

[92] Other leaders throughout the world were guilty of similar denialism. *See, e.g.*, The Conversation, *5 Leaders Who Mishandled the COVID-19 Pandemic*, U.S. NEWS & WORLD REP. (May 18, 2021), https://www.usnews.com/news/best-countries/articles/2021-05-18/5-leaders-who-badly-mishandled-the-covid-19-pandemic [perma.cc/YUZ7-UDEL].

[93] *See supra* text accompanying notes 70–82.

[94] *See, e.g.*, Denford, *supra* note 71, at 513 ("In some situations, participants justified breaking social distancing rules because they did not consider themselves or their household to be vulnerable."); *see generally* Rebecca Ferrer & William M. Klein, *Risk Perceptions and Health Behavior*, 5 CURRENT OP. PSYCH. 85, 88 (2015) (noting that some studies suggest that "unrealistic optimism [regarding risk level] yields lower motivation to engage in health protective behaviors . . . [and] has been linked to objective negative health outcomes"); Ferrer & Klein, *supra*, at 89 ("Health-related risk perceptions play an important role in motivating health behavior change"); Talia Morstead et al., *Perceived Threat and Coping Responses During the COVID-19 Pandemic: Prospective Associations with Vaccine Hesitancy*, 40 VACCINE 7586, 7586 (2022) ("[H]eightened perceived threat of disease generally increases one's willingness to take preventive action."); Paschal Sheeran et al., *Does Heightening Risk Appraisals Change People's Intentions and Behavior? A Meta-Analysis of Experimental Studies*, 140 PSYCH. BULL. 511, 529 (2014) (finding support for "the idea that risk appraisal has a causal role in changing behavior—interventions that were successful in heightening risk appraisals led to changes in subsequent intentions and behavior").

[95] Mun-Keat Looi, *Will We Ever Know Where COVID-19 Came From?*, BMJ (Sept. 9, 2024), ht tps://www.bmj.com/content/386/bmj.q1578 [perma.cc/5JB5-TPGE] ("The consensus among scientists is that, although a lab leak origin is possible, the scientific evidence points to a natural, zoonotic origin from wild animals."); Chad de Guzman, *Did COVID Originally Leak from a Chinese*

a number of theories promulgated by authority figures, social media influencers, and others have had important implications for trust in government and public health officials. Trust, or lack thereof, directly and indirectly affects the ability of the government to respond to current and future public health emergencies.[96]

Since the beginning of the pandemic, Trump and other governmental officials have been particularly keen to push the "Wuhan lab leak theory." Trump recently reignited this debate during his second presidential term by creating a new website declaring the lab leak as the "true origins" of COVID-19.[97] In fact, attempts to navigate to "Covid.gov," a federal website that previously shared information about vaccines, testing, and treatment for COVID-19,[98] instead lead to the new "WhiteHouse.gov" website titled "LAB LEAK: The True Origins of COVID-19."[99] The website further states that *The Proximal Origin of SARS-Cov-2*—a 2020 publication in *Nature Medicine*,[100] which concluded that "SARS-CoV-2 is not a laboratory construct or purposefully manipulated virus"[101]—"was prompted by Dr. Fauci to push the preferred narrative that COVID-19 originated naturally."[102] According to the website, "[b]y nearly all measures of science, if there was evidence of a natural origin it would have *already surfaced*. But it

Lab? Politics May Prevent Us Ever Knowing For Sure, TIME (Feb. 28, 2023), https://time.com/6258960/covid-19-origins-lab-leak-china-politics/ [perma.cc/M5S8-PWP3].

[96] Studies show the importance of trust in government and its impact on health behavior. Interestingly, however, the behaviors that such trust engenders can depend on the authority figures in charge. For example, during the first year of the pandemic, during which the Trump Administration was in charge of the federal government, trust in the federal government was associated with a *lower* likelihood of engaging in expert-recommended health behaviors. Elizabeth Suhay et al., *Americans' Trust in Government and Health Behaviors During the COVID-19 Pandemic*, 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 221, 222 (2022). In contrast, trust in state and local governments/health officials during that same time period was associated with a greater likelihood of engaging in expert-recommended health behaviors. *Id.* As the authors of this study note, "government advice is not always conducive to public health. In the United States, then President Donald Trump and some high-ranking Republican officials provided problematic advice to the public and undermined health experts. This raises the possibility that, in some instances, a high level of trust in government actors is in fact harmful to public health." *Id.*

[97] *Lab Leak: The True Origins of Covid-19*, WHITE HOUSE [hereinafter *Lab Leak*], https://www.whitehouse.gov/lab-leak-true-origins-of-covid-19/ [perma.cc/WQJ7-KRJT]; Benjamin Mueller, *On New Website, Trump Declares Lab Leak as 'True Origins' of Covid*, N.Y. TIMES (Apr. 18, 2025), https://www.nytimes.com/2025/04/18/science/trump-covid-website-lab-leak.html [perma.cc/V6WG-BFVU].

[98] *Trump Turns a COVID Information Website into a Promotion Page for the Lab Leak Theory*, AP NEWS (Apr. 18, 2025), https://apnews.com/article/trump-covid-origin-lab-leak-fauci-c8767c1e2c5698c845059ab7f0534ff7 [perma.cc/C4ST-FAND].

[99] *Lab Leak*, *supra* note 97.

[100] Kristian G. Anderson et al., *The Proximal Origin of SARS-CoV-2,* 26 NATURE MED. 450 (2020).

[101] *Id.* at 450.

[102] *Lab Leak*, *supra* note 97.

hasn't." [103] The website goes on to question the efficacy of social distancing, masking, and lockdowns.

The exact goal of the website is unclear, but its effect seems only to sow further political and social discord, rather than advance a constructive discussion and research to improve scientific understanding of the virus. Indeed, we do not deny that evidence has emerged over time strengthening the lab leak hypothesis. Instead, we take issue with the politicized and personalized nature of the attacks that have emerged from the discourse and debate over the origins of the virus. The tenor of the debate creates an environment ripe for distrust in government at a time when such trust remains imperative to slow the spread of COVID-19 and, potentially, emerging viruses in the future. Infighting and name-calling by those in positions of power only furthers the public divide.

Skepticism about mechanisms to slow the spread of the virus—such as masking, social distancing, and vaccines—was in part created and exacerbated by disbelief in the severity of the virus and belief of government involvement in its emergence or spread, both of which are correlated with an unwillingness to engage in behaviors to mitigate the spread of the virus. [104] Conspiracies, disbelief, and distrust in virus mitigation tactics were exacerbated by political turmoil and inconsistent government messaging. As discussed further in Part IV, vaccines have long been subject to skepticism and distrust, and the COVID-19 pandemic reignited and exacerbated vaccine skepticism, with lasting consequences not only for COVID, but many other vaccine-preventable diseases.

The denialism, conspiracies, and mismanaged government messaging that plagued the COVID-19 pandemic, much of which continues to this day, had a significant influence on the trajectory of the pandemic in the United States by impacting the government's willingness and ability to respond to the pandemic, and the public's willingness to adhere to government guidance. Importantly, the government's response to the virus left a lingering shadow of distrust that has important implications for the country's ability to prepare for and respond to future public health emergencies.

C. Medical Misinformation and The Politicization of Healthcare

As demonstrated in Part II, at the heart of the United States' response to COVID-19 exists a thick political tension and division

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[103] *Id.*

[104] *Cf.*, Morstead et al., *supra* note 94, at 7586 (noting that individuals who perceive a greater threat of disease generally have more willingness to take preventative measures).

regarding health misinformation and disinformation. Simply put, preventable and excessive deaths associated with COVID-19 were more likely in states governed by Republicans (i.e., "red" states). [105] Specifically, as one study showed, red states had higher COVID-19 infection rates and deaths in 2021 compared to those governed by Democrats (i.e., "blue" states).[106] This may have been, at least in part, attributable to the fact that red states implemented fewer political decisions to mitigate COVID-19 than Democrat-led blue states.[107]

The Hearing discussed above represents a case study that lays bare a significant political divide regarding whether, when, and how the government can act to protect its citizens.[108] Indeed, the staggering deaths associated with the virus seemed unimportant or largely irrelevant to Subcommittee members intent to cast preventative health measures such as masking, social distancing, and vaccination as unconstitutional assaults on individual liberties.[109] The stark realities regarding massive mortalities and morbidities associated with the coronavirus seemed extraneous and immaterial to the Hearing's partisan political agenda.

Members of the Subcommittee who organized the Hearing could reasonably be expected to know the staggering death tolls associated with the deadly virus—at least in relation to their local communities and states. And even while COVID-19 affected wide swaths of the U.S. population, chilling racial disparities emerged. For example, for individuals living on Native American reservations, on which close to half "do not have clean water or adequate sanitation,"[110] disparities in their COVID-19-related deaths emerged as the necessary precautions to prevent contracting the virus—such as handwashing—proved difficult without clean water. Alongside Black Americans, Indigenous Americans died at alarming rates from the virus.[111] As Professors Michele Goodwin and Erwin Chemerinsky explain in prior scholarship:

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[105] *See* C. Dominik Güss et. al., *The Politics of COVID-19: Differences Between U.S. Red and Blue States in COVID-19 Regulations and Deaths,* 5 HEALTH POL'Y OPEN 100107, Dec. 15, 2023, at 1, 1.

[106] *Id.*

[107] *Id.*

[108] *See supra* notes 4–9 and accompanying text.

[109] *Liberty, Tyranny, and Accountability Hearing Transcript*, *supra* note 4, at 1 ("Every level of government, Federal, State, and local, to some degree took part in this attack on the liberty of the American people. . . . [T]he effects of COVID-19 tyranny are permanent if we don't act to change them." (quoting Congressman Roy)).

[110] Brian Beach, *After No Clean Drinking Water for 4 Years, this Native American Tribe Wants More than Sympathy*, NPR (Oct. 23, 2023), https://www.kcur.org/2023-10-19/native-american-communities-struggle-water-access [perma.cc/3R8U-LE5U].

[111] *See* Elisabeth Gawthrop, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB. (Oct. 19, 2023), https://www.apmresearchlab.org/covid/deaths-by-race [perma.cc/5CYU-P3NN] (reporting that in the United States, as of September 2023, Indigenous

> To place [coronavirus] suffering in context, more Americans died during the first three months of the COVID-19 pandemic (over 100,000 by June 2020) than all the American deaths suffered during the Vietnam War; the fatalities of the 9/11 terrorist attacks; and the wars in Iraq and Afghanistan; as well as the deaths resulting from the 2009 H1N1 pandemic, Ebola, and the Zika virus—all combined.[112]

Thus, despite claims of being rooted in health and science, the Hearing lacked grounding in either. In criticizing the alleged "unchecked government overreach" that occurred in response to the pandemic,[113] there was no acknowledgment of basic medical literature stating the fact that "the lungs are ground zero" for coronavirus infections, that it "tears through organ systems from brain to blood vessels,"[114] or that it "can attack almost anything in the body with devastating consequences."[115] As Dr. Harlan Krumholz, cardiologist at Yale University and Yale-New Haven Hospital, explains, "[i]ts ferocity is breathtaking and humbling."[116]

Among the witnesses at the Hearing were Harmeet Dhillon, Founder and Chief Executive Officer of the Center for American Liberty, who more recently was confirmed by the U.S. Senate as the Assistant Attorney General for Civil Rights during Trump's second

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Americans had the highest death rate per 100,000 among six racial and ethnic groups); Hill & Artiga, *supra* note 31 ("In sum, these data show that, overall, Black, Hispanic, and [American Indian or Alaska Native] people have experienced higher rates of COVID-19 infection and death compared to White people when accounting for age differences across racial and ethnic groups.").

[112] Michele Goodwin & Erwin Chemerinsky, *The Trump Administration: Immigration, Racism & COVID-19*, 169 U. PENN L. REV., 313, 325–26 (2021) (citations omitted); *see also Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/us/covid-cases.html [perma.cc/WYB7-D9BG] (last updated Mar. 23, 2023); *Provisional COVID-19 Mortality Surveillance*, CDC, https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm [perma.cc/YSG7-S4PT] (last updated July 3, 2025); *America's Wars,* DEP'T VETERANS AFFS. (Nov. 2019), https://department.va.gov/americas-wars/ [perma.cc/7DU4-4TVS]; *Deaths in World Trade Center Terrorist Attacks—New York City, 2001*, 51 CDC MORBIDITY & MORTALITY WKLY. REP. 16 (2002), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm51SPa6.htm [perma.cc/H3AM-MENW]; *Casualty Status*, DOD, https://www.defense.gov/casualty.pdf [perma.cc/3SH9-KES5] (last updated Jan. 30, 2025); *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, CDC, https://archive.cdc.gov/#/details?url=https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html [perma.cc/88WM-JCDK] (last updated June 11, 2019); *Ebola Facts*, INFECTIOUS DISEASES SOC'Y AM. https://www.idsociety.org/globalassets/idsa/public-health/ebola/ebola-fact-sheet.pdf [perma.cc/EP67-CK6G] (last updated Jan. 13, 2020); *Zika Cases in the United States,* CDC (July 1, 2025), https://www.cdc.gov/zika/zika-cases-us/index.html [perma.cc/2R5A-L8M7].

[113] *Liberty, Tyranny, and Accountability Hearing Transcript*, *supra* note 4, at 10 (statement of Rep. Harmeet K. Dhillon, Founder and Chief Executive Officer, Center for American Liberty).

[114] Wadman et al., *supra* note 21, at 356.

[115] *Id.* (quoting Dr. Harlan Krumholz, cardiologist at Yale University and Yale-New Haven Hospital).

