

# MEDICAL MARTIAL LAW: TOWARDS A MORE EFFECTIVE PANDEMIC POLICY

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## I. INTRODUCTION

In early 2020, prophylactic actions and draconian proposals targeted the confinement of COVID-19 virus contagion vectors.<sup>1</sup> Law, politics, geography, and the epidemiological sciences are intimately involved in structuring inter-disciplinary policy responses to balance curbs to the disease's devastation to human population health and the economic damage of lockdowns.<sup>2</sup> A flurry of research has flowed since the spring of 2020 into many aspects important to this research, including COVID-19 testing, treatments, and vaccines, presidential powers to address pandemics, federalism aspects of pandemic response, the effectiveness of pandemic

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<sup>1</sup> *Flattening the COVID-19 Peak: Containment and Mitigation*, OECD, <https://www.oecd.org/coronavirus/policy-responses/flattening-the-covid-19-peak-containment-and-mitigation-policies-e96a4226/> (last updated Mar. 24, 2020).

<sup>2</sup> See generally Edward Kong & Daniel Prinz, *The Impact of Shutdown Policies on Unemployment During a Pandemic*, 189 J. OF PUB. ECON., Nov. 9, 2020, at 17; see also Edward Kong & Daniel Prinz, *Disentangling Policy Effects Using Proxy Data: Which Shutdown Policies Affected Unemployment During the COVID-19 Pandemic?*, 189 J. OF PUB. ECON., Nov. 9, 2020, at 17. (comparing non-pharmaceutical interventions (NPIs) during the COVID-19 pandemic in the United States as to differential timing of the introduction of restaurant and bar limitations, non-essential business closures, stay-at-home orders, large gathering bans, school closures, and emergency declarations as proxy outcomes using Google searches to estimate growth in unemployment during the COVID-19 pandemic as due to each of these NPIs).

lockdowns,<sup>3</sup> and the economic impact of pandemic suppression measures.<sup>4</sup> This article focuses on the intersection of economic and geographic boundary determinations and authorities to enforce pandemic control measures.

This article also addresses varying proposals and deployments of travel restrictions to contain the virus. As a form of Medical Martial Law, it predictably raises significant liberty questions: The freedom of movement and the constitutional right to travel. Provisionally, Medical Martial Law is defined as government imposition of various emergency control measures to contain and suppress a pandemic.<sup>5</sup> However, the full contours of Medical Martial Law are complex, both broad and deep, so they are developed more fully throughout as the primary thesis of this article.

The theme of this article is timely because it explores federalism problems with government-mandated containment of pandemic disease vectors.<sup>6</sup> Early in the 2020 COVID-19 pandemic, uncertainties abounded as to legal/regulatory authorities and appropriate methods available to address

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<sup>3</sup> See, e.g., S. Hsiang, et al., *The Effect of Large-Scale Anti-Contagion Policies on the COVID 19 Pandemic*, 584 NATURE 262-67 (June 8, 2020) (finding shutdown prevented 60 million COVID-19 cases in the United States and 500 million worldwide); See Seth Flaxman et al., *Estimating the Effects of Non-Pharmaceutical Interventions on COVID-19 in Europe*, 584 NATURE 257-61 (June 8, 2020) (particularly explaining how major non-pharmaceutical interventions and lockdowns have had a large effect on reducing transmission and how continued intervention should be considered to keep transmission of SARS-CoV-2 under control).

<sup>4</sup> See, e.g., *Business Cycle Dating Committee Announcement June 8, 2020: Determination of the February 2020 Peak in Economic Activity*, NAT'L. BUREAU ECON. RSCH. (June 8, 2020), <https://www.nber.org/cycles/june2020.pdf> (finding the United States fell into a recession in February 2020 which ended the 128-month economic expansion, the longest on record; the COVID-19 pandemic had led to an economic downturn with different characteristics and dynamics from previous recessions; and "[t]he unprecedented magnitude of the decline in employment and production, and its broad reach across the entire economy, warrants the designation of this episode as a recession, even if it turns out to be briefer than earlier contractions").

<sup>5</sup> See Executive Order, Red Lake Band of the Chippewa Indians, Apr. 3, 2020, available at <https://www.redlakenation.org/wp-content/uploads/2020/04/Executive-Order-Medical-Martial-Law-04032020.pdf> (showing how the only contemporary authoritative appearance of this term Medical Martial Law appears in travel restrictions intended to safeguard, from outsider importation of COVID-19 infection); see also *Coronavirus In Minnesota: Red Lake Reservation Issues Medical Martial Law*, CBS MINN. (Apr. 2, 2020), <https://www.cbsnews.com/minnesota/news/coronavirus-in-minnesota-red-lake-reservation-issues-medical-martial-law/>; see also Sandra Schmidt, *Medical Martial Law: Somewhere Between Biosafety and Freedom*, OUTBREAK NEWS TODAY (July 11, 2015), <http://outbreaknewstoday.com/medical-martial-law-somewhere-between-biosafety-and-freedom-26675/> (predicting that some form of Medical Martial Law might become relevant in the future); see also *Extremists and Conspiracy Theorists Urge Resistance to "Medical Martial Law"*, ADL (Apr. 23, 2020), <https://www.adl.org/blog/extremists-and-conspiracy-theorists-urge-resistance-to-medical-martial-law> (citing several web postings and television appearances using some variant of the phrase). A few conspiracy theorists may have independently coined the term "Medical Martial Law" during the initial COVID-19 lockdown to rally opposition to government control. *Id.*

<sup>6</sup> See generally *Vector-borne Diseases*, WORLD HEALTH ORG. (Mar. 2, 2020), <https://www.who.int/news-room/fact-sheets/detail/vector-borne-diseases>. Herein, the term "disease vector" refers to the pathways that contagious diseases follow as they are impacted by public policies that attempt to contain or may operate to detract from the significance of these trails.

the pandemic's injury to public health and economic vitality.<sup>7</sup> We review the sometimes conflicting powers of federal, state, and local governments to effect measures that suppress pandemic injury. By developing the Special Quarantine District construct from economic geography, we conclude that authorities based on traditional political boundaries are ill-suited to effective pandemic response management. Further, we conclude that the potential for central control under various forms of emergency conditions lacks effective enforcement mechanisms for a successful pandemic response while suffering the limitations of ineffective checks and balances. The issues explored in this article will garner significant attention as domestic and international governments at all levels continue to struggle with balancing pandemic response with sustaining economic vitality as focused through political pressures for liberty. We hope to inform the impending post-pandemic retrospective analysis of success as methods are refined for science to guide public policy formulation and deployment.

This article develops the novel Medical Martial Law concept by fusing and extending three well-developed bodies of scholarship: Martial law, reviewing the palette of national emergency powers as applied to pandemics, and economic geography.<sup>8</sup> In Section II,<sup>9</sup> the authorities of states and local governments (municipalities, counties) are analyzed under federalism as the basic polity to declare and enforce Medical Martial Law. In Section III,<sup>10</sup> the promise of interdisciplinary resolution of Medical Martial Law problems is addressed. In Section IV,<sup>11</sup> the right to travel is balanced against these non-federal powers to blunt enforcement authorities of the states. In Section V,<sup>12</sup> constitutional, statutory and doctrinal development of traditional martial law is adapted to pandemics under Presidential emergency powers. Finally, Section VI<sup>13</sup> discusses the nexus between Medical Martial Law and business interruption and how private enterprise initiation and enforcement of remedial counter-measures to COVID-19 serve as a balance between the interests of personal and economic liberty and pandemic suppression.

#### A. Problem Statement

Medical Martial Law is of immediate and profound concern to businesses. However, no comprehensive understanding of the risks and

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<sup>7</sup> *The Territorial impact of COVID-19: Managing the Crisis Across Levels of Government*, OECD, <https://www.oecd.org/coronavirus/policy-responses/theterritorial-impact-of-covid-19-managing-the-crisis-across-levels-ofgovernment-d3e314e1/> (last updated Nov. 10, 2020).

<sup>8</sup> These bodies of scholarship are cited throughout.

<sup>9</sup> *Supra* section II.

<sup>10</sup> *Supra* section III.

<sup>11</sup> *Supra* section IV.

<sup>12</sup> *Supra* section V.

<sup>13</sup> *Supra* section VI.

constraints imposed by Medical Martial Law seems likely among either line or upper management of private-sector companies, their counsel, or among their primary constituents (e.g., customers, suppliers, employees, shareholders, bondholders, communities surrounding operations). The attendant supply chain disruptions discussed in this article require novel management perspectives that may be informed by this research. Managing such disruptive forces requires synthesizing existing law with predictions based on the movement of goods, services, and human populations that influence the attendant disease contagion vectors.<sup>14</sup>

At a time when some advocate for the irrelevance of borders (e.g., Ireland, European Union),<sup>15</sup> there is a resurgence of nationalistic political sensitivity that could exacerbate policies to re-impose border “micro-controls.”<sup>16</sup> Travel restrictions fundamentally implicate the management of disruption for large sectors of business, particularly supply chains, essential facilities, first responders, labor mobility, and critical infrastructure vitality.<sup>17</sup> The justification of travel restrictions can be expected under emergency powers at all levels of government in the United States: federal, state/commonwealth/provincial, local, county, municipality and special regions adjusted to optimize effectiveness given contagion vectors.

Public health authorities are not uniformly defined, authorized, funded, or empowered to achieve compliance during a lockdown<sup>18</sup> or during the inverse—the phased or abrupt reopening following a pandemic lockdown. Such variety may have once served well given the prime directive of dual federalism—a state’s rights-inspired experimentation attuned to localized

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<sup>14</sup> See generally SONIA SHAH, PANDEMIC: TRACKING CONTAGIONS, FROM CHOLERA TO EBOLA AND BEYOND (Picador 2017) (chronicling the sudden and surprising spread of prior pandemics across multiple countries leading to illness in new and previously unthinkable ways). This article uses the term “disease contagion vector” to signify the epidemiological understanding of various agencies that transmit infectious disease pathogens into other living organisms. See, e.g., Lynne S. Garcia, *Classification of Human Parasites, Vectors, and Similar Organisms*, 29 CLINICAL INFECTIOUS DISEASES 734-36 (1999). “Agency,” in the contagion vector context, means action-producing effect, rather than a regulatory agency, also used in this article, the latter meaning governmental or NGO with a mission to exercise regulatory powers.

<sup>15</sup> See, e.g., Sasmita Mohanty et al., *Irrelevant Borders: Perspectives of Globalization* RESEARCH GATE (Dec. 28, 2018), [https://www.researchgate.net/profile/Sasmita\\_Mohanty5/publication/329972732\\_IrrelevantBorders\\_Perspectives\\_of\\_Globalization/links/5c267bea92851c22a34b6821/Irrelevant-Borders-Perspectives-of-Globalization.pdf](https://www.researchgate.net/profile/Sasmita_Mohanty5/publication/329972732_IrrelevantBorders_Perspectives_of_Globalization/links/5c267bea92851c22a34b6821/Irrelevant-Borders-Perspectives-of-Globalization.pdf).

<sup>16</sup> Jayashri Srikantiah & Shirin Sinnar, Essay, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. 197, 199 (2019) (arguing demographic discrimination implemented as reinforced control over national border crossing).

<sup>17</sup> Stefan Gossling et al., *Pandemics, Tourism and Global Change: a Rapid Assessment of COVID-19*, 29 J. OF SUSTAINABLE TOURISM 1, 2 (2020).

<sup>18</sup> *Lockdown*, MERRIAM-WEBSTER’S DICTIONARY (11th ed. 2021) (defining “lockdown” in the context of epidemic or pandemic emergencies means as “a temporary condition imposed by governmental authorities (as during the outbreak of an epidemic disease) in which people are required to refrain from or limit activities outside the home involving public contact (such as dining out or attending large gatherings)”).

political conditions. However, such non-standard political institutions likely now create vulnerabilities to legal challenge and lead to failure at controlling contagion vectors and undermines regional controls.<sup>19</sup> This article examines the risk of travel restriction imposition in the declaration, implementation, definition, scope of restriction, enforcement, and relaxation of Medical Martial Law conditions.

Liberty deprivations discussed here represent a balance between the conjectural benefits of semi-quarantine against economic prosperity dependent on personal and economic freedoms. Decision-making under non-standard regional health authority is considered under an interdisciplinary view of jurisdiction that combines geographic boundary conditions, political subdivision jurisdiction, and inter-governmental powers.<sup>20</sup> The liberty concepts examined here are based on the Declaration of Independence, the Articles of Confederation, and the United States Constitution, including the Bill of Rights, the Fifth and Fourteenth Amendments' due process clauses, Privileges and Immunities in Article IV, § 2, cl. 1, and the Tenth Amendment's federalism—preemption and reserved powers.<sup>21</sup> Doctrinal case analysis of the right to travel is synthesized with various statutory emergency powers of the President as well as with other candidate subdivisions that may work better to compel lockdown compliance.

In the United States, the authority to lock down regions for medical emergency purposes is diffused by constitutional design.<sup>22</sup> This is a shared power inherent in dual federalism among federal, state and local political subdivisions.<sup>23</sup> During the early panic to contain the spread of COVID-19, news references to managing lockdowns alluded to uniformity in the existence of public health-related political subdivisions, the nation's "public health districts."<sup>24</sup> However, there is no uniformity in the creation of such borders or in the empowering of such political subdivisions, despite the use

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<sup>19</sup> Andre Desiderio, *McConnell Pushes 'Bankruptcy Route' as Local Governments Struggle*, POLITICO (Apr. 22, 2020, 2:40 PM), <https://www.politico.com/news/2020/04/22/mitch-mcconnell-bankruptcy-route-201008> (recounting statements made by Mitch McConnell, Senate Majority Leader of the 116th Congress, advancing budget safety valve of state bankruptcy, arguably undercutting resources needed to conduct local public health enforcement).

<sup>20</sup> *The Governmental Public Health Infrastructure*, in *THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY* (Nat'l Academies Press 2002).

<sup>21</sup> See THE DECLARATION OF INDEPENDENCE (U.S. 1776); ARTICLES OF CONFEDERATION OF 1781; U.S. CONST. amend. I-X; U.S. CONST. amend. XIV; U.S. CONST. art. IV § 2, cl. 1.

<sup>22</sup> See, e.g., Joseph Mishel, *The Model State Emergency Health Powers Act: Balancing Public Safety and Civil Liberties*, SETON HALL L. (2019).

<sup>23</sup> *Id.*

<sup>24</sup> Ayesha Anwar et al., *Role of Mass Media and Public Health Communications in the COVID-19 Pandemic*, CUREUS, (Sept. 14, 2020), <https://www.cureus.com/articles/38293-role-of-mass-media-and-public-health-communications-in-the-covid-19-pandemic>.

of the term “public health districts” being limited to Alabama,<sup>25</sup> Idaho,<sup>26</sup> Georgia,<sup>27</sup> and Virginia.<sup>28</sup> Indeed, Texas and some other states illustrate the haphazard naming of local public health governmental organizations.<sup>29</sup> A variety of political subdivisions are designated by state law and are recognized by federal health regulators, such as public health departments and the like. This illustrates some confusion about the diversity of geographically-defined entities across the United States. Further, confusion is noted from authority possessed by a NGO,<sup>30</sup> the Public Health Accreditation Board (“PHAB”), to accredit local health departments.<sup>31</sup> The influence of de jure standards and professionalism set by the National Association of County and City Health Officials (“NACCHO”) is a corollary.<sup>32</sup> The diversity of all these authorities increases confusion, which suggests how this research could inform a more careful development of a coherent, grand design. Most states have state-wide health departments, and many counties have local health authorities.<sup>33</sup> These are historically-defined political subdivisions rather than districts that encompass commuting patterns or economic activity aggregations within which contagion vectors are more likely and susceptible to control when compared with legacy political subdivisions.<sup>34</sup>

Indeed, a recent study by economists maintains that New York City’s uniform approach to lockdowns caused more economic disruption and harm than if the authorities had employed a more precise targeting of

<sup>25</sup> ALA. DEP’T PUB. HEALTH, <https://www.alabamapublichealth.gov/index.html> (last visited Oct. 18, 2022).

<sup>26</sup> *Public Health Districts*, IDAHO DEP’T HEALTH AND WELFARE, <https://healthandwelfare.idaho.gov/Health/HealthDistricts/tabid/97/Default.aspx> (last visited Oct. 18, 2022).

<sup>27</sup> *Public Health Districts*, GA. DEP’T PUB. HEALTH, <https://dph.georgia.gov/public-health-districts> (last visited Oct. 18, 2022).

<sup>28</sup> VA. DEP’T HEALTH, <https://www.vdh.virginia.gov/local-health-districts/> (last visited Oct. 18, 2022).

<sup>29</sup> *Texas Local Public Health Organizations*, TEX. HEALTH & HUM. SERV.’S, <https://www.dshs.texas.gov/regions/lhds.shtm> (last visited Oct. 18, 2022).

<sup>30</sup> Non-governmental organization.

<sup>31</sup> Currently, 36 states have PHAB-accredited public health department structures, 3 Indian tribal structures have such PHAB accreditation, and 255 local governments in 39 states are accredited local health departments under PHAB voluntary accreditation standards. See *Accredited Health Departments*, CDC, <https://www.cdc.gov/publichealthgateway/accreditation/departments.html> (last visited Oct. 23, 2022). The CDC has various roles in such accreditation, including funding and standardization guidelines encouraging accreditation. See *CDC’s Role in Accreditation*, CDC, [https://www.cdc.gov/publichealthgateway/accreditation/cdc\\_role.html](https://www.cdc.gov/publichealthgateway/accreditation/cdc_role.html) (last visited Oct. 23, 2022).

<sup>32</sup> *Medical Countermeasure Best Practice Resource Guide*, NAT’L ASS’N OF CNTY & CITY HEALTH OFF. (Sept. 2022), <https://www.naccho.org/uploads/downloadable-resources/MCM-Best-Practice-Resource-Guide.pdf>.

<sup>33</sup> *State and Territorial Health Department Websites*, CDC, <https://www.cdc.gov/publichealthgateway/healthdirectories/healthdepartments.html> (last visited Oct. 19, 2022).

<sup>34</sup> Ed Young, *The Pandemic’s Legacy is Already Clear*, THE ATLANTIC (Sept. 20, 2022), <https://www.theatlantic.com/health/archive/2022/09/covid-pandemic-exposes-americas-failing-systems-future-epidemics/671608/>.

neighborhoods using cell phone data.<sup>35</sup> Accordingly, it is arguable that neighborhoods with small residential populations, like the garment district, should have been allowed to stay open for business.<sup>36</sup> At the same time, it was correct for businesses to be closed in areas like Manhattan's East Side, which is heavily residential.<sup>37</sup>

Throughout the course of the pandemic, refusals of entry have been proposed, and some exercised, under federal and state travel bans and on regional multi-state compacts.<sup>38</sup> Restrictions might be imposed based on indicators such as state registration of vehicles as evidenced primarily by vehicle license plates.<sup>39</sup> Such unilateral administrative action has suspect validity,<sup>40</sup> exemplifying the classic conundrum of minimizing Types I and II errors. This article contributes by focusing on how government unit defining boundaries can support the attenuation of disease contagion vectors, inform provenance-tracking travel routes, identify suspected exposure locations and minimize social-proximity encounters.<sup>41</sup>

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<sup>35</sup> John R. Birge et al., *Controlling Epidemic Spread: Reducing Economic Losses with Targeted Closures*, BECKER FRIEDMAN INST. FOR ECON., May 8, 2020.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., N.Y. Exec. Order No. 205: Quarantine Restrictions on Travelers Arriving in New York (June 24, 2020) (recounting that on June 24, 2020, the governors of New York, New Jersey, and Connecticut agreed to limit nonresident travelers from entering their states and issued executive orders to enforce the travel ban. Quarantine once within the states of was recommended in New Jersey but made mandatory for New York City, which deployed roadblocks to enforce the fourteen days quarantine.); see also Connecticut Exec. Order No. 7111 (July 21, 2020).

States on this Tri-State Travel Advisory (mandatory quarantine) list vary as COVID-19 testing is reported as rates of infection adduced from sample statistics. For example, New York's list requires mandatory quarantine for travelers coming from states with infection rates of positive tests in excess of 10%, or number of positive cases exceeding 10 per 100,000 residents based on a seven-day rolling average. Other states may create their own thresholds, consciously parallel the prevailing infection threshold, or use metrics provided by the Center for Disease Control (CDC) and issued as CDC Guidelines.

<sup>39</sup> See Nicholas Bogel-Burroughs, *Rhode Island Pulls Over New Yorkers to Keep the Virus at Bay*, N.Y. TIMES (Mar. 28, 2020), <https://www.nytimes.com/2020/03/28/us/coronavirus-rhode-island-checkpoint.html> (chronicling how Rhode Island refuses entry to New York vehicles); see also Tom Moroney, *Rhode Island Expands Car Stops From New York to All States*, BLOOMBERG (Mar. 29, 2020, 12:33 PM), <https://www.bloomberg.com/news/articles/2020-03-29/rhode-island-ends-policy-of-stopping-cars-with-new-york-plates> (reporting that Rhode Island rescinds order refusing entry to New York vehicles).

<sup>40</sup> See Morgan Eads, *Federal Judge Blocks Enforcement of Kentucky Gov. Beshear's COVID-19 Travel Ban*, LEXINGTON HERALD LEADER, <https://amp.kentucky.com/news/coronavirus/article242498611.html> (last updated May 5, 2020) (holding invalid Kentucky Governor Beshear's Executive Order No. 2020-258 (Mar. 30, 2020)); see also Edward Fitzpatrick, *ACLU Objects to Giving State Police Power to Pull Over Cars with N.Y. Plates in Response to Coronavirus*, BOSTON GLOBE (Mar. 26, 2020), <https://www.bostonglobe.com/2020/03/26/metro/governor-raimondo-providing-daily-briefing-covid-19-230-pm-with-live-updates/>.

<sup>41</sup> See generally Ian Ayers et al., *How to Make COVID-19 Contact Tracing Apps Work: Insights from Behavioral Economics*, YALE L. SCH., Sept. 12, 2020, at 5.

This research develops an approach to an optimal choice model for the designation of political subdivisions in Medical Martial Law situations. This approach is developed in light of the constraints of federalism and existing statutory or regulatory authorities. Alternative candidate models for a definition of “regions” are examined. Existing authorities are analyzed to demark particular geographies. Particular boundaries should be defined to more accurately capture the scope of restriction based on reasonable projections to contain infectious disease contagion vectors. This will permit a prioritization of useful activities by humans that can lead to useful exemptions on travel restrictions and lockdowns in recognition of essential versus non-essential travel.

Further, more precise empowerment of enforcement methods and violation penalties could be enabled. These regional demarcations are explored in a range from temporary to more permanent geographically-defined boundaries. The assessment of likely enforcement techniques is adapted from techniques to compel, constrain and control travel using traditional travel control methods of flexible or fixed roadblocks and checkpoints and to develop new methods. Consider that travel bans may not be uniformly imposed by state and local law enforcement; indeed, no-fly restrictions have largely been enforced by the airlines.<sup>42</sup>

Legacy geographic region definitions are examined in light of other regional definitions, the latter having a scientific basis for contagion vectors.<sup>43</sup> For example, it seems appropriate to evaluate legacy political subdivisions such as the states and commonwealths, counties, municipalities, zip codes, wards, and precincts. Further, regional definitions are based on acknowledgment under the economic geographic doctrine of “intra-active” trade zones, such as multi-state regions (e.g., New England, the Midwest) and metropolitan statistical areas based on census big data (e.g., CSA or Consolidated Statistical Areas). Alternatives that should also be considered are hospital referral regions (“HRR”) and mega-regions,<sup>44</sup> the latter being defined by data-driven commuter flows.<sup>45</sup> Another range of geographic definitions with considerable precedent should be considered, including relevant market definitions from antitrust and non-compete enforcement. All such geographic definition regimes should be evaluated for ease of initial

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<sup>42</sup> Leslie Josephs, *Airlines Scramble to Enforce New Coronavirus Travel Restrictions in ‘Imperfect System’*, CNBC (Feb. 2, 2020, 9:19 PM), <https://www.cnbc.com/2020/02/02/coronavirus-airlines-scramble-to-enforce-us-travel-restrictions.html> (reporting that airlines enforce no-fly bans).

<sup>43</sup> Garrett Dash Nelson & Alisdair Rae, *An Economic Geography of the United States: From Commutes to Megaregions*, PLOS ONE (Nov. 13, 2016), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0166083>.

<sup>44</sup> *See id.*

<sup>45</sup> At least one fanciful, straw man with some intuitive appeal, are the regions of professional sports team’s fan zones, within which media influence, advertising, and travel for game attendance is regularly expected. These ostensibly are closely coterminous with megaregional bounding.



deployment into existing regimes, policy deployment straightforwardness, and scientific efficacy for attenuation of disease contagion vectors.

Clearly, the history of boundary determinations has been driven by natural geography, culture, conflict and political pressures, and is often the result of negotiated compromise.<sup>46</sup> Any new boundary design effort will likely remain so. In the next section, we explore how pandemic-induced Medical Martial Law is increasingly an inter-disciplinary problem at the intersection of law, politics, economic geography, and epidemiology.

## II. TRADITIONAL STATE BORDERS AND COVID-19: DO THEY HAMPER EFFORTS TO FIGHT THE PANDEMIC?

All governments exercise sovereignty over a defined area of space.<sup>47</sup> In the United States, the fifty state governments have a distinct spatial area in which they govern in concert with the federal government.<sup>48</sup> Since COVID-19 has no respect for lines drawn on the earth, it begs the question of whether governments can operate practically and efficiently when they are constrained by what they can do within man-made borders.<sup>49</sup> Anecdotal stories suggest governments now face daunting problems in regulating the scourge of COVID-19 over multi-political entities that can result in higher morbidity and mortality rates.<sup>50</sup>

State borders of the original thirteen states were determined by colonial charters.<sup>51</sup> After independence, the lands west were formed into territories.<sup>52</sup> Within territories, such as the Northwest and Southwest Territories, states were subsequently drawn.<sup>53</sup> Many of these borders, but certainly not all, followed natural geographic features such as rivers, deserts, and mountain ranges, which either reflected existing settlement and transportation patterns

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<sup>46</sup> See, e.g., Bo Won Chang, *The Power of Geographical Boundaries: Cultural, Political, And Economic Border Effects in a Unitary Nation* (2010) (M.A. thesis, Iowa State Univ.) (on file with Graduate Faculty, Iowa State Univ.).