[116] *Id.*

Administration.[117] In her remarks, Ms. Dhillon rightfully acknowledged that in times of actual or perceived crises, governments may interfere with critically important civil liberties and civil rights in an unlawful manner. Indeed, government overreach is more likely to occur in the wake of crises and threats of war, terrorism, or even real or perceived public health emergencies. And in those times, courts and legislatures must intervene—although these institutions at times may also be complicit in the infringement of civil liberties and civil rights.

Like Ms. Dhillon, we too share the concern about perceived or actual national crises serving as deceitful proxies for abridging and infringing civil liberties.[118] Indeed, we urge caution when the government claims that legal norms must be suspended or altered for the sake of crisis. That, however, is likely where our shared vision of constitutionalism and COVID-19 ends.

The Hearing exposed a suspended or altered reality about the grave human threats and deathly realities that the COVID-19 pandemic presented, threats that made some curtailments of individual liberties not only appropriate, but necessary. Moreover, it displayed a worrisome indication of what may transpire when the next global or national health crisis emerges, particularly if that occurs during the second Trump Administration and under the leadership of Robert F. Kennedy Jr., who was confirmed as Secretary of Health & Human Services (HHS) in February 2025.[119] Kennedy was nominated and confirmed despite his lack of substantive health training or background and despite having previously "peddl[ed]" misinformation regarding vaccines and "actively [trying] to sabotage public health campaigns, including rollout of the life-saving COVID-19 vaccine."[120]

With the current political backdrop, a similar health crisis will likely lead to serious harm and preventable deaths and morbidities, likely stratified by the response of the jurisdiction in which a person resides. To our point, Dr. Steven H. Woolf and colleagues report that

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[117] *Attorney General Pamela Bondi Swears in Harmeet Dhillon as the Assistant Attorney General for the Civil Rights Division*, U.S. DEP'T OF JUST. (Apr. 7, 2025), https://www.justice.gov/opa/gallery/attorney-general-pamela-bondi-swears-harmeet-dhillon-assistant-attorney-general-civil [perma.cc/5FEA-Q9YZ]; *see also Liberty, Tyranny, and Accountability Hearing Transcript*, *supra* note 4, at 10–19 (statement of Dhillon).

[118] *Cf.* Whelan, *supra* note 47, at 1808–09 (noting that the presidents can abuse their national emergency powers, "as evinced by President Trump's declaration of a national emergency on the Mexico border to access billions of dollars to build a border wall after Congress refused to provide the funds").

[119] Clare Foran, Morgan Rimmer & Ted Barrett, *Senate Confirms RFK Jr. as Health and Human Services Secretary*, CNN (Feb. 13, 2025), https://www.cnn.com/2025/02/13/politics/rfk-jr-senate-confirmation-vote/index.html [perma.cc/9B7K-X77H].

[120] Darya Minovi, *Robert F. Kennedy Is Unfit to Lead US Public Health Agencies*, EQUATION (Jan. 30, 2025, 8:15 AM), https://blog.ucs.org/dminovi/robert-f-kennedy-is-unfit-to-lead-u-s-public-health-agencies/ [perma.cc/ZP4E-4RU5].

"[e]xcess death rates during the COVID-19 pandemic varied considerably across the U.S. states and were associated with partisan representation in state government."[121] Specifically, they noted that as the pandemic spread across the entire United States (i.e., from June 2020–March 2022), "[s]tates with Republican governors experienced . . . significantly higher death rates . . . than did states with Democratic governors" and "[i]ncreasing Republican representation was associated with . . . higher excess death rates."[122] The conclusion among researchers studying misinformation, disinformation, and the coronavirus is that sociopolitical influence played a particular role in pandemic deaths.[123]

Why does all this matter? The political chaos and politicization that transpired during the COVID-19 pandemic, much of which continues unabated or on the rise, engenders public distrust in government, science, and medicine, all of which impede the government's ability and willingness to make appropriate use of its authorities and obligations to protect the public health, as well as the public's willingness to adhere to government mandates.

IV. VACCINES AND THE CURRENT POLITICAL AND SOCIAL STORM

Political and social attacks against science and health are particularly salient for vaccines, which represent a key tool in the government's ability to respond to a viral pandemic, be that COVID-19 or a new viral threat that may (very likely) emerge in the future. Despite the importance of vaccines, vaccine hesitancy, skepticism, and distrust have a long history in the United States. This Part unpacks the history, resurgence, and rise of vaccine hesitancy throughout the United States, which continues unabated despite significant scientific evidence and consensus that vaccines are safe, effective, and save millions of lives each year.[124] The increasing politicization of health and public health responses has only increased vaccine skepticism and aggravated its consequences.

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[121] Steven H. Woolf et al., *Excess Death Rates by State During the COVID-19 Pandemic*, 114 AM. J. PUB. HEALTH 882, 882 (2024).

[122] *Id.* at 887.

[123] *See id.*; Jacob Wallace et al., *Excess Death Rates for Republican and Democratic Registered Voters in Florida and Ohio During the COVID-19 Pandemic*, 183 J. AM. MED. ASS'N INTERNAL MED. 916 (2023) (finding significantly higher excess mortality for Republican voters than Democratic voters in Ohio and Florida after COVID-19 vaccines became available to all adults).

[124] *See, e.g.*, *Fast Facts on Global Immunization*, CDC (Sept. 19, 2024), https://www.cdc.gov/global-immunization/fast-facts/index.html [perma.cc/NF3D-9UV8]; Austin Carter et al., *Modeling the Impact of Vaccination for the Immunization Agenda 2030: Deaths Averted Due to Vaccination Against 14 Pathogens in 194 Countries from 2021 to 2030*, 42 VACCINES S28, S28 (Supp. 1 2024).

A. Vaccine Skepticism: Origins and Rationales

The first formal vaccine was developed by Edward Jenner in the 1790s against smallpox.[125] Following this success, vaccine mandates in the United States and other countries emerged during the middle of the nineteenth century.[126] These mandates gave rise to opposition, which in the United States led to the seminal 1905 Supreme Court decision in *Jacobson v. Massachusetts*.[127] The case arose after the plaintiff, Henning Jacobson, was fined for refusing to comply with a Massachusetts law mandating smallpox vaccination.[128] Jacobson challenged the Massachusetts law, claiming that the law violated his liberty rights protected by the Fourteenth Amendment.[129] The Supreme Court upheld the law, holding that states, pursuant to their police powers, have the authority to enact "reasonable regulations" to "protect the public health and the public safety."[130] Despite this decision, vaccine mandates continue to engender significant public and political pushback.[131]

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[125] *History of the Smallpox Vaccine*, WHO, https://www.who.int/news-room/spotlight/history-of-vaccination/history-of-smallpox-vaccination [perma.cc/KYK8-DXJ9].

[126] *Id.*

[127] 197 U.S. 11 (1905).

[128] *Id.* at 13.

[129] *Id.* at 14. The law provided an exception for "children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination." *Id.* at 12.

[130] *Id.* at 25.

[131] Vaccine mandates often give rise to protest and litigation. *See, e.g.*, Jenna Greene, *Why Workers Fired for Refusing Covid Vaccines Are Starting to Win in Court*, REUTERS (Nov. 1, 2024), https://www.reuters.com/legal/government/column-why-workers-fired-refusing-covid-vaccines-are-starting-win-court-2024-11-01/ [perma.cc/P5NE-74FN] (reporting that jurors awarded $1 million each to six Bay Area Rapid Transit employees who had been fired for refusing to comply with their employer's COVID-19 vaccine mandates); Press Release, Ken Paxton, Att'y Gen. Tex., Paxton Victorious in Lawsuit Against the Biden Administration's Vaccine Mandate for Federal Contractors (May 15, 2023), https://www.texasattorneygeneral.gov/news/releases/paxton-victorious-lawsuit-against-biden-administrations-vaccine-mandate-federal-contractors [perma.cc/4HA7-F5Z2]; Michelle M. Mello et al., *A Look at the Supreme Court Ruling on Vaccination Mandates*, SLS BLOGS (Jan. 20, 2022), https://law.stanford.edu/2022/01/20/a-look-at-the-supreme-court-ruling-on-vaccination-mandates/ [perma.cc/83KD-9H9W]; *Health Care Workers Settle COVID Shot Mandate for $10.3 Million*, LIBERTY COUNS. (July 29, 2022), https://lc.org/newsroom/details/072922-health-care-workers-settle-covid-shot-mandate-for-dollar103-million [perma.cc/MN44-W9UJ]; Meghann Myers, *DoD Settles COVID Vaccine Mandate Lawsuits for $1,8 Million*, MIL. TIMES (Oct. 9, 2023), https://www.militarytimes.com/news/your-military/2023/10/09/dod-settles-covid-vaccine-mandate-lawsuits-for-18-million/ [perma.cc/8LSD-JNWS]; Danielle Wallace, *Parents Sue California Over Religious Exemptions for School-Mandated Vaccines, Cite Newsom's Past on COVID Jab*, FOX NEWS (Nov. 2, 2023), https://www.foxnews.com/politics/parents-sue-california-religious-exemptions-school-mandated-vaccines-newsom-seeks-add-covid-jab [perma.cc/25D8-ZXUC]; Brandy Zadrozny & Ben Collins, *As Vaccine Mandates Spread, Protests Follow – Some Spurred by Nurses*, NBC NEWS (Aug. 11, 2021), https://www.nbcnews.com/tech/social-media/vaccine-mandates-spread-protests-follow-spurred-nurses-rcna1654 [perma.cc/G9SA-F725].

Individuals express vaccine hesitancy and skepticism for various reasons, which we place into three categories. The categories, which intertwine, include (1) historically-based vaccine hesitancy/skepticism; (2) health- and safety-related vaccine hesitancy/skepticism; and (3) politically-based vaccine hesitancy/skepticism.

1. Historically-based vaccine hesitancy

Historically-based vaccine hesitancy arises predominantly among historically marginalized populations as a result of the long history of exploitation, abuse, and explicit and implicit discrimination experienced by these populations, leading to a distrust in government, science and medical research, and the healthcare system. Such exploitation is evidenced by abuse of enslaved Black women by James Marion Sims;[132] the Tuskegee Syphilis Study;[133] various trials studying contraceptives involving Hispanic populations;[134] use of psychiatric patients, prisoners, and others to study sexually transmitted diseases;[135] and the unconsented-to collection and prolific use of cells taken from Henrietta Lacks.[136] In many ways, this distrust is understandable: examples of problematic and unethical treatment throughout history continue to drive some vaccine hesitancy today, particularly among communities of color.

2. Health- and safety-related hesitancy and skepticism

A second category of vaccine hesitancy and skepticism relates to concerns about vaccine safety and potential adverse reactions, many of which are not supported by the current body of evidence. Vaccines, like all medical products, have risks and benefits. But as Part IV.B explores further, the weight of the evidence shows that the benefits of available and recommended vaccines outweigh their risks.

This group of anti-vaccination advocates or "anti-vaxxers" emerged and proliferated during the late 1990s in the wake of a now discredited and retracted research article published in *The Lancet* by Andrew

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[132] *See, e.g.*, HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 61–66 (2006); Walter Fisher, *Physicians and Slavery in the Antebellum Southern Medical Journal*, 23 J. HIST. MED. & ALLIED SCIS. 36, 48 (1968); L. Lewis Wall, *The Medical Ethics of Dr. J Marion Sims: A Fresh Look at the Historical Record*, 32 J. MED. ETHICS 346 (2006).

[133] WASHINGTON, *supra* note 132, at 157–85.

[134] *See* Allison M. Whelan, *Unequal Representation: Women in Clinical Research*, 106 CORNELL L. REV. ONLINE 87, 97–99 (2021) (explaining two such studies).

[135] *See generally* Alicia Ouelette, *People with Disabilities in Human Subjects Research: A History of Exploitation, a Problem of Exclusion*, *in* OXFORD HANDBOOK OF RESEARCH ETHICS 667 (Ana S. Iltis & Douglas MacKay, eds., 2020).

[136] *See* Whelan, *supra* note 134, at 99–102.

Wakefield. In 1998, Wakefield and twelve of his colleagues published a case series suggesting that the measles, mumps, and rubella (MMR) vaccine may cause or contribute to autism and bowel disease.[137] The uncontrolled study consisted of only twelve children.[138] Nevertheless, the study received widespread publicity and quickly led to drops in MMR vaccination rates.[139] After widespread criticism and refutation of the study's findings linking autism and the vaccine, editors at *The Lancet* issued a statement in 2004 that Wakefield and his colleagues had failed to disclose financial interests but largely exonerated them from charges of ethical violations and scientific misconduct. [140] Ultimately, however, *The Lancet* retracted the paper in February 2010, stating that it was now clear that "several elements" of the Wakefield paper "are incorrect, contrary to the findings of an earlier investigation."[141] A few months later, the General Medical Council in the United Kingdom revoked Wakefield's license to practice medicine in the U.K., ruling that he had acted "dishonestly and irresponsibly" in conducting the research that formed the basis of the 1998 article.[142]

Despite the backlash against the publication and its formal retraction, certain media outlets, along with a subset of vocal healthcare professionals, government officials, and celebrities, continue to cite the research and other anecdotal evidence to spread misinformation and ignite fear about the MMR vaccines, as well as vaccines in general.[143] In 2015, for example, Senator Rand Paul (R-KY)

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[137] Andrew J. Wakefield et al., *Illeal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Development Disorder in Children*, 351 LANCET 637 (1998) (retracted Feb. 2010).

[138] *See* T.S. Sathyanarayana Rao & Chittaranjan Andrade, *The MMR Vaccine and Autism: Sensation, Refutation, Retraction, and Fraud*, 53 INDIAN J. PSYCHIATRY 95 (2011).

[139] *Id.*

[140] Richard Horton, *A Statement by the Editors of* The Lancet, 363 LANCET 820 (2004) (admission by *The Lancet* that Wakefield et al. had failed to disclose financial interests but exonerating Wakefield and colleagues from charges of ethical violations and scientific misconduct); *see also* Simon H. Murch et al., *Retraction of an Interpretation*, 363 LANCET 750 (2004) (retraction of the interpretation of the original 1998 data by ten of the twelve co-authors of the paper, stating that "no causal link was established between MMR vaccine and autism as the data were insufficient").

[141] The Editors of *The Lancet*, *Retraction—Illeal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 375 LANCET 445 (2010).

[142] Alice Park, *Doctor Behind Vaccine-Autism Link Loses License*, TIME (May 24, 2010), https://healthland.time.com/2010/05/24/doctor-behind-vaccine-autism-link-loses-license/ [perma.cc/5LTW-PLBZ].

[143] *A Case of Junk Science, Conflict and Hype*, 9 NATURE IMMUNOLOGY 1317, 1317 (2008) ("The anti-vaccine movement jumped on [the Wakefield study], and the ensuing media frenzy continues to this day."); Sarah Boseley, *How Disgraced Anti-Vaxxer Andrew Wakefield Was Embraced By Trump's America*, GUARDIAN (July 18, 2018), https://www.theguardian.com/society/2018/jul/18/how-disgraced-anti-vaxxer-andrew-wakefield-was-embraced-by-trumps-america [perma.cc/E2BD-ZE8W] ("Under an anti-establishment [Trump] presidency, the anti-vaccine crusader [Wakefield], whose views appear to have become all the more entrenched by his drubbing at the hands of eminent scientists around the world, is back in the limelight and his new visibility could give his

misleadingly stated that "many" children have developed "profound mental disorders" due to vaccines, a claim refuted by the weight of scientific evidence.[144] President Trump, who has sought to take credit for the development and success of the COVID-19 vaccines, has nevertheless also promoted vaccine misinformation. In 2014, Trump tweeted: "Healthy young child goes to doctor, gets pumped with massive shot of many vaccines, doesn't feel good and changes – AUTISM! Many such cases!"[145] One year later, in 2015, Trump suggested a link between vaccines and autism, stating: "People that work for me, just the other day, two years old, beautiful child went to have the vaccine and came back and a week later, got a tremendous fever, got very, very sick, now is autistic."[146] Then in 2016, Trump met with anti-vaccine activists, including Wakefield.[147]

Trump has also surrounded himself during both of his presidencies with vaccine skeptics, including Tom Price, who served a short term as the Secretary of HHS during Trump's first presidency, and Robert F. Kennedy Jr., Secretary of HHS, during his second presidency. Price "belong[ed] to a Phoenix-based group that promotes the belief that vaccines cause autism, and that 'shaken baby syndrome' — a brain injury in infants or toddlers as a result of forceful shaking — is a misdiagnosis for vaccine injury."[148]

Kennedy stands to play a significant role in the future of vaccines in the United States. Although he has attempted to deny being anti-vaccine, he has repeated the claim that autism can be caused by vaccines,[149] and he is the founder of Children's Health Defense.[150] Children's Health Defense's stated mission is to "restore children's health and protect future generations from harm."[151] The organization is widely viewed as an anti-vaccine group that continues to perpetuate the belief that vaccines cause autism.[152] Indeed, the non-profit's website

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arguments even more currency.").

[144] Dave Levitan, *Paul Repeats Baseless Vaccine Claims,* FACTCHECK.ORG (Feb. 3, 2015), https://www.factcheck.org/2015/02/paul-repeats-baseless-vaccine-claims/ [perma.cc/7KVU-3MQY].

[145] Donald Trump (@realDonaldTrump), TWITTER (Mar. 28, 2014, 7:35 am), https://x.com/realDonaldTrump/status/449525268529815552 [perma.cc/2JM4-XQSR].

[146] Paul S. Pottinger, *Trump's Reckless Linkage of Vaccines and Autism*, SEATTLE TIMES, https://www.seattletimes.com/opinion/trumps-reckless-linkage-of-vaccines-and-autism/ [perma.cc/3RHX-ERST] (last updated Jan. 4, 2017).

[147] *Id.*

[148] *Id.*

[149] Jesse Watters, *Robert F. Kennedy Jr: Fauci 'Caused a Lot of Injury'*, FOX NEWS (July 10, 2023), https://www.foxnews.com/video/6330950198112 [perma.cc/55ZM-H8UA].

[150] *Robert F. Kennedy Jr*, CHILD.'S HEALTH DEF., https://childrenshealthdefense.org/about-us/robert-f-kennedy-jr/ [perma.cc/UH4K-XLAD].

[151] *The Mission of Children's Health Defense*, CHILD'S HEALTH DEF., https://childrenshealthdefense.org/about-us/childrens-health-defense-mission/ [perma.cc/2MKQ-7KQG].

[152] Brandy Zadrozny, *RFK Jr.'s Anti-Vaccine Group Lost $3 Million Last Year*, NBC NEWS

currently includes a video with a headline reading: "The childhood vaccine schedule has everything to do with the autism epidemic."[153]

Furthermore, Kennedy, at the behest of President Trump, announced that HHS is "assembling teams of world-class scientists to focus research on the origins of the epidemic" of childhood chronic disease, including autism.[154] The CDC also announced plans to directly study the potential connection between vaccines and autism, despite extensive research that has disproven or failed to find evidence of such a link.[155] Reports indicate that David Geier has been tasked with analyzing vaccine safety data. Geier has a history of spreading misinformation that vaccines cause autism, raising serious questions about the impartiality of the study.[156] As misinformation about vaccine safety and effectiveness proliferates, vaccine hesitancy in the United States continues to rise, undermining decades of progress in preventing or even eliminating certain vaccine-preventable diseases.[157]

3. Politically-based vaccine hesitancy and skepticism

The final category of vaccine skepticism, which links closely to the second, emerged with greater force over the past decade and particularly during the COVID-19 pandemic.[158] In this category are those whose anti-vaccination beliefs stem largely from their political views. While some in this category also align with those who are skeptical about vaccine safety, this group's main opposition to vaccines stems from opposition to government mandates and overreach. Studies support a relationship between one's politics and one's views on

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(Nov. 13, 2024), https://www.nbcnews.com/news/us-news/rfk-jr-childrens-health-defense-tax-revenue-loss-rcna179934 [perma.cc/WU8W-RHB6].

[153] *Autism: Where We Are Now & Where We're Going*, CHILD'S HEALTH DEF., https://childrenshealthdefense.org/autism/?itm_term=homehero [perma.cc/8FLH-2WZ6].

[154] Press Release, Dep't of Health & Hum. Servs., 'Autism Epidemic Runs Rampant,' New Data Shows 1 in 31 Children Afflicted (Apr. 15, 2025), https://www.hhs.gov/press-room/autism-epidemic-runs-rampant-new-data-shows-grants.html [perma.cc/DMH5-CNNM].

[155] Dan Levine & Leah Douglas, *Exclusive: US CDC Plans Study into Vaccines and Autism, Sources Say*, REUTERS (Mar. 9, 2025), https://www.reuters.com/business/healthcare-pharmaceuticals/us-cdc-plans-study-into-vaccines-autism-sources-say-2025-03-07/ [perma.cc/94D7-V25F].

[156] Erika Edwards & Brandy Zadrozny, *HHS Taps Anti-Vaccine Activist to Look at Debunked Links Between Autism and Vaccines, Sources Say*, NBC NEWS (Mar. 26, 2025), https://www.nbcnews.com/health/health-news/hhs-taps-anti-vaccine-activist-look-debunked-links-autism-vaccines-sou-rcna198214 [perma.cc/6C4H-PXB8].

[157] Ashlesha Kaushik et al., *Pediatric Vaccine Hesitancy in the United States—The Growing Problem and Strategies for Management Including Motivation Interviewing*, VACCINES, Jan. 24 2025, at 1, 1.

[158] That said, opposition to vaccines stemming from opposition to "governmental overreach" is not new. *See, e.g.*, James Colgrove & Sara J. Samuel, *Freedom, Rights, and Vaccine Refusal: The History of an Idea*, 112 AM. J. PUB. HEALTH 234, 235 (2022) (describing how "a small part of the overall landscape of resistance to vaccination" in the late nineteenth and early twentieth centuries framed vaccination as "a violation of inalienable rights").

vaccination, with opposition to vaccines found more frequently among the most conservative-leaning populations.[159] Indeed, "the political right and the anti-vaccine movement" appear to be "drawing ever-closer together" in recent years, "an alliance that promises to give both sides more power."[160] Very recently, government officials in Florida have decided to forego long-standing vaccination mandates in schools.

The consequences of vaccine hesitancy, regardless of its source or reason, are many. Vaccine skepticism decreases vaccine uptake, threatening the ability to establish herd immunity; it can lead to the re-emergence of rare, eradicated, or almost-eradicated diseases like polio and measles;[161] it creates unnecessary burdens for the healthcare system as people seek treatment for preventable diseases;[162] it has economic costs due to lost work hours resulting from sickness or caring for those (e.g., children) suffering from vaccine-preventable illnesses;[163] and it causes unnecessary morbidity and mortality.[164] Troublingly, vaccine hesitancy and skepticism continue despite strong evidence of safety and efficacy.

B. Vaccine Skepticism on the Rise Despite Evidence of Safety and Efficacy

The majority of Americans view vaccines in a positive light and believe that vaccines are a generally safe and important tool to protect others.[165] That said, vaccine hesitancy among the general population,

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[159] Mark Lacour & Zebulon Bell, *Attitudes Towards COVID-19 Vaccines May Have "Spilled Over" to Other, Unrelated Vaccines Along Party Lines in the United States*, HARV. KENNEDY SCH. MISINFORMATION REV., June 20, 2024, at 1, 1 (finding that "[c]onservatives had far more negative attitudes towards the COVID-19 vaccines compared to liberals, but also had more negative attitudes towards the influenza, MMR, HPV, and chickenpox vaccines").

[160] Geoff Brumfiel, *Inside the Growing Alliance Between Anti-Vaccine Activists and Pro-Trump Republicans*, NPR (Dec. 6, 2021), https://www.npr.org/2021/12/06/1057344561/anti-vaccine-activists-political-conference-trump-republicans [perma.cc/CS6G-255M].

[161] *History of Measles*, CDC (May 9, 2024), https://www.cdc.gov/measles/about/history.html [perma.cc/4GZ4-Y7QM] (reporting that measles was considered eliminated from the United States in 2000).

[162] Paige M. Farrenkopf, *The Cost of Ignoring Vaccines*, 95 YALE J. BIOLOGY & MED. 265, 265 (2022).

[163] Fangjun Zhou et al., *Health and Economic Benefits of Routine Childhood Immunizations in the Era of the Vaccines for Children Program — United States, 1994–2023*, 73 CDC MORBIDITY & MORTALITY WKLY. REP. 682, 683 (2024) ("Indirect costs include productivity losses attributable to premature mortality and permanent disability among cohort members, as well as opportunity costs associated with parents who miss work to care for their sick children or cohort members themselves who miss work because of vaccine-preventable illness.").

[164] *See, e.g.*, Katherine M. Jia et al., *Estimated Preventable COVID-19-Associated Deaths Due to Non-Vaccination in the United States*, 38 EUR. J. EPIDEMIOLOGY 1125, 1125 (2023) (estimating that "at least 232,000 deaths [from COVID-19] could have been prevented among unvaccinated adults" in the United States from May 30, 2021 to September 3, 2022, had they been vaccinated with a least a primary series of the COVID-19 vaccine).

[165] Amanda L. Eiden et al., *Attitudes and Beliefs About Vaccination Among Adults in the*

and particularly among parents making decisions about childhood vaccines, has been on the rise in recent years.[166] Moreover, the minority of Americans holding anti-vaccination sentiments remains disproportionately loud and powerful, with increasing numbers in positions of power in state and federal governments. Vaccine hesitancy and skepticism—particularly when held or promoted by those in power—have important implications for whether and how the government can respond in times of public health crises.

Unsurprisingly, rising vaccine hesitancy corresponds with declining rates of vaccination, particularly among children.[167] The reasons for the decline are multi-factorial and include "financial barriers, access issues, vaccine hesitancy, and vaccine-related misinformation."[168] Declining childhood vaccination rates have contributed to numerous disease outbreaks, particularly measles and pertussis (whooping cough).[169] During 2025, a measles outbreak spread throughout Texas and other states, with Gaines County, Texas, as the epicenter.[170] As of September 16, 2025, the CDC reported a total of 1,491 confirmed measles cases across 42 states.[171] The vast majority of cases come from Texas, with the Texas Department of State Health Services reporting 803 as of September 16, 2025.[172] Tragically, two school-aged children in Texas have died, both of whom were not vaccinated and had no underlying conditions.[173] One adult from New Mexico has also died, and although the cause of death remains under investigation, the deceased tested positive for measles.[174]

United States: A Real-World, Cross-Sectional, Web-Based Survey Study, 50 VACCINES, no. 126807, 2025, at 1, 8.

[166] *See, e.g.*, Charitha Gowda & Amanda F. Dempsey, *The Rise (and Fall?) of Parental Vaccine Hesitancy*, 9 HUM. VACCINES IMMUNOTHERAPEUTICS 1755 (2013).

[167] Holly A. Hill et al., *Decline in Vaccination Coverage by Age 24 Months and Vaccination Inequities Among Children Born in 2020 and 2021 — National Immunization Survey-Child, United States, 2021–2023*, 73 CDC MORBIDITY & MORTALITY WKLY. REP. 844, 847, 851 (2024); Elizabeth Williams & Jennifer Kates, *Childhood Vaccination Rates Continue to Decline as Trump Heads for a Second Term*, KFF (Nov. 18, 2024), https://www.kff.org/policy-watch/childhood-vaccination-rates-continue-to-decline-as-trump-heads-for-a-second-term/ [perma.cc/BK83-5EW7].