<sup>47</sup> *Sovereignty*, MILWAUKEE PUB. MUSEUM, <https://www.mpm.edu/content/wirp/ICW-07> (last visited Oct. 19, 2022).

<sup>48</sup> *Id.*

<sup>49</sup> ELLEN CHURCHILL SEMPLE, *INFLUENCES OF GEOGRAPHIC ENVIRONMENT ON THE BASIS OF RATZEL'S SYSTEM OF ANTHROPO-GEOGRAPHY* 204 (2005) (suggesting that rigid adherence to artificial lines are ultimately futile when challenged by changing pressures including, we maintain, a pandemic).

<sup>50</sup> Aviva Okeson-Haberman, *Coordinating the Reopening of Neighboring Towns During Pandemic Proves Difficult*, NPR (May 21, 2020, 5:22 AM), <https://www.npr.org/2020/05/21/859991366/coordinating-the-reopening-of-neighboring-towns-during-pandemic-proves-difficult>.

<sup>51</sup> *Colony*, NAT'L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/colony> (last visited Oct. 19, 2022).

<sup>52</sup> See generally FRANCES NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* (Wentworth Press, vol. 6 2016).

<sup>53</sup> See generally *id.*

or future patterns.<sup>54</sup> Indeed, the Mississippi River forms the partial borders of every state, stretching from Minnesota south to Louisiana.<sup>55</sup> This made great sense at the time and still does today. However, in an age of modern technology, a strong argument can be made that traditional boundaries in general, including physical ones, have declined in non-political significance.<sup>56</sup>

Still, it has become quite apparent that constraints imposed on governors' authority to operate *only* within their jurisdictional space are less than optimal in fighting COVID-19. This is particularly evident in the Northeast, where in the early part of the pandemic, the three hard-hit states of New York, New Jersey, and Connecticut converge and where many residents have always traveled across their states' boundaries for work, recreation, or interstate travel.<sup>57</sup> Cooperation among the governors has helped but presents difficulties during times of great stress and where time can be of the essence, but reliable scientific information is scarce, non-existent, or even politicized.

With these deficiencies in mind, can a better way of ordering legal authority in space be determined? The following discussion of functional regions addresses this.

#### A. Functional Regions-Space Defined by Inter-related Processes

A region can be defined in a number of ways. All traditional regions have a spatial component, obviously, but how so? A state or county is spatial in nature with a political function but rarely reflects a natural system, such as a watershed<sup>58</sup> or a region integrating culture with its natural environment.<sup>59</sup> Most regions created by law exhibit a degree of homogeneity, such as an area

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<sup>54</sup> See generally *id.*

<sup>55</sup> See generally *id.*

<sup>56</sup> See JAMES M. RUBENSTEIN, *THE CULTURAL LANDSCAPE* 276 (Pearson 11th ed. 2014); see also Gany T. Marx, *The Declining Significance of Traditional Borders (and the Appearance of New Borders) in an Age of High Technology*, in *INTELLIGENT ENVIRONMENTS* 484-94 (Elsevier Science 1997).

<sup>57</sup> Eric Levenson, *Why New York is the Epicenter of the American Coronavirus Outbreak*, CNN, <https://www.cnn.com/2020/03/26/us/new-york-coronavirus-explainer/index.html> (last updated Mar. 26, 2020).

<sup>58</sup> John F. Ross, *The Visionary John Wesley Powell Had a Plan for Developing the West, But Nobody Listened*, *SMITHSONIAN MAG.* (July 3, 2018), <https://www.smithsonianmag.com/smithsonian-institution/visionary-john-wesley-powell-had-plan-developing-west-nobody-listened-180969182/> (arguing that if Powell's idea had been implemented of states drawn according to watersheds, it might have prevented the 1930's dust bowl and today's water scarcities in the West).

<sup>59</sup> Carl O. Sauer, *Geography and the Gerrymander*, 12 *AM. POL. SCI. REV.* 403 (1918) (discussing how gerrymandering was wrong, not so much because it causes political chicanery but it ignores a culture's geographic unity in a region thereby diluting the political will of the gerrymandered jurisdiction).

in which there is a common language or religion.<sup>60</sup> Although susceptible to delineation, none of these kinds of regions contribute much to creating a public policy to combat this pandemic within the country or in any state.

A kind of region that could be very helpful in advancing public policy responses to a pandemic is the *functional region*. Functional regions are formed by the spatial extent of the activities within them.<sup>61</sup> The most common kind of functional region is defined by economic interaction. For example, a large city is surrounded by various zones of occupation, such as suburbs, its urban fringe bordering on the countryside, and oftentimes, satellite towns and cities it interacts with to varying degrees. Economic geographers refer to the city as the core or node, while the surrounding zone it interacts with is referred to as the city's trade area or hinterland.<sup>62</sup> The trade area eventually ends when the functional interaction is no longer palpable.<sup>63</sup>

The more difficult task, of course, is how can the delineation of a functional region be achieved. Economic geographers have long used theoretical approaches, including gravity and other models. Gravity models measure interaction in space using variables such as population and distance to measure hinterland boundaries between, say, two or more cities. More specifically, retail trade can be measured spatially on a more micro scale, for example, between shopping centers using square footage and driving times or probability models of whether a shopper will likely visit a certain business establishment in space.<sup>64</sup> These models have for years been used in disciplines ranging from economic geography, regional science, and marketing.<sup>65</sup> They have long offered useful information to businesses as well as city and regional planners. With the advent of highly efficient computing with the ability to process huge amounts of data, there now exists even greater advancements in the delineation of functional regions, even mega-regions.

The idea of megaregions is not new.<sup>66</sup> One quite recent and potentially helpful study by Nelson and Rae<sup>67</sup> uses big data to delineate a functional

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<sup>60</sup> JAN NIJMAN ET AL., *GEOGRAPHY: REALMS, REGIONS AND CONCEPTS* 10 (Regions 17th ed. 2017).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See BRIAN J.L. BERRY, *GEOGRAPHY OF MARKET AREAS AND RETAIL DISTRIBUTION* 40 (Prentice-Hall 1967); see also Robert J. Aalberts, *Methods for Determining the Reasonableness of Geographic Limitations in Covenants Not to Compete*, 4 *MIDWEST L. REV.* 103, 107 (1984-85) (discussing the application of Reilly's Law of Retail Gravitation to construct fair and legal trade areas for those subject to covenants not to compete rather than political areas that may be overly broad and therefore unreasonable and arguably a violation of antitrust laws).

<sup>65</sup> See *supra* note 64.

<sup>66</sup> See Yoav Hagler, *Defining U.S. Megaregions*, AM. 2050, Nov. 2009, available at <https://s3.us-east-1.amazonaws.com/rpa-org/pdfs/2050-Paper-Defining-US-Megaregions.pdf>; see also Joel Kotkin & Mark Shill, *A Map of America's Future: Where Growth Will Be Over the Next Decade*, *FORBES* (Sept. 23, 2013, 10:56 AM), <https://www.forbes.com/sites/joelkotkin/2013/09/04/a-map-of-americas-future-where-growth-will-be-over-the-next-decade/?sh=268ecee5623d>.

<sup>67</sup> Nelson & Rae, *supra* note 43.

region. Their research sheds important light on the formulation of a more responsive public policy for fighting COVID-19. In their study, the authors gathered more than four million commuter flows across the entire lower forty-eight states.<sup>68</sup> The result was the delineation of megaregions reflecting United States cities and respective hinterlands as well as an orbit of smaller sub-centers.<sup>69</sup> Tellingly, the mega-regions they found often cut across state lines.

One interesting and relevant finding of their study indicated that those living in western Wisconsin, not surprisingly, have a close spatial relationship to Minneapolis but not to Milwaukee or Madison in the State's east.<sup>70</sup> To see this visually, take note of the map below, which delineates Minnesota's trade area based on commuting in black, which cuts a wide swath into Wisconsin.<sup>71</sup> Unfortunately, for those living in western Wisconsin, as well as those in Minnesota, their COVID-19 policy is formulated in Madison and influenced by the politics of the State's largest city, Milwaukee—not by Minnesota, where they often commute to work, shop, and recreate.

A practical example of why the foregoing spatial scenario impairs COVID-19 mitigation efforts occurred during the first part of the pandemic. On May 14, 2020, the Wisconsin Supreme Court struck down the State's stay-at-home order, immediately lifting restrictions on businesses, including bars and restaurants.<sup>72</sup> The popular press displayed pictures of Wisconsin citizens flocking to crowded bars without masks on either patrons or employees with no readily apparent social distancing measures.<sup>73</sup>

Minnesota, on the other hand, allowed bars and restaurants to open on June 1, 2020, limiting them to outdoor service for fifty patrons at a time.<sup>74</sup> Moreover, those who did patronize these businesses were required to make reservations mainly so if there were breakouts of the virus, contact tracing would be enabled by identifying those with whom they made close contacts.<sup>75</sup> Employees also were compelled to wear masks.<sup>76</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Wis. Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

<sup>73</sup> Molly Beck et al., 'OPEN IMMEDIATELY!': Wisconsinites Head Out to Bars After State Stay-At-Home Orders Lifted, USA TODAY (May 14, 2020, 7:52AM), <https://www.usatoday.com/story/news/nation/2020/05/14/wisconsin-stay-home-order-lifted-bars-reopen-supreme-court-coronavirus/5189137002/>.

<sup>74</sup> Jeremy Olson & Briana Bierschbach, *Outdoor Dining in Minnesota OK'd for June 1*, MINNEAPOLIS STAR TRIB. (May 21, 2020, 1:48 PM), <https://www.startribune.com/minnesota-to-open-up-outdoor-restaurant-dining-stay-home-restrictions-walz-minneapolis/570634212/>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

With this in mind, a good number of western Wisconsinites who patronized crowded bars and restaurants were, according to medical experts, at very high risk—and much more at risk than someone in Minnesota, where bars were closed—of contracting the virus.<sup>77</sup> Moreover, even a short duration of seventeen days of exposure by an infected person in Wisconsin, working and shopping in Minnesota, even if it was just to patronize essential businesses like grocery stores, might have resulted in numerous cases that could have been prevented.<sup>78</sup> Conversely, a Minnesotan wishing to patronize a bar or restaurant, which they were unable to do in their own State, might go to neighboring Wisconsin where he might, with a higher degree of probability, contract the virus and bring it back to infect people in Minnesota. Perhaps predictably, two weeks after Wisconsin lifted its stay-at-home order, the number of cases and deaths spiked in Wisconsin.<sup>79</sup> This presents a serious political and health problem that cannot be easily resolved with the current policy of governing within political borders.

However, if the mega-region centered in Minneapolis was established as a Special Quarantine Region or District (“SQD”), this problem would likely have lessened. Unfortunately, it may be difficult to prove this experimentally and gauge the immediate effect on infection rates in the adjacent Minnesota trade area due to the demonstrations occurring at the same time over the murder of George Floyd by a white police officer.<sup>80</sup>

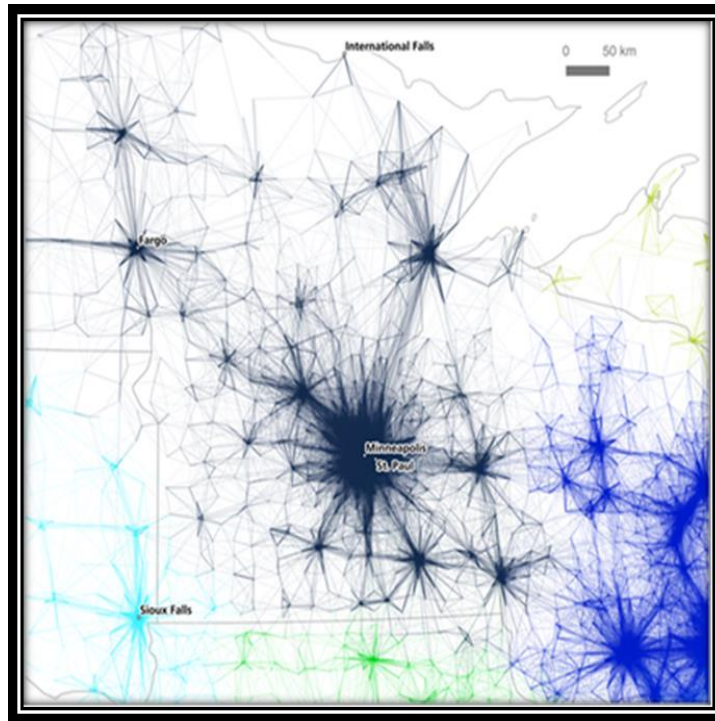
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<sup>77</sup> Bryan Pietsch, *The Risk Levels of Everyday Activities like Dining Out, Going to the Gym, and Getting a Haircut, According to an Infectious-Disease Expert*, BUS. INSIDER (May 17, 2020), <https://www.businessinsider.com/riskiest-to-least-risky-activities-during-coronavirus-pandemic-ranked-2020-5> (quoting Dr. Susan Hassig, a Tulane University epidemiologist, stating that bars are so high risk that they “should not be allowed to open” due to their very nature involving mingling, crowded bar tops, and the inability to wear a mask when drinking, plus the fact that alcohol can affect decision-making which can make things even worse).

<sup>78</sup> Molly Beck et al., *supra* note 73.

<sup>79</sup> Daniella Silva, *Wisconsin Reports Record Numbers of New Coronavirus Cases, Deaths*, NBC NEWS (May 28, 2020, 2:36 PM), <https://www.nbcnews.com/news/us-news/wisconsin-reports-record-number-new-coronavirus-cases-deaths-n1216471>.

<sup>80</sup> Tommy Beer, *Experts Fear Minneapolis Protests Will Trigger Spike in Coronavirus Cases*, FORBES (May 29, 2020, 12:08 PM), <https://www.forbes.com/sites/tommybeer/2020/05/29/experts-fear-minneapolis-protests-will-trigger-spike-in-coronavirus-cases/?sh=262862876e53>.



The foregoing problem witnessed in Minnesota and Wisconsin has certainly occurred repeatedly in many parts of the United States. In their study of commuter patterns for the country as a whole, Nelson and Rae created a map (see map below) that displays many heavily populated cities, particularly in the mid-west and east, which, as in the case of Minneapolis, have functional regions.<sup>81</sup> These megaregions, based upon commuter data approximating 100 miles, bestride a significant number of state borders.<sup>82</sup> For example, Kansas City straddles the border between Kansas and Missouri, while across the State, the economic hinterland of St. Louis spans both Missouri and Illinois.<sup>83</sup> This kind of border straddling continues east to include Chicago (Illinois and Wisconsin), Detroit (Michigan and Ohio), Cincinnati (Ohio and Kentucky), and Pittsburgh (Pennsylvania and Ohio).<sup>84</sup> Possibly the largest and definitely the most populated economic hinterlands encompass and overlap state lines beginning in Washington D.C., extending northeast to Boston, and crossing the borders of Virginia, Washington D.C., Maryland, Delaware, New Jersey, Pennsylvania, New York, Connecticut,

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<sup>81</sup> Nelson & Rae, *supra* note 43.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Rhode Island, Massachusetts, and New Hampshire.<sup>85</sup> Indeed, if there had been a functional region or district established with authority to regulate the current pandemic centered in New York City, it might have been handled much better. Indeed, in retrospect, the Governor of Rhode Island probably would not have had to act unilaterally to keep out cars with New York license plates, a classic Type I error.<sup>86</sup>



Creating such a new mega-region to solve difficult problems is not new. An excellent example is the Tennessee Valley Authority (“TVA”).<sup>87</sup> Established in 1933 as a federally owned corporation, it was established to provide navigation, flood control, electricity generation, fertilizer manufacturing, and economic development along the Tennessee River.<sup>88</sup> Its tributaries encompassed all of Tennessee, plus parts of the States of Alabama, Kentucky, Virginia, North Carolina, and Georgia, all of which are within the Tennessee River’s watershed.<sup>89</sup> This region was among the poorest and most devastated by the Great Depression, and the TVA permanently changed life for the better for its citizens.<sup>90</sup> Many other examples of cross-state cooperation based on function rather than state borders include port authorities and regional planning districts, both commonly seen across the country.<sup>91</sup>

With this in mind, the government should engage in a process of creating SQDs based on functional interactions, such as, but not limited to,

<sup>85</sup> *Id.*

<sup>86</sup> See sources cited *supra* note 39.

<sup>87</sup> *Tennessee Valley Authority Act (1933)*, NATIONAL ARCHIVES (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/tennessee-valley-authority-act>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Nelson & Rae, *supra* note 43.

the interaction of people based on commuting data and not strictly on political borders. If this is done, a future pandemic could be managed in a much more efficient and effective manner resulting in decreased rates of morbidity and mortality.

### III. JUST ANOTHER TRICKY INTERDISCIPLINARY PROBLEM?

Establishing borders has always been an interdisciplinary pursuit. Border creation involves explorers, their Imperialist sponsors, Imperialist authorization of land claims,<sup>92</sup> expropriation of indigenous peoples' claims, natural geographic barriers, practical limits on the reach of supply chains, the strength and successful maintenance of political authorities, border shifts resulting from conflict and settlement, temporal weather conditions, and climate change.<sup>93</sup> However, established borders can become unstable. Borders often fail to effectively constrain normal human migration, evolving economic activity, travel patterns, transportation capacity, and frequency, as well as the natural paths and routes of animals, indigenous peoples, explorers, settlers, pioneers, and modern supply chains.<sup>94</sup>

Borders that often fail to contain these forces clearly face potent challenges in constraining disease vectors. Many disease vectors are borne by movements in goods, humans, and animals.<sup>95</sup> Political authorities that impose legal control are generally constrained by political boundaries.<sup>96</sup> Extraterritorial exertion of authority is fraught with difficulty, although a few mechanisms have arisen to facilitate both extra-jurisdictional and inter-jurisdictional cooperation.<sup>97</sup> Therefore, control over and containment of disease vectors is becoming less effective within traditional political boundaries, while the endowment of control authorities within newly devised bounded areas more responsive to disease contagion remains uncertain.

All these factors pose challenges to the stable creation and maintenance of physical barriers. These factors coalesce in some hypothetical pursuit of optimal precision needed to effectively implement Medical Martial Law.

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<sup>92</sup> See, e.g., DANIEL CLAYTON, *Colonizing, Settling and the Origins of Academic Geography*, in THE WILEY-BLACKWELL COMPANION TO HUMAN GEOGRAPHY 50-70 (Wiley-Blackwell, John A. Agnew & James S. Duncan, 2011). Advancements in the fields of physical geography and cartography (precision map-making) vastly enabled exploration, Colonialism by Imperialist nations, exploitation of indigenous peoples and resources, and general development of the "New World."

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Some of these mechanisms include the United States Constitution's full faith and credit, MOU among state Attorneys General or regulators, dual federalism, federal interstate-commerce regulation, res judicata, collateral estoppel, extradition, international law, affiliated trading group treaties.



Precise targeting of contagion vectors is necessary to avoid political repercussions of either the economic devastation of excessively broad lockdowns, premature re-openings, or rampant pandemic casualties.<sup>98</sup> National lockdowns used in some nations have become highly unpopular.<sup>99</sup> Public health systems become over-stressed as infections spread and disease severity triggers pandemic panic.<sup>100</sup> Broad lockdowns raise classic Type I errors (false positives, over-inclusion), while failure to quarantine imposes Type II errors (false negatives, under-inclusion).<sup>101</sup> This article is intended to facilitate precision by contributing to the understanding of methods that reduce both Type I and Type II errors. Our design of a new boundary drafting regime, authorized to impose more accurate travel bans, may produce better results but arguably relies on more complex measures.

In fast-moving domains, such as where technological deployment intersects with public policy and political economy, the pressures to accommodate interdisciplinary views are strong and immediate, making diverse views worthy of considered attention reflect on the contemporary financial technologies (“FinTech”) revolution, in particular, cryptocurrency applications of BlockChain technologies (e.g., Bitcoin).<sup>102</sup> These FinTech matters impact widely diverse disciplines: Banking law, central banking, computer science, artificial intelligence, macroeconomics, monetary economics, money-laundering enforcement, industrial organization, and incumbent financial services intermediaries.<sup>103</sup> Innovation in crypto is now in very active development, such that scholarship and advancement inspire all these disciplines (also some others) to devote attention to the emerging FinTech field.<sup>104</sup>

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<sup>98</sup> JONATHAN D. MAYER, THE IMPACT OF GLOBALIZATION ON INFECTIOUS DISEASE EMERGENCE AND CONTROL: EXPLORING THE CONSEQUENCES AND OPPORTUNITIES: WORKSHOP SUMMARY (Knobler S, Mahmoud A, Lemon S, et al. eds. 2006).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See generally Saul McLeod, *What are Type I and Type II Errors?*, SIMPLY PSYCH. (July 04, 2019), [https://www.simplypsychology.org/type\\_I\\_and\\_type\\_II\\_errors.html](https://www.simplypsychology.org/type_I_and_type_II_errors.html); see also WASSILY LEONTIEF, INPUT-OUTPUT ECONOMICS (Oxford Univ. Press, 2nd ed. 1986). Type I risks impose injuries of unfair discrimination and can result in public or political backlash. Type II risks threaten the spread of disease. It is often considered easier and cheaper to deploy more draconian measures that suffer Type I errors. For example, in the COVID-19 experience, it may have appeared easier to close a whole nation or state with the single stroke of the political executive’s pen than to consider the messy industrial organization details of input/output analysis of an entire economy. In all situations, physical geographic boundaries, based on economic geography, are best deployed for efficacy, when fused with epidemiology inspired disease vector movement and control.

<sup>102</sup> John W. Bagby et al., *An Emerging Political Economy of the Blockchain: Enhancing Regulatory Opportunities*, 88 U.M.K.C. L. REV. 419-74 (2019).

<sup>103</sup> *Id.*

<sup>104</sup> See, e.g., *id.* (arguing BlockChain is regulable but requires deep interdisciplinary work).

However, Medical Martial Law has devolved into a political battle between epidemiology and public pressure.<sup>105</sup> Indeed, at least law, politics, history, economic geography, and the epidemiological sciences are strongly implicated as the disciplines needed to work together in structuring effective and least damaging interdisciplinary policy responses.<sup>106</sup> Unfortunately, there is only limited history of true interdisciplinarity in adjusting jurisdictional boundaries, limited mostly to gerrymandering, policing, and post-conflict international relations.

The primary interdisciplinary approach used here is a fusion of public policy, political economy, and economic geography. First, the science of spatial understanding is contributed by physical geography for the physical barriers that shape political borders and may define contagion vectors based largely on limiting traditional travel patterns. Second, economic geography provides insight into the size, shape, and extent of regional trade areas within which contagion vectors may be predicted. Third, the policy reach of various political subdivisions is advanced with insights fusing political geography with political science. Finally, novel boundary zone re-definitions are proposed here that better reflect economic realities representing the likely disease transport vectors. They should minimize spillover, the predictable substitution of competing places when restrictions incentivize switching, as discussed next.

#### A. Spillover, Balloon Effects Cause Regulatory Arbitrage

Strict controls imposed in one geographic region, in one market, or over one economic sector, regularly results in a natural tendency to seek relief elsewhere.<sup>107</sup> Spillover is a naturally-generated, sometimes even deterministically-produced, release of pressure from one place to another.<sup>108</sup> Like the squeezing of a water balloon, the pressure produces a bulge of nearly identical magnitude elsewhere, most likely at some contiguous location.<sup>109</sup> In Medical Martial Law situations, this spillover might also be towards similar or comparable geographic zones.

Spillover is an axiomatic industrial organization concept that recognizes a substitution effect when scarcity impacts markets for one type

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<sup>105</sup> John W. Bagby & David Reitter, *Anticipatory FinTech Regulation: On Deploying Big Data Analytics to Predict the Direction, Impact and Control of Financial Technology*, SSRN, Sept. 19, 2019.

<sup>106</sup> *Id.* (developing interdisciplinary model overcoming ex-disciplinary-intolerant myopia, silo perspective on problem solving).

<sup>107</sup> Cornelius Friesendorf, *Squeezing the Balloon?: United States Air Interdiction and the Restructuring of the Southern American Drug Industry in the 1990s*, 44 CRIME, L. & SOC. CRIME 35 (2005).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

of good or service.<sup>110</sup> Decreases in supply or increases in the cost of one product produce demand for substitutes. After such a change, consumers immediately explore other products that can serve similar purposes. Producers identify production capacities that can be retooled easily to produce substitutes.<sup>111</sup> Measures of economic utility are explored that ostensibly approximate satisfaction of particular product features as demanded.<sup>112</sup> When some activity constraints are imposed in one sector or region, the constraint causes that demand (or supply) to migrate to an adjacent or substitute sector (or region). Spillover explains the elasticity of demand, demand shifts with changes in the supply's price, availability, or features.<sup>113</sup>

Regulatory arbitrage is another version of this phenomenon.<sup>114</sup> This is aptly demonstrated in attempts to enforce pandemic lockdown. Consider that beach closings are a form of regulation. When regulated entities (beachgoers) perceive excessive constraint in one sector (region, municipal beach), they can easily move to an adjacent sector, arbitrating by avoiding higher costs in the constrained region by seeking the refuge of lower costs in another region. As some beaches closed during spring break in 2020, revelers migrated to nearby beaches, frustrating the distancing regulations that beach closures envisioned. The spillover effect arises in Medical Martial Law impositions when activity is limited to particular geographic regions. This was evident during spring break in 2020 at beaches when subjected to piecemeal closings<sup>115</sup> and again in the fall of 2020 as pandemic fatigue became widespread.<sup>116</sup> Spillover and regulatory arbitrage must be considered in almost any geographic targeting of Medical Martial Law. Coordinated responses among local authorities are one possible counter.<sup>117</sup> Another countermeasure is inherent in dual federalism; central governmental solutions can address non-uniformity among state or local governments if the regulated phenomena impact multiple regions, such as for products or services where state law burdens interstate commerce.

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<sup>110</sup> See, e.g., Hiroyasu Inoue et al., *The Impact of Supply-Chain Networks on Interactions between the Anti-COVID-19 Lockdowns in Different Regions*, COVID ECON. VETTED & REAL-TIME PAPERS, Sept. 15, 2020, at 157.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See, e.g., Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 CORNELL INT'L L.J. 63 (2014).