[168] Hill et al., *supra* note 167, at 844.

[169] *See, e.g.*, Varun K. Phadke et al., *Association Between Vaccine Refusal and Vaccine-Preventable Diseases in the United States. A Review of Measles and Pertussis*, 315 J. AM. MED. ASS'N 1149, 1155 (2016) (reporting that "vaccine refusal—as measured by population-level vaccine exemption rates—was associated with an elevated risk for measles and pertussis").

[170] Kate Schweitzer, *Amid Texas Measles Outbreak, Clinicians Struggle to Offset Increasing Vaccine Hesitancy*, 333 J. AM. MED. ASS'N 1278, 1280 (2025).

[171] *Measles Cases and Outbreaks*, CDC (Sept. 17, 2025), https://www.cdc.gov/measles/data-research/index.html [perma.cc/6DPA-BVLP].

[172] *Id.*

[173] *Measles Outbreak – August 12, 2025*, TEX. HEALTH & HUM. SERVS. (Aug. 12, 2025), https://www.dshs.texas.gov/news-alerts/measles-outbreak-2025 [perma.cc/SP56-WWJA].

[174] *Lea County Resident Tests Positive for Measles After Death*, N.M. HEALTH (Mar. 6, 2025), https://www.nmhealth.org/news/alert/2025/3/?view=2188# [perma.cc/6LGB-DJQE].

Relatedly, as vaccine coverage for pertussis ("whooping cough")[175] declines, cases have increased.[176] Pertussis is a highly contagious bacterial infection that primarily affects infants and young children, with babies under the age of one at greatest risk for severe complications or death.[177] The United States confirmed at least one dozen deaths from pertussis in 2024, marking the highest number of fatalities since a 2017 surge.[178] As of April 2025, two infants in Louisiana had died from pertussis in the past six months amidst rising cases of the illness in the state.[179] Yet instead of utilizing its well-established police powers to take action to promote public health, such as by encouraging vaccination or taking steps to increase access to and information about vaccines, the Louisiana government did the opposite. Specifically, these deaths were reported around the same time that Louisiana's health department announced it would no longer promote vaccination,[180] which followed on the heels of the state forbidding public healthcare workers from promoting vaccines for COVID-19, influenza, and mpox.[181]

Vaccine hesitancy and skepticism also contribute to persistently low vaccination rates among adults for a variety of diseases.[182] The death toll from influenza thus far in 2025 is the highest since 2018, attributable in part to vaccine hesitancy "as more people become

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[175] Hill et al., *supra* note 167.

[176] *Whooping Cough Is on the Rise, Returning to Pre-Pandemic Trends*, CDC (July 22, 2024), https://www.cdc.gov/ncird/whats-new/cases-of-whooping-cough-on-the-rise.html [perma.cc/HQ5U-D9K2]; *Pertussis Surveillance and Trends*, CDC (June 11, 2025), https://www.cdc.gov/pertussis/php/surveillance/index.html [perma.cc/K3EC-P9CM].

[177] *About Whooping Cough*, CDC (Apr. 2, 2024), https://www.cdc.gov/pertussis/about/index.html [perma.cc/SZJ2-EX35].

[178] Alexander Tin, *U.S. Records Most Whooping Cough Deaths Since 2017*, CBS NEWS (Feb. 11, 2025), https://www.cbsnews.com/news/whooping-cough-deaths-us-most-since-2017/ [perma.cc/U5ZC-HUE2].

[179] Tanya Lewis, *Whooping Cough Kills Two Babies in Louisiana as Cases Soar*, SCI. AM. (Apr. 4, 2025), https://www.scientificamerican.com/article/whooping-cough-killed-two-children-heres-how-to-protect-kids/ [perma.cc/NB8N-PNNK].

[180] Ralph L. Abraham & Wyche T. Coleman, III, *Louisiana Surgeon General: Restoring Trust in Public Health Starts with Restoring Trust in Medicine*, LA. DEP'T OF HEALTH (Feb. 13, 2025), https://ldh.la.gov/news/7478 [perma.cc/Z6PK-E4VE]; Mary Van Beusekom, *Citing Government Overreach, Louisiana Won't Promote Vaccination, Surgeons General Say*, CIDRAP (Feb. 14, 2025), https://www.cidrap.umn.edu/anti-science/citing-government-overreach-louisiana-wont-promote-vaccination-surgeons-general-say [perma.cc/LSB5-N9JC].

[181] Rosemary Westwood, *Louisiana Forbids Public Health Workers from Promoting COVID, Flu, and Mpox Shots*, NPR (Dec. 20, 2024), https://www.npr.org/sections/shots-health-news/2024/12/20/nx-s1-5223440/louisiana-ban-public-health-promoting-covid-flu-mpox-vaccines-landry-rfk-jr-anti-vaccine [perma.cc/N3VG-65NB].

[182] *See generally* Victoria Zhang, Peiyao Zhu & Abram L. Wagner, *Spillover of Vaccine Hesitancy into Adult COVID-19 and Influenza: The Role of Race, Religion, and Political Affiliation in the United States*, 20 INT'L J. ENV'T RSCH. & PUB. HEALTH, no. 3376, 2023, at 1; Nandina Selvam, *The Implications of Low Vaccination Rates*, NAT'L FOUND. INFECTIOUS DISEASES (Aug. 31, 2023), https://www.nfid.org/the-implications-of-low-vaccination-rates/ [perma.cc/VTS9-785X].

vulnerable because of growing vaccine skepticism taking hold in statehouses and the Trump Administration."[183] Vaccine rates are likely to continue to decline amidst a perfect storm of increasing vaccine skepticism, scaling back of vaccine promotion efforts, loosening of state vaccine mandates and broadening of vaccine mandate exceptions, and implicit and explicit messaging from the federal government that vaccines are unsafe.

All of this continues despite well-established evidence that vaccines are safe, effective, and lifesaving. Vaccines, like any medical product, come with risks. But in the United States, vaccines are not made available to the public until they undergo rigorous clinical trials that demonstrate that the vaccine is "safe, pure, and potent."[184] Even for vaccines made available to the public under an Emergency Use Authorization (EUA), like the initial COVID-19 vaccines, the FDA must determine that based on the totality of scientific evidence available, it is reasonable to believe that (a) the product "may be effective" in preventing, diagnosing, or treating the disease or condition caused by the pathogen (e.g., COVID-19) and (b) "the known and potential benefits of the product, when used to diagnose, prevent, or treat [the] disease or condition, outweigh the known and potential risks of the product.[185]

The success of the rigorous pre-market and post-market requirements for vaccines is illustrated by solid evidence and consensus amongst experts that the benefits of available vaccines outweigh the risks.[186] Vaccines are recognized as one of the most successful public health achievements, which have resulted in significant improvements in wellbeing, longevity, and morbidity and mortality rates, particularly among infants and children. According to a 2024 study published in *The*

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[183] Tim Henderson, *Flu Deaths Rise as Anti-Vaccine Disinformation Takes Root*, STATELINE (Mar. 18, 2025), https://stateline.org/2025/03/18/flu-deaths-rise-as-anti-vaccine-disinformation-takes-root/ [perma.cc/6SHE-UVDY].

[184] 42 U.S.C. § 262(a)(2)(C)(i)(I). "Potency has long been interpreted to include effectiveness." U.S. FOOD & DRUG ADMIN., DEMONSTRATING SUBSTANTIAL EVIDENCE OF EFFECTIVENESS FOR HUMAN DRUG AND BIOLOGICAL PRODUCTS: DRAFT GUIDANCE FOR INDUSTRY 3 (2019).

[185] 21 U.S.C. § 360bbb-3(c)(2).

[186] Ingrid Gletter-Iverson, Terje Aven & Roger Flage, *A Risk Science Perspective on Vaccines*, 44 RISK ANALYSIS 2780, 2780 (2023) ("[V]accines can have side effects, but the risks are considered by the health authorities and experts to be small compared to their benefits."); *Developing Safe and Effective Vaccines*, CDC (Aug. 9, 2024), https://www.cdc.gov/vaccines-children/about/developing-safe-effective-vaccines.html [perma.cc/K76V-CXWN] (noting that a vaccine is not approved and made available on the market until testing shows that the vaccine is "safe, effective, and its benefits outweigh the risks"); Naseem S. Miller, *Childhood Vaccines: What Research Shows About Their Safety and Potential Side Effects*, JOURNALIST'S RES. (Feb. 26, 2025), https://journalistsresource.org/home/childhood-vaccines-what-the-research-says-about-their-safety-and-side-effects/ [perma.cc/V3GH-DFXC] ("The science behind vaccines is very clear . . . The benefits outweigh the risks." (quoting Dr. Sean O'Leary, Chair of the Committee on Infectious Diseases at the American Academy of Pediatrics)).

Lancet, vaccines have saved 154 million lives globally since 1974, which amounts to a rate of six lives saved every minute.[187] Ninety-five percent of the lives saved were children younger than five years old.[188]

Vaccines have also led to the eradication of smallpox worldwide.[189] In the United States, vaccines have helped lead to the elimination of measles, rubella, and polio.[190] "Elimination" status is achieved in a country or region where there has not been sustained transmission of the virus for a period of twelve months or longer.[191] Recent outbreaks of measles, such as the current outbreak in Texas, place the elimination status of measles in the United States in doubt.

Vaccine innovation, including the development of vaccines for aggressive and hard-to-treat conditions like pancreatic cancer,[192] is at risk in the wake of vaccine skepticism and broader attacks on science and medicine undertaken at the behest of President Trump. Recent executive actions slashing research funding (including funding for research into vaccine hesitancy[193]), restricting federally-funded research on certain topics, and revisiting the discredited link between vaccines and autism all place the future of vaccine research, development, and use at risk.[194] In one stunning example, Secretary Kennedy announced that HHS was cancelling almost five hundred

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[187] Andrew J. Shattock et al., *Contribution of Vaccination to Improved Survival and Health: Modelling 50 Years of the Expanded Programme on Immunization*, 403 LANCET 2307, 2307 (2024).

[188] *Id.* at 2312.

[189] *Smallpox*, WHO, https://www.who.int/health-topics/smallpox [perma.cc/YV3S-DU5A].

[190] *Maintain the Elimination of Measles, Rubella, Congenital Rubella Syndrome, and Polio — IID-01*, OFF. DISEASE PREVENTION & HEALTH PROMOTION, https://odphp.health.gov/healthypeople/objectives-and-data/browse-objectives/infectious-disease/maintain-elimination-measles-rubella-congenital-rubella-syndrome-and-polio-iid-01 [perma.cc/4465-G4XU].

[191] Alix Martichoux, *US At Risk of Losing Health Designation It's Had for 25 Years*, HILL (Mar. 30, 2025), https://thehill.com/homenews/nexstar_media_wire/5213772-measles-elimination-status-us/ [perma.cc/CX32-793R]; Berkeley Lovelace Jr., *Ousted FDA Vaccine Chief Says U.S. Measles Elimination Status Under Threat as Cases Climb*, NBC NEWS (Apr. 8, 2025), https://www.nbcnews.com/health/health-news/ousted-fda-vaccine-chief-us-measles-elimination-status-threat-rcna199966 [perma.cc/479J-XLRY].

[192] Currently, there are two approved preventive cancer vaccines, the Human Papillomavirus (HPV) vaccine and the Hepatitis B vaccine. *Cancer Vaccines: The Types, How They Work, and Which Cancers They Treat*, MEMORIAL SLOAN KETTERING CANCER CTR., https://www.mskcc.org/cancer-care/diagnosis-treatment/cancer-treatments/immunotherapy/cancer-vaccines [perma.cc/5WFK-RMTW] (noting that (1) chronic HPV infection can cause several types of cancer, including cervical, head and neck, anal, penile, vaginal, and vulvar cancers, (2) the HPV vaccine greatly reduces the risk of these cancers, (3) Hepatitis B is a liver disease caused by the Hepatitis B virus, and (4) chronic Hepatitis B can lead to liver cancer, and the vaccine greatly reduces that risk).

[193] Rob Stein & Will Stone, *NIH Cuts Funding for Vaccine-Hesitancy Research. mRNA Research May Be Next*, NPR (Mar. 12, 2025), https://www.npr.org/2025/03/12/nx-s1-5325863/nih-trump-vaccine-hesitancy-mrna-research [perma.cc/8LY3-JV8T].

[194] Meredith Cohn, *Hopkins Trailblazer Scrambles to Protect Cancer Research as Trump Cuts Hit Home*, BALT. BANNER (Apr. 9, 2025), http://thebaltimorebanner.com/economy/science-medicine/hopkins-cancer-research-nih-trump-funding-Y4TF6MQBVVAVRP7VWJSGMPC4E4/ [perma.cc/6WYC-L7R4].

million dollars in funding for mRNA vaccine development, and suggested that mRNA vaccines are unsafe.[195] Infectious disease and public health experts quickly criticized the decision, with one stating, "I don't think I've seen a more dangerous decision in public health in my 50 years in the business."[196] Thus, just as appropriate use of executive authorities can promote public health and safe lives, misuse and abuse of such authorities can exact harm.

The United States is on the edge of a precipice. The health and wellbeing of the United States, including the country's ability to prepare for and respond to future public health emergencies, hang in the balance. Federal and state governments must evaluate the successes and failures of the COVID-19 pandemic to prepare to respond to future health crises in a way that makes full use of their constitutional authorities, while also respecting civil rights and liberties.