<sup>115</sup> Tamara Thiessen, *Coronavirus: From Sydney to Miami, How Crowds Are Forcing Iconic Beaches to Close*, FORBES (Mar 21, 2020, 7:32 AM), <https://www.forbes.com/sites/tamarathiessen/2020/03/21/sydney-miami-crowds-beaches-close-coronavirus/?sh=600741863e8b>.

<sup>116</sup> *As the Coronavirus Surges, a New Culprit Emerges*, N.Y. TIMES (Apr. 25, 2021), <https://www.nytimes.com/2020/10/17/us/coronavirus-pandemic-fatigue.html>.

<sup>117</sup> See, e.g., Hiroyasu Inoue et al., *supra* note 110.

## IV. LIBERTY: THE RIGHT TO TRAVEL

One of the many challenges Americans face in the age of COVID-19 is the legal as well as recommended, but not binding, governmental restrictions imposed on short-term visitors wishing to travel across jurisdictional boundaries. Some of the stricter examples have arisen in the Northeastern United States, particularly those from New York, which has experienced the most infections and deaths.<sup>118</sup> Rhode Island, as mentioned, forbade cars with New York license plates to enter the State, forcing them to quarantine for fourteen days, earning heavy criticism from many, including the New York governor and the American Civil Liberties Union.<sup>119</sup> Several days later, the Rhode Island governor expanded the restrictions to all cars visiting the State.<sup>120</sup> Moreover, travelers from New York, New Jersey, Connecticut, or Louisiana were required to quarantine for fourteen days when destined for Florida,<sup>121</sup> while travelers from Louisiana and a number of other cities and states traveling to Texas were required to undergo a similar quarantine under its governor's executive orders.<sup>122</sup> South Dakota Indian reservations imposed travel restrictions by stopping incoming cars and mandating that they must fill out questionnaires and be allowed into the reservation only for essential activities, thus earning the scorn of that State's governor.<sup>123</sup> In a later turn of events, New York, Connecticut, and New Jersey, enjoying in late June 2020 the country's lowest rates of infection, issued a requirement that travelers from nine southern and southwestern states must quarantine for fourteen days once they arrive in those three states.<sup>124</sup> Those who failed to obey could be subject to a judicial order, mandatory quarantine, and substantial fines.<sup>125</sup> By

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<sup>118</sup> Bill Mahoney & Josh Gerstein, *Rhode Island Ends Specific Restrictions on New Yorkers-by Making them National*, POLITICO (Mar. 29, 2020, 2:48 PM), <https://www.politico.com/states/new-jersey/story/2020/03/29/rhode-island-ends-restrictions-on-new-yorkers-1269535>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Julia Thompson et al., *These States Require Travelers to Self-Quarantine or Present a Negative COVID-19 Test*, USA TODAY (May 25, 2020, 5:59 PM), <https://www.usatoday.com/story/travel/destinations/2020/05/25/coronavirus-travel-restrictions-us-states-quarantine-requirements/5256975002/>.

<sup>122</sup> Patrick Svitek, *Gov. Greg Abbott Ends Self-Quarantine Mandate for Travelers From Louisiana*, TEX. TRIB. (Apr. 28, 2020, 4:00 PM), <https://www.texastribune.org/2020/04/28/greg-abbott-coronavirus-quarantine-mandate-louisiana/>.

<sup>123</sup> Anna Medaris Miller, *South Dakota Governor Demands Sioux Tribes 'Immediately' Remove COVID-19 Checkpoints because they Interfere with Traffic*, BUS. INSIDER (May 9, 2020), <https://www.businessinsider.com/south-dakota-governor-demands-sioux-tribes-remove-covid-19-checkpoints-2020-5>.

<sup>124</sup> Eric Levenson, *NY, NJ and CT Require Travelers from States with High Coronavirus Rates to Quarantine for Two Weeks*, CNN (June 24, 2020, 9:19 PM), <https://www.cnn.com/2020/06/24/us/new-york-coronavirus-travel-restriction>.

<sup>125</sup> *Id.* (demonstrating that the initial eight states were Alabama, Arkansas, Arizona, Florida, North Carolina, South Carolina, Texas and Utah. An additional eight were added June 30, 2020—California, Georgia, Iowa, Idaho, Louisiana, Mississippi, Nevada and Tennessee).

late August 2020, at least eleven states still had issued executive orders by their governors or state agencies, which involved some kind of travel restriction.<sup>126</sup> These restrictions ranged from Connecticut and New York, where visitors entering from certain states must quarantine for fourteen days, to Alaska, which required a negative COVID-19 test or quarantining for fourteen days for all travelers, and Hawaii, which has a blanket fourteen-day quarantine restriction traveling into those states.<sup>127</sup>

Supporters of these policies argue that if people from heavily infected states are not stopped, as well as the adoption of other public health interventions, they will overwhelm their health systems.<sup>128</sup> Accordingly, outsider travelers must wait for when the “curve has flattened” in their state before any semblance of normal travel can return.<sup>129</sup>

#### A. Personal Mobility and the Commerce Clause

Personal mobility has long been recognized by the Supreme Court as a right protected under the Constitution’s Commerce Clause.<sup>130</sup> On the other hand, a state, under the long-recognized Dormant Commerce Clause and the doctrine of dual federalism, can also regulate interstate commerce under its police powers and policies that protect and promote health, safety, welfare, and morals, so long as the regulation does not create an undue burden on interstate commerce or is not preempted by federal law.<sup>131</sup> Furthermore, the federal government possesses nearly unlimited power to regulate interstate commerce so long as it can demonstrate an effect on it, aptly called the Affection Doctrine.<sup>132</sup> Thus, we feel safe to say that the federal government would have the authority constitutionally under the Commerce Clause to impose cross-border SQDs<sup>133</sup> but, as in most political issues today involving federalism, would likely face political pushback by those who advocate states’ rights, among other political reasons.<sup>134</sup> It is also very likely that two

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<sup>126</sup> See, e.g., *Travel Restrictions Issued by States in Response to the Coronavirus (COVID 19) Pandemic, 2020-2022*, BALLOTPEDIA, [https://ballotpedia.org/Travel\\_restrictions\\_issued\\_by\\_states\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID\\_19\)\\_pandemic,\\_2020](https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID_19)_pandemic,_2020) (last visited Oct. 18, 2022) (including Alaska, Hawaii, Connecticut, Kansas, Maine, Massachusetts, New Jersey, New Mexico, New York, Rhode Island, Vermont).

<sup>127</sup> See *id.*

<sup>128</sup> Helen Branswell, *Why ‘Flattening the Curve’ May be the World’s Best Bet to Slow the Coronavirus*, STAT NEWS (Mar. 11, 2020), <https://www.statnews.com/2020/03/11/flattening-curve-coronavirus/>.

<sup>129</sup> *Id.*

<sup>130</sup> *Gibbons v. Ogden*, 22 U.S. 1, 3 (1824).

<sup>131</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.1, 260-61 (3d ed. 1986).

<sup>132</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); see also James M. McGoldrick Jr., *The Commerce Clause, The Preposition, and the Rational Basis Test*, 14 UNIV. MASS. L. REV. 182, 219 (2019).

<sup>133</sup> McGoldrick, *supra* note 132.

<sup>134</sup> *Id.*

states, like Minnesota and Wisconsin, discussed earlier regarding the current pandemic,<sup>135</sup> could also use their respective police powers to cooperate and jointly create a SQD for the Minneapolis trade area that extends into Wisconsin since whatever burden placed on interstate commerce is not unduly burdensome, but is in fact, beneficial to their citizens.<sup>136</sup> Again, politics would likely enter the fray and might, as one example, be seen as impinging on liberty rights for, among other things, having to wear a mask that might be valued more strongly in one state than in its neighboring state.

Still, even equipped with such potentially strong constitutional authority at the state level, assuming that cross-border cooperation is not achievable for various political reasons, constitutional challenges to the state actions limiting mobility during the COVID-19 pandemic must be considered seriously. One case with analogous value is *Edwards v. California*.<sup>137</sup> Under a California statute, a person would be guilty of a misdemeanor if he knowingly brought into the state a nonresident “indigent person.”<sup>138</sup> The Court, in invalidating the law, relied on a recognized national common market theory under the Commerce Clause that analogized a person’s right to cross state borders to be equivalent if not superior to those rights granted to the shipping of competitive commodities across state lines indicating the such a restriction on personal travel is unduly burdensome.<sup>139</sup> In language supporting those wishing to travel out of a contagion zone into a state limiting entry, the Court rejected many years of precedent supporting a state’s police powers to take measures to regulate against the “moral pestilence of paupers, vagabonds, and possibly convicted”<sup>140</sup> entering the state. This begs the question of whether a biological pestilence may have some legal and moral equivalency to a moral pestilence, and therefore prohibit an out-of-state traveler during a pandemic, as Rhode Island did to travelers from New York.<sup>141</sup>

#### B. A Fundamental Right to Travel, the Fifth Amendment, and Equal Protection

The Constitution has also been interpreted to provide a fundamental right to travel between and among the states.<sup>142</sup> The right flows from the Equal Protection Clause of the Fifth Amendment, as well as its incorporation

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<sup>135</sup> See *Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900; see also Nelson & Rae, *supra* note 43; see also Molly Beck et al., *supra* note 73.

<sup>136</sup> Molly Beck et al., *supra* note 73.

<sup>137</sup> *Edwards v. California*, 314 U.S. 160 (1941).

<sup>138</sup> *Id.* at 171-73.

<sup>139</sup> *Id.* at 174-77.

<sup>140</sup> *New York v. Miln*, 36 U.S. 102, 142-43 (1837).

<sup>141</sup> *Mahoney & Gerstein*, *supra* note 118.

<sup>142</sup> *Nowak & Rotunda*, *supra* note 131.

to the actions of the states through the Fourteenth Amendment.<sup>143</sup> In essence, the Supreme Court has ruled that some regulations at both the federal and state levels must satisfy a rigorous strict judicial scrutiny test in which the government in question must bear the burden of showing that the regulation serves an overriding or compelling governmental interest.<sup>144</sup>

In *Shapiro v. Thompson*,<sup>145</sup> the Court ruled that a District of Columbia restriction on those traveling across jurisdictional lines to secure welfare benefits was impermissible.<sup>146</sup> In *Shapiro*, the strict scrutiny test was applied, arguing that a law impeding migration violated the right to travel since it acts counter to an overriding policy of promoting national cohesion and the strong economic interests of fostering the notion of the nation as a single economic unit.<sup>147</sup>

However, it is noteworthy that the strict scrutiny test has not been applied uniformly in all travel restrictions scenarios.<sup>148</sup> Rather, in some cases, courts have applied a less stringent “important” government interest test if the foregoing policy goals are not present.<sup>149</sup> A case on point is *Jones v. Helms*,<sup>150</sup> in which a Georgia statute providing differing criminal punishments for child abandonment based on whether the parent left the State (a felony) or stayed (a misdemeanor) was upheld using the less strict standard.<sup>151</sup>

### C. Right to Travel During a Contagion

While both *Edwards* and *Shapiro* provide for a right to travel, neither directly addresses the issue of public health and the threat of contagions infecting its citizens from other jurisdictions.<sup>152</sup> Fortunately, for advocates who wish to prohibit free travel from those located out-of-state to protect their own citizens from contagions, a strong precedent exists in the case of *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health* (“*Compagnie Francaise*”).<sup>153</sup> The facts of the case revolve around a French passenger ship, the *Britannia*, which arrived from Europe in 1897 at

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<sup>143</sup> *Id.*

<sup>144</sup> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

<sup>145</sup> *Id.* at 643.

<sup>146</sup> *Id.*

<sup>147</sup> *Thompson*, 394 U.S. 618.

<sup>148</sup> *Jones v. Helms*, 452 U.S. 412, 415-16 (1981).

<sup>149</sup> See Nowak & Rotunda, *supra* note 131.

<sup>150</sup> *Helms*, 452 U.S. at 413-16.

<sup>151</sup> *Id.*

<sup>152</sup> *Edwards*, 314 U.S. 160; *Thompson*, 394 U.S. 618.

<sup>153</sup> *Compagnie Francaise de Navigation a Vapeur v. Board of Health*, 186 U.S. 380 (1902); see also Allison M. Whelan, Note, *That's My Baby: Why the State's Interest in Promoting Public Health Does Not Justify Residual Newborn Blood Spot Research Without Parental Consent*, 98 MINN. L. REV. 419, 424 (Nov. 2013) (discussing the *Compagnie Francaise* case).

the Port of New Orleans in the midst of a yellow fever epidemic.<sup>154</sup> The ship's 408 passengers contained both American and foreign passengers, mainly Italian immigrants.<sup>155</sup> The New Orleans Board of Health, under authority from the state legislature, had imposed a quarantine within 100 miles for any uninfected persons and, therefore, would not allow the passengers to disembark.<sup>156</sup> The company sought to enjoin the Port's action arguing that its real objective was to prevent the Italian immigrants from landing.<sup>157</sup> After the case was dismissed, the *Britannia* took its passengers to Pensacola, where they were allowed to disembark and brought the cargo back to New Orleans to be unloaded.<sup>158</sup>

The case eventually wound its way to the United States Supreme Court.<sup>159</sup> The company argued that the Port's quarantine violated the Commerce Clause, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment, among other contentions.<sup>160</sup> The Court ruled that in the absence of federal preemption, the State's exercise of its police powers to protect its citizens was proper.<sup>161</sup>

The *Compagnie Francaise* case, which has not been revisited, reconsidered, or modified, provides very strong support for the appropriate use of quarantines and other means to fight contagions like COVID-19.<sup>162</sup> In 2016, the case was cited to justify the quarantine of a nurse who had been treating Ebola patients in Africa.<sup>163</sup>

Since the advent of the COVID-19 pandemic, several courts have cited *Compagnie Francaise* in upholding mitigation measures such as stay-at-home orders and other requirements.<sup>164</sup> Connecticut was one state where a governor issued a public health emergency early in the pandemic<sup>165</sup> and an executive order that limited the number of individuals who could gather

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<sup>154</sup> *Compagnie Francaise de Navigation a Vapeur*, 186 U.S. at 381.

<sup>155</sup> *Id.* at 382.

<sup>156</sup> *Id.* at 380-82.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 383.

<sup>159</sup> *Compagnie Francaise de Navigation a Vapeur*, 186 U.S. at 387.

<sup>160</sup> *Id.* at 380.

<sup>161</sup> *Id.* at 397.

<sup>162</sup> See Anthony Michael Kreis, *Contagion and the Right to Travel*, HARV. L. REV. BLOG (Mar. 27, 2020), <https://blog.harvardlawreview.org/contagion-and-the-right-to-travel/>. It should be noted that, despite the precedential strength of the *Compagnie Francaise* case, it does have its limits. For example, as one commentator has stated in discussing the right to travel during an epidemic “. . . this power is not totally unfettered and there is room for courts to strike down quarantine federal constitutional law that are arbitrary or overbroad.” *Id.*

<sup>163</sup> *Hickox v. Christie*, 205 F. Supp. 3d 579, 591 (D. N.J. 2016).

<sup>164</sup> See *Amato v. Elicker*, 460 F. Supp. 3d 202 (D. Conn. 2020).

<sup>165</sup> Press Release, Office of Governor Ned Lamont, Declaration of Public Health and Civil Preparedness Emergencies (Mar. 10, 2020) (accessible at <https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200310-declaration-of-civil-preparedness-and-public-health-emergency.pdf>).



together for recreational or social purposes.<sup>166</sup> In addition, an executive order also implemented restrictions for restaurants and bars, which were only allowed to serve food for off-premises consumption.<sup>167</sup>

In *Amato v. Flicker*, the owners of a restaurant filed a claim against the Governor and Mayor of New Haven, Connecticut, requesting a temporary restraining order as well as a preliminary injunction and alleging that the executive orders infringed upon their constitutional rights of assembly and association.<sup>168</sup> In upholding the executive orders and denying the plaintiffs' requests for a temporary restraining order and preliminary injunction, the *Amato* Court noted that the executive order had a "real and substantial relation" to the goal of the State of Connecticut in curbing the spread of COVID-19.<sup>169</sup> The court cited the *Compagnie Francaise* case in remarking that courts uphold more extreme measures, like quarantines, that limit assembly with any person and that the executive orders in question were less extreme in that it does not prohibit the assembly with any person.<sup>170</sup>

*Compagnie Francaise* has also been cited in a recent case involving the controversial issue of vaccine mandates.<sup>171</sup> In *Bridges v. Houston Methodist Hospital*, a hospital employee and 116 other employees sued a Texas hospital to block a requirement the hospital had announced requiring employees to be vaccinated against the virus.<sup>172</sup> The employee brought forward a wrongful termination claim, alleging she would be fired for refusing to take the vaccine.<sup>173</sup>

Among her arguments, the plaintiff alleged that the vaccination requirement violated public policy.<sup>174</sup> However, the Court in *Bridges* noted the requirement is consistent with public policy, citing the *Compagnie Francaise* case for the proposition that the United States Supreme Court has in the past upheld involuntary quarantine for contagious diseases.<sup>175</sup> In addition, the *Bridges* Court also remarked that the Equal Employment Opportunity Commission released guidance that employers can require COVID-19 vaccinations provided there are reasonable accommodations made to individuals for religious beliefs or for those with disabilities.<sup>176</sup> Thus, the *Bridges* Court dismissed the plaintiff's wrongful termination claim.<sup>177</sup>

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<sup>166</sup> *Amato*, 460 F. Supp. 3d at 209.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 220.

<sup>170</sup> *Id.* at 220-21.

<sup>171</sup> *Bridges v. Houston Methodist Hosp.*, 543 F. Supp. 3d 525, 527 (S.D. Tex. 2021).

<sup>172</sup> *Id.* at 526.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 527.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Bridges*, 543 F. Supp. 3d at 527.

Another challenge to a COVID-19 mitigation measure occurred in *Weissshaus v. Cuomo*.<sup>178</sup> In the *Weissshaus* case, a traveler to the State of New York sought an injunction in federal court to attempt to stop enforcement of a requirement for out-of-state travelers to complete a “New York State Traveler Health Form.”<sup>179</sup> This form required out-of-state travelers to disclose whether they had recently tested positive for COVID-19, experienced any COVID-19 symptoms, and whether they had recently traveled to a country with a high positivity rate for COVID-19.<sup>180</sup> Enforcement of the requirement was by state officials who checked incoming passengers for completion.<sup>181</sup> A \$10,000 civil penalty or a fifteen-day imprisonment could be imposed for failure to complete the form.<sup>182</sup>

The plaintiff argued that the traveler health form was preempted by federal law, largely focusing on the duties of the United States Customs and Border Protection agency and asserting this agency preempted screening or registration requirements at ports of entry.<sup>183</sup> The Governor argued the requirement of the health form was a lawful measure to safeguard public health.<sup>184</sup>

In granting the Governor’s motion to dismiss the challenge to the form, the Court in *Weissshaus* remarked that the field involved in this challenge was not entry into the United States, but rather “public health inspection at a state border.”<sup>185</sup> The *Weissshaus* Court noted that the Traveler Health Form permitted “the State to identify symptomatic travelers, enforce quarantine requirements, and perform contact tracing,” which are components of the State’s police powers.<sup>186</sup> In quoting the *Compagnie Francaise* decision, the Court in *Weissshaus* stated that the power to perform inspections is directly related to the power to enact quarantines, a power which was upheld in *Compagnie Francaise*.<sup>187</sup>

Finally, a challenge to Michigan Governor Gretchen Whitmer’s stay-at-home order cited *Compagnie Francaise* in its dismissal of the challenge.<sup>188</sup>

This discussion supports the argument that both state and federal governments could, if the political will and leadership are present, create a large array of laws for regulating a pandemic like COVID-19. This could include the delineation of functional regions based on economic data, such

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<sup>178</sup> *Weissshaus v. Cuomo*, 544 F. Supp. 3d 300 (E.D. N.Y. 2021).

<sup>179</sup> *Id.* at 302.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 303.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 304-05.

<sup>184</sup> *Weissshaus*, 544 F. Supp. 3d at 302.

<sup>185</sup> *Id.* at 306.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 307-08.

<sup>188</sup> *Martinko v. Whitmer*, 465 F. Supp. 3d 774 (E.D. Mich. 2020).

as trade areas and the establishment of SQDs. Still, a number of other legal sources, including statutes, executive actions, and court challenges, among others, must be considered as well to gain an overall understanding of how Medical Martial Law might function or be validly authorized or sustained.<sup>189</sup> The next section discusses a wide array of such powers.

## V. EMERGENCY POWERS OF GOVERNMENT EXECUTIVES

This section explores several major variants of the methods used to exercise emergency powers and impose government controls. These include the constitutional, statutory, and common law authorities used to justify deprivations of liberty. The concurrence of all these mechanisms at one time has been quite rare. However, a synchronized application of many or even most is not unrealistic. These foundations are reviewed here because they are the essential authorities for the imposition of Medical Martial Law—the mechanism(s) emerging as some variant of traditional martial law. Medical Martial Law might proceed as a response to a regional or national epidemic or pandemic response by traditional government action or as some new form of government action in urgent, disaster situations. Medical Martial Law could arise as the side effects of a pandemic frenzy, then spill over into traditional martial law foci—civil unrest, riots, property destruction and/or endangerment. This section introduces traditional martial law as composed of these major martial law tools: Suspension<sup>190</sup> of habeas corpus, posse comitatus, powers requiring national emergency declarations, and the Defense Production Act.<sup>191</sup> As with traditional martial law, Medical Martial Law may arise from federal, state, and even tribal imposed restrictions.<sup>192</sup> A complete understanding of Medical Martial Law requires the review of traditional martial law authorities.

Many of these interrelated forms have already appeared as remedies to the COVID-19 pandemic.<sup>193</sup> Most have been confined by geographic limitations, and each has been driven by economic geography asserted to be enforceable by some political authority at federal, state, or local levels.<sup>194</sup>

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<sup>189</sup> See, e.g., Adiel Kaplan, *As Covid Cases Soar, GOP State Lawmakers Keep Fighting To Limit Governors' Power To Respond*, NBC NEWS (Nov.14, 2020), <https://www.nbcnews.com/politics/politics-news/covid-cases-soar-gop-state-lawmakers-keep-fighting-limit-governors-n1247801> (reporting confusing array of conflicting state legislature and state court (de-)authorizing governors to impose public health restrictions by executive action).

<sup>190</sup> “Suspension,” as used here, is a term of art in the law of habeas corpus but is also relevant to other tools or mechanisms of martial law.

<sup>191</sup> See, e.g., Kaplan, *supra* note 189 (reporting that a confusing array of conflicting state legislature and state court (de-)authorizing governors to impose public health restrictions by executive action).

<sup>192</sup> See, e.g., *id.*

<sup>193</sup> See, e.g., *id.*

<sup>194</sup> See, e.g., *id.*

Each traditional martial law tool or mechanism is analyzed for relevance to its application directly or by analogy to Medical Martial Law. Each has significant potential to constrain business activity.

#### A. Martial Law

It seems likely that Medical Martial Law could assume many, if not most, characteristics of conventional martial law. Traditionally, martial law is the suspension of civilian law that has been typically exercised by state and local government.<sup>195</sup> The suspension typically results in temporary replacement of civilian law enforcement with the imposition of military control.<sup>196</sup> Experience with martial law varies widely throughout history and among nations. Opponents of martial law cite an all too frequent imposition using dictatorial rule when made by despotic governments.<sup>197</sup> By contrast, martial law adherents claim, particularly in the United States and other mature democracies, it has been rare and its incidents confined to dire emergencies.<sup>198</sup> Generally, martial law declarations are subject to judicial review.<sup>199</sup>

Notable impositions of martial law in the United States have occurred regionally under various circumstances.<sup>200</sup> For example, martial law has been imposed in the wake of military action.<sup>201</sup> Perhaps the prime exemplar was exerted by Congress on the Confederacy during the post-Civil War reconstruction of the former Confederate states.<sup>202</sup> Another wartime exemplar was ordered in New Orleans by General Andrew Jackson during

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<sup>195</sup> See, e.g., Frederick Pollock, *What Is Martial Law*, 18 L. Q. REV. 152 (1902).

<sup>196</sup> See, e.g., *id.*

<sup>197</sup> See generally TATLOW JACKSON, *MARTIAL LAW: WHAT IS IT? AND WHO CAN DECLARE IT?* (Philadelphia, John Campbell 1862).

<sup>198</sup> *Id.*

<sup>199</sup> See *Sterling v. Constantin*, 287 U.S. 378, 397 (1932).

<sup>200</sup> See Joseph Nunn, *Martial Law in the United States: Its Meaning, Its History, and Why the President Can't Declare It*, BRENNAN CTR. FOR JUST. (Aug. 20, 2020), <https://www.brennancenter.org/our-work/research-reports/martial-law-united-states-its-meaning-its-history-and-why-president-cant> (arguing widespread historical misunderstanding of martial law but ultra vires when declared by a U.S. President).

<sup>201</sup> See *id.*

<sup>202</sup> See generally MARK L. BRADLEY, *THE ARMY AND RECONSTRUCTION: 1865-1877* (St. John's Press 2016); see also AMANDA L. TYLER, *HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 187-93* (Oxford Univ. Press, 2017). Congress overrode all four vetoes made by President Andrew Johnson of the Military Reconstruction Acts. These Acts divided the Confederacy into five military districts governed by former Union generals, required the former "rebel states" to qualify for readmission, suspended habeas corpus and imposed martial law. During the Civil War, Confederate President Jefferson Davis suspended habeas corpus and imposed martial law numerous times, much of which was done in the border states.

the War of 1812.<sup>203</sup> In more modern times, the Hawaiian territorial governor declared martial law for three years following the Japanese attack on Pearl Harbor.<sup>204</sup> Historically, United States territorial governors wielded considerable plenary powers, particularly as to public safety and law enforcement, as authorized under the various Organic Acts that established the territories and their governance.<sup>205</sup> President Franklin Delano Roosevelt's ("FDR") World War II internment order relocated United States citizens and non-citizens of Japanese descent.<sup>206</sup> Japanese internment epitomizes confusion over the precise limits applicable to martial law. FDR's Executive Order No. 9066,<sup>207</sup> an incident considered a near equivalent of martial law, confounded the ambiguity in defining martial law jurisprudence.<sup>208</sup>

Disasters have also precipitated martial law. Consider martial law declarations after the Chicago fire of 1871 and again in San Francisco following the 1906 earthquake.<sup>209</sup> Martial law has been imposed after religious-precipitated insurrection, such as in 1844 by Joseph Smith, the Mayor of Nauvoo, Illinois, in response to the persecution of Mormons,<sup>210</sup> and

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<sup>203</sup> See Mathew Warshauer, *The Battle of New Orleans Reconsidered: Andrew Jackson and Martial Law*, 39 J. LA. HIST. ASS'N 261 (1998) (explaining how then General Andrew Jackson declared martial law December 1814 covering New Orleans in anticipation of the British invasion).

<sup>204</sup> Organic Act of 1900, Pub. L. 56-339, 31 Stat. 141, 153 (providing for Post-Pearl Harbor Hawaii to be placed under martial law for the duration of the war, empowering the Hawaiian territorial governor "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, [to] suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law. . ."); see also *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946) (highlighting that allegedly intentional delay prevented Supreme Court review, which eventually limited the scope of Hawaiian martial law and restored civilian governance, until 1946).

<sup>205</sup> See generally Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 UNIV. CHI. L. REV. 779-806 (1992); see also JACK ERICSON EBLEN, *THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT, 1784-1912* (Univ. Pittsburg Press, 1968); see also ALLEN P. STAYMAN, *U.S. TERRITORIAL POLICY: TRENDS AND CURRENT CHALLENGES* (East-West Center 2009) (explaining that the various Organic Acts have established governing authorities and the governing framework for U.S. territories since the Articles of Confederation. U.S. territorial governors in the latter twentieth century are generally politically responsive to the territory's electorate. However, historically territorial governors were traditionally presidential appointees who assumed office after Senate confirmation. Many territorial governors had broader powers than today's territorial governors). For example, many could dissolve the elected legislatures, declare martial law and suspend habeas corpus. By the twentieth century, U.S. territories were bifurcated into incorporated territories, those expected to be on a path to statehood, and unincorporated territories, the latter not on that path. The Constitution does not "follow the flag" to unincorporated territories, so Congress is still not bound to afford all fundamental Constitutional rights to territorial citizens in the unincorporated group.

<sup>206</sup> Exec. Order No. 9066, 31 Fed. Reg. 9066 (Feb. 19, 1942).

<sup>207</sup> *Id.*; see generally Eblen, *supra* note 206, at 95.

<sup>208</sup> Civil Liberties Act of 1988, 50 U.S.C. § 1989b (1988) (considering that final reparation payments were quite tardy, President Ronald Reagan signed the Civil Liberties Act in 1988).

<sup>209</sup> Robert McNamara, *The Great Chicago Fire of 1871*, THOUGHTCO. (July 3, 2019), <https://www.thoughtco.com/the-great-chicago-fire-of-1871-1774058>.

<sup>210</sup> EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900* 114-15 (Univ. Ill. Press 2001).

again by appointed territorial Governor Brigham Young in the 1857-1858 Utah War with the United States.<sup>211</sup> Labor strife in mining and port operations precipitated martial law declarations by governors and by the President in: (1) the 1892 union strike in Coeur d'Alene, Idaho,<sup>212</sup> (2) the 1914 Colorado Coalfield War,<sup>213</sup> (3) the 1920-1921 West Virginia Coal Wars,<sup>214</sup> and (4) San Francisco's port in the 1934 west coast waterfront strike.<sup>215</sup> During the 2020 COVID-19 Pandemic, there has been both related and unrelated civil unrest.<sup>216</sup> While much has been peaceful demonstration, other events have included violent crime, rioting, and looting.<sup>217</sup> Martial law powers potentially applicable to Medical Martial Law also likely authorize public safety measures that address civil unrest, particularly if unrest accompanies the pandemic and its negative economic impact.

Martial law in the United States has not been a predominately federal exercise of emergency powers.<sup>218</sup> Instead, martial law has largely resulted from state and local government suspension of civilian law.<sup>219</sup> Hybrid situations also arise, such as when federal troop interventions occur at the request of a state's legislature or governor.<sup>220</sup> States, and local governments operating under home rule,<sup>221</sup> generally have inherent police powers to protect the health, safety, welfare, and morals of their inhabitants.<sup>222</sup> Such state powers were reinforced in the United States Supreme Court's 1909 case of *Jacobson v. Massachusetts*,<sup>223</sup> upholding mandatory vaccination, a predictable component of Medical Martial Law, as not violating the

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<sup>211</sup> See, e.g., Richard D. Poll & William P. Mackinnon, *Causes of the Utah War Reconsidered*, 20 J. MORMON HIST. 16, 17 (1994).

<sup>212</sup> MARK WYMAN, *HARD ROCK EPIC: WESTERN MINERS AND THE INDUSTRIAL REVOLUTION, 1860-1910* 170 (Univ. Cal. Press 1979).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Discussion of the Black Lives Matter (BLM) movement is beyond the scope of this article. Nevertheless, emergency authorities considered for deployment by federal, state, and local governments parallel those for Medical Martial Law. See, e.g., Webinar: Black Lives Matter and the 2020 Elections, held by Digital Conservancy (July 15, 2020) (on file with University of Minnesota Digital Conservancy); see also Kevin Drakulich et al., *Race and Policing in the 2016 Presidential Election: Black Lives Matter, the Police, and Dog Whistle Politics*, 58 CRIMINOLOGY 370 (2020).

<sup>217</sup> See *id.*

<sup>218</sup> See generally Nunn, *supra* note 200.

<sup>219</sup> See generally *id.*

<sup>220</sup> See *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108 (1871) (showing that dual federalism generally reserves the police powers to the states, but that police powers then devolve as an inherent right under the Cooley Doctrine in a minority of states); but see *Hunter v. Pittsburgh*, 207 U.S. 161, 179 (1907) (showing that in a majority of states, the implied inherent rights of home rule are limited under Dillon's rule to those powers specifically delegated by state statute).

<sup>221</sup> See sources cited *supra* note 220.

<sup>222</sup> U.S. CONST. amend. X.

<sup>223</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 37 (1905) (upholding state police powers and their application to require compulsory vaccination laws).

Fourteenth Amendment's due process requirement.<sup>224</sup> Justice Harlan articulated the required balancing of normal individual rights versus collective rights that dominate during great dangers:

There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that, in every well ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.<sup>225</sup>

State police powers are likely the key element in pandemic response as they form the font for local quarantine imposition.<sup>226</sup> Federal imposition of martial law has been rare. According to Arkin,

[A]n official U.S. Army history states that martial law has only been declared once in United States history. But an Army field manual reports that martial law has been imposed four times. The Justice Department said there had been two such cases. All of these are in error, [Arkin] concludes, and reflect inconsistent definitions of the term.<sup>227</sup>

The term “suspension” may refer to the impact on civilian law and its institutions in martial law situations but also refers to the corollary, the “suspension” of the writ of habeas corpus, a functional parallel to martial law.<sup>228</sup> Martial law is a separate matter from the suppression of individual rights that often triggers challenges to individual confinement or imprisonment under habeas corpus.<sup>229</sup>

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 29 (upholding state police powers and their application to require compulsory vaccination laws).

<sup>226</sup> See, e.g., Bernadette Meyler, *Stanford Law's Bernadette Meyler on Executive Powers in Times of Crisis*, STAN. L. SCH. BLOGS (Mar. 25, 2020) <https://law.stanford.edu/2020/03/25/stanford-laws-bernadette-meyler-on-executive-powers-in-times-of-crisis/>.

<sup>227</sup> Steven Aftergood, *SECURITY NEWS (2000-2021)*; *William Arkin's "American Coup"*, FED'N AM. SCI. (Sep.19, 2013), <https://fas.org/blogs/security/2013/09/american-coup/> (citing WILLIAM M. ARKIN, *AMERICAN COUP* (Little Brown 2013)); see EDWARD SAMUEL CORWIN, *THE PRESIDENT: OFFICE AND POWERS: 1787-1957* 139 (NYU Press, 4th ed. 1957). Confusion over any precise definition of a state of martial law probably exists because the few dozen examples throughout United States history are so varied that generalizations are more doctrinal than reductionist.

<sup>228</sup> Edward G. White, *Looking Backward and Forward at the Suspension Clause*, 117 MICH. L. REV. 1313 (2019).

<sup>229</sup> 28 U.S.C. §§ 2241-2255; U.S. CONST. art. I, § 9, cl. 2 (explaining that habeas corpus rights are protected under federal statute and are fundamental Constitutional rights under the U.S.).

It seems obvious that some decisions at any level of the United States government—local, state, or federal—could result in charges brought against one or more individuals as fulfilling the definition of a military combatant. As military combatants, these individuals could be detained and subjected to suspension status if it was alleged they were members of a foreign military or even non-military saboteurs.<sup>230</sup> For example, if these individuals were infected with COVID-19 and then entered the United States as agents to spread the pandemic disease, habeas corpus suspension would arguably be appropriate. Thus, these actions could function as a form of Medical Martial Law to isolate and detain such humans as disease vectors.<sup>231</sup> Although the suspension of habeas corpus is a governmental activity distinct from martial law, they are often invoked as co-reinforcing dictates.<sup>232</sup>

## B. Suspension of Habeas Corpus

Violators of Medical Martial Law conceivably could be burdened or advantaged by the evolving habeas corpus jurisprudence—granting powers or exerting limitations on the justiciability of habeas corpus. A creature of English common law, habeas corpus found its way into the United States Constitution because pre-Revolutionary colonists suffered summary “justice” under the English crown.<sup>233</sup> Habeas corpus involves filing petitions in judicial proceedings to challenge the legal authority or the basis for the detention of a suspect individual. When the writ of habeas corpus is granted, the judicial decision reviews law enforcement custody and ostensibly releases the alleged violator.

During President Lincoln’s administration, at least two (in)famous habeas corpus cases are relevant to the interpretation and likely limitations of a Medical Martial Law regime.<sup>234</sup> First, Lincoln suspended habeas corpus

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Constitution, which provides: “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”).

<sup>230</sup> Compare Renée DiResta, *For China, the ‘USA Virus’ Is a Geopolitical Ploy*, ATL. MAG. (Apr. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/chinas-COVID19-conspiracy-theories/609772/> (reporting rampant conspiracy theories on the intentional origins of COVID-19 virus); with Jonathan Marcus, *Coronavirus: Trump Stands by China Lab Origin Theory for Virus*, BBC NEWS (May 1, 2020), <https://www.bbc.com/news/world-us-canada-52496098> (reporting allegations that COVID-19 was created in Wuhan laboratory).

<sup>231</sup> See sources cited *supra* note 230.

<sup>232</sup> See Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L. J. 600, 691 (2008).

<sup>233</sup> See THE FEDERALIST NO. 84 (Alexander Hamilton) (stating that “[t]he establishment of the writ of habeas corpus, the prohibition of ex post facto laws . . . are perhaps greater securities to liberty and republicanism than any [the Constitution] contains”).

<sup>234</sup> *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861); see, e.g., Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship*, 224 MIL. L. REV. 481 (2016) (arguing general misinterpretation of *Merryman* by some academics and jurists that results in at least three myths about the case’s legal setting and effect: (1) that Lincoln defied an order from Taney to release



in Maryland early in the war, in April 1861.<sup>235</sup> The Maryland Federal District Court overturned this suspension in *In re Merryman*.<sup>236</sup> Congressional reaction to this prompted legislation granting the president suspension powers in the Habeas Corpus Suspension Act in 1863,<sup>237</sup> which Lincoln again tested in the classic case *Ex parte Milligan*.<sup>238</sup> This time the Supreme Court rebuffed Lincoln's attempted suspension under the statute because civilian courts remained adequate.<sup>239</sup> *Milligan* held unconstitutional a requirement for military tribunals when civilian courts are still operating successfully.<sup>240</sup> Lincoln sought to reinforce the civil war effort by silencing dissent through the expansion of military tribunals.<sup>241</sup>

### 1. Exceptions to Habeas Corpus Limit Accused's Rights

One or more of these exceptions could form the basis of detentions in Medical Martial Law situations. First, status as unlawful combatants grants jurisdiction to secret military tribunals to prosecute saboteurs.<sup>242</sup> Second, in the September 11, 2001 ("9/11") terrorist attack aftermath, President George W. Bush issued a (military) executive order<sup>243</sup> declaring that suspected terrorists could be designated "enemy combatants," giving the President power to hold them indefinitely on suspicion of terrorist acts or on some alleged connection with terrorists.<sup>244</sup> However, this suspension was limited to non-citizens, given that trials in the military commissions were held unconstitutional and violated the Geneva Convention.<sup>245</sup> In post-9/11

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Merryman; (2) that Lincoln acted contrary to Taney's order; and (3) that Lincoln failed in his duty to appeal *Merryman*).

<sup>235</sup> See sources cited *supra* note 234.

<sup>236</sup> See *id.*

<sup>237</sup> Habeas Corpus Suspension Act, 12 Stat. 755 (1863).

<sup>238</sup> *Ex parte Milligan*, 71 U.S. 2, 67 (1866).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Ex parte Quirin*, 317 U.S. 1, 21 (1942); see *supra* text accompanying note 6.

<sup>243</sup> See *Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, THE WHITE HOUSE (November 13, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html> (essentially an Executive Order later limited to detention of non-citizens).

<sup>244</sup> See *id.*

<sup>245</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 594 (2006) (holding Combatant Status Review Tribunals (CSRT), established to try Guantanamo Bay detainees, are unconstitutional given they lack "[the] power to proceed because its structures and procedures violate both the [Uniform Code of Military Justice] and the [four] Geneva Conventions [signed in 1949]"); Pub. L. No. 109-366, 120 Stat. 2600 (2006) (explaining that Congress again attempted re-introduction of habeas corpus suspension with Military Commissions Act of 2006 and again it was revised in 2009 to deny Constitutional Rights to enemy combatants); Pub. L. No. 111-84, 123 Stat. 2190 (2009) (challenged in *Boumediene v. Bush*, 553 U.S. 723, 727, 765 (2008) (noting "that the political branches may [not] switch the Constitution on or off at will would lead to a regime in which they, not this Court, 'say what the law is'" (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)))).

jurisprudence, numerous habeas corpus applications and grants continue at both state and federal levels.<sup>246</sup>

### C. Posse Comitatus

The Posse Comitatus<sup>247</sup> rule is a major potential enablement, as well as a limitation, on the use of the military to enforce martial law.<sup>248</sup> As early as the ninth century, the posse was authorized under English common law with the creation of local sheriffs.<sup>249</sup> A posse was originally an impromptu group, generally composed of local people, which could be mobilized under extraordinary circumstances to keep the peace.<sup>250</sup> Subsequent statutes expanded this to address the military's role in domestic law enforcement.<sup>251</sup> The Posse Comitatus Act of 1878 ("PCA")<sup>252</sup> was enacted in the aftermath of heavy-handed<sup>253</sup> Union soldier occupation during Reconstruction. Pre-Revolutionary United States colonists suffered greatly under the British army's deployment in regular law enforcement, leading to Hamilton's warnings against misplaced fear over empowering local or state militias.<sup>254</sup> Posse comitatus was widely used to recruit or even draft civilian auxiliary groups of common folk into a sheriff's posse to pursue lawbreakers.<sup>255</sup> Today, the PCA generally prohibits the national armed forces from enforcing state civilian law.<sup>256</sup>

<sup>246</sup> See, e.g., LISA M. SEGHELLI, CONG. RSCH. SERV. NO. RL33259, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 9 (2007).

<sup>247</sup> Gary Felicetti & John Luce, *The Posse Comitatus Act: Liberation from the Lawyers*, PARAMETERS, Autumn 2004, at 94-107 (explaining that "Comitatus" is Latin for armed accompanying escort, having evolved in feudal times to constitute a bond of obligation between warriors and the manorial lord).

<sup>248</sup> *Id.*

<sup>249</sup> See, e.g., *id.*

<sup>250</sup> See, e.g., *id.*

<sup>251</sup> See, e.g., *id.*

<sup>252</sup> 18 U.S.C. § 1385 (1878).

<sup>253</sup> See John G. Sproat, *Blueprint for Radical Reconstruction*, 23 J. S. HIST. 25 (1957) (explaining that a historical era colloquially referred to as "Radical Reconstruction," particularly as seen from the former Confederacy perspective, was oppressive to the south as precipitated by northern carpetbaggers, anti-secessionist southern scalawags, and Congressional republicans); see also RICHARD L. HUME & JERRY B. GOUGH, BLACKS, CARPETBAGGERS, AND SCALAWAGS: THE CONSTITUTIONAL CONVENTIONS OF RADICAL RECONSTRUCTION (LSU Press, 2008).

<sup>254</sup> THE FEDERALIST NO. 29, at 18 (Alexander Hamilton) (McLean ed., 1788) (arguing not to fear neighbors as justification for small, well-regulated militia and against the anti-federalist's argument that local/state militias should be mistrusted).

<sup>255</sup> See David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 761 (2015) (arguing posse comitatus still used widely in the United States. Colorado has active posses, and posse comitatus remains relevant to Second Amendment interpretation).

<sup>256</sup> Joseph Nunn, *The Posse Comitatus Act Explained*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021), <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained>.

The PCA specifically prohibits and criminalizes the United States Army, amended in 1956 to include the United States Air Force,<sup>257</sup> from use as a posse comitatus unless expressly authorized by the Constitution or Congress. Notably, the Navy and Marine Corps,<sup>258</sup> the Coast Guard<sup>259</sup> and the United States Space Force are not specifically constrained, although Department of Defense (“DoD”) regulations do constrain these other branches.<sup>260</sup> Nevertheless, these restrictions are sometimes distinguished as not constituting “execution of the law” in the language of the PCA prohibition.<sup>261</sup> Limited United States military intervention is sometimes permitted, such as in the war on drug interdiction, assistance in disasters, or post-9/11 counter-terrorism use.<sup>262</sup> In some cases, there has been proposed or actual use of military personnel and espionage systems for reconnaissance and evidence gathering for criminal enforcement purposes.<sup>263</sup> These latter uses are sometimes permissible under PCA so long as military aid does not permeate activities by the civilian force.<sup>264</sup>

These and other PCA exceptions may become important in the imposition of Medical Martial Law if there would be enforcement of lockdown, post-pandemic phased re-openings, or orders issued directing product production, distribution, or performance of services by private

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<sup>257</sup> 18 U.S.C. § 1385 (1994) (providing that “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both”).

<sup>258</sup> See *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1477 (11th Cir. 1992); see also *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991); see also *United States v. Ahumado-Avendano*, 872 F.2d 367, 372 n.6 (11th Cir. 1989); see also *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1339-40 (9th Cir. 1987); see also *United States v. Roberts*, 779 F.2d 565, 567 (9th Cir. 1986); see also *United States v. Walden*, 490 F.2d 372, 374 (4th Cir. 1974); see also *State v. Short*, 775 P.2d 458, 459 (Wash. 1989).

<sup>259</sup> See JENNIFER K. ELSEA, CONG. RSCH. SERV., NO. R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW (2018) (highlighting that the Coast Guard is part of the Department of Homeland Security until declaration of war when it falls under Department of Defense authority becoming part of the Navy).

<sup>260</sup> 32 C.F.R. § 213.2 (2007); Department of Defense Instruction No. 3025.21 (2013) (both applying to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff (CJCS) and the Joint Staff, the Combatant Commands, the Defense Agencies, the Department of Defense Field Activities, and all other organizational entities within the Department of Defense).

<sup>261</sup> Elsea, *supra* note 259.

<sup>262</sup> See generally *id.*

<sup>263</sup> See *Yunis*, 924 F.2d at 1094 (discussing the Navy transportation of prisoner in FBI custody); see also *Hall v. State*, 557 N.E.2d 3, 4-5 (Ind. Ct. App. 1990) (discussing Air Force undercover agents assisting local police in drug investigations).

<sup>264</sup> See, e.g., *United States v. Bacon*, 851 F.2d 1312, 1313-14 (11th Cir. 1988) (concluding there was no ‘military permeation of civilian law enforcement’); see also *United States v. Holloway*, 531 F. App’x 582, 583 (6th Cir. 2013) (concluding no PCA violation “where the Navy agent turned over the information . . . to the civil authorities, [and was] not involved in the subsequent search”).

industry under the Defense Procurement Act (“DPA”).<sup>265</sup> PCA becomes inapplicable at the request of a state<sup>266</sup> to enforce federal law, such as in insurrection,<sup>267</sup> to enforce federal rights,<sup>268</sup> and to support civilian law enforcement.<sup>269</sup> In addition, there are a substantial array of narrowly drawn statutory exceptions from the prohibition of military involvement in law enforcement when special conditions exist.<sup>270</sup>

### 1. *Insurrection Act of 1807*

Probably the most expansive presidential power<sup>271</sup> to impose martial law is the deployment of federalized armed forces under the Insurrection Act of 1807.<sup>272</sup> As the major exception to Posse Comitatus, it permits the President to proclaim insurrection,<sup>273</sup> without Congressional approval, then federalize either a well-regulated state militia or deploy federal troops within United States borders.<sup>274</sup> In other words, an invocation of the Insurrection Act authorizes the use of active duty military to enforce civilian, domestic law.<sup>275</sup> The Insurrection Act appears to have arisen due to the convergence of the federal government’s military weakness under the Articles of Confederation with Shay’s Rebellion in rural Massachusetts.<sup>276</sup> Provisionally, consider *insurrection* can be defined as a violent uprising or rebellion of citizens against their government.<sup>277</sup>

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<sup>265</sup> See *infra* text accompanying notes 342 to 403.

<sup>266</sup> 10 U.S.C. § 251.

<sup>267</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>268</sup> U.S. CONST. amend. XIV, § 5.

<sup>269</sup> Act of Dec. 1, 1981, Pub. L. No. 97-86, 95 Stat. 1115 (codified as amended at 10 U.S.C. § 271-79).

<sup>270</sup> See Elsea, *supra* note 259 (cataloging dozens of special exceptions).

<sup>271</sup> See, e.g., Stephen I. Vladeck, *Yes, Trump Can Invoke the Insurrection Act to Deport Immigrants*, ATL. MAG. (May 17, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/can-trump-use-insurrection-act-stop-immigration/589690/> (arguing Congress has delegated too much power to presidents).

<sup>272</sup> 10 U.S.C. §§ 251–255 (formerly 10 U.S.C. §§ 331–335; based on Calling Forth Act of 1792, 1 Stat. 264 (repealed 1795)); the Militia Act of 1795, 1 Stat. 424 (repealed, in part, 1861); See generally Elsea, *supra* note 259 (analyzing history of exceptions to posse comitatus by the use of federal(ized) Armed Forces to execute domestic law).

<sup>273</sup> Insurrection is not clearly defined in the dozens of U.S. Code sections that use it. Instead, as discussed below, the Act lists broad conditions under which the President can authorize active duty military to enforce civilian, domestic law.

<sup>274</sup> See generally Elsea, *supra* note 259.

<sup>275</sup> See Joseph Nunn, *The Insurrection Act Explained*, BRENNAN CTR. FOR JUST. (April. 21, 2022), <https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained>.

<sup>276</sup> See Thaddeus A. Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 870-73 (2010) (chronicling political debate representing pressures to authorize, yet limit the use of military in domestic law enforcement along with the loss of public confidence in the use of the military given the Colonists’ struggles with English military rule leading up to the Revolutionary War).

<sup>277</sup> See *id* at 901 (noting no specific definition exists in federal statutes for “insurrection” so the law can remain flexible as differing schemes arise) (citing *Pan Am. World Airways, Inc. v. Aetna Cas.*

Insurrection Act invocations have occurred several dozen times over the nation's history, largely for riots, labor and strike troubles, tax revolts, Klan suppression, natural disasters (e.g., Hurricane Katrina),<sup>278</sup> enforcement of reconstruction, and desegregation.<sup>279</sup> The Insurrection Act has always been narrowly invoked geographically, locally, and never more broadly than statewide.<sup>280</sup> Importantly, to the development of a Medical Martial Law regime, there has never been a large-scale geographic invocation.<sup>281</sup> Further, state requests have precipitated most invocations.<sup>282</sup> For example, during the nineteenth-century reconstruction, President Ulysses S. Grant issued the twenty-day dispersal order to the Ku Klux Klan at the South Carolina governor's request,<sup>283</sup> setting up passage just two months later of the Klan Act, another revision of the Insurrection Act.<sup>284</sup> Three twentieth-century invocations were made by Presidents Dwight D. Eisenhower and John F. Kennedy without request from the states' governors or state legislatures: (1) the 1957 Little Rock Crisis (Central High desegregation) to protect

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& Sur. Co., 505 F.2d. 989, 1005 (2d Cir. 1974) (requiring intent element to overthrow a lawfully constituted regime) and *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894) (defining insurrection as "a rising against civil or political authority,-the open and active opposition of a number of persons to the execution of law in a city or state").

<sup>278</sup> See, e.g., DANIELLE CROCKETT, *THE INSURRECTION ACT AND EXECUTIVE POWER TO RESPOND WITH FORCE TO NATURAL DISASTERS* (Univ. of Ca., Berkeley Sch. of L. 2007) (discussing modern revisions to the Insurrection Act).

<sup>279</sup> See Ian Shapira, *For 200 Years, The Insurrection Act Has Given Presidents the Power to Deploy the Military to Quell Unrest*, WASH. POST (June 3, 2020, 8:35 PM), <https://www.washingtonpost.com/history/2020/06/03/insurrection-act-trump-history/>.

<sup>280</sup> See, e.g., CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, *DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787* 13 (Ballantine Books, 1986). Invocations of the Insurrection Act's predecessor, the Calling Forth Act, were made by President Washington, such as his 1794 suppression of the Whiskey Rebellion in Western Pennsylvania. There was a thirty-day maximum of Presidential militia calling forth. Military weakness under the Articles of Confederation (e.g., Shay's Rebellion) prompted both Presidential Commander in Chief empowerment in the Constitution as well as the Insurrection Act.

<sup>281</sup> See generally Nunn, *supra* note 275.

<sup>282</sup> For compilations of Insurrection Act invocations, see BENNET MILTON RICH, *PRESIDENTS AND CIVIL DISORDER* (Brookings Inst., 1941); CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877-1945* (1997); PAUL J. SCHEIPS, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945-1992* (2005); FREDERICK T. WILSON, *FEDERAL AID IN DOMESTIC DISTURBANCES, 1787-1903*, S. Doc. No. 57-209, (1903) (collecting the eighteenth and nineteenth century instances, along with related proclamations and other documentation); U.S. ARMY JUDGE ADVOCATE GENERAL, *FEDERAL AID IN DOMESTIC DISTURBANCES, 1903-1922*, S. Doc. No. 67-263, (1922) (updating with early twentieth century incidents).