V. CONSTITUTIONAL LAW, VACCINES, AND COVID: GOVERNMENTAL AUTHORITY TO RESPOND IN CRISIS

Historical, ongoing, and increasing politicization of public health and science—and the government's involvement therein—particularly vaccines, have important implications for the government's authority to respond appropriately and effectively in times of public health crises. In this final Part, we argue that the government not only possesses the authority but assumes the responsibility to aid and assist in times of medical and public health crises, much as it does in times of war and military threats. While this argument may be perceived as novel, the government in times of war has long operated from the position of preserving and protecting the lives of its citizenry and avoiding or preventing death and harm to citizens. We view disease as a powerful threat—one that rivals or exceeds the level of aggression and destruction potentially inflicted by an enemy in war. In times of health crisis, this may include taking steps to mitigate and reduce the spread of disease through shelter-in-place orders, masking requirements, and other preventative health measures to stem the spread of deadly and life-threatening diseases.

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[195] Amanda Seitz, *RFK Jr. Pulls $500 Million in Funding for Vaccine Development*, AP NEWS (Aug. 6, 2025), https://apnews.com/article/kennedy-vaccines-mrna-pfizer-moderna-1fb5b9436f2957075064c18a6cbbe3c9 [perma.cc/AE8L-U5KJ].

[196] *Id.* (quoting Mike Osterholm, University of Minnesota expert on infectious disease and pandemic preparedness); *see also* Rob Stein, *Public Health Experts Dismayed by RFK Jr.'s Defunding of mRNA Vaccine Research*, NPR (Aug. 6, 2025), https://www.npr.org/sections/shots-health-news/2025/08/06/nx-s1-5493544/rfk-defunding-mrna-vaccine-research [perma.cc/39P5-285H] (quoting various experts about their disagreements and concerns with the funding cuts).

Globally, this authority dates back millennia. Domestically, our fifty-state review found formal state laws authorizing quarantine or other disease mitigation measures dating back decades, if not centuries.[197] In Section V.A, we briefly describe the history and justification for quarantine and other public health laws. Then, in Section V.B, we turn to the United States and observe their enactment in both red and blue states and thus highlight the path of misinformation or omission in the wake of public health mitigation efforts being cast as "totalitarianism."[198] In Section V.C, the Article turns to the constitutional authority for government mitigation of public health harms and why we believe the government also has the *obligation* to mitigate public health harms. In meeting this obligation, however, we recognize that it remains imperative to guard against excessive government overreach and to protect civil rights and liberties during times of crisis.

A. The Role and History of Quarantine Throughout the World

A review of the history of quarantine and other disease mitigation measures displays a litany of legal, ethical, and social justifications for these and similar types of public health practices. The history of governments infringing on individual rights to some degree in order to protect public health dates back millennia. Indeed, "[t]he practice of quarantine—the separation of the diseased from the healthy—has been around a long time," as early as the writing of the Old Testament.[199] Biblical stories connected to hiding "until the fury has passed by,"[200] shielding from disease, "dwelling apart," or entering one's chamber to separate from others in times of contagion, can be found in both the Old Testament books of Isaiah and Leviticus.[201]

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[197] *See* discussion *infra* Part V.A; *see, e.g.*, ALA. CODE § 22-1-8 (1940) (stating that "[a]ny person who violates any of the health or quarantine laws, except those for which a special penalty is prescribed, shall be guilty of a misdemeanor"); ARK. CODE ANN. § 20-15-710 (1963) ("Any person committed to an institution who is found guilty of violating the rules and regulations of the institution or of conducting himself or herself in a disorderly manner may be confined for a period not to exceed six (6) months in any place where persons convicted of disorderly conduct may be confined.").

[198] *See Liberty, Tyranny, and Accountability Hearing Transcript*, *supra* note 4, at 70 ("Then, at that point, what we figured out and what we learned even more is that there are an awful lot of totalitarians that live among us, and they want to control every aspect of our lives." (quoting Representative Harriet Hageman (R-WY)).

[199] Peter Tyson, *A Short History of Quarantine*, PBS (Oct. 12, 2004), https://www.pbs.org/wgbh/nova/article/short-history-of-quarantine/ [perma.cc/XG86-PHQJ].

[200] *Isaiah* 26:20.

[201] *See Leviticus* 13:45–46 (explaining the importance of dwelling apart in times of disease and sickness); *Leviticus* 13:54–55 (warning that to prevent the spread of illness and disease clothes are to be washed and quarantining as needed).

Similarly, scholars note that "religious teachings of hygiene, infection control, and illnesses" can be found in Islamic texts.[202] In fact, WHO and CDC protocols in 2020 align with early Islamic teachings that recommended "followers not to travel to places known to be afflicted with illness, and [advising] those in the contaminated areas or communities not to leave and spread the disease further."[203]

Jewish teachings unearth the same. In the *Journal of Religion and Health,* Tsuriel Rashi meticulously describes the manner in which medical quarantine, social distancing, and disease mitigation efforts are situated in Jewish ethics.[204] He suggests that the record of early epidemics might logically have led to strategies to stem the tide of diseases that could harm both animals and humans.[205] Rashi explains further that epidemics were "not only subject to theological considerations but" also "a series of medical and social imperatives that are strengthened by religious norms."[206] For example, Maimonides, a physician and philosopher, "was not satisfied with just the religious commandment to pray and fast during a plague. He insisted that there is a halachic *obligation* . . . not only to treat disease but also to prevent it from spreading and that doing so requires medical and social concerns."[207]

Jewish teachings also stress the importance of adhering to public health recommendations to mitigate the spread of disease. Over 200 years ago, in response to an outbreak of cholera in Poland, Rabbi Akiva Eger "called on the people to be meticulous about following the instructions of the doctors and the government . . . and to involve the authorities in helping enforce the rules against those who violate them." [208] In sum, Rashi's thoughtful examination of the Talmud suggests that "clearly, Jewish tradition also sees the obligation to deal with the plague from two perspectives: the religious aspect, which calls

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[202] H.H. Musa et al., *COVID-19 Outbreak Controls: Lesson Learned from Islam*, ETHICS, MED. PUB. HEALTH, July 4, 2020, at 1, 1 ("The Prophet Muhammad introduced hygienic practices more than 1400 years ago, for examples Muslims perform five daily prayers, where they must be in a physical purity by washing the hands, mouth, nose, face, wiping the head, ears, and washing feet three times. Performing this five times a day, it builds a culture of cleanliness and decreases the risk of infectious diseases. The Prophet, instructed Muslims to cover their faces when sneezing and coughing, this will minimize the spread of airborne bacteria and viruses.").

[203] *Id.*

[204] *See generally* Tsuriel Rashi, *Justifications for Medical Quarantine in Jewish Ethics*, 59 J. RELIGION & HEALTH 2678 (2020).

[205] *Id.* at 2680.

[206] *Id.* at 2681.

[207] *Id.* (emphasis added).

[208] *Id.* at 2686.

for self-correction, fasting, and prayer, and the medical and civil challenges."[209]

Lessons in early disease mitigation practices, ranging from social distancing to quarantine, can also be found outside of religious texts. In A.D. 549, in the wake of the bubonic plague, "the Byzantine emperor Justinian enact[ed] a law meant to hinder and isolate people arriving from plague-infested regions."[210] Decades after, the Council of Lyons "restrict[ed] lepers from freely associating with healthy persons."[211] The first formal Western system of quarantine was recorded in the fourteenth century when Venice "requir[ed] ships to lay at anchor for 40 days before landing."[212] However, it was not only in Europe, but also in China, where early policies regarding quarantine were socially, if not legally, inscribed. In the seventh century, China is recorded as having "a well-established policy to detain plague-stricken sailors and foreign travelers who arrive[d] in Chinese ports."[213]

The first formal law related to quarantine in Europe dates to 1377 in Dubrovnik, Croatia.[214] This important historical record provided "that on July 27, 1377, the city's Major Council passed a law 'which stipulates that those who come from plague-infested areas shall not enter [Ragusa] or its district unless they spend a month on the islet of Mrkan or in the town of Cavtat, for the purpose of disinfection.'"[215] Across the archives that we consulted, formal and informal responses to health crises in the form of mitigation measures like quarantine are nothing new—in ports throughout the world from Egypt [216] and Nigeria[217] to Japan[218] and Singapore.[219]

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[209] *Id.* at 2680.

[210] Tyson, *supra* note 199.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] Dave Roos, *Social Distancing and Quarantine Were Used in Medieval Times to Fight the Black Death*, HISTORY, https://www.history.com/articles/quarantine-black-death-medieval [perma.cc/REQ4-6QFA] (last updated May 28, 2025).

[215] *Id.* ("Mrkan was an uninhabited rocky island south of the city and Cavtat was situated at the end of the caravan road used by overland traders en route to Ragusa.").

[216] LAVERNE KUHNKE, LIVES AT RISK: PUBLIC HEALTH IN NINETEENTH-CENTURY EGYPT 94 (1990) (noting that Egypt established a quarantine board in 1831).

[217] Quarantine Act (1926) Cap. (Q2) (Nigeria) (Nigeria's formal quarantine law dating 1926); Nigeria Health Watch, *Nigeria's Public Health Emergency Bill: Strengthening the Legal Framework for Responding to Public Health Emergencies*, MEDIUM (Apr. 20, 2023), https://nigeriahealthwatch.medium.com/nigerias-public-health-emergency-bill-strengthening-the-legal-framework-for-responding-to-public-ffea57ec413e [perma.cc/DR2W-XN59] ("The Quarantine Act of 1926 is an important piece of legislation that establishes a legal framework for preventing and controlling infectious diseases in Nigeria.").

[218] Kaikō Ken'ekihō [The Law of Port Quarantine], Law No. 19 of 1899 (Japan).

[219] Quarantine Ordinance, No. 7 of 1868 (Straits Settlements).

It is thus of little surprise that quarantine and disease mitigation practices have a long domestic history as well. Even before the drafting of the U.S. Constitution, beginning in 1738, the City of New York utilized Bedloe's Island to quarantine arriving ships and inspect their passengers and crew members for diseases such as yellow fever.[220] Similar screening protocols were utilized in 1755, when New York again used the island to quarantine individuals infected with smallpox.[221] A century later, after the prohibition of slavery, the Statue of Liberty would be assembled on the island, which continued to serve as an inspection station.[222]

Our objective in providing this history is to intervene in a troubling contemporary discord, which harbors ahistorical instincts and translates the mitigation of disease through social distancing and quarantine measures as inherently or necessarily "totalitarian." This history is intended to display examples of social justifications for quarantines over time. While we acknowledge both real and potential governmental abuse of such mitigation measures, the contemporary, hasty reaction to take them as such at face value is not only incorrect, but dangerous. These former practices show that quarantines are justified practices taken on for legitimate social good. In other words, through a brief and modest retelling of our archival research and the history it uncovers, the Article situates quarantine and social distancing as socially, medically, and legally practiced and justified for many reasons, including religious, moral, and public health. The following Part further unpacks the long practice of quarantine and disease mitigation measures in the United States.

B. Quarantine and Disease Mitigation in the United States

On June 3, 2024, Dr. Anthony Fauci testified before the House of Representatives Committee on Oversight and Accountability's Select Subcommittee on the Coronavirus Pandemic.[223] His testimony drew widespread, international attention, not necessarily generated from his sober observations, but rather the stark, politically divisive, and derisive tone of the hearing. The hearing transcript makes clear that Dr. Fauci became a target for Republican lawmakers. According to Representative Brad Wenstrup (R-OH), Dr. Fauci not only bore the

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[220] *History of Quarantine*, NOVA (Aug. 2004), https://www.pbs.org/wgbh/nova/typhoid/quarantine.html [perma.cc/3PTW-VMFZ].

[221] Liberty Island Chronology, NAT'L PARK SERV., https://www.nps.gov/stli/learn/historyculture/liberty-island-a-chronology.htm [perma.cc/A9LK-5WFG] (last updated May 4, 2023).

[222] *Id.*

[223] *A Hearing with Dr. Anthony Fauci, Hearing Before the Select Subcomm. on the Coronavirus Pandemic of the Comm. on Oversight and Accountability*, 118th Cong. (2024).

responsibility for the perception of a heavy-handed federal government mismanaging its coronavirus response, but also for the interference with individual liberties by recommending masking, stay-at-home mandates, and being risk-averse with regard to children and schools. As put by Representative Wenstrup, Dr. Fauci "oversaw one of the most invasive regimes of domestic policy the U.S. has ever seen, including mask mandates, school closures, coerced vaccinations, social distancing of six feet, and more."[224] Comments by Representative Marjorie Taylor Greene (R-GA) were even more acerbic and forecast the potential political chaos yet to come if an outbreak or pandemic resurfaces anytime soon in the United States. Representative Greene accused Dr. Fauci of being responsible for authorizing "disgusting and evil" experimentations at taxpayer expense,[225] and "making up" rules like "[s]ix feet social distancing and masking of children."[226]

We find these and other comments about COVID-19 mitigation measures ironic, given past and existing federal and state responses to public health crises that mirrored or were even more extreme than those utilized during the COVID-19 pandemic. Dating back centuries, federal and state governments have engaged in public health management to thwart the spread of infectious diseases through isolation, quarantine, and other mitigation efforts.

In 1796, shortly after the Country's founding, Congress enacted the Act Relative to Quarantine, which authorized the executive to impose quarantine to protect states against disease.[227] Subsequently, Congress enacted the "Act for the Relief of Sick and Disabled Seamen," which provided for taxation to fund the development and construction of hospitals to treat merchant seamen.[228] A few years later, in 1799, Congress adopted the "Act Respecting Quarantine and Health Laws," which revisited and revised its prior quarantine act. Its attention focused on federal efforts to minimize the spread of illness and disease that could be borne from international vessels.[229] As the robust trade in slavery and Antebellum-based goods (people, sugar, cotton, tobacco, textiles) flourished, disease aboard ships became a serious concern for the federal government. Ultimately, the law conveyed federal authority

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[224] *Id.* at 4.