<sup>283</sup> Proclamation No. 197, *Law and Order in the State of South Carolina* (Mar. 24, 1871); AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017).

<sup>284</sup> Ku Klux Klan Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (codified as amended in scattered sections of 42 U.S.C.); see, e.g., Shapira, *supra* note 279 (discussing how hundreds of Klan members were detained under the revised Insurrection Act, most convicted by 1872).

defendants,<sup>285</sup> (2) in 1962 to quell the Ole' Miss riot in Oxford MS,<sup>286</sup> and (3) in 1963 to enforce public school desegregation in Alabama.<sup>287</sup>

Three broad conditions are defined as the variants of “insurrection,”<sup>288</sup> triggering the President’s power<sup>289</sup> to invoke this posse comitatus exception, thereby permitting deployment of federal(ized) militia or regular military. First, calling up any state militia or deployment of the United States military for insurrection against state government is authorized when requested by the state’s governor or legislature.<sup>290</sup> Second, calling up any state militia is authorized when there are obstructions, combinations, assemblages, or rebellions against a state or the United States.<sup>291</sup> Third, calling up any state militia is authorized for suppression of any insurrection, domestic violence, unlawful combination, or conspiracy that (i) “hinders the execution of the laws of that State, a part or class of its people is deprived of a Constitutional right, privilege, immunity, or protection, or (ii) “opposes or obstructs the execution of the laws of the United States or impedes the course of justice.”<sup>292</sup> The first situation is triggered by the request of states as a condition to Presidential imposition of force deployments. However, neither the second situation nor the third require state government action, invitation, or request.<sup>293</sup> Instead, the President alone can determine when conditions allowing a posse comitatus exception are present and then choose to “enforce” laws or “suppress” the underlying incidents of insurrection.<sup>294</sup>

## 2. *The Insurrection Act’s Political Vulnerability*

Briefly, in 2007, the Insurrection Act was made deployable, even without state consent, in any emergency hindering the enforcement of laws.<sup>295</sup> However, all fifty governors quickly joined in opposition, and the provision was repealed in early 2008.<sup>296</sup> The Insurrection Act and its predecessor provisions have always stimulated the wary eye, given Colonial

<sup>285</sup> Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957).

<sup>286</sup> Exec. Order No. 11,053, 27 Fed. Reg. 9681 (Sept. 30, 1962).

<sup>287</sup> Exec. Order No. 11,111, 28 Fed. Reg. 5707 (June 11, 1963); Exec. Order No. 11,118, 28 Fed. Reg. 9863 (Sept. 10, 1963).

<sup>288</sup> U.S. CONST. art. IV, § 4. The Constitution grants federal power to provide military assistance to the states in situations of “domestic violence,” but Congress limited this in the Insurrection Act to be arguably more serious activities than mere domestic violence and arguably less serious than rebellion, revolution or invasion.

<sup>289</sup> 10 U.S.C. § 254. The President must first issue a dispersal order to the insurgents.

<sup>290</sup> 10 U.S.C. § 251.

<sup>291</sup> 10 U.S.C. § 252.

<sup>292</sup> 10 U.S.C. § 253.

<sup>293</sup> See generally Elsea, *supra* note 259.

<sup>294</sup> See generally *id.*

<sup>295</sup> See Crockett, *supra* note 278.

<sup>296</sup> See Hoffmeister, *supra* note 276 at 908-17 (proposing numerous checks and balances necessitating procedural and definitional changes to modernize the Insurrection Act).

experience with English rule and military enforcement.<sup>297</sup> The original Calling Forth Act had sunset provisions, and it required court findings before the use of the military.<sup>298</sup> Notably, these judicial review provisions did not survive modernization.<sup>299</sup> All these posse comitatus exceptions were originally designed to assist but never replace state or local civilian law enforcement.<sup>300</sup> Of course, a real foreign invasion has nearly always triggered the authorized use of the military inside the borders of the United States.<sup>301</sup>

Consider how President John Adams regularly deployed federal troops to intimidate.<sup>302</sup> Arguably, as a regular practice, presidential (mis)use of the military as a political tool is invalid and likely to engender broad public disrespect for the military. Indeed, the experience with Posse Comitatus during reconstruction likely underlies considerable Pentagon reluctance to be drawn into policing domestic violence, given the general adequacy of local law enforcement as supplemented by state militias. Posse Comitatus serves as a predictable anti-military reaction among citizens, potentially leading to clipping of DoD wings in many ways: Appropriations, authorizations, base closings, Veterans Affairs aid, respect towards the military.<sup>303</sup> This reticence to restrict military service as a form of posse comitatus is well founded.<sup>304</sup> Consider that in the late 1860s and 1870s it was “radical reconstruction’s” use of military zones in former confederate states that orchestrated public opposition to domestic military deployment.<sup>305</sup> Surprisingly, the sufficiency of popular opposition to domestic military deployment spurred the creation

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<sup>297</sup> See generally Elsea, *supra* note 259.

<sup>298</sup> See generally *id.*

<sup>299</sup> See generally *id.*

<sup>300</sup> See, e.g., *id.*

<sup>301</sup> See e.g., Ben Zimmer, *Where Does Trump’s ‘Invasion’ Rhetoric Come From?*, ATL. MAG. (Aug. 6, 2019), <https://www.theatlantic.com/entertainment/archive/2019/08/trump-immigrant-invasion-language-origins/595579/> (arguing invasion is racist language to describe contemporary immigrants but such usage originated on the West Coast more than a century ago). An incomplete list of invasions of the United States since nationhood include: the Declaration of Independence, the Revolutionary War, the War of 1812, the Mexican War, various Mexican Border incursions in Texas and Arizona, Texas Independence, Bleeding Kansas, Confederacy by secession, Confederate invasion of the South, Confederacy in various battle incursion into Union states, German and Nazi U-Boat sinkings off the U.S. coasts, and Pearl Harbor. Of course, the alleged Latin American invasion prompting President Trump to advocate expansion of the border wall/fence is highly controversial so is not yet added to this list. Indeed, rhetorical use of the term “invasion” has been argued to be at least a veiled threat, if not a precursor, to mobilization of U.S. military resulting in an immediate broadening scope of President powers.

<sup>302</sup> See, e.g., PAUL DOUGLAS NEWMAN, *FRIES’S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION* (Univ. Pa. Press, 2004) (recounting the 1799 Fries Rebellion in eastern Pennsylvania).

<sup>303</sup> See generally Nunn, *supra* note 256.

<sup>304</sup> See generally *id.*

<sup>305</sup> See generally Hoffmeister, *supra* note 276.

of the posse comitatus restriction in the first place, yet emanated primarily from the reconstruction-subdued, former confederate southern states.<sup>306</sup>

It seems most reasonable for seasoned Pentagon strategists to respect the balance between civilian generosity manifesting respect for the military versus outrage triggered by misuse of the military. While military coup is de rigeur in dictatorial banana republics, they are nearly unheard of in most successful democratic republics.<sup>307</sup> Pentagon realists likely understand that DoD consumes nearly half the federal budget, resulting in staunch resistance to presidential whim that predictably might eventually result in undercutting DoD.<sup>308</sup> Consider the World War II depth of this respect. President Harry Truman was merely informed for consensus purposes about the destructive potential of the Fat Man and Little Boy nuclear weapons.<sup>309</sup> Of course, by the post-Cold War years, nuclear deployment decision-making transitioned through the former General of the Armies serving as President to become a mostly presidential decision.<sup>310</sup> Civilian invocation of nuclear weapons is typical among all the world's nuclear powers.<sup>311</sup> Still, in the United States., this represents a 180-degree authorization of decision-making and was punctuated by President Richard Nixon's infamous drunken whim threat to nuke North Vietnam, as revealed in the 2013-2014 disclosure of the Nixon Tapes, now an alarmingly legendary event.<sup>312</sup>

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<sup>306</sup> See generally Elsea, *supra* note 259.

<sup>307</sup> See generally FREDERIC C. DEYO, *THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM* (2018).

<sup>308</sup> See, e.g., Veronica Stracqualursi, *The Prominent Former Military Leaders Who Have Criticized Trump's Actions Over Protests*, CNN POLITICS, <https://www.cnn.com/2020/06/05/politics/military-leaders-trump-floyd-protests/index.html> (last updated June 5, 2020); see also Anthony Capaccio, *Ex-Generals Come Out Against Trump for Plan to Militarize U.S.*, BLOOMBERG (June 8, 2020, 3:00 AM), <https://www.bloomberg.com/news/articles/2020-06-08/ex-generals-come-out-against-trump-for-plan-to-militarize-u-s>. Retired generals condemn presidential threats to use active duty armed forces for law enforcement when unnecessary.

<sup>309</sup> See generally JOSEPH M. SIRACUSA, *NUCLEAR WEAPONS: A VERY SHORT INTRODUCTION* (Oxford Univ. Press, 3rd ed. 2020).

<sup>310</sup> See generally *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> (last updated June 9, 2022).

<sup>311</sup> See generally Michael E. O'Hanlon & Bruce Riedel, *The Russia Ukraine War May be Bad News for Nuclear Nonproliferation*, BROOKINGS (Mar. 29, 2022), <https://www.brookings.edu/blog/order-from-chaos/2022/03/29/the-russia-ukraine-war-may-be-bad-news-for-nuclear-nonproliferation/>. Nuclear powers have some similarities in nuclear weapon deployment decision-making: United States, Russia (Soviet Union), United K, France, China, India, Pakistan, fortunately not yet likely North Korea nor Iran.

<sup>312</sup> See, e.g., Fresh Air, *Fueled By Fear, How Richard Nixon Became 'One Man Against The World,'* NPR (June 15, 2015), <https://www.npr.org/transcripts/414615258>.



#### D. Emergency Powers

Risks that threaten public order or signal imminent crisis fomenting a national emergency typically arouse expectations that the President, a state's governor, or local government executive (mayor, city manager, county commission) could impose martial law, perhaps including other draconian measures.<sup>313</sup> Medical Martial Law is likely no exception. Presidential powers have accumulated, largely without repeal, over many decades.<sup>314</sup> Presidential emergency powers have been exercised under various statutory authorities.<sup>315</sup> Although most authorities were created by statute, of all the declared emergencies, presidents have invoked only a few of these many sources of authority.<sup>316</sup> As of 2019, fully two-thirds of these powers have never been invoked.<sup>317</sup> As of this writing, there are thirty-one states of national emergency declared by various presidents that persist, unrevoked today.<sup>318</sup> Some states of national emergency arguably represent political posturing<sup>319</sup>

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<sup>313</sup> See HAROLD C. RELYEA, CONG. RSCH. SERV., NO. RS21024, *MARTIAL LAW AND NATIONAL EMERGENCY* (2005); see also *A Guide to Emergency Powers and Their Use*, *supra* note 310 (assembling exhaustive compendium of 136 separate presidential emergency powers, statutory authorities and noting requisite pre-declaration process and findings, where applicable, although 96 require only the President's signature).

<sup>314</sup> See, e.g., Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, *ATL. MAG.*, Jan.-Feb. 2019, <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> (predicting, over a year in advance, that President Trump's rhetorical use of threats to declare emergencies would be deployed intentionally to trigger extraordinary powers; warning of actions such as: (i) deploying an Internet "Kill Switch," (ii) sanctioning Americans under the 1977 International Emergency Economic Powers Act (IEEPA), (iii) skirting Posse Comitatus restrictions by deploying military in U.S. cities, and (iv) targeting political enemies by canceling health insurance and freezing bank accounts; also opining "You can imagine a situation where he (Trump) engineers a crisis that leads to domestic violence, which then becomes a pretext for martial law"); see also CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., R45618, *THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE* (2020).

<sup>315</sup> See generally L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505, *NATIONAL EMERGENCY POWERS* (2021).

<sup>316</sup> See generally *id.* (arguing the annual frequency that presidents have invoked emergencies based on the International Emergency Economic Powers Act (IEEPA) suggest the triggering events "are not emergency actions at all, but the implementation of standard policy that should be bound by non-emergency law."); see also *International Emergency Economic Powers*, Pub. L. No. 95-223, § 202, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701-1708).

<sup>317</sup> Halchin, *supra* note 315.

<sup>318</sup> See *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> (last updated Oct. 13, 2022) (assembling exhaustive compendium of fifty-nine presidential National Emergency declarations by Executive Order, noting expiry of twenty-eight and another thirty-one that are still in effect); see also EMILY E. ROBERTS, CONG. RSCH. SERV., LSB10252, *DECLARATIONS UNDER THE NATIONAL EMERGENCIES ACT, PART 1: DECLARATIONS CURRENTLY IN EFFECT* (2019); EMILY E. ROBERTS, CONG. RSCH. SERV., LSB10253, *DECLARATIONS UNDER THE NATIONAL EMERGENCIES ACT, PART 2: DECLARATIONS NO LONGER IN EFFECT* (2019).

<sup>319</sup> See, e.g., Robert L. Tsai, *Manufactured Emergencies*, 129 *YALE L.J.* 590 (2020).

that threatens the legitimacy of the presidency, as well as checks and balances.<sup>320</sup>

Although it may be shocking to many, there is an accumulating library of classified Presidential Emergency Action Documents (“PEADs”) now archived by the Federal Emergency Management Agency (“FEMA”) component of the Department of Homeland Security (“DHS”).<sup>321</sup> The existence and extent of expansive emergency powers have been bootstrapped by several Presidents in consultation with White House counsel and the Department of Justice (“DoJ”).<sup>322</sup> PEADs have remained largely classified, so there is limited transparency to Congress or the public.<sup>323</sup> These PEADs may be intended to support a particular president’s advocacy that particular emergency actions be based on inherent powers or implied powers.<sup>324</sup> Inherent powers are a major thrust in the theory of expanding Presidential powers,<sup>325</sup> mostly based on three power grants to the executive branch: (i) executive power vesting, (ii) faithful execution, and (iii) foreign relations powers.<sup>326</sup>

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<sup>320</sup> See Anna Lührmann & Bryan Rooney, *Autocratization by Decree: States of Emergency and Democratic Decline*, 53 COMPAR. POL’Y, no. 4, 2020.

<sup>321</sup> See generally Patrick Thronson, *Toward Comprehensive Reform of America’s Emergency Law Regime*, 46 UNIV. MICH. J. L. REFORM 737 (2013) (arguing that PEADs do not authorize Presidents beyond Constitutional powers but project inherent Presidential powers to deal with national emergencies); see also *Presidential Emergency Action Documents*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents> (last updated May 26, 2022).

<sup>322</sup> See generally *Presidential Emergency Action Documents*, *supra* note 321.

<sup>323</sup> See, e.g., Deb Riechmann, *Trump’s Emergency Powers Worry Some Senators*, *Legal Experts*, FED. NEWS NETWORK (May 16, 2020), <https://federalnewsnetwork.com/government-news/2020/05/trumps-emergency-powers-worry-some-senators-legal-experts/>; *Presidential Emergency Action Documents*, *supra* note 321 (listing PEADs from past presidents); see also *Freedom of Information Act Electronic Reading Room*, CIA, <https://www.cia.gov/library/readingroom/docs/CIA-RDP84-00780R004700100007-5.pdf> (last visited Oct. 12, 2022).

<sup>324</sup> See, e.g., Neil Kinkopf, *Inherent Presidential Power and Constitutional Structure*, 37 PRES. STUD. Q. 37 (2007).

<sup>325</sup> See Louis Fischer, *How the Supreme Court Promotes Independent Presidential Power*, 39 CATO J. 683 (2019); Neal Devins, *The Erosion of Congressional Checks on Presidential Power*, THE CIPHER BRIEF (Jan. 20, 2017), <https://www.thecipherbrief.com/the-erosion-of-congressional-checks-on-presidential-power>.

<sup>326</sup> Saikrishna B. Prakash & Christopher H. Schroeder, *The Vesting Clause: Common Interpretation*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-ii/clauses/347> (last visited Oct. 14, 2022).

### 1. *The Theory of Emergency Conditions*

Under the plain meaning rule, statutory terms must be given their literal and ordinary meaning in common language,<sup>327</sup> unless the result would be absurd.<sup>328</sup> The plain meaning of “emergency” is “an unforeseen combination of circumstances or the resulting state that calls for immediate action.”<sup>329</sup> Key concepts in this definition are (i) temporary, sudden and urgent, (ii) infrequent occurrence, (iii) gravity, negative impact, threat to life and well being, (iv) some response is indicated,<sup>330</sup> but, (v) experience has not adequately accumulated to guide effective response.<sup>331</sup>

[Emergency] denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable limits.<sup>332</sup>

At the turn of the millennium, the United States confronted two emergency examples: (i) the Y2K technology failure that might have threatened life, property, and the general welfare,<sup>333</sup> and (ii) the 9/11 attacks.<sup>334</sup> While both were temporarily disruptive, no martial law was widely invoked.<sup>335</sup> Instead, in the modern era, less extensive presidential declarations of emergency have targeted the super-imposition of federal powers, participation of federal employees and the military, or the supplementation of state and local civilian law with federal assistance.<sup>336</sup>

The declaration of a state of emergency has largely replaced martial law.<sup>337</sup> Provisionally it would seem to be a more targeted and limited scope of activity.<sup>338</sup> As such, it might be more likely to be justified as an appropriate contemporary remedial reaction to a pandemic than would be martial law,

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<sup>327</sup> See, e.g., Arthur W. Murphy, *Old Maxims Never Die: The Plain-Meaning Rule and Statutory Interpretation in the “Modern” Federal Courts*, 75 COLUM. L. REV. 1299 (1975); but see William Baude, & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539 (2017).

<sup>328</sup> See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

<sup>329</sup> *Emergency*, MERRIAM-WEBSTER (Online ed. 2022), <https://www.merriam-webster.com/dictionary/emergency>.

<sup>330</sup> See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 440 (1934).

<sup>331</sup> See Corwin, *supra* note 227.

<sup>332</sup> See S. Res. 9, 93rd Cong. (1993) (enacted).

<sup>333</sup> The Federal Emergency Management Agency (FEMA) was concerned with the possibility that Y2K could have shut down portions the power grid. See S. REP. NO. 106-10, at 3 (1999).

<sup>334</sup> See S. REP. NO. 107-351 (2002).

<sup>335</sup> Relyea, *supra* note 313.

<sup>336</sup> See *A Guide to Emergency Powers and Their Use*, *supra* note 310 (assembling the “emergency framework statutes”).

<sup>337</sup> See Nunn, *supra* note 201 (discussing the President’s lack of power to declare martial law).

<sup>338</sup> *Legislative Oversight of Emergency Executive Powers*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 26, 2022), <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>.

Posse Comitatus, or widespread suppression of habeas corpus, as discussed in sections A, B, and C above. Nevertheless, in the COVID-19 pandemic context, additional emergency declarations loom to challenge sacred civil liberties.<sup>339</sup>

Despite the more targeted, regionally-limited geographic scope of modern emergencies, they may nevertheless be considered National Emergencies. Obviously, difficulties typically overwhelm one region of the United States more intensely than they do in some other regions of the United States. Nevertheless, the likely spillover effect<sup>340</sup> may still necessitate a broader geographic scope in which to exercise control. Executive orders are the main mechanism by which national emergencies are initiated.<sup>341</sup>

#### E. Executive Orders Declare and Implement Emergency Authority

Almost all presidents<sup>342</sup> have issued executive orders, essentially directives<sup>343</sup> that function in four general ways to:<sup>344</sup> (i) manage the United States by pursuing policy goals, (ii) set management standards for the executive branch, (iii) decree the commencement or cessation of certain actions, or (iv) promote policy views in attempted exertion of influence on the nation.<sup>345</sup> While there is no direct Constitutional authority for executive

<sup>339</sup> Lawrence O. Gostin & James G. Hodge, *US Emergency Legal Responses to Novel Coronavirus: Balancing Public Health and Civil Liberties*, 323 JAMA NETWORK 1131, 1131-32 (2020); Giacomo DelleDonne, *Crises, Emergencies and Constitutional Change*, in ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE (Xenophon Contiades & Alkmene Fotiadou eds., 2020).

<sup>340</sup> See generally Qiang Wang & Xinyu Han, *Spillover effects of the United States economic slowdown induced by COVID-19 pandemic on energy, economy, and environment in other countries*, 196 ENV'T RSCH., no. 110936, 2021 (discussing spillover effects and the COVID-19 pandemic).

<sup>341</sup> See *Emergency Powers*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers> (last visited Oct. 14, 2022).

<sup>342</sup> The sole exception was the ninth President, William Henry Harrison, who died just a month after taking office in 1841. *Executive Order*, HISTORY, <https://www.history.com/topics/us-government/executive-order> (last updated Feb. 4, 2021).

<sup>343</sup> Executive orders take a number of forms, with differing titles, nevertheless generally all are treated as executive orders. See Memorandum Opinion for the Counsel to the President from Randolph D. Moss, Assistant Att'y Gen. on Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, (Jan. 29, 2000), <https://www.justice.gov/file/19436/download>. A presidential directive has the same substantive legal effect as an executive order. It is the substance of the presidential action that is determinative, not the form of the document conveying that action. See *id.* Both an executive order and a presidential directive remain effective upon a change in administration, unless otherwise specified in the document, and both continue to be effective until subsequent presidential action is taken or supersession by statute. See *id.*

<sup>344</sup> See VIVIAN S. CHU & TODD GARVEY, CONG. RSCH. SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION (2014).

<sup>345</sup> The latter are forms of "moral suasion" announced from the President's bully pulpit; they are often called "hortatory" because they are but mere exhortation. See STAFF OF H. COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: STUDY OF A USE OF

orders, they have been legitimized as implied from Article II, “faithful execution” of Presidential powers.<sup>346</sup> Indeed, before World War I, emergency decrees were issued by presidents largely in the exercise of their inherent exigency authority.<sup>347</sup> In the twentieth century, executive orders were more likely issued pursuant to some statutory authorization.<sup>348</sup> Executive orders are subject to invalidation by judicial review<sup>349</sup> and can be superseded by legislative repeal<sup>350</sup> or later presidential revocation or modification.<sup>351</sup> Official organization, documentation, numbering, and retention as citable authority did not become common practice until the twentieth century.<sup>352</sup>

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PRESIDENTIAL POWERS (Comm. Print 1957); William Hebe, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 688 (1972).

Arguably, many of President Trump’s orders fall into the moral suasion category, sometimes characterized by the media as “toothless.” Jared Bernstein, *Trump’s executive orders underline all the failures of his administration*, WASH. POST (Aug.10, 2020, 12:33 PM), <https://www.washingtonpost.com/outlook/2020/08/10/trumps-executive-orders-underline-all-failures-his-administration/> (arguing President Trump falsely claimed he extended the moratorium on evictions by issuing Exec. Order No. 13,945).

<sup>346</sup> U.S. CONST. art. II, § 1 (“The executive power shall be vested in a President of the United States of America.”); U.S. CONST. art. II § 3 (“... take care that the laws be faithfully executed . . .”).

<sup>347</sup> See Halchin, *supra* note 315.

<sup>348</sup> See HAROLD C. RELYEA, CONG. RSCH. SERV. No. 98-611, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW (2008) (comparing presidential directives largely in the national security sphere that essentially amount to various forms of executive order, including: NSC Policy Papers, National Security Action Memoranda, National Security Study Memoranda, National Security Decision Memoranda, Presidential Review Memoranda, Presidential Directives, National Security Study Memoranda, National Security Decision Directives, National Security Reviews and, National Security Directives, Presidential Review Directives, Presidential Decision Directives, and National Security Presidential Directives).

<sup>349</sup> See *infra* text accompanying notes 387 to 405 (discussing the *Steel Seizure Cases* and the resulting Defense Production Act).

<sup>350</sup> Legislative repeal is the Congressional attempt to override a prior executive order proclaimed under the authority granted by a statute. Congressional repeal is more likely to be upheld as contrast with executive orders made under Constitutional authority. Nevertheless, judicial review is the arbiter. See Chu & Garvey, *supra* note 344.

<sup>351</sup> Many executive orders become unstable between changes in presidential administrations. Indeed, succeeding presidents penchant for revocation of prior administration’s executive orders are becoming typical. Such policy instability is most predictable when changes in party affiliation signal changed political ideology on particular regulatory programs. Incoming presidents often seek to implement new political agendas.

See Chu & Garvey, *supra* note 344; see also Robert L. Glicksman, *Shuttered Government*, 62 ARIZ. L. REV. 573 (2020) (arguing Trump administration’s systematic agency opacity compromises agency achievement of statutory goals by at least ten methods: (i) the war on science, (ii) limits on public participation in rulemaking, (iii) stacking advisory boards without neutral participants, (iv) concealment of information in agency possession that would undercut agency decision-making, (v) concealing data previously publicly accessible from website access, (vi) censoring agency officials, (vii) refusing disclosures responsive to legitimate FOIA requests, (viii) failing to replace expertise drained by retirement or frustrated departure, (ix) undermining oversight by Congress and Inspectors General, and (x) preparation of superficial administrative records).

<sup>352</sup> See generally HISTORICAL RECORDS SURVEY, N.Y. ET AL., PRESIDENTIAL EXECUTIVE ORDERS, NUMBERED 1-8030, 1862-1938: VOLUME 1 THE LIST (N.Y., Archives 1944); see also JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (N.Y.: Bureau of Nat’l Literature 1897). FDR remains the winner with 3,522 Executive Orders issued. A

Most state governors have similar authority to issue executive orders, many already relevant to constraining individuals and businesses in the COVID-19 pandemic.<sup>353</sup>

Starting with Washington's administration, Congress began a "pattern of policy expression and implementation regarding emergency powers."<sup>354</sup> "Congress legislated extraordinary or special authority for discretionary use by the President" in emergencies.<sup>355</sup> In issuing a proclamation, the President notified Congress of the use of this power and then notified other affected parties.<sup>356</sup> Lincoln's early Civil War management brought a flurry of such activity. Nearly immediately after Lincoln's inauguration, he initiated a series of preparatory steps anticipating the Civil War.<sup>357</sup> For example, Lincoln ordered successive blocking of Confederate ports, ordered an expansion of the Union Army by 22,714, expanded the Navy by 18,000, ordered accommodation for up to 42,032 volunteer military personnel for three-year terms of service, and ordered the acquisition of 19 naval vessels "for purposes of public defense."<sup>358</sup>

Through these and other actions, even Lincoln acknowledged that Civil War preparations pushed the limits of Presidential proclamations powers. However, the exigency seemed clear, secession was seriously underway at his inauguration and Congress was not in session, so proclamations initiated the Union's war effort.<sup>359</sup> In his July message to the newly assembled Congress, Lincoln suggested,

These measures, *whether strictly legal or not*, were ventured upon under what appeared to be a popular and a public necessity, trusting then, as now, that Congress would readily ratify them. "It is believed," he wrote, "that

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comparison tabulation and bulk download source for the executive orders of presidents William Clinton, George W. Bush, Barack Obama and Donald Trump is accessible at *Executive Orders*, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders> (last visited Oct. 13, 2022).

<sup>353</sup> See generally *Powers & Authority*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/consulting-2/powers-and-authority/#orders> (last visited Oct. 19, 2022); see also THE BOOK OF THE STATES 116-17 (Audrey S. Francies & Heather M. Perkins eds., 2021). Since the 2020 COVID 19 pandemic, state governors have issued hundreds of executive orders and the chief executives or board members of many state, county and municipal health departments have issued many more directives, orders, prohibition or cease and desist orders, and guidelines, many of which are mandatory. See *Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 26, 2022), <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>.

<sup>354</sup> Halchin, *supra* note 315.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> Richardson, *supra* note 352, at 3215-16.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* at 3225.

nothing has been done beyond the constitutional competency of Congress.”<sup>360</sup>

Subsequently, Congress authorized and approved these and other questionable emergency actions, though observers have noted that “neither Congress nor the Supreme Court exercised any effective restraint upon the President.”<sup>361</sup> During the presidencies of Woodrow Wilson and FDR, “a major procedural development occurred in the exercise of emergency powers—use of a proclamation to declare a national emergency and thereby activate all standby statutory provisions delegating authority to the President during a national emergency.”<sup>362</sup>

### *1. National Emergencies Act*

Two primary authorities for a presidential declaration of national emergencies relevant to Medical Martial Law and its impact on business are: (1) the National Emergencies Act (“NEA”)<sup>363</sup> and (2) the Stafford Act, which facilitates the granting of disaster assistance.<sup>364</sup> The NEA passage culminated in growing concern that several prior presidents were pushing the limits of presidential powers in ruling by decree.<sup>365</sup> For example, many presidents (e.g., Lincoln, FDR, Truman, Obama, and Trump) are well-known to have attempted the use of executive orders to circumvent checks and balances of bicameralism and presentment to edict political or expedient matters.<sup>366</sup> Some emergency powers were intended for use only in wartime.<sup>367</sup> The NEA supplied a new means for Congressional review, oversight, and termination of Presidential national emergency declarations:

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<sup>360</sup> *Id.* (emphasis added).

<sup>361</sup> JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (CreateSpace Indep. Publ’g Platform 2012); *see also* WILFRED E. BINKLEY, PRESIDENT AND CONGRESS (Alfred A. Knopf 1947); CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES (Routledge rev. ed. 2002); WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (Routledge 1st ed. 2001).

<sup>362</sup> HAROLD C. RELYEA, CONG. RSCH. SERV. No. 98-505, NATIONAL EMERGENCY POWERS 5 (2001).

<sup>363</sup> National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as 50 U.S.C. §§ 1601-1651).

<sup>364</sup> The Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1974) (codified as amended 42 U.S.C. §§ 5121-5123).

<sup>365</sup> *See* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (Univ. Press of Kan. 2nd ed. 2014); *see also* Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL’Y 267 (2001).

<sup>366</sup> *See, e.g.*, John McCain et al., *No Cybersecurity Executive Order, Please*, WALL ST. J. (Sept. 13, 2012, 7:03 PM), <https://www.wsj.com/articles/SB10000872396390444017504577647131630683076> (arguing Presidential overreaching to bypass Congress with expansive cyber-infrastructure protection executive order(s) in effort to unilaterally revive the failed legislation).

<sup>367</sup> *See generally* *A Guide to Emergency Powers and Their Use*, *supra* note 310.

Over the course of at least the last 40 years . . . Presidents have had available an enormous-seemingly expanding and never-ending-range of emergency powers. Indeed, at their fullest extent and during the height of a crisis, these “prerogative” powers appear to be virtually unlimited, confirming Locke’s perceptions [that these prerogatives “should be left to the discretion of him that has the executive power”]. Because Congress and the public are unaware of the extent of emergency powers, there has never been any notable congressional or public objection made to this state of affairs. Nor have the courts imposed significant limitations.<sup>368</sup>

A key justification for the exercise of executive power by decree is that the luxury of a more pragmatic, participatory, deliberative process exposes the nation to risks during quickly changing conditions. Of course, the swiftness of executive action almost always outpaces the typically more leisurely legislative pace or the mandatory deliberate care that public participation requires for the promulgation of administrative regulations.<sup>369</sup> When exigency conditions arise, regulatory agencies must justify claims of good cause by supplying independent facts showing legitimate exigency.<sup>370</sup>

The NEA establishes procedures for presidential declaration and Congressional regulation of national emergencies.<sup>371</sup> The President must formally declare the emergency, then articulate what provisions of law are relied upon for the declaration and notify Congress.<sup>372</sup> Existing states of emergency are returned to dormancy, requiring a re-declaration by

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<sup>368</sup> See S. REP. NO. 93-549 (1973).

<sup>369</sup> Good cause suspension of notice and comment rulemaking permits administrative agencies to justify expediency when “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B). Good cause suspension seems the essence of exigency often necessitating the faster pace of emergency response. Therefore, administrative agency circumvention of notice and comment rulemaking during pandemic emergencies is a likely open path to remove barriers to a wide variety of regulatory hurdles in the approval of experimental drugs, certification of novel personal protective equipment (PPE) designs and override of other public health regulations originally intended to protect the public from poorly efficacy-proven drugs, devices, and control methods. Courts have upheld agency determinations that emergencies constitute good cause such as: (1) suspension of a pilot’s license for national security reasons by the Federal Aviation Administration (FAA), *Jifry v. F.A.A.*, 370 F.3d 1174, 1179-80 (D.C. Cir. 2004); (2) imposition of safety procedures for air tour operations, *Hawaii Helicopters Operators Ass’n v. F.A.A.*, 51 F.3d 212, 214 (9th Cir. 1995); (3) prevention of immediate economic harm with an interim rule following a judicial ruling, *Am. Fed. of Gov’t Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981); (4) serious threat to financial stability of an employee (health) benefit program, *Nat’l Fed’n of Fed. Emp. v. Devine*, 671 F.2d 607 (D.C. Cir. 1982); and (5) public interest in national gasoline shortage, *Reeves v. Simon*, 507 F.2d 455, 457 (Temp. Emer. Ct. App. 1974).

<sup>370</sup> *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1146 (D.C. Cir. 1992) (holding reasoning based only on agency internal projections of effects of regulated activity as insufficient to constitute good cause showing).

<sup>371</sup> JENNIFER K. ELSEA, ET AL., CONG. RSCH. SERV. No. R46379, EMERGENCY AUTHORITIES NATIONAL UNDER THE EMERGENCIES ACT, STAFFORD ACT, AND PUBLIC HEALTH SERVICE ACT 3 (2020).

<sup>372</sup> *Id.*



subsequent presidents to revive them.<sup>373</sup> Presidents are authorized to terminate states of emergency, and they automatically terminate unless revived after one year.<sup>374</sup> Congress was initially given a unicameral form of legislative veto, but following *I.N.S. v. Chadha*,<sup>375</sup> this was later revised to require a joint Congressional resolution, with presentment to the President, in order to terminate a state of emergency.<sup>376</sup> Therefore, presidential acquiescence in the termination is necessary unless a veto is overridden.

## 2. *Steel Seizure Case*

The Steel Seizure case<sup>377</sup> probably constitutes the most significant historical concern with Presidential emergency declarations from the perspective of businesses and their legal counsel.<sup>378</sup> Harry Truman's Korean War experience sparked another major foundation and possible limitation for the future imposition of Medical Martial Law as a pandemic response. Labor unrest at steel plants threatened the defense contractor supply chain in steel products considered essential to the war effort.<sup>379</sup> When the United Steelworkers threatened to strike over wages, President Truman issued Executive Order No. 10340,<sup>380</sup> directing Charles Sawyer, then Secretary of Commerce, to seize control of the nation's steel production facilities.<sup>381</sup> The order would have interposed federal direction over the steel companies' operating management.<sup>382</sup> Ironically, while the steelworkers supported the move, the private steel companies challenged the seizure arguing the President lacked the power to seize private property without Congressional authorization.<sup>383</sup> The Supreme Court's rebuke of Truman's power grab

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<sup>373</sup> States of Emergency declared under a President's Constitutional authority persist and are not rendered dormant unless terminated otherwise. Halchin, *supra* note 315.

<sup>374</sup> *See id* at 11.

<sup>375</sup> *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding legislative veto by either house of Congress unconstitutional).

<sup>376</sup> Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 405 (1985).

<sup>377</sup> *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579 (1952).

<sup>378</sup> *See* Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT 63 (2002).

<sup>379</sup> *Seizure! Truman Takes the Steel Mills*, CONST. RIGHTS FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-4-4-b-seizure-truman-takes-the-steel-mills.html> (last visited Oct. 14, 2022, 2:49 PM).

<sup>380</sup> Exec. Order No. 10340, 17 Fed. Reg. 3139, ¶ 8 (Apr. 10, 1952). WHEREAS a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field.

<sup>381</sup> *Seizure! Truman Takes the Steel Mills*, *supra* note 379.

<sup>382</sup> Exec. Order No. 10340, 17 Fed. Reg. 3139, ¶ 4 (Apr. 10, 1952).

<sup>383</sup> *Seizure! Truman Takes the Steel Mills*, *supra* note 379.

remains perhaps *the* classic separation of powers case confining Presidential “inherent” powers in holding that the President is above the Constitution.<sup>384</sup>

In *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>385</sup> a 6-3 decision,<sup>386</sup> the majority affirmed the District Court’s injunction<sup>387</sup> against the seizure as unconstitutional.<sup>388</sup> Truman’s seizure was an action requiring legislation<sup>389</sup> and, therefore, not an implied or inherent executive power.<sup>390</sup> While seizures of private property have occurred by presidential decree before, they still must be authorized by statute.<sup>391</sup> Congress had consciously refused to authorize presidential seizure in the 1947 Taft-Hartley Act.<sup>392</sup> Furthermore, Truman’s seizure order was not authorized by presidential war powers granted to the President as Commander in Chief.<sup>393</sup> Arguably, the political gamesmanship between the executive and legislative branches in anticipation of possible override was evident in other prior presidential proclamations, then recurred in the Steel Seizure Case.<sup>394</sup> The Steel Seizure Case clearly indicate that the President’s preferred method to consolidate federal executive branch control of goods production, supply chain operations, and the rendition of services by business is relegated to the Defense Production Act.<sup>395</sup>

#### F. Defense Production Act

The Defense Production Act of 1950 (“DPA”)<sup>396</sup> gives plenary power to presidents to prioritize and allocate materials and facilities to facilitate the production of goods and services for national security.<sup>397</sup> DPA is a very significant potential usurpation of private-sector business decision-making.<sup>398</sup> It severely challenges under-informed line managers, senior

<sup>384</sup> See, e.g., Damon Root, *When Courts Kill Executive Orders*, REASON, May 2017.

<sup>385</sup> *The Steel Seizure Case*, 343 U.S. 579.

<sup>386</sup> *Id.* at 634-710 (including five concurring opinions and a dissent).

<sup>387</sup> *Id.* at 587-89 (arguing, the Attorney General’s argument in the district court pressed the “aggregate of powers” concept that would have expanded executive powers that the Supreme Court was likely influenced to specifically narrow this theory. The president is not given such a reservoir of implied powers, an accumulation of all express powers found in the Constitution, and statutes).

<sup>388</sup> *Id.* at 585.

<sup>389</sup> *Id.* at 588-89.

<sup>390</sup> *Id.* at 584, 587.

<sup>391</sup> *The Steel Seizure Case*, 343 U.S. at 588-89.

<sup>392</sup> *Id.* at 586; Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197).

<sup>393</sup> *Id.* at 587-89.

<sup>394</sup> See, e.g., Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263 (2010).

<sup>395</sup> See *The Steel Seizure Case*, 343 U.S. at 584.

<sup>396</sup> Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C. §§ 4501-4502, §§ 4511-4518, §§ 4531-4534, and §§ 4551-4568).

<sup>397</sup> 50 U.S.C. § 4511(a).

<sup>398</sup> JARED BROWN, CONG. RSCH. SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 2 (2018).

management, and their counsel in an obscure area of national security law.<sup>399</sup> Originally, this included powers of requisition, expansion of production capacity in the private sector, price and wage stabilization, labor dispute settlement, control of allocations in the private sector of material critical to national defense, and exertion of related control over credit.<sup>400</sup> Further complicating any cohesive understanding of the DPA by the private sector are uncertainties in which regulatory agency assumes control.<sup>401</sup> The DPA authorities are administered by various agencies, and the DPA is subject to sunset provisions.<sup>402</sup> The DPA has been reauthorized fifty times since its initial passage, with some changes in its authorities implemented at different times during its seventy-year history.<sup>403</sup>

The DPA's origin was seeded by growing perception, during the years between World War II and the Korean War, of the need for restoring federal authority over the production of war material similar to the expired First and Second War Powers Acts.<sup>404</sup> Soon after Victory over Japan Day, also known as V-J Day, as the world's economies struggled to return to normalcy, most nations demobilized much of their war material production, and they drastically cut military procurement appropriations and spending.<sup>405</sup> Buttressing this complacency was the growing belief that the United States' nuclear arsenal might sufficiently substitute for maintaining wartime levels of conventional weaponry and supportive production during peacetime.<sup>406</sup> This de-emphasis on military budgets, when combined with post-war labor strife, apparently signaled to Truman that some new authority—the DPA—was needed.<sup>407</sup> Indeed, in response to the post-war strike wave,<sup>408</sup> various anti-labor reactions ensued.<sup>409</sup> Truman was particularly impacted by the 1946

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<sup>399</sup> See Emma Watkins & Thomas Spoehr, *The Defense Production Act: An Important National Security Tool, But It Requires Work*, THE HERITAGE FOUND., Oct. 2019, at 1.

<sup>400</sup> 15 C.F.R. §§ 700.1-700.93 (2014).

<sup>401</sup> See Brown, *supra* note 398.

<sup>402</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (extending a majority of DPA authorities until September 30, 2025).

<sup>403</sup> See MICHAEL CECIRE, & HEIDI M. PETERS, CONG. RSCH. SERV., NO. R43767, *THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 3* (2020).

<sup>404</sup> First War Powers Act of 1941, Pub. L. No. 77-354, 55 Stat. 838 (codified as amended at 50a U.S.C. §§ 601-605); Second War Powers Act of 1942, Pub. L. No. 77-507, 56 Stat. 176 (codified as amended at 50a U.S.C. §§ 601-605).

<sup>405</sup> ELLIOTT V. CONVERSE III, *REARMING FOR THE COLD WAR 1945-1960* (U.S. Dep't of Def. 2012).

<sup>406</sup> See DANIEL H. ELSE, CONG. RSCH. SERV., RS20587, *DEFENSE PRODUCTION ACT: PURPOSE AND SCOPE I* (2009).

<sup>407</sup> Paul McQuade, et al., *The History and Use of the Defense Production Act*, HIST. ASSOC. INC. (Oct. 11, 2022, 5:41 AM), <https://www.historyassociates.com/defense-production-act-war-history/>.

<sup>408</sup> JEREMY BRECHER, *STRIKE!* (South End Press 1997).

<sup>409</sup> See Dale Mineshema-Lowe, *Taft-Hartley Act of 1947 (1947)*, THE FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1050/taft-hartley-act-of-1947> (last visited Oct. 18, 2022) (striking immediately following cessation of hostilities occurred in many industries: 1945

shutdown of rail services, which lead to Truman's Executive Order No. 10,155<sup>410</sup> seizing the railroads and requiring the striking workers to be drafted into the armed forces to sustain their transportation employment and work.<sup>411</sup> This action set the stage for Truman's steel seizure experience.<sup>412</sup>

### *1. Production Redirection under DPA*

The most interventionist and potent of the DPA's powers are found in its Title I, authorizing the President to become contractually bound and/or prioritize defense-related contracting:

[R]equir[ing] that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the *national defense* shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or order . . .<sup>413</sup>

Production for "national defense" under the DPA now includes private-sector manufacturing and supply chain operations well beyond the traditional war material produced by the defense industrial base, including:

[P]rograms for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity...and *critical infrastructure protection* and restoration.<sup>414</sup>

Therefore, the DPA can be used to exert central economic controls on private-sector industries by: (i) prioritizing contracts, (ii) directing private industry to ensure the availability of essentials by imposing civil and criminal penalties for failure to accept and perform priority contracts, called "rated orders,"<sup>415</sup> (iii) allocating the distribution of these goods and services, (iv) guaranteeing loans, and (v) devising special action plans.<sup>416</sup> The DPA permits

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(film, petroleum, automobile), 1946 (electrical, meatpacking, steel, coal mining, rail, mining). Taft-Hartley passed over Truman's veto in 1947, significantly restricting union powers).

<sup>410</sup> Exec. Order No. 10155, 15 Fed. Reg. 5785 (Aug. 25, 1950).

<sup>411</sup> See Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941); Exec. Order No. 9664, 10 Fed. Reg. 15301 (Dec. 18, 1945).

<sup>412</sup> See *supra* text accompanying notes 100 to 106.

<sup>413</sup> 50 U.S.C. § 4511(a) (emphasis added).

<sup>414</sup> 50 U.S.C. § 4552(14) (emphasis added). The Stafford Act further expands this to include emergency preparation for and minimization of "effects of a hazard upon the civilian population." 42 U.S.C. § 5195(a)(3).

<sup>415</sup> 15 C.F.R. § 700.8 (2014), *reprinted as amended in* 50 U.S.C. § 4501 et seq. (defining contracts as "rated orders").

<sup>416</sup> 50 U.S.C. § 4511.

mandatory rated orders to be further facilitated up or down private-sector supply chains, imposing further requirements on suppliers and customers of raw materials, component parts, or logistical contracts.<sup>417</sup> Three rating levels are currently in use; the lowest are non-rated, a rating of “DO” is priority under Defense Priorities and Allocations System (“DPAS”), and a “DX” is the highest rating under DPAS.<sup>418</sup>

Further complicating private-sector compliance is a diffuse and evolving set of authorities vested in federal regulatory agencies to administer DPA orders.<sup>419</sup> These are more recently evident in President Obama’s Executive Order No. 13,603.<sup>420</sup> It delegated responsibility to the Department of Commerce to administer prioritization and allocation by establishing the DPAS to support the military, energy, homeland security, emergency preparedness, and critical infrastructure requirements. Commerce has re-delegated some authorities to DoD, DHS, General Services Administration, and Department of Energy, and President Trump delegated COVID-19 responsibility solely to Health and Human Services.<sup>421</sup>

## 2. DPA Complexities Relevant to Pandemic-Induced Medical Martial Law

Medical Martial Law would seem to be a straightforward application of DPA authorities, requiring various activities by all three of the major types of private enterprise envisioned by the DPA legislative history and experience.<sup>422</sup> The first type includes private sector firms with the DoD as their sole customer, while the second type is dual-use—private firms selling to the DoD and the private sector, both in substantial amounts.<sup>423</sup> The third type is firms with no prior procurement experience with the DoD, composed

<sup>417</sup> 15 C.F.R. § 700.3(d) (2014), *reprinted as amended in* 50 U.S.C. § 4501 et seq.

<sup>418</sup> 15 C.F.R. § 700.11 (2014), *reprinted as amended in* 50 U.S.C. § 4501 et seq.; *see also* Cecire & Peters, *supra* note 403, at 8 (2020) (discussing attempts to standardize ratings throughout all agencies delegated DPA authorities into a “Federal Priorities and Allocations System” (FPAS)).

<sup>419</sup> *See id.*

<sup>420</sup> Exec. Order No. 13603, 77 Fed. Reg. 16651 (Mar. 16, 2012).

<sup>421</sup> Exec. Order No. 13909, 85 Fed. Reg. 16227 (Mar. 18, 2020) (President Trump redirected allocation authority for the duration of the COVID 19 pandemic to HHS).

<sup>422</sup> DPA authorities are not confined to compelling action by private enterprise that has DoD as its sole customer. Although, many private firms are devoted primarily to production of war materiel and services (software), under DoD military acquisition procurement, many private firms in the defense industrial base also have dual use technologies. These firms also have significant supply contracts delivering into private-sector supply chains. For example, the steel industry subjected to temporary nationalization in Truman’s Steel Seizure Cases, were private industry participants that also supplied private industrial (e.g., automobile, appliances, building trades) and consumer markets. DEF. ACQUISITION UNIV, DEFENSE ACQUISITION GUIDEBOOK (2010), <https://www.acqnotes.com/Attachments/Defense%20Acquisition%20Guidebook.pdf> (providing procurement assistance to private sector firms seeking to bid on DoD projects).

<sup>423</sup> *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-955, DOD CONTRACTING EFFORTS NEEDED TO ADDRESS AIR FORCE COMMERCIAL ACQUISITION RISK 4 (2006).

of those existing firms with supply experience only to the private sector and startups seeking to enter the defense industrial base or dual-use groupings.<sup>424</sup>

Government contracting, in modern times and with respect to both defense contracting and non-defense procurement by the federal government and by state and local governments, must bear substantial transaction costs when compared with private sector contracting.<sup>425</sup> Government contracting is a separate and complex professional pursuit.<sup>426</sup> It has evolved into a hugely intricate process riddled with bureaucratic practices designed to (i) solicit numerous reasonable bidders engaged in competitive bidding such that cost containment is more likely than in non-competitive, sole-sourcing, (ii) minimize corruption, conflicts of interest, favoritism, bribes, and kickbacks, while also attempting, in good faith, the assurance of (iii) geographic diversity of supply, and (iv) sustainability of critical infrastructures necessary to avoid supply shortages, such as those imposed by hostile foreign powers, blockades or scarcity.<sup>427</sup> Most dual-use producers consign their government contracting relations to special departments with this distinct expertise.<sup>428</sup> Invocation of the DPA would be disruptive to private-sector businesses, many of which have limited in-house government contracting staff or experience.<sup>429</sup>

Arguably, supplies of goods and services pursuant to the DPA mandates could frequently be directed to be made through non-DoD government and private supply chains.<sup>430</sup> This seems particularly relevant during pandemic emergencies because personal protective equipment, drugs, devices, and testing services and their consumables suppliers are likely procured primarily to supply private or non-DoD (and VA) hospitals, private-sector medical institutions, and the pharmaceutical industry.<sup>431</sup> Generally, non-military procurement is administered by the General Services Administration

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<sup>424</sup> *See id.*

<sup>425</sup> Steven Tadelis, *Public Procurement Design: Lessons from the Private Sector*, 30 INT'L J. INDUS. ORG. 297 (2012).

<sup>426</sup> BILL BODZIAK ET AL., GOVERNMENT CONTRACTING FOR DUMMIES 4 (Deltek Special ed. 2012).

<sup>427</sup> *See, e.g.*, Lani A. Perlman, *Guarding the Government's Coffers: The Need for Competition Requirements To Safeguard Federal Government Procurement*, 75 FORDHAM L. REV. 3187 (2007) (arguing the prevention of fraud and favoritism to protect public coffers justifies procurement complexity and costs).

<sup>428</sup> *See* FAR 17/502-2 (2022).

<sup>429</sup> *See generally* Alan Cohn et al., *Defense Production Act Invoked, Order Issued*, STEPTOE (Mar. 28, 2020), <https://www.stepto.com/en/news-publications/defense-production-act-invoked-order-issued.html>.

<sup>430</sup> *See The Defense Production Act: The Obscure Law that Industry and Government Should be Talking About Today (and for the Foreseeable Future)*, DORSEY & WHITNEY LLP (Mar. 19, 2020), <https://www.dorsey.com/newsresources/publications/client-alerts/2020/03/the-defense-production-act>.

<sup>431</sup> MICHAEL H. CECIRE, CONG. RSCH. SERV., R46628, COVID-19 AND DOMESTIC PPE PRODUCTION AND DISTRIBUTION: ISSUES AND POLICY OPTIONS 1-2 (2020).

(GSA).<sup>432</sup> DPA oversight falls upon various Congressional, independent, and multi-agency oversight groups.<sup>433</sup>

### 3. DPA Deployment: The Spring 2020 Pandemic Lockdown

President Trump declared a COVID-19 national emergency on March 13, 2020.<sup>434</sup> Presidential deployment of the DPA was both threatened by the bully pulpit and implemented by delegating authority to various agencies and by the filing of charges.<sup>435</sup> For example, the DPA was preliminarily invoked in a few instances during the shutdown period in late winter and early spring of the 2020 COVID-19 pandemic.<sup>436</sup> Then again, in the late spring to summer 2020 reopening of the United States economy, the DPA was again preliminarily deployed in the reopening, post-lockdown period of spring to summer 2020.<sup>437</sup>

During the initial lockdown, President Trump threatened the invocation of the DPA during the COVID-19 pandemic to compel private-sector companies to produce or procure medical supplies<sup>438</sup> and equipment, personal protective equipment (“PPE”), and ventilators.<sup>439</sup> Authority was delegated in Executive Order No.13909 to the Secretary of Health and Human Services (“HHS”), signaling as threats to invoke the DPA by first delegating authority to HHS.<sup>440</sup> Then again, Executive Order No. 13,910 is also largely hortatory, signaling deterrence against hoarding or price gouging

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<sup>432</sup> See FAR 8.402(a) (2022).

<sup>433</sup> See, e.g., U.S. DEPT. OF HOMELAND SEC., THE DEFENSE PRODUCTION ACT COMMITTEE REPORT TO CONGRESS (June 24, 2019) (reporting mandatory review by 17 interagency members).

<sup>434</sup> See Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020); see also Presidential Statement on Emergency Determination Under the Stafford Act, THE WHITE HOUSE (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/> (requiring financial aid under the Stafford Act).

<sup>435</sup> See Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017).

<sup>436</sup> See Anshu Siripurapu, *What Is the Defense Production Act?*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/in-brief/what-defense-production-act> (last updated Dec. 22, 2021, 3:40 PM).