[225] *Id.*

[226] *Id.* at 40.

[227] An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796) (repealed 1799).

[228] An Act for the Relief of Sick and Disabled Seamen, ch. 77, 1 Stat. 605 (1798); *see also*, *Disease Control and Prevention: Health Care for Seamen*, NAT'L LIB. MED., https://www.nlm.nih.gov/exhibition/phs_history/seamen.html [perma.cc/4W7K-XEPD].

[229] *An Act Relative to Quarantine (1796)*, STATUTES & STORIES (Feb. 9, 2020), https://www.statutesandstories.com/blog_html/an-act-relative-to-quarantine/ [perma.cc/6KG9-S7QT].

as a check on these matters—extending power beyond state public health requirements.

Throughout the twentieth and twenty-first centuries, federal and state legislatures have continued to enforce and enact disease prevention and control laws, albeit with more protections for individual liberties. Consider California, whose Health and Safety Code provides that during a communicable disease outbreak, a health officer "shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases."[230] Such measures can include quarantining, isolating, or disinfecting "persons, animals, houses, or rooms" as well as destruction of certain goods or animals, but only "when ordinary means of disinfection are considered unsafe, and when the property is, in the judgment of the department, an imminent menace to the public health."[231] To mitigate the harms caused to individuals as a result of such quarantine and disease mitigation efforts, the law further provides for "adequate provision for compensation in proper cases" made to those "injured thereby."[232]

Under a separate section, California law provides that any person who violates or fails to comply with an order of a health officer, such as a quarantine order, is guilty of a misdemeanor.[233] A first offense is punishable by forced compliance with quarantine up to a year and two years' probation, with a repeat offense punishable by confinement of not more than a year.[234]

California is not an outlier. Even in deep red states, laws that predated both Trump Administrations and the COVID-19 pandemic mirror that of California. For example, Texas state law reads that during an outbreak of a communicable disease:

> [T]he commissioner or one or more health authorities may impose an area quarantine coextensive with the area affected. The commissioner may impose an area quarantine, if the commissioner has reasonable cause to believe that individuals or property in the area may be infected or contaminated with a communicable disease, for the period necessary to determine whether an outbreak of communicable disease has occurred. A health authority may impose the quarantine only within the boundaries of the health authority's jurisdiction.[235]

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[230] CAL. HEALTH & SAFETY CODE § 120175 (Deering 2024).

[231] *Id.* § 120210.

[232] *Id.*

[233] *Id.* § 120280.

[234] *Id.* §§ 120280, 120285.

[235] TEX. HEALTH & SAFETY CODE ANN. § 81.085(a) (West 2024).

Texas's law extends to local municipalities as well, allowing that "[a] home-rule municipality may . . . adopt rules to protect the health of persons in the municipality, including quarantine rules to protect the residents against communicable disease."[236] Laws in other states with conservative legislatures and governors read similarly, including in Arkansas, [237] Florida, [238] Georgia, [239] Idaho, [240] Indiana, [241] and Mississippi,[242] among others. The Mississippi Code, for example, reads:

> The State Department of Health shall have the authority to investigate and control the causes of epidemic, infectious and other disease affecting the public health, including the authority to establish, maintain and enforce isolation and quarantine, and in pursuance thereof, to exercise such physical control over

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[236] *Id.* § 122.006(1).

[237] ARK. CODE ANN. § 20-7-109(a)(1) (2024) (providing the State Board of Health with the power "to make all necessary and reasonable rules of a general nature for . . . [t]he proper enforcement of quarantine, isolation, and control of [infectious, contagious, and communicable] diseases"); *id.* § 14-262-101 (providing fines for violating orders of the State Board of Health).

[238] FLA. STAT. § 381.0011(2)–(3) (2024) ("It is the duty of the Department of Health to . . . [a]dminister and enforce laws and rules relating to sanitation, control of communicable diseases, illnesses and hazards to health among humans and from animals to humans, and the general health of the people of the state" and "[c]oordinate with federal, state, and local officials for the prevention and suppression of communicable and other diseases, illnesses, injuries, and hazards to human health"); *id.* § 381.00315(2)(d) ("The State Health Officer is responsible for declaring public health emergencies," upon which the officer may "order[] an individual to be examined, tested, treated, isolated, or quarantined for communicable diseases that have significant morbidity or mortality and present a severe danger to public health.").

[239] GA. CODE ANN. § 31-12-4 (2024) ("The department and all county boards of health may, from time to time, require the isolation or segregation of persons with communicable diseases or conditions likely to endanger the health of others. The department may, in addition, require quarantine or surveillance of carriers of disease and persons exposed to, or suspected of being infected with, infectious disease until they are found to be free of the infectious agent or disease in question.")

[240] IDAHO CODE § 39-415 (2024) ("The district board shall have the same authority, responsibility, powers, and duties in relation to the right of quarantine within the public health district as does the state."); *id.* § 50-304 ("Cities may establish a board of health and prescribe its powers and duties; pass all ordinances and make all regulations necessary to preserve the public health; prevent the introduction of contagious diseases into the city; and make quarantine laws for that purpose and enforce the same within the city.").

[241] IND. CODE § 16-19-3-9 (2024) ("The state department may establish quarantine and may do what is reasonable and necessary for the prevention and suppression of disease."); *id.* § 16-41-9-1.5(a)(2) (providing that under certain circumstances involving communicable diseases, "[t]he public health authority may petition a circuit or superior court for an order imposing isolation or quarantine on the individual. A petition for isolation or quarantine filed under this subsection must be verified and include a brief description of the facts supporting the public health authority's belief that isolation or quarantine should be imposed on an individual, including a description of any efforts the public health authority made to obtain the individual's voluntary compliance with isolation or quarantine before filing the petition").

[242] MISS. CODE ANN. § 41-23-5 (2024).

> property and individuals as the department may find necessary for the protection of the public health.[243]

The state penalizes persons that "knowingly and willfully violate the lawful order of the county, district or state health officer where that person is afflicted with a life-threatening communicable disease or the causative agent thereof shall be guilty of a felony and, upon conviction, shall be punished by a fine not exceeding [$5,000] or by imprisonment in the penitentiary for not more than five (5) years, or by both."[244]

Based on our review, three points can be gleaned from this discussion. First, as these laws in more conservative states indicate, public health mitigation policies, including quarantine laws, predate COVID-19. They are nothing new and have survived legal challenges.[245] Second, the policies are widely adopted because they benefit society. Third, despite the existence of quarantine laws in conservative states authorizing isolation measures to protect public health and safety, the backlash to disease mitigation efforts, such as masking, shelter-in-place orders, and social distancing, has become a volatile, political issue. In short, the issue does not seem to be about whether the authority exists, but rather politicized debates about whether and when the situation calls for use of these authorities—arguments that can be weaponized with misinformation and disinformation.

C. Constitutional Authority

Notwithstanding the long history of quarantine laws in the United States, lawsuits emerged challenging both institutional and state efforts to guard against COVID-19. At the heart of the challenges were fundamental questions related to the constitutionality of mitigation efforts. Did they violate constitutional norms? Were they rooted in history? Could they be described as overreach? While there is no doubt that the government can use its emergency authorities in unjust or unconstitutional ways, common narratives expounded during COVID-19 overlooked or ignored the many situations in which infringements are necessary, appropriate, and even required. Indeed, as we argue, the government has not only the authority but also the obligation to take necessary measures to protect its citizens, which may involve

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[243] *Id.*

[244] *Id.* § 41-23-2.

[245] *See, e.g.*, Wright v. DeWitt Sch. Dist. No.1 of Ark. Cnty., 385 S.W.2d. 644 (Ark. 1965) (upholding state law granting state authority to promulgate health regulations to control communicable diseases); Ex parte Hardcastle, 208 S.W. 531 (Tex. Crim. App. 1919) (upholding Texas quarantine law).

curtailments of individual liberties in the name of broader public health and safety.

1. Authority and history of government action to protect public health

Supreme Court jurisprudence referencing or upholding quarantine measures dates to the early 1800s. In a seminal 1824 case, *Gibbons v. Ogden*,[246] the Court specifically referenced state authority to regulate health and erect quarantine laws.[247] In outlining the areas of state law that are not preempted by Congress's authority under the Commerce Clause, Justice John Marshall specifically referenced quarantine powers:

> [T]hat immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, *quarantine laws*, health laws of every description, as well as laws for regulating the internal commerce of a State.[248]

This reservation of quarantine and health enforcement authority to state governments may explain the limited federal role of active enforcement of quarantine within states—with the exceptions of travel restrictions and screenings at ports of entry. Nevertheless, governmental *parens patriae* authority to protect public health and safety is well established in constitutional law.

Today, the authorities of the government to protect public health are seen, and debated, most clearly in vaccination policies. Eighty years after *Gibbons*, the Supreme Court spoke directly to state police power to protect public health in its 1905 seminal decision, *Jacobson v. Massachusetts*.[249] As discussed *supra*, the Court upheld in *Jacobson* an ordinance requiring compulsory vaccination of all persons fit for inoculation. The Court found the ordinance to be a valid exercise of local police power to protect public health and reduce the spread of smallpox. The Court held that such laws are constitutional when they are "necessary for the public health or the public safety."[250] In the 120 years since that decision, the Court has affirmed the constitutionality of state

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[246] 22 U.S. (9 Wheat.) 1 (1824).

[247] *Id.* at 203.

[248] *Id.* (emphasis added).

[249] 197 U.S. 11 (1905).

[250] *Id.* at 27.

compulsory vaccination laws in cases like *Zucht v. King*,[251] which upheld childhood vaccination requirements for entrance to public schools.[252] In fact, compulsory vaccination laws have existed in the United States in some form since the nineteenth century.[253]

As prior scholarship articulates, the nation's political founders favored inoculating populations against disease.[254] In their article on school vaccination requirements, Professors Lawrence Gostin and James Hodge reflect on Thomas Jefferson's belief that inoculations would likely decrease the spread of diseases, such as smallpox, and ultimately save lives.[255] The problem at that time related to class and race stratification. Broader access to vaccinations across all segments of society began to emerge in 1809 as Massachusetts became the first state to enact a mandatory smallpox vaccination law and government support for compulsory vaccinations expanded.[256]

Prior research describes how the shift in vaccination priorities coincided with public health efforts attuned to addressing poverty.[257] Most of the compulsory inoculation laws attached to public schooling can be traced to the aftermath of the Civil War and the period of Reconstruction. This period, marked by underlying themes of equality, equity, and human dignity, coincided with compulsory education laws proliferating in the United States, reaching youth across the socio-economic and racial spectrum. What had previously been a ban on learning—as a legacy of slavery—was lifted, and with it access to vaccination.

Our sense is that local government officials understood the risks of unvaccinated children infecting their classmates.[258] Namely, they grew concerned that bringing together school-age children in public schools created a risk of a smallpox outbreak.[259] Even though Boston's 1827 law

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[251] 260 U.S. 174 (1922).

[252] *Id.* at 177.

[253] James G. Hodge & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 849 n.126 (2002).

[254] *Id.* at 838–40, 849 n.126.

[255] *Id.*

[256] *See id.* at 849 n.126; *see also* Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, *in* LAW IN PUBLIC HEALTH PRACTICE 262, 271 (Richard A. Goodman et al. eds. 2003).

[257] *See* Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws are Constitutional*, 110 NW. UNIV. L. REV. 589, 601 (2016).

[258] *Id.* at 596–97.

[259] Alfred J. Sciarrino, *The Grapes of Wrath, Part II*, 8 J. MED. & L. 1, 17 (2004) (quoting *Commonwealth v. Gillen*, 65 Pa. Super. 3, 38 (Pa. Super. Ct. 1916)) ("As a court in Pennsylvania stated in 1916: 'It is an accepted fact, that during the common school ages, children are specially susceptible to the infectious and contagious diseases mentioned in these acts, and that this hazard is greatly increased by their being brought together from our varied conditions of society. To avoid the spread of these diseases, it has been deemed necessary by the legislature to enforce rigid

providing for the compulsory inoculation of school-aged children dates back decades before the Civil War, the city led the nation as the first to offer public schooling, public schooling for Black children, and integrated schooling, [260] a century before *Brown v. Board of Education*.[261]

As Gostin and Hodge explain, statewide compulsory vaccination laws for school-aged children proliferated. This expansion spread from Massachusetts in 1855 to New York in 1862 and Connecticut in 1872.[262] Less than a decade later, vaccination protocols for children advanced to Indiana in 1881.[263] Illinois, Arkansas, Virginia, and Wisconsin followed in 1882, and six years later, to California in 1888, Iowa in 1889, and Pennsylvania in 1895.[264] By 1904, eleven of the then forty-five U.S. states had compulsory vaccination laws.[265]

A century later, all fifty states have enacted compulsory vaccination laws that apply to school-aged children.[266] Courts have upheld these laws.[267] These compulsory vaccination laws share two important features: (1) their proven efficacy in averting and even eliminating disease [268] and (2) exemptions for certain populations.

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quarantine and preventive measures, even to the isolation of persons, and exclusion of pupils from infected districts.'"); *see also* Hodge & Gostin, *supra* note 253, at 850.

[260] *See* Hodge & Gostin, *supra* note 253, at 851.

[261] 347 U.S. 483 (1954).

[262] *See* Hodge & Gostin, *supra* note 253, at 851.