<sup>437</sup> See Robert Thompkins et al., *Coronavirus May Compel Companies to Do Business with the Federal Government Under Defense Production Act*, HOLLAND & KNIGHT (Mar. 20, 2020), <https://www.hklaw.com/en/insights/publications/2020/03/coronavirus-may-compel-companies-to-do-business>; see also *The Defense Production Act and COVID 19: What Industry Needs to Know*, GIBSON DUNN (Mar. 19, 2020), <https://www.gibsondunn.com/defense-production-act-and-covid-19-what-industry-needs-to-know/>.

<sup>438</sup> Kaitlan Collins, *White House Set to Use Defense Production Act To Ramp Up Testing Swab Manufacturing*, CNN POLITICS (Apr. 20, 2020), <https://www.cnn.com/2020/04/19/politics/defense-production-act-puritan-testing-swabs-coronavirus/index.html>.

<sup>439</sup> Matthew Hoye, *Trump Invokes Defense Production Act to “Facilitate The Supply” of Equipment to Build Ventilators*, CNN POLITICS (Apr. 2, 2020), [https://www.cnn.com/world/live-news/coronavirus-pandemic-04-02-20-intl/h\\_f3b2f88584fa9906f615bc1afd5ae51e](https://www.cnn.com/world/live-news/coronavirus-pandemic-04-02-20-intl/h_f3b2f88584fa9906f615bc1afd5ae51e).

<sup>440</sup> Exec. Order No. 13909, 85 Fed. Reg. 56 (Mar. 18, 2020).

and delegating authority to the HHS Secretary.<sup>441</sup> The HHS Secretary exercised this delegated authority on March 25, 2020.<sup>442</sup> Soon thereafter, the very first such DPA violation complaint ever predicated on the price gouging theory was filed in Long Island, New York.<sup>443</sup> Authority was also delegated under the DPA to the DHS.<sup>444</sup> As the lockdown period produced some evidence of “curve-flattening,” political pressures influenced reopening.<sup>445</sup>

#### 4. DPA Deployment: The Pandemic Reopening

During the initial reopening in the spring of 2020, it was widely reported that President Trump would order various openings to reinvigorate the economy expeditiously.<sup>446</sup> First, President Trump claimed Executive Order No. 13,917 would force meatpacking plants to remain open during state and local imposed lockdowns after COVID-19 outbreaks.<sup>447</sup>

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<sup>441</sup> *Id.*; see also Memorandum from Attorney General William P. Barr on Department of Justice COVID-19 Hoarding and Price Gouging Task Force (Mar. 24, 2020), <https://www.justice.gov/file/1262776/download> (assuring that private citizen consumers of essentials are unlikely to be prosecuted, instead aggressive enforcement more likely against bad actors stockpiling beyond needs for profiteering and warehousing for later overcharging).

<sup>442</sup> Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID 19 Hoarding Prevention Measures, 85 Fed. Reg. 17592 (Mar. 25, 2020) (codified as amended at 59 U.S.C. § 4512). This HHS notice designated the following as necessary health and medical resources: N-95 and various other filtering facepiece respirators, elastomeric, air-purifying respirators, powered air purifying respirator, portable ventilators, *chloroquine phosphate or hydroxychloroquine HCl*, certain sterilization services, clinical setting disinfecting devices, medical, personal protective equipment (PPE), PPE face and surgical masks and face shields, PPE gloves, ventilators and related machinery modified for use as ventilator accessories (emphasis added).

<sup>443</sup> Press Release, U.S. Dep’t of Just., Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment (Apr. 24, 2020), <https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarce-0>; Complaint, United States v. Singh, No. 20-MJ-236 (SIL) (E.D.N.Y. Apr. 24, 2020) (alleging hoarding and gouging violations based on a search of defendant’s premises revealed inventories of hoarding proportions and markups as follows, *inter alia*, 21,267 N-95 masks marked-up 59%-99%, 5,241 face shields marked-up 222%, 767,104 latex gloves marked-up 100% to 219%).

<sup>444</sup> Memorandum on Order Under the Defense Production Act Regarding 3M Company, THE WHITE HOUSE (April 2, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-order-defense-production-act-regarding-3m-company/> (delegating to HHS authority under the Social Security Act to temporarily waive or modify certain requirements of the Medicare, Medicaid, HIPAA Privacy Rule and State Children’s Health Insurance).

<sup>445</sup> Gordon Russell et al., *Is coronavirus growth slowing in New Orleans? Trend suggests so, but virus is surging elsewhere*, NOLA (last updated March 30, 2020), [https://www.nola.com/news/coronavirus/article\\_4e709de2-72df-11ea-8538-a3df576e4390.html](https://www.nola.com/news/coronavirus/article_4e709de2-72df-11ea-8538-a3df576e4390.html).

<sup>446</sup> Philip Rucker et al., *Trump says he may soon push businesses to reopen, defying advice of coronavirus experts*, WASH. POST, [https://www.washingtonpost.com/politics/trump-says-he-may-soon-lift-restrictions-to-reopen-businesses-defying-the-advice-of-coronavirus-experts/2020/03/23/f2c7f424-6d14-11ea-a3ec-70d7479d83f0\\_story.html](https://www.washingtonpost.com/politics/trump-says-he-may-soon-lift-restrictions-to-reopen-businesses-defying-the-advice-of-coronavirus-experts/2020/03/23/f2c7f424-6d14-11ea-a3ec-70d7479d83f0_story.html) (last updated March 23, 2020).

<sup>447</sup> Exec. Order No. 13917, 85 Fed. Reg. 26313 (Apr. 28, 2020).



Considerable evidence that the close working quarters and occupational health and safety conditions at beef and pork meatpacking plants, as well as in poultry processing plants, had become COVID-19 hotspots, including plants largely in rural Midwestern areas otherwise mostly unscathed at that time by the virus spread.<sup>448</sup> However, again the DPA invocation was largely hortatory, using delegation of DPA authority to the Secretary of Agriculture, which served mostly as a signaling exercise.<sup>449</sup> A careful reading of Executive Order No. 13,917 reveals it does not directly order meat processing plants to reopen.<sup>450</sup> Instead, the delegation of Presidential DPA authority to the Secretary of Agriculture, Sonny Perdue, failed to force any meat packing plants to reopen, again contributing to the popular misconception of swift and decisive executive action.<sup>451</sup>

Allegedly, President Trump again engaged in political posturing with religious groups by attempting to jawbone governors to relax state-imposed distancing that would severely limit attendance at religious entities.<sup>452</sup> These hortatory efforts used public pronouncements<sup>453</sup> and hastily posted CDC guidelines.<sup>454</sup> However, in a 5-4 decision, the Supreme Court upheld California state-imposed maximum public gathering density limits.<sup>455</sup>

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<sup>448</sup> See Stephanie Soucheray, *US food processing plants become COVID-19 hot spots*, CTR. FOR INFECTIOUS DISEASE RSCH. & POL'Y (Apr. 27, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/04/us-food-processing-plants-become-covid-19-hot-spots>.

<sup>449</sup> See HEIDI PETERS, CONG. RSCH. SERV., IN11387, COVID-19: DEFENSE PRODUCTION ACT (DPA) DEVELOPMENTS AND ISSUES FOR CONGRESS 1 (2020).

<sup>450</sup> Exec. Order No. 13917, 85 Fed. Reg. 26313 (Apr. 28, 2020).

<sup>451</sup> See Daniel Hemel, *No, Trump Didn't Order Meat-Processing Plants to Reopen*, WASH. POST (May 4, 2020), <https://www.washingtonpost.com/outlook/2020/05/04/trump-meat-processing-order/> (arguing Executive Order No. 13917 does not order meat processing plant re-openings, instead it delegates Presidential DPA authority to the Secretary of Agriculture "to ensure America's meat and poultry processors continue operations" consistent with guidance from the CDC and OSHA and to "allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense," none of which at the time of the Executive Order forced any meat packing plants to reopen, but constitutes moral suasion from a bully pulpit when "presidential pronouncements are translated into popular [mis]understandings").

<sup>452</sup> Tom Gjelten, *President Trump Sides with Churches Asserting a Right to Reopen*, NPR (May 23, 2020, 9:09 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/23/861386816/president-trump-sides-with-churches-asserting-a-right-to-reopen>.

<sup>453</sup> *Id.*; see also Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing; Department of Justice Files Statement of Interest in Mississippi Church Case, U.S. DEP'T OF JUST. (April 14, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0>.

<sup>454</sup> *CDC Releases Recommendations for Communities of Faith*, CDC NEWSROOM (May 22, 2020), <https://www.cdc.gov/media/releases/2020/s0522-cdc-releases-recommendations-faith.html>.

<sup>455</sup> *Bay United Pentecostal v. Newsom*, 140 S. Ct. 1613 (2020) (denying injunction against California Governor Gavin Newsom's temporary numerical limitations on public gathering attendance at places of worship to 25% of building capacity or a maximum of 100 attendees to stem the spread of COVID 19 as consistent with the free exercise clause of the First Amendment); see also *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (denying injunction against

The DPA delegations discussed above have developed into the norm. Consequently, there is little coherent, direct, or detailed presidential oversight of rational DPA management.<sup>456</sup> This seems reasonable given the complexity of several very different supply chains that could potentially fall under the DPA direction.<sup>457</sup> Such comprehensive experience is arguably within the wheelhouses of various cabinet secretaries.<sup>458</sup> Nevertheless, central coordination by a person or a group with solid industrial production and logistics expertise would most likely meet with receptive acceptance in at least some industries.<sup>459</sup> Indeed, to pursue such optimal DPA coordination, in early April, Senate Minority Leader Chuck Schumer argued for the appointment of a top military official, a DPA “czar,” to oversee both DPA production and distribution.<sup>460</sup> On March 27, 2020, President Trump created the new position of Defense Production Act Policy Coordinator and immediately filled it with the White House’s existing Director of Trade and Manufacturing Policy, Peter Navarro.<sup>461</sup> Navarro’s appointment is argued<sup>462</sup> to amplify advocacy of “on-shoring” of critical infrastructure manufacturing facilities, many of those supply chains previously off-shored<sup>463</sup> to other

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Nevada Governor Steve Sisolak’s directive that limit public gatherings in places of worship to 50 persons regardless of their sizes).

<sup>456</sup> Andrew Jacobs, *Despite Claims, Trump Rarely Uses Wartime Law in Battle Against Covid*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/health/Covid-Trump-Defense-Production-Act.html>.

<sup>457</sup> Aiden Lawson & June Rhee, *Usage of the Defense Production Act throughout history and to combat COVID-19*, YALE SCH. OF MGMT. (June 3, 2020), <https://som.yale.edu/blog/usage-of-the-defense-production-act-throughout-history-and-to-combat-covid-19>.

<sup>458</sup> Cecire & Peters, *supra* note 403, at 27.

<sup>459</sup> *Id.*

<sup>460</sup> See Press Release, Chuck Schumer, Majority Leader, Senate, *Today On CNN, Schumer Renews Call For The Trump Administration To Fully Invoke Defense Production Act And Appointment Of Top Military Official To Oversee Both Production And Distribution Of Medical Equipment And Supplies To Help Fight Coronavirus*, [https://www.democrats.senate.gov/newsroom/press-releases/today\\_on-cnn-schumer-renews-call-for-the-trump-administration-to-fully-invoke-defense-production-act-and-appointment-of-top-military-official-to-oversee-both-production-and-distribution-of-medical-equipment-and-supplies-to-help-fight-coronavirus](https://www.democrats.senate.gov/newsroom/press-releases/today_on-cnn-schumer-renews-call-for-the-trump-administration-to-fully-invoke-defense-production-act-and-appointment-of-top-military-official-to-oversee-both-production-and-distribution-of-medical-equipment-and-supplies-to-help-fight-coronavirus) (reporting Schumer’s phone call suggesting to President Trump in late March 2020 the appointment of a new DPA coordinator position and Schumer’s dismay in President Trump’s reversal a few hours later).

<sup>461</sup> See, e.g., Chalfant, Morgan & Sylvan Lane, *Trump Names New Defense Production Act Coordinator for Coronavirus Fight*, THE HILL (Mar. 27, 2020), <https://thehill.com/homenews/administration/489938-trump-names-new-defense-production-act-coordinator-for-coronavirus>.

<sup>462</sup> See, e.g., Ana Swanson, *Peter Navarro Has Antagonized Multinational Companies. Now He’s in Charge*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/business/economy/peter-navarro-coronavirus-defense-production-act.html> (arguing Prof. Navarro, Univ. Cal.-Irvine, is “corporate America’s biggest nemesis, punishing multinational companies for moving jobs offshore,” Navarro has a recent record of advocating scrapping trade deals, advocating seizure of PPE hoards (masks) and participating in COVID 19 pandemic DPA actions such as “weaponizing [DPA] against companies [Navarro] viewed as too reluctant to help, specifically including General Motors and 3M).

<sup>463</sup> David Owen Kazmer, *Manufacturing Outsourcing, Onshoring, and Global Equilibrium*, 57 BUS. HORIZONS 463, 463-72 (2014).

nations. These are all issues of immediate and highly relevant interest to nearly all business constituencies, including line and senior managers, legal counsel, boards, auditors, financial service providers, suppliers, and customers.

##### *5. DPA Deployment: The Biden Administration and Continued Fight Against COVID-19*

The key weapon in the fight against the spread and prevalence of severe COVID-19 disease has largely been viewed to be vaccines.<sup>464</sup> In May 2020, the Trump administration announced the commencement of “Operation Warp Speed,” a comprehensive effort to develop a COVID-19 vaccine by the end of 2020.<sup>465</sup> By November 2020, efficacy data released from Pfizer and BioNTech from its COVID-19 vaccine trials indicated an over ninety percent efficacy with reducing infections from COVID-19.<sup>466</sup> Moderna followed up this promising data from Pfizer and BioNTech with stunning results from their own vaccine trials, reporting their COVID-19 vaccine produced approximately ninety-four percent efficacy.<sup>467</sup> In mid-December 2020, the FDA approved an emergency use authorization (“EUA”) for the Pfizer and BioNTech COVID-19 vaccine to be administered,<sup>468</sup> and vaccinations soon began in December 2020 within the United States.<sup>469</sup> The approval of the Moderna vaccine by the FDA for EUA in mid-December 2020 added a second approved vaccine for emergency use.<sup>470</sup> Despite the approval of both the Pfizer/BioNTech and Moderna vaccines in late 2020 for emergency use, demand initially far exceeded supply, and the initial rollout of the vaccines to the public was marked by a number of distribution issues, ranging from

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<sup>464</sup> See, e.g., Helen Branswell, *The world needs COVID-19 vaccines. It may also be overestimating their power*, STAT NEWS (May 22, 2020), <https://www.statnews.com/2020/05/22/the-world-needs-covid-19-vaccines-it-may-also-be-overestimating-their-power/>.

<sup>465</sup> David Smith, *Trump unveils ‘warp-speed’ effort to create coronavirus vaccine by year’s end*, THE GUARDIAN (May 16, 2020), <https://www.theguardian.com/us-news/2020/may/15/trump-coronavirus-warp-speed-vaccine-white-house>.

<sup>466</sup> Damian Garde & Matthew Herper, *Pfizer and BioNTech to submit COVID-19 vaccine data to FDA as full results show 95% efficacy*, STAT NEWS (Nov. 18, 2020), <https://www.statnews.com/2020/11/18/pfizer-biontech-covid19-vaccine-fda-data/>.

<sup>467</sup> *Id.*

<sup>468</sup> Jacqueline Howard, *FDA issues emergency use authorization for Pfizer/BioNTech COVID-19 vaccine*, CNN (Dec. 12, 2020), <https://www.cnn.com/2020/12/11/health/covid-vaccine-fda-eua/index.html>.

<sup>469</sup> Will Feuer, *U.S. administers first shots of Pfizer’s COVID vaccine, launching a historic rollout*, CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/14/us-administers-first-shots-of-pfizers-covid-vaccine-launching-a-historic-rollout.html>.

<sup>470</sup> Amanda Watts et al., *FDA plans to authorize Moderna’s coronavirus vaccine quickly*, CNN (Dec. 17, 2020), <https://www.cnn.com/2020/12/17/health/moderna-covid-vaccine-fda-vrbpac-vote/index.html>.

who was eligible for the initial shots to issues of distribution of the vaccine from the federal government to state and local entities.<sup>471</sup>

Amidst the remarkable development of COVID-19 vaccines within months, a bruising presidential campaign during the fall of 2020 resulted in Joe Biden's election to the Presidency.<sup>472</sup> The COVID-19 pandemic and response to it was a significant issue in the election.<sup>473</sup> Mandates, particularly regarding the wearing of masks, were one of the responses to the pandemic that transformed into a political issue.<sup>474</sup>

As the transition from the Trump administration to the Biden administration took place, a key focus of the early days of the Biden administration was the response to COVID-19.<sup>475</sup> A federal pandemic response coordinator was named.<sup>476</sup> A nationwide mask mandate was implemented for federal buildings.<sup>477</sup> And the Biden administration announced a goal of administering 100 million vaccine doses to Americans within 100 days.<sup>478</sup>

The Biden administration has continued utilization and invocation of the DPA as a mechanism to fight the pandemic.<sup>479</sup> The Biden administration expanded the DPA towards the production of vaccines, as President Biden remarked in March 2021 that the DPA had been invoked to equip two Merck facilities to develop Johnson & Johnson vaccines.<sup>480</sup> President Biden also

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<sup>471</sup> Jen Christensen, *States complain that demand for the COVID-19 vaccine is outpacing supply*, CNN (Jan. 19, 2021), <https://www.cnn.com/2021/01/19/health/covid-19-vaccine-demand-outpacing-supply/index.html>.

<sup>472</sup> Stephen Collinson & Maeve Reston, *Biden defeats Trump in an election he made about character of the nation and the President*, CNN (Nov. 7, 2020), <https://www.cnn.com/2020/11/07/politics/joe-biden-wins-us-presidential-election/index.html>.

<sup>473</sup> Veronica Stracqualursi & Jim Acosta, *Trump pollster says Covid-19, not voter fraud, to blame for reelection loss*, CNN (Feb. 2, 2021), <https://www.cnn.com/2021/02/02/politics/trump-2020-reelection-loss-covid/index.html>.

<sup>474</sup> Lauren Aratani, *How did face masks become a political issue in America?*, THE GUARDIAN (Jun. 29, 2020), <https://www.theguardian.com/world/2020/jun/29/face-masks-us-politics-coronavirus>.

<sup>475</sup> Lev Facher, *Biden, in inaugural address, pledges the U.S. 'can overcome' Covid-19*, STAT (Jan. 20, 2021), <https://www.statnews.com/2021/01/20/biden-in-inaugural-address-pledges-the-u-s-can-overcome-covid-19/>.

<sup>476</sup> Cheyenne Haslett, *Jeff Zients, Biden's COVID czar, inherits hardest job in administration*, ABC NEWS (Jan. 18, 2021), <https://abcnews.go.com/Politics/jeff-zients-bidens-covid-czar-inherits-hardest-job/story?id=75233679>.

<sup>477</sup> Exec. Order No. 13991, 86 Fed. Reg. 7045 (Jan. 20, 2020).

<sup>478</sup> Berkeley Lovelace Jr., *Biden will reach goal of having 100 million COVID vaccine 'shots in arms' in his first 100 days as early as Thursday*, CNBC (Mar. 18, 2021), <https://www.cnbc.com/2021/03/18/covid-vaccine-biden-to-hit-goal-of-100-million-shots-in-first-100-days-early.html>.

<sup>479</sup> Sydney Lupkin, *Defense Production Act Speeds Up Vaccine Production*, NPR (Mar. 13, 2021), <https://www.npr.org/sections/health-shots/2021/03/13/976531488/defense-production-act-speeds-up-vaccine-production>.

<sup>480</sup> Remarks by President Biden on the Administration's COVID-19 Vaccination Efforts, 2021 DAILY COMP. PRES. DOCS. 00725 (Sept. 9, 2021).

stated that the Act would be utilized “to expedite critical materials in vaccine production, such as equipment, machinery, and supplies.”<sup>481</sup>

As millions of Americans received vaccinations during the winter and spring of 2021, cases plummeted throughout the United States.<sup>482</sup> However, by the summer of 2021, the Delta variant of the virus caused a new surge of infections in the United States.<sup>483</sup> The waning of Delta variant infections during the fall of 2021<sup>484</sup> was followed by a surge in infections in December 2021 with an emerging Omicron variant.<sup>485</sup>

The surge in Omicron cases in December 2021 led to a massive surge in demand for COVID-19 tests.<sup>486</sup> The Biden administration has also utilized the DPA to ramp up the production of tests.<sup>487</sup>

## VI. BUSINESS DISRUPTION UNDER MEDICAL MARTIAL LAW

This article reviews the significant extant and potential future disruption of business operations from local, state, and federal law imposition of the various tools of Medical Martial Law. However, comprehensive analysis of the hundreds of state executive orders, regulatory changes, and statutory proposals is well beyond the scope of this work. Furthermore, the myriad of private contracting restrictions, such as mandatory masking by employees or customers and the in-premises human density limits, are also beyond the scope of this work. Nevertheless, unanticipated impacts on business have been ventilated here to alert business management and their counsel of the potential near-draconian regulation that Medical Martial Law could impose. A key federal and state exception to lockdown is the provision of essential services by essential workers.

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<sup>481</sup> *Id.*

<sup>482</sup> Robin Foster & Ernie Mundell, *U.S. COVID Infections, Deaths Drop to Levels Not Seen Since Last Summer*, HEALTH DAY (May 24, 2021), <https://consumer.healthday.com/5-24-covid-infections-deaths-drop-to-levels-not-seen-since-last-summer-2653090221.html>.

<sup>483</sup> Travis Caldwell et al., *The pandemic is ‘spiraling out of control’ due to unvaccinated people, Trump’s surgeon general says*, CNN (July 27, 2021), <https://www.cnn.com/2021/07/25/health/us-coronavirus-sunday/index.html>.

<sup>484</sup> Eric Boodman, *Not all Covid waves look the same. Here’s a snapshot of the Delta surge*, STAT NEWS (Nov. 8, 2021), <https://www.statnews.com/2021/11/08/not-all-covid-waves-look-the-same-heres-a-snapshot-of-the-delta-surge/>.

<sup>485</sup> Aya Elamroussi, *Omicron surge is ‘unlike anything we’ve ever seen,’ expert says*, CNN (Dec. 31, 2021), <https://www.cnn.com/2021/12/30/health/us-coronavirus-thursday/index.html>.

<sup>486</sup> Aya Elamroussi, *Finding a COVID-19 test is a struggle right now in the US as Omicron and holiday plans collide*, CNN (Dec. 23, 2021), <https://www.cnn.com/2021/12/22/health/us-coronavirus-wednesday/index.html>.

<sup>487</sup> *FACT SHEET: President Biden Announces New Actions to Protect Americans and Help Communities and Hospitals Battle Omicron*, THE WHITE HOUSE (Dec. 21, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/21/fact-sheet-president-biden-announces-new-actions-to-protect-americans-and-help-communities-and-hospitals-battle-omicron/>.

### A. Essential Workers Avert Some Business Disruption

During pandemics, it becomes necessary to temporarily suspend some business activities, such as those most likely prone to disease transmission. A partial and broad shutdown is a well-known, primary and efficacious public health tool to reduce contagion.<sup>488</sup> In early spring 2020, evidence of rapid virus transmission immediately emerged in “contagion-prone” industries, such as meat processing, public transportation, and large-scale, indoor public gatherings (e.g., conferences, conventions, rallies, concerts, religious services, theaters, restaurants, parties, bars, academic settings, sports).<sup>489</sup> Many sequestered workers successfully turned to telecommuting, telemedicine, teleconference meetings, online education, and other work-from-home substitutes, significantly attenuating contagion while balancing their continued productivity.<sup>490</sup> However, in many industries, workers must be physically present at production or directly perform services.<sup>491</sup> Thus, many workers suffered layoffs.<sup>492</sup> Only some workers retain good prospects for quick rehire, and too many others have far fewer certain prospects.<sup>493</sup>

During lockdown and phased re-opening, some industries are prioritized for higher permitting or mandating that they remain open or that they can open earlier.<sup>494</sup> These prioritized industries are *essential industries* because their work sustains the life and health of the population.<sup>495</sup> These essential industries include retail groceries and food, the pharmaceutical

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<sup>488</sup> In the 1919 Spanish Flu, masking, distancing and quarantine were the main tools of contagion suppression. See, e.g., Nina Storchlic, & Riley D. Champine, *How some cities ‘flattened the curve’ during the 1918 flu pandemic*, NAT’L GEOGRAPHIC (Mar. 27, 2020), <https://www.nationalgeographic.com/history/2020/03/how-cities-flattened-curve-1918-spanish-flu-pandemic-coronavirus/> (reporting how social distancing, masking and quarantine saved thousands of lives).

<sup>489</sup> See Jocelyn J. Herstein et al., *Characteristics of SARS-CoV-2 Transmission among Meat Processing Workers in Nebraska, USA, and Effectiveness of Risk Mitigation Measures*, 27 EMERGING INFECTIOUS DISEASES 1032 (2021); Constance Delaugerre et al., *Prevention of SARS-CoV-2 transmission during a large, live, indoor gathering (SPRING): a non-inferiority, randomized, control trial*, 22 LANCET INFECTIOUS DISEASES 341 (2022).

<sup>490</sup> See, e.g., Matthew Dey et al., *Ability to Work from Home: Evidence from Two Surveys and Implications for The Labor Market in the COVID 19 Pandemic*, U.S. BUREAU OF LAB. STAT. (June 2020), <https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm>.

<sup>491</sup> See *Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?*, OECD, [https://read.oecd-ilibrary.org/view/?ref=135\\_135250-u15liwp4jd&title=Productivity-gains-from-teleworking-in-the-post-COVID-19-era](https://read.oecd-ilibrary.org/view/?ref=135_135250-u15liwp4jd&title=Productivity-gains-from-teleworking-in-the-post-COVID-19-era) (last updated Sept. 7, 2020).

<sup>492</sup> Rubén Hernández-Murillo & Pawel Krolikowski, *Assessing Layoffs in Four Midwestern States during the Pandemic Recession*, CLEVELAND FED. RSRV. BANK, Aug. 2020, at 1-2.