[263] *Id.*

[264] *Id.*

[265] Kristine M. Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY & L. 249, 250 (1995).

[266] On September 3, 2025, Florida Surgeon General Joseph Ladapo announced that the state planned to end all state vaccine mandates, including for students to attend schools. However, mandates written in state laws will require an act of the state's legislature. Yacob Reyes, *Florida to End All Vaccine Mandates, State Officials Say*, AXIOS (Sept. 3, 2025). https://www.axios.com/local/tampa-bay/2025/09/03/florida-ends-vaccine-mandates-schools-joseph-ladapo [perma.cc/W37Z-WCSD].

[267] *See, e.g.*, Zucht v. King, 260 U.S. 174 (1922); Prince v. Massachusetts, 321 U.S. 158 (1944) (reinforcing the state's authority to require vaccination, emphasizing the precedence of public health and safety interests over individual objections); We the Patriots U.S., Inc. v. Conn. Off. Early Childhood Dev., 76 F.4th 130 (2d Cir. 2023) (upholding Connecticut law that repealed religious exemptions to school vaccination requirements); Boone v. Boozman, 217 F. Supp. 2d 938 (E.D. Ark. 2002) (holding that an Arkansas student immunization statute was constitutional); Bridgette Bjorlo, *State Upholds Mandatory School Vaccinations*, FOX61 (July 31, 2024), https://www.fox61.com/article/news/local/ct-upholds-mandatory-school-vaccinations/520-4ebef7ef-422f-4f9d-9424-9186711a504f [perma.cc/TY76-NH8A].

[268] Michelle M. Mello et al., *Effectiveness of Vaccination Mandates in Improving Uptake of COVID-19 Vaccines in the USA*, 400 LANCET 535, 535 (2022) ("Substantial evidence shows that vaccination mandates in the USA performed well on both dimensions of effectiveness before the COVID-19 epidemic. Cross-state comparisons show that states' school-entry mandates (eg, for pertussis and measles) are effective in improving vaccination coverage among schoolchildren and greatly reduced disease outbreaks in the USA."); FE Andre et al., *Vaccination Greatly Reduces Disease, Disability, Death and Inequity Worldwide*, 86 BULL. WORLD HEALTH ORG. 140, 141 (2008) ("In the USA, there has been a 99% decrease in incidence for the nine diseases for which vaccines

According to data from 2019, medical exemptions are provided in each state for medical conditions that increase the risk of adverse effects to a certain vaccine or even multiple vaccines.[269] Some states—such as West Virginia and Montana—expressly address the duration of an exemption (i.e., temporary or permanent),[270] while some states, such as New Mexico, require re-certification of medical or religious exemptions.[271] Even while each state's medical stipulations differ, all states provide such an exemption.[272]

Whether at the U.S. Supreme Court level, such as in *Zucht*,[273] or the local or state level, compulsory vaccination laws have frequently been deemed constitutional. In *Wright v. De Witt School District*,[274] for example, the Arkansas Supreme Court held that it is within the state's police power to require school children to be vaccinated and that such a requirement does not "violate the constitutional rights of anyone, on religious grounds or otherwise."[275] Similarly, the Mississippi Supreme Court upheld the constitutionality of a vaccination law in *Brown v. Stone.*[276] In that case, the Mississippi Supreme Court held that a religious exemption in the Mississippi state compulsory vaccination law for school children was unconstitutional because it only allowed exemption for members of recognized denominations to obtain exemption.[277] The court concluded that because a state compulsory vaccination law could stand on its own without a religious exemption, the law was constitutionally valid without the exemption.

2. Obligation to protect the public health

The prior subpart makes clear that the government possesses the *authority* to curtail individual liberties to a certain degree to protect the public. We go a step further and argue that the government also has

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have been recommended for decades, accompanied by a similar decline in mortality and disease sequelae.").

[269] *See* Malone & Hinman, *supra* note 256, at 274; *see also State School Immunization Requirements and Vaccine Exemption Laws*, CDC (Feb. 2022) [hereinafter CDC, *State School Immunization*], http://www.cdc.gov/phlp/docs/school-vaccinations.pdf [perma.cc/A7EP-PGJF], at 3–4, 10.

[270] *See* CDC, *State School Immunization*, *supra* note 269, at 11.

[271] *Id.* at 6.

[272] *Id.* at 3, 10.

[273] 260 U.S. 174, 177 (1922).

[274] 385 S.W.2d 644 (Ark. 1965).

[275] *Id.* at 646. *See also* Cude v. State, 377 S.W.2d 816, 819 (Ark. 1964) ("According to the great weight of authority, it is within the police power of the State to require that school children be vaccinated against smallpox, and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise.").

[276] 378 So. 2d 218 (Miss. 1979).

[277] *Id.* at 223.

the *obligation* and *responsibility* to do so. The politicization of public health measures, along with the spread of misinformation and disinformation—sometimes at the hands of the government itself—violate the government's obligations to its citizens. This is true even when the government must carry out this responsibility by limiting individual rights in the name of the greater good. We note, however, that the government's *obligation* to protect public health, just like its *authority* to do the same, is not unlimited. On the contrary, all due care must be taken when meeting that obligation to avoid undue infringements of individual liberties, particularly when such infringements differ along demographic lines.[278]

Despite the U.S. Constitution's guarantee of life, liberty, and property, the U.S. Supreme Court has yet to recognize a constitutional right to health in the form of a right to government-provided healthcare.[279] While the argument to recognize a right to health and, concomitantly, health care, has been put forth by scholars and advocates, and while we do not necessarily disagree with their positions, our argument here is more limited. Specifically, we argue that individuals have a right to protection from public health threats and emergencies, and the government has an obligation to provide that protection. As Professor Wendy Parmet notes, it is often assumed "that the sole function of constitutional law is to place limits—not obligations—upon government." [280] As expounded by Chief Justice Rehnquist in *Deshaney v. Winnebago*, "the [Due Process] Clause is phrased as a limitation on the State's power to act."[281]

We agree with Professor Parmet that the underlying assumption that the government has no duty to provide health care, or as we argue, to protect public health from contagion, is not rooted in ethics or law. Even while the Constitution is "remarkably silent about the relationship between individual and government,"[282] it is not altogether mute on this point. Consider Article IV, Section 4, the "Guarantee Clause." It states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them against Invasion*; and on Application of the Legislature, or

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[278] We intend the term "demographic lines" to be construed broadly, and include differences by race, ethnicity, sex, sexual orientation or gender identity, immigration and nationality status, age, disability, and more.

[279] *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

[280] Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 273 (1993).

[281] *Deshaney*, 489 U.S. at 195.

[282] Parmet, *supra* note 280, at 277.

of the Executive (when the Legislature cannot be convened) against domestic Violence."[283] This affirmative duty has long been overlooked.

We contend that the Guarantee Clause provides a constitutional foundation for the argument that the federal government has an affirmative obligation to protect the States and their residents from pandemics and public health threats. While the Clause is most often discussed in connection with its requirement that the United States guarantee to every State a "Republican Form of Government," its parallel protection against "Invasion" and "domestic Violence" reveals a broader structural commitment to preserving the stability and functioning of republican governance. The Clause's textual command, historical underpinnings, and doctrinal treatment collectively support a broader reading that encompasses a federal responsibility when public health crises threaten the viability of state institutions.

The Clause's inclusion of protections against "invasion" and "domestic violence" reflects an understanding that certain emergencies—whether military, civil, or otherwise—could disable the functioning of republican institutions. In the eighteenth and nineteenth centuries, epidemics such as yellow fever and cholera frequently disrupted legislative sessions, postponed elections, and strained civil order.[284] Contemporary accounts described such outbreaks in terms akin to sieges on civil society.[285]

A reasonable interpretation of "shall protect" against both invasion and violence should include application to both disease and the deadly harms that can emerge from public health threats. This interpretation would extend to protecting not only the states, but also the people within the states from deadly diseases. If the Clause obligates the federal government to act when armed invasion or internal insurrection endangers state institutions, it is reasonable to construe it as likewise obligating protection against pandemics capable of producing comparable—or even more severe—systemic disruption. Indeed, even by the end of April 2020, deaths in the United States from COVID-19 had already surpassed U.S. fatalities in the Vietnam War.[286] And by February 2021, the U.S. death toll from COVID-19 matched the toll of the Vietnam War, the Korean War, and World War II *combined*.[287]

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[283] U.S. CONST. art. IV, § 4 (emphasis added).

[284] Howard Markel, *When Germs Travel*, 68 AMERICAN SCHOLAR 61 (1999).

[285] *Id.*

[286] Nina Strochlic, *U.S. Coronavirus Deaths Now Surpass Fatalities in the Vietnam War*, NAT'L GEOGRAPHIC (Apr. 28, 2020), https://www.nationalgeographic.com/history/article/coronavirus-death-toll-vietnam-war-cvd [perma.cc/FS4W-HDL2].

[287] Niall McCarthy, *U.S. Deaths from COVID-19 Match Toll of Three Major Wars*, STATISTA (Feb. 23, 2021), https://www.statista.com/chart/24252/us-covid-19-deaths-compared-to-deaths-in-major-wars/ [perma.cc/C7NJ-ZSTL].

Although "invasion" and "domestic violence" are often read narrowly, their placement in a clause devoted to preserving republican government suggests a purposive reading. Invasion refers not only to hostile armies but to any external force that overwhelms a state's capacity to govern; domestic violence encompasses severe internal disruptions to governance and civil order. A pandemic that incapacitates legislative bodies, hinders free and fair elections, and overwhelms civil institutions functions analogously to these threats. Under this functional-equivalence theory, the Guarantee Clause would permit—and arguably require—federal intervention to mitigate such harms.

The Supreme Court's decision in *Luther v. Borden*[288] is often cited for the proposition that Guarantee Clause claims are non-justiciable political questions. However, *Baker v. Carr*[289] narrowed the reach of the political question doctrine and suggested that certain structural claims may be justiciable if they are susceptible to judicially manageable standards. Even if the Clause is largely enforced through the political branches, its substantive commitments inform the scope of federal powers and duties. In public health, *Jacobson v. Massachusetts*[290] affirmed state police power to protect health and safety, but this does not displace the federal government's complementary obligation under Article IV to act when pandemics threaten the viability of state republican government.

Modern scholarship supports this more robust reading of the Guarantee Clause as a source of affirmative federal obligations. Professor Tara Leigh Grove has argued that the Clause historically carried substantive content and that its relegation to the political question doctrine is a relatively modern phenomenon.[291] Law and public-health law scholars have likewise emphasized that pandemic governance requires coordination between state and federal authorities, especially when crises threaten national stability.[292]

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[288] 48 U.S. (7 How.) 1 (1849).

[289] 369 U.S. 186 (1962).

[290] 197 U.S. 11 (1905).

[291] *See generally* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015).

[292] *See e.g.*, Yanbai Andrea Wang & Justice Weinstein-Tull, *Pandemic Governance*, 63 B.C. L. REV. 1950, 1953 (2022) ("To effectively respond to a pandemic, crisis management theory tells us that political leaders must identify the crisis, make sense of it, and clearly communicate and coordinate their response."); Thomas A. Birkland et al., *Governing in a Polarized Era: Federalism and the Response of U.S. State and Federal Governments to the COVID-19 Pandemic*, 51 PUBLIUS: J. FEDERALISM 650, 654 (2021) (arguing that lack of "coordination of federal resources and state responses" was a major problem during COVID-19); Beverly A. Cigler, *Fighting COVID-19 in the United States with Federalism and Other Constitutional and Statutory Authority*, 51 PUBLIUS: J. FEDERALISM 673, 677 (2021) ("The U.S. public health and emergency management systems reject a strict dual federalism model of 'either-or' that would divide responsibility and power into discrete

Accepting the Guarantee Clause as encompassing pandemic protection would not federalize all public-health functions; rather, it would reserve federal action for instances where public-health threats rise to the level of impairing the fundamental operations of republican governance. This includes major health catastrophes like the COVID-19 pandemic. Our goal in this Article is not to delineate precisely what the government must do to fulfill this obligation, but rather to lay the foundation for recognizing that obligation, which can be fleshed out in future work. How the government fulfills that obligation will likely depend on the circumstances and the threat to which it must respond.

Even without that more novel claim, it is not preposterous to suggest that the government must protect its citizens, to the extent possible, from disease. As scholar James Tobey argues, "[t]he protection and promotion of the public health has long been recognized as the responsibility of the sovereign power. Government is, in fact, organized for the express purpose, among others, of conserving the public health and cannot divest itself of this important duty."[293] And while this obligation is shared across federal, state, and local levels of government, the federal government's role in protecting and promoting public health has expanded significantly throughout the country's history.[294]

D. Protecting Civil Liberties and Civil Rights Against Excessive Government Intrusion

In the current politicized climate of vaccination, it is important to restate why inoculation is important and constitutional. Many studies demonstrate the importance and value of vaccinations both in terms of preventing death and avoiding needless suffering.[295] However, we are also mindful of a perverse history of racial exclusion and discrimination in the United States inappropriately tied to public health.

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categories. Instead, a cooperative federalism model that uses a flexible application of the Tenth Amendment and designs systems that envision national government leading cooperative relations within itself and with the states is in place. Shared power is at the heart of federalism, so leadership matters—including the need to coordinate all actors and government levels while working with the private and nonprofit sectors.").

[293] James A. Tobey, *Public Health and the Police Power*, 4 N.Y.U. L. REV. 126, 126 (1927).

[294] *See* Josh Michaud, *U.S. Public Health*, KAISER FAM. FOUND. (Mar. 6, 2025), https://www.kff.org/other-health/health-policy-101-u-s-public-health/?entry=table-of-contents-what-is-public-health [perma.cc/QF7G-NKU2] (listing several "milestones" during the twentieth century that expanded the federal government's role in public health).

[295] Vaccinations are now available and routinely administered for the following diseases: COVID-19, Haemophilus influenzae type b ("Hib"); Diphtheria; Hepatitis A; Hepatitis B; Human Papillomavirus ("HPV"); Meningococcal disease; Influenza; Measles; Mumps; Pertussis (whooping cough); Pneumococcal disease; Polio; Rubella (German measles); Tetanus (lockjaw); Rotavirus; and Varicella (chickenpox). *Vaccines for Children - A Guide for Parents and Caregivers*, FDA, http://www.fda.gov/BiologicsBloodVaccines/ResourcesforYou/Consumers/ucm345587.htm [perma.cc/H3VE-LXUB] (last updated Nov. 4, 2024).

Unfortunately, the vestiges of racial stereotypes and stigma linger, particularly in association to health and disease. Thus, we do not reject the notion that government overreach is possible in times of public health or any other crisis. Section V.D briefly turns to these concerns, drawing lessons on race and class in America. To this end, we argue that the vitriol against mitigation efforts during the pandemic was largely overstated. Instead, we offer examples of government overreach that place in context where guardrails are necessary.

At the core of this Article are three concepts. First, protecting and preserving the public's health and safety is a governmental responsibility. Second, public health mitigations are constitutional to protect the public's health and safety during health crises. This may include sheltering in place, mask mandates, and protocols associated with compulsory vaccination. Third, protecting civil liberties and civil rights is fundamental to a healthy democracy. Thus, we believe these interests must be balanced in times of health crisis, while also being protected against over-politicization. The protection of one's interest to be free in society must not come at the cost of risking the life of another due to infectious disease. Alternatively, claims of protecting the public's health and safety must not be a smokescreen or proxy for unconstitutional discrimination.

Acknowledging the burdens associated with the balancing we call for matters. For example, during the peak of COVID-19, children in most districts throughout the United States learned from home rather than attending school. People were expected to distance themselves from others—spacing at least six feet. This meant that relatives were at least wary of hugging or even gathering. Across the United States, seniors and those with vulnerable health did not have intimate physical contact with visitors. For the most part, Americans labored outside of the work environment, pivoting to virtual work and meetings. Religious communities turned to online services, forgoing the important congregational or communal aspect of observation. Students missed K-12, college, graduate, and professional school graduations as schools and universities turned to online ceremonies. Parents and relatives in nursing homes were visited less frequently by loved ones if at all. And in the instances of hospitalization or even death, many were without family. Business suffered economically. Establishments that could not pivot or adjust to these conditions shuttered and closed. COVID conditions further exacerbated societal stress for communities where human contact was crucial but limited, including in circumstances of intimate partner violence. These adjustments, some far more painful and intrusive than others, were serious tradeoffs. We acknowledge these serious burdens. It is the crux of threading the needle rather than

hammering the nail. In the backdrop of these realities, the question remains: *what should be done?*

The obvious options: *ignoring the pandemic and gathering at your own risk*—fail to consider three serious matters. First, the known health and safety risks to others. Even with social distancing, hospitals were overwhelmed with COVID sickness and disease, such that physicians and nurses died. Without constraints, it is quite possible that COVID-19 could have been even more catastrophic for American healthcare with repercussions lasting decades. This problem is not simply one of ethics, but infrastructure.

Second, Americans face a broken healthcare system with many problems, including a lack of universal healthcare. This means that the costs of individual care to treat illnesses are not guaranteed, as some Americans remain un- or under-insured. The federal Emergency Medical Treatment and Labor Act (EMTALA) mandates that hospital emergency rooms stabilize patients, but not that they absorb the costs. *Who pays?* Third, not only does the United States have a distinctly different healthcare system than peer nations, which serve the public, but its legal system also differs. That is, the American tort system is fueled by attempts to mitigate the costs of poor decisions through civil litigation. For example, through tort law—whether intentional battery or foolish negligence—the costs of accidents, including medical expenses, are addressed and remedied. For many, it is only through the tort system that the health costs of their accidents are addressed, as there exists no universal healthcare in the United States.

Because this Article grounds its analysis and arguments in the sociolegal, it turns to and relies on empirical contexts. From this methodology, we draw important lessons. We rely on science and evidence and urge a balancing that considers scope and scale. To level set, a brief reminder is due. As an empirical matter, COVID-19, a global pandemic, caused death and destruction at a level so rarely witnessed that the last public health threat of similar scope occurred a century prior. While the elderly and immunocompromised were at great risk, in reality, no age was spared. Our point is that the known and proven threat of COVID-19 meant a level of response that differed in the United States from other recent disease threats like Ebola, H1N1, swine flu, bird flu, and Zika.

In contrast to COVID-19, consider if the government imposed shelter-in-place orders, social distancing, and mask mandates in response to Ebola, which though deadly, did not spread in the United States. Such a response would have been excessive and an impermissible infringement on civil rights and civil liberties. Similarly, had the government targeted Black communities with such conditions, because Ebola is most associated with West Africa, that too would have

been an unlawful intrusion on the civil rights of Black Americans. Using race as a proxy for mitigating disease would have constituted impermissible racial discrimination.

Using health as a proxy for discrimination would not be without precedent. For example, both *Wong Wai v. Williamson*[296] and *Jew Ho v. Williamson,* [297] represent the use of health as a proxy for racial discrimination. The race-based quarantine of the Chinese community in San Francisco led to one of the most important opinions involving quarantines in American jurisprudence. On March 6, 1900, a city health officer autopsied a deceased Chinese man and found bacteria in the body (later identified as *Yersina pestis*) that, in his opinion, resembled the bubonic plague.[298] The city board of health quickly imposed an order prohibiting Chinese residents from leaving the city.[299] A federal court later struck down the order in *Wong Wai v. Williamson* as discriminatory under the Fourteenth Amendment.[300]

A few months later, the city issued a new order: a quarantine of the neighborhoods of Chinatown. Presumably, city officials calculated that the ordinance would appear race-neutral by focusing on geography rather than race. The quarantine nonetheless targeted individuals. Jew Ho, a business owner in the quarantined section of town challenged the law in *Jew Ho v. Williamson*.[301] Ho claimed that the law, which targeted the community in which he lived and worked, interfered with his right to ply his trade. The court found that Jew Ho's quarantine was unconstitutional:

> [Jew Ho's] quarantine cannot be continued, by reason of the fact that it is unreasonable, unjust, and oppressive, and therefore contrary to the laws limiting the police powers of the state and municipality in such matters; and, second, that it is [discriminating] in its character, and is contrary to the

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[296] 103 F. 1 (N.D. Cal. 1900).

[297] 103 F. 10 (N.D. Cal. 1900).

[298] *Bubonic Plague Hits San Francisco: 1900-1909*, PBS, https://www.pbs.org/wgbh/aso/databank/entries/dm00bu.html [perma.cc/HJ2P-UUHW].

[299] Gregory P. Campbell, *The Global H1N1 Pandemic, Quarantine Law, and the Due Process Conflict*, 12 SAN DIEGO INT'L L.J. 497, 508–09 (2011).

[300] *Wong Wai*, 103 F. at 7 ("[The regulations] are not based upon any established distinction in the conditions that are supposed to attend this plague, or the persons exposed to its contagion, but they are boldly directed against the Asiatic or Mongolian race as a class, without regard to the previous condition, habits, exposure to disease, or residence of the individual; and the only justification offered for this discrimination was a suggestion made by counsel for the defendants in the course of argument, that this particular race is more liable to the plague than any other. No evidence has, however, been offered to support this claim, and it is not known to be a fact. This explanation must therefore be dismissed as unsatisfactory.").

[301] *Jew Ho*, 103 F. at 12.

> provisions of the fourteenth amendment of the constitution of the United States.[302]

In a close review of San Francisco's implementation of the order, the court found that White residents of Chinatown were not subject to the order. Thus, although race-neutral on its face, the law's enforcement reduced it to an unconstitutional race-based violation of civil liberties. In essence, the law was under-inclusive in that it excluded a population from surveillance, and, as such, it could not be argued to prevent the spread of disease.[303]

Tragically, two decades later in 1917, government officials at the southern border in El Paso, Texas launched a program to "disinfect" people seeking to enter the United States through what became known as "gasoline baths."[304] This horrific practice targeted Mexican laborers who traveled across the border to provide day labor.[305] Health officials, weaponizing racial stereotypes, used a deadly gas and forced men, women, and even children to undress and be doused with Zyklon B and pesticides like DDT.[306] This project, known as the "Bracero Program," has largely been forgotten, even though this effort to "fumigate" migrant workers lasted for decades.[307] The techniques and chemicals utilized in the process were later adopted by the Third Reich.[308]

A decade later, in *Buck v. Bell,*[309] Virginia led dozens of states in a campaign to purge the United States of White people deemed morally delinquent, illegitimate, and unfit.[310] Chief Justice Oliver Wendell Holmes authored the case, which upheld Virginia's model, compulsory sterilization law, and ultimately ushered in and legitimized eugenics in the United States. According to the Court:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those

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[302] *Id.* at 26.

[303] Campbell, *supra* note 299, at 509.

[304] *See e.g.*, Ranjani Chakraborty, *The Dark History of "Gasoline Baths" at the Border,* VOX (July 29, 2019), https://www.vox.com/2019/7/29/8934848/gasoline-baths-border-mexico-dark-history [perma.cc/84EH-PWTQ].

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] *Id.*

[309] 274 U.S. 200 (1927).

[310] *See The Right to Self-Determination: Freedom from Involuntary Sterilization*, DISABILITY JUST., https://disabilityjustice.org/right-to-self-determination-freedom-from-involuntary-sterilization [perma.cc/A33K-U5XB].

> concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. [311]

The subject of Virginia's sterilization law was Carrie Buck, who survived rape and out-of-wedlock childbirth at sixteen. According to the Court, she was "poor" and was taken to a colony reserved for people the state sought to sterilize. According to Justice Holmes, three generations of people like Carrie were enough to justify cutting the fallopian tubes.[312]

Our point is that when the government weaponizes its authority and responsibility to protect health and safety, it in actuality breaches its authority and violates constitutional norms.

Critics of this Article may make several claims, and we briefly address three. The first is that we have not presented a solution to resolve the government's weaponization of racial and economic vulnerability in times of health crisis. We take seriously the underlying concerns of injustice, inequality, and inequity in society. Our prior scholarship addresses these very important concerns. The Article advocates for more, and not less, legal and social discourse acknowledging the harms we articulate and legal and policy proposals to address these concerns.

While the focus of this Article does not take up the social determinants of health or methods to combat racial discrimination in government and healthcare (as both are beyond the scope and scale of this project) we acknowledge the existence of protracted social injustice, systemic racism, and intersectional harms that uniquely disempower people of color and the economically vulnerable in health care at a time in which doing so has become fraught in the United States. As we argue earlier, COVID-19 revealed preexisting patterns of racial discrimination and injustice. We acknowledge, but do not resolve these concerns in this Article, and leave so for future scholarship.

The second criticism that we briefly address is that we provide *too much* context and content. That is, the Article takes a fine-toothed comb to the pandemic, sometimes at the micro level. However, the weakness in this argument rests in the fact that empirical evidence matters and should be embraced in serious intellectual discourse. We demonstrated

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[311] *Buck,* 274 U.S. at 207 (noting that the decisions "paved the way for 30 other states to enforce such laws. As a result, more than 60,000 men, women and children in the United States were sterilized without their consent from the 1920s through the mid-1970s").

[312] *Id.*

that, despite evidence of harm and death resulting from COVID-19, the peddling of political propaganda created negative externalities, causing harm and preventable death.

Third, some of our arguments may appear *non-controversial.* If courts already permit quarantine in responding to health emergencies, does our claim that the government should intervene in times of credible health crises to protect and preserve the public's health have merit? In other words, given prior legal precedent permitting government intrusion on civil liberties in times of public health crisis, there may be nothing more to say. The future is secure. For decades, that seemed to be the case.

However, *Roe v. Wade's* overturning and other attacks on the rule of law demonstrate that prior, sound legal precedents may not be dams that restrain future pressures and egregious judicial decisions that transform decades of law and ultimately healthcare. This Article is written in the wake of aggressive antivaccine movements, heightened mistrust of government, the dangerous spread of medical misinformation, and deep political partisanship. Thus, if the past three terms of the Roberts Court prove instructive, prior precedents protecting civil liberties and civil rights are all vulnerable to the Court's interpretation that protecting the vulnerable public in *education, housing, voting, reproductive health, the environment,* and more is no longer necessary. From this, we take the perspective of dissent, advancing scholarship in exile such that in a different future, pathways forward may be paved.

VI. CONCLUSION

Charles Parker and Eric Stern remind us that the Trump Administration missed significant opportunities to appropriately and responsibly address the COVID-19 crisis.[313] The Administration's failures played a crucial role in undermining rather than protecting and preserving health. As they explain, "the U.S. president is ultimately responsible for ensuring a healthy policy process to guard against the pathologies implicated in the federal government's sub-optimal response to the COVID-19 crisis."[314] While Parker and Stern are not wrong, we believe that the significant failure was not the poor leadership shown by the Trump Administration during the COVID-19 pandemic, but rather the weaponization of political grievance, the trafficking in disinformation and misinformation, and fomenting political divide rather than collaboration and cooperation. In preparing

[313] *See* Parker & Stern, *supra* note 3, at 616.

[314] *Id.*

for the next public health emergency, we argue for recognizing that the government has authority and obligation to respond in times of catastrophic health crises, but that the authority claimed by the government in times of health crises cannot be abused or used as a proxy for unlawful discrimination.