<sup>493</sup> See Atta Tarki, et al., *The Coronavirus Crisis Doesn’t Have to Lead to Layoffs*, HARV. BUS. REV., March 2020, at 2-3; Rubén Hernández-Murillo & Pawel Krolikowski, *Assessing Layoffs in Four Midwestern States during the Pandemic Recession*, CLEVELAND FED. RSRV. BANK, Aug. 2020, at 1-2.

<sup>494</sup> See Connie Lin, *What is an ‘Essential’ Business Anyway? A Cheat Sheet for Getting Through the COVID 19 Pandemic*, FAST CO. (Mar. 31, 2020), <https://www.fastcompany.com/90484557/what-is-an-essential-business-anyway-a-cheat-sheet-for-getting-through-the-COVID-19-pandemic>.

<sup>495</sup> See *id.*

supply chain, energy, telecommunications, national defense, healthcare, public safety, some government continuity, and various others.<sup>496</sup> Prioritizing these businesses and their workers, those who may or must brave the pandemic, is still hotly debated.<sup>497</sup>

Essential workers generally work in *critical infrastructure*. These are industries that are approximately eighty-five percent owned, operated, and maintained by the private sector.<sup>498</sup> Following the 9/11 attacks, critical infrastructure became a major focus for national security.<sup>499</sup> The list of critical infrastructures continues to evolve, although rankings remain a hotly debated competition for primacy, particularly when vying for limited budget largess.<sup>500</sup> Critical infrastructure differs among the nations but is defined generally in the Critical Infrastructure Protection Act provisions of the USA Patriot Act:<sup>501</sup>

[S]ystems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.<sup>502</sup>

In Medical Martial Law situations, the states define what constitutes “essentiality” and enforce the classification of workers and business

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<sup>496</sup> A fuller list might include: Certain supply chains (fisheries, farms, food processing, supermarkets, pharmaceuticals, vehicle fuels, the power grid, essential parts and replacement equipment), restaurants (takeout, delivery, limited dine-in), hospitals and healthcare providers (e.g., physicians, dentists, veterinary, medical technology, ambulance, maintenance, emergency medical services (EMS)), banking, tax preparation, some financial services and payment systems, post offices, public safety (fire, law enforcement), automotive repair, convenience stores, laundromats, transportation hubs (airports, ports, train and bus stations), and shelters. *See, e.g., id.*

<sup>497</sup> Predictably, some goods and services are advocated as essential but attract controversy, e.g., personal care services, golf, florists, personal fitness and recreation, liquor and cannabis retail, gun stores, clothing, hardware stores and office supplies. Of course, the transmission prospects for essential, or these “quasi-essential,” businesses should be considered. *See, e.g.,* Patrick McGeehan & Matthew Haag, *These Stores Are ‘Essential’ in the Pandemic. Not Everyone Agrees*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/nyregion/coronavirus-essential-workers.html>.

<sup>498</sup> John W. Bagby, *Evolving Institutional Structure and Public Policy Environment of Critical Infrastructures*, 9 PA. SPEAKER’S J. 187, 189 (2010).

<sup>499</sup> *Id.* at 192.

<sup>500</sup> *See, e.g.,* BRIAN E. HUMPHREYS, CONG. RSCH. SERV., R45809, CRITICAL INFRASTRUCTURE: EMERGING TRENDS AND POLICY CONSIDERATIONS FOR CONGRESS 12 (2019); JOHN D. MOTEFF, CONG. RSCH. SERV., RL30153, CRITICAL INFRASTRUCTURES: BACKGROUND, POLICY, AND IMPLEMENTATION 2 (2015).

<sup>501</sup> Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 400 (2001) (codified as amended at 42 U.S.C. § 5195c).

<sup>502</sup> 42 U.S.C. § 5195c(e).

operations.<sup>503</sup> These workers conduct the operations of many critical infrastructures.<sup>504</sup> Each state's designation of essentiality, an "essential worker order," likely permits or orders these workers to continue work during lockdowns and phased re-openings.<sup>505</sup> Essentiality also likely obligates employers to protect their health and safety.<sup>506</sup> Employers generally must accommodate these workers with PPE and provide adequate spacing, ventilation and shielding, and sometimes also testing.<sup>507</sup>

DHS has delegated most development of critical infrastructure standards to the Cybersecurity & Infrastructure Security Agency ("CISA").<sup>508</sup> Cybersecurity is overarching to almost all other critical infrastructures because the Internet connects most business and government operations and provides control for remote operations.<sup>509</sup> CISA has developed guidelines for critical infrastructures that largely drive essentiality in the pandemic.<sup>510</sup> Most states have started developing their essential worker regimes based on these federal guidelines.<sup>511</sup> Indeed, twenty-one states follow the CISA guidelines fairly closely.<sup>512</sup> However, twenty-three have developed their own guidelines, and eight states have no essentiality guidelines.<sup>513</sup> Comprehensive and detailed cataloging of every state designation and invocation of essentiality<sup>514</sup> likely reveals at least five

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<sup>503</sup> See Benjamin Gerber, *Will the Coronavirus Lead to Martial Law?*, GERBER & HOLDER, <https://www.gerberholderlaw.com/blog/georgia-workers-industry-news/pandemic-and-martial-law/> (last visited on Oct. 10, 2022).

<sup>504</sup> See *COVID-19: Essential Workers in the States*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 11, 2021), <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx>.

<sup>505</sup> See *id.*

<sup>506</sup> See Deborah Berkowitz, *Worker Safety & Health During COVID-19 Pandemic: Rights & Resources*, NAT'L EMP. L. PROJECT (Apr. 9, 2020), <https://www.nelp.org/publication/worker-safety-health-during-covid-19-pandemic-rights-resources/>.

<sup>507</sup> See *id.*

<sup>508</sup> See *Critical Infrastructure Protection: DHS Actions Urgently Needed to Better Protect the Nation's Critical Infrastructure*, U.S. GOV'T ACCOUNTABILITY OFF. (Apr. 6, 2022), <https://www.gao.gov/products/gao-22-105973>.

<sup>509</sup> See *generally Critical Infrastructure Protection: DHS Actions Urgently Needed to Better Protect the Nation's Critical Infrastructure*, U.S. GOV'T ACCOUNTABILITY OFF. (Apr. 6, 2022), <https://www.gao.gov/products/gao-22-105973>.

<sup>510</sup> Advisory Memorandum from Christopher C. Kerbs, Director of Cybersecurity and Infrastructure Security Agency, on Ensuring Essential Critical Infrastructure Workforce: *Ensuring Community and National Resilience in COVID-19 Response* (Aug. 18, 2020), [https://www.cisa.gov/sites/default/files/publications/Version\\_4.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_FINAL%20AUG%2018v3.pdf](https://www.cisa.gov/sites/default/files/publications/Version_4.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_FINAL%20AUG%2018v3.pdf).

<sup>511</sup> *COVID-19: Essential Workers in the States*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 11, 2021), <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx>.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

<sup>514</sup> Such a compendium is well beyond our scope. Nevertheless, a few sources are relevant. See, for example, *COVID 19: Essential Workers in the States*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 11, 2021), <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx>.



observations: (i) while federal CISA guidelines inspire state designations of essentiality, there remain substantial differences in many details among the states, (ii) predominately urban states likely lock down more readily and exempt fewer essential industries than do substantially rural states, (iii) the state's political culture plays a considerable role, (iv) those states with economies based on a substantial component of tourism likely expand essentiality and hasten reopening, and (v) some favoritism is expected towards significant intra-state industries.

#### B. Government Commandeers Business—Central Control of an Emergency Planned Economy

A wartime economy is an anathema to free-market libertarians. Indeed, federal control of the economy through central planning is widely rejected as the normal answer to the basic economic questions: (i) what to produce, (ii) who produces it, (iii) who gets the production, (iv) where and how is production performed, (v) how are market clearing prices and quantities determined, and (vi) how is flexibility maintained and innovation incentivized?<sup>515</sup> However, absent a Senate declaration of war, could a president invoke national emergencies to centralize control over some or even most of the United States economy?<sup>516</sup> If so, this potential could disrupt normal business operations with scant advance notice wreaking dire consequences for business managers or planning advice from their business lawyers.

It seems unlikely that any president could last long commandeering the economy against the will of a strong majority.<sup>517</sup> However, the DPA

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the-states.aspx#Map for a graphical, clickable U.S. map accessing each state's essentiality documents. See also *State COVID 19 Lockdowns: What Contractors Operating in "Lockdown" Areas Need to Know*, WILEY (Apr. 7, 2020), [https://www.wiley.law/assets/html/documents/563\\_State-COVID-19-Lockdowns-4-7-20.pdf](https://www.wiley.law/assets/html/documents/563_State-COVID-19-Lockdowns-4-7-20.pdf), which focuses on construction and the building trades.

<sup>515</sup> There is some disagreement on the three, four or five basic economic questions, economists since Adam Smith have wrestled with them. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (W. Strahan and T. Cadell, London, 2007); see also FRIEDRICH AUGUST HAYEK, *THE ROAD TO SERFDOM* (Univ. Chi. Press, 1944) (conceding government central control sometimes necessary).

<sup>516</sup> Goitein, *supra* note 314 (posing threat of presidential declaration of emergency permitting takeover of major aspects of the economy with detailed decision-making delegated to various federal agencies).

<sup>517</sup> See, e.g., Thom Dunn, *Trump Administration Considers a Centrally Planned Economy to Deal With Coronavirus*, BOINGBOING (Feb. 28, 2020), <https://boingboing.net/2020/02/28/trump-administration-considers.html>;

Ted Hesson, & Alexandra Alper, *Exclusive: U.S. Mulls Using Sweeping Powers to Ramp Up Production of Coronavirus Protective Gear*, REUTERS (Feb. 27, 2020), <https://www.reuters.com/article/us-china-health-usa-production-exclusive/exclusive-u-s-mulls-using-sweeping-powers-to-ramp-up-production-of-coronavirus-protective-gear-idUSKCN20L2S0>; but see Andrew Koppelman, *Why Even Free-Marketeers Should Support Central Planning in a Pandemic*,

(domestic) and IEEPA (international) provide numerous historical and contemporary examples of businesses ordered to (i) produce particular goods or services, (ii) abandon existing products and services in favor of those chosen ostensibly to diminish a national emergency, (iii) change business practices or production methods, vary hours of operations, substitute suppliers or change designs, or (iv) redirect existing production to alternative buyers to support war and emergency efforts coordinated by the federal government.<sup>518</sup>

In the COVID-19 Medical Martial Law situation, the DPA has been used to coax, order or facilitate the production of PPE, ventilators, pharmaceuticals, tests, and vaccines at the expense of various corporations' traditional product lines.<sup>519</sup> Furthermore, parallel to the pandemic, when characterized as a triggering national emergency, the other powers of Medical Martial Law could be used under the president's national emergency declarations pursuant to the NEA and the IEEPA under the guise of national security.<sup>520</sup> For example, on May 1, 2020, President Trump invoked the NEA and IEEPA in Executive Order No. 13,920<sup>521</sup> to declare a national emergency over the unrestricted supply of bulk power equipment<sup>522</sup> by a foreign adversary. The IEEPA is also enforceable under federal criminal law.<sup>523</sup> The June 2020 conviction of U.C.L.A. adjunct Electrical Engineering professor Yi-Chi Shih under the IEEPA for illegal exports.<sup>524</sup>

President Trump's suspicion that foreign-owned social media (SM) platforms could infiltrate the domestic information supply chain, as well as

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PROSPECT (Mar. 24, 2020) (arguing Friedrich Hayek's arguments against central planning now work in favor of it due to the pandemic).

<sup>518</sup> See Emma Watkins & Thomas Spoehr, *The Defense Production Act: An Important National Security Tool, But It Requires Work*, THE HERITAGE FOUND. (Oct. 15, 2019), <https://www.heritage.org/defense/report/the-defense-production-act-important-national-security-tool-it-requires-work>.

<sup>519</sup> Lila Sevner, *Covid-19 and the Defense Production Act*, THE REGUL. REV. (Apr. 15, 2020), <https://www.theregreview.org/2020/04/15/sevener-covid-19-defense-production-act/> (discussing COVID-19 and the Defense Production Act).

<sup>520</sup> Caroline Burke, *This Is The Difference Between Martial Law & A National Emergency*, BUSTLE (Feb. 14, 2019), <https://www.bustle.com/p/does-a-national-emergency-include-martial-law-heres-what-the-courts-say-15955801>.

<sup>521</sup> Exec. Order No. 13,920, 85 Fed. Reg. 26595 (May 1, 2020).

<sup>522</sup> The term "bulk-power system" means

(i) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and

(ii) electric energy from generation facilities needed to maintain transmission reliability.

For the purpose of this order, this definition includes transmission lines rated at 69,000 volts (69 kV) or more but does not include facilities used in the local distribution of electric energy. Exec. Order No. 13,920, 85 Fed. Reg. 26595 at § (4)(a) (May 1, 2020).

<sup>523</sup> 50 U.S.C. § 1705 (2007).

<sup>524</sup> *United States v. Yi Chi Shih*, 2:18-cr-00050-JAK (Cal. Ct. App. July 2020) (convicting defendant of illegally obtaining integrated circuits with military applications (MMIC) that later were exported to China without the required export license).

alleged opposition to their rhetoric and the chill of political expression on some SM platforms, has led to two additional executive orders against TikTok and WeChat, both controlled by Chinese companies.<sup>525</sup> In *TikTok*, President Trump invoked IEEPA and NEA to bar United States' concerns from entering into transactions with TikTok's parent ByteDance.<sup>526</sup> A separate divestiture decision was made by the Committee on Foreign Investment in the United States ("CFIUS").<sup>527</sup> The WeChat order also invokes IEEPA and NEA to ban the United States' concerns from entering transactions with WeChat's parent Tencent.<sup>528</sup> TikTok filed for an injunction in the Central District of California to stop President Trump's actions.<sup>529</sup> A preliminary injunction was granted in part by Judge Carl Nichols of the United States District Court for the District of Columbia on September 27, 2020, in *TikTok Inc. v. Trump*.<sup>530</sup> Dozens of Trump executive orders impact business and deal with international trade restrictions where the President's central economic controls are the broadest, well-tested, and generally validated by the courts.<sup>531</sup> The invocation of additional domestic authorities, and national emergency-induced pandemic controls of private industry under the DPA, raise additional threats to free enterprise.<sup>532</sup>

### C. Private Enterprise Initiation and Enforcement of COVID-19 Remedial Measures

As the COVID-19 pandemic has ravaged across communities all throughout the United States for the past two years, a number of remedial measures have been utilized in various jurisdictions throughout the United States to attempt to turn the tide against the virus.<sup>533</sup> As this article has

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<sup>525</sup> Daniel P. Brooks & Nova J. Daly, *President Trump Targets Chinese Social Media Apps TikTok and WeChat in New Executive Orders*, WILEY (Aug. 7, 2020), <https://www.wiley.law/alert-President-Trump-Targets-Chinese-Social-Media-Apps-TikTok-and-WeChat-in-New-Executive-Orders>.

<sup>526</sup> Exec. Order No. 13,942, 85 Fed. Reg. 48637 (Aug. 6, 2020) (appending TikTok to the previous *Securing the Information and Communications Technology and Services Supply Chain*, Exec. Order No. 13,873, 84 Fed. Reg. 22,689 (May 15, 2019)).

<sup>527</sup> Presidential Order Regarding the Acquisition of Musical.ly by ByteDance Ltd., 2020 DAILY COMP. PRES. DOCS. 00608 (Aug. 14, 2020); *see also* 85 Fed. Reg. 51297 (Aug. 19, 2020).

<sup>528</sup> Exec. Order No. 13,943, 85 Fed. Reg. 48641 (Aug. 6, 2020).

<sup>529</sup> *TikTok Inc. & ByteDance Ltd. v. Trump*, Case 2:20-cv-07672 (Cal. Ct. App. Aug. 24, 2020).

<sup>530</sup> *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73 (D.D.C. 2020).

<sup>531</sup> Anna Rose Marx, *Banning Business: The Impact of Trump's Executive Orders on International Business Negotiations*, RESEARCHGATE (Dec. 2017), [https://www.researchgate.net/publication/331097787\\_Banning\\_Business\\_The\\_Impact\\_of\\_Trump%27s\\_Executive\\_Orders\\_on\\_International\\_Business\\_Negotiations](https://www.researchgate.net/publication/331097787_Banning_Business_The_Impact_of_Trump%27s_Executive_Orders_on_International_Business_Negotiations).

<sup>532</sup> Press Release, FEMA, Applying the Defense Production Act, Fed. Emergency Mgmt. Agency (Jan. 26, 2021) (on file with author).

<sup>533</sup> Ballotpedia, *State government responses to the coronavirus (COVID-19) pandemic, 2020*, BALLOTPEDIA, [https://ballotpedia.org/State\\_government\\_responses\\_to\\_the\\_coronavirus\\_\(COVID\\_19\)\\_pandemic\\_2020](https://ballotpedia.org/State_government_responses_to_the_coronavirus_(COVID_19)_pandemic_2020).

discussed, measures such as stay-at-home orders toward the beginning of the pandemic and the expansion of remote work<sup>534</sup> helped to curb the spread of the virus. However, as time has progressed, legal challenges to stay-at-home orders emerged, and some state courts have even limited the ability of a state to promulgate such orders.<sup>535</sup> For example, the case of *Wisconsin Legislature v. Palm* addressed the enforceability of an Emergency Order (Emergency Order No. 28) of the Wisconsin Department of Health and Human Services promulgated on April 16, 2020.<sup>536</sup> The Order prohibited all travel except travel that was deemed “essential” and ordered the closure of a number of restaurants (except for take-out or delivery service) and businesses.<sup>537</sup> The Wisconsin Legislature filed a declaratory judgment action, contending that the Emergency Order did not comply with the rulemaking procedures for emergency rules outlined by Wisconsin statute.<sup>538</sup> The Wisconsin Supreme Court granted the declaratory judgment, holding that the Emergency Order is a “rule” pursuant to Wisconsin statute, and since the statute relating to emergency rulemaking procedures was not followed, the Emergency Order was unenforceable.<sup>539</sup>

There is an apparent tension between the policy of taking aggressive measures to mitigate the spread of COVID-19 and, on the other hand, the policy of promoting a more laissez-faire oriented economic and personal freedom to proceed as normally as possible without major restrictions. On the one hand, public health officials have expressed support for mask mandates<sup>540</sup> and vaccine mandates,<sup>541</sup> and on the other hand, some elected officials have strongly expressed opposition to mask mandates<sup>542</sup> and vaccine mandates.<sup>543</sup> This debate has exposed a chasm in the United States regarding

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<sup>534</sup> Stacy A. Hickox & Chenwei Lao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25 (2020) (discussing the benefits of remote work).

<sup>535</sup> John Kruzell, *Legal challenges to stay-at-home orders gain momentum*, THE HILL (May 16, 2020), <https://thehill.com/regulation/court-battles/498096-legal-challenges-to-stay-at-home-orders-gain-momentum/>.

<sup>536</sup> *Palm*, 2020 WI 42, 391 Wis. 2d 497, 508-09, 942 N.W.2d 900, 906.

<sup>537</sup> *Id.*

<sup>538</sup> *Id.* at 907.

<sup>539</sup> *Id.* at 918.

<sup>540</sup> Press Release, CDC Newsroom, CDC calls on Americans to wear masks to prevent COVID-19 spread, (July 14, 2020), <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html>.

<sup>541</sup> Ken Terry, *AMA, Other Medical Groups Call for Vaccine Mandate*, WEBMD HEALTH NEWS (July 27, 2021), <https://www.webmd.com/vaccines/covid-19-vaccine/news/20210727/ama-other-medical-groups-call-for-vaccine-mandates>.

<sup>542</sup> Grace Panetta, *South Dakota Gov. Kristi Noem calls out GOP governors who ‘shut down’ their states and mandated masks, accusing them of trying to revise history*, BUS. INSIDER (July 12, 2021, 8:56 AM), <https://www.businessinsider.com/kristi-noem-calls-out-gop-governors-covid-shutdowns-mask-mandates-2021-7>.

<sup>543</sup> Charlotte Klein, *Republican Governors Now Racing Each Other to Ban COVID Vaccine Mandates*, VANITY FAIR (Oct. 13, 2021), <https://www.vanityfair.com/news/2021/10/republican-governors-ban-covid-vaccine-mandates>.

vaccinations.<sup>544</sup> And in general, mitigation measures have unfortunately become highly politicized.<sup>545</sup>

This great debate, between taking more measures to suppress the virus and also allowing economic and personal freedoms, is in need of a “Grand Balance” to accommodate both the values of suppressing the virus and allowing economic and personal freedom. As discussed below, this “Grand Balance” is a difficult endeavor to achieve given the political climate in the United States and the litigation that has already occurred with mask mandates and vaccine mandates.<sup>546</sup> However, private enterprise initiation holds the key to balancing the various policy concerns in the “Grand Balance” of pandemic suppression and economic and personal liberty.<sup>547</sup>

### *1. Mandatory Medical Measures by Private Enterprise and Policymakers to Mitigate COVID-19*

#### *i. Mask Mandates*

Public health officials, including Dr. Anthony Fauci, have encouraged the wearing of masks, particularly in congregated settings, to reduce the transmission of COVID-19.<sup>548</sup> A number of studies have indicated that masks, particularly N-95 grade masks, are efficacious in limiting the spread of the virus.<sup>549</sup> However, spirited opposition to mask mandates emerged throughout 2020<sup>550</sup> and 2021<sup>551</sup> among some individuals and policymakers.

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<sup>544</sup> Robert Towey, *CNBC poll shows very little will persuade unvaccinated Americans to get COVID shots*, CNBC, <https://www.cnn.com/2021/09/10/cnbc-poll-shows-very-little-will-persuade-unvaccinated-americans-to-get-covid-shots.html> (last updated Sept. 27, 2021, 8:14 AM).

<sup>545</sup> See, e.g., Nancy Knauer, *The Federal Response to COVID-19: Lessons from the Pandemic*, 73 HASTINGS L.J. 49 (2022) (discussing the political roots for the federal government’s lacking response to COVID-19).

<sup>546</sup> Alana Wise, *The political fight over vaccine mandates deepens despite their effectiveness*, NPR (Oct. 17, 2021, 7:00 AM), <https://www.npr.org/2021/10/17/1046598351/the-political-fight-over-vaccine-mandates-deepens-despite-their-effectiveness>.

<sup>547</sup> George Washington Univ., *Private Sector Plays Key Role in the Fight against COVID-19*, GW PUB. HEALTH (June 17, 2020), <https://publichealth.gwu.edu/content/private-sector-plays-key-role-fight-against-covid-19>.

<sup>548</sup> Alexandra Hutzler, *Fauci Stresses Masks, Vaccines, Boosters After First Case of Omicron Detected in U.S.*, NEWSWEEK (Dec. 1, 2021, 3:01 PM), <https://www.newsweek.com/fauci-stresses-masks-vaccines-boosters-after-first-case-omicron-detected-us-1655056>.

<sup>549</sup> Evan Moore, *With mandates now lifted, is one-way masking enough against COVID? This is what experts say*, THE CHARLOTTE OBSERVER (June 22, 2022, 9:08 PM), <https://www.charlotteobserver.com/news/coronavirus/article259507394.html>.

<sup>550</sup> Emily Stewart, *Anti-maskers explain themselves*, VOX (Aug. 7, 2020, 7:40 AM), <https://www.vox.com/the-goods/2020/8/7/21357400/anti-mask-protest-rallies-donald-trump-covid-19>.

<sup>551</sup> Katie Reilly, *School Masking Mandates Are Going to Court. Here’s Why the Issue Is So Complicated*, TIME (Oct. 1, 2021, 9:40 AM), <https://time.com/6103134/parents-fight-school-mask-mandates/>.

Private businesses have largely been supportive of mask requirements during the course of the COVID-19 pandemic.<sup>552</sup> Data from one study released in 2021 of small businesses indicated that two-thirds of those businesses surveyed expressed support for mask mandates.<sup>553</sup> A number of major industries have implemented mask mandates of their own, from hotels,<sup>554</sup> casinos,<sup>555</sup> and grocery stores.<sup>556</sup>

A number of states also implemented mask mandates to attempt to mitigate the spread of the virus.<sup>557</sup> The mask mandates have not gone without legal challenges, however. In *Munza v. Ivey*, Alabama's mask mandate in indoor public spaces was challenged.<sup>558</sup> In *Munza*, the Alabama Supreme Court held that the Plaintiff lacked any specific "injury in fact" with the mandate.<sup>559</sup> Thus, the Alabama Supreme Court upheld a trial court's dismissal of the challenge.<sup>560</sup> Most challenges to mask mandates thus far in the courts have been dismissed.<sup>561</sup> For example, challenges have fallen short on the alleged basis that mask mandates violate free speech rights,<sup>562</sup> violate the right to free assembly<sup>563</sup> or violate the Equal Protection Clause.<sup>564</sup>

Even though a number of states have dropped their mask mandates,<sup>565</sup> mask mandates still remain as of the date of this writing. In January 2021,

<sup>552</sup> Nancy Schimelpfening, *How Businesses Requiring Masks Protects Workers and You from COVID-19*, HEALTHLINE (July 24, 2020), <https://www.healthline.com/health-news/how-businesses-requiring-masks-protects-workers-and-you-from-covid-19>.

<sup>553</sup> Alexandra Kelley, *Two-thirds of small business owners support mask mandates*, THE HILL (Sept. 9, 2021), <https://thehill.com/changing-america/resilience/smart-cities/571586-two-thirds-of-small-business-owners-support-mask>.

<sup>554</sup> Jena Tesse Fox, *Hotels battle COVID-19 with guest mask mandates*, HOTEL MGMT. (July 22, 2020, 10:47 PM), <https://www.hotelmanagement.net/operate/hotels-mandate-guest-mask-use>.

<sup>555</sup> *Many Gulf Coast casinos implement mask mandates for employees*, WLOX (July 29, 2021, 12:44 PM), <https://www.wlox.com/2021/07/29/beau-rivage-requires-employees-wear-masks/>.

<sup>556</sup> Nathaniel Meyersohn, *These top US chains are reinstating their mask requirements*, CNN BUS. (Aug. 7, 2021, 2:51 PM), <https://www.cnn.com/2021/08/07/business/retailers-restaurants-mask-rules/index.html>.

<sup>557</sup> Kaia Hubbard, *These States Have COVID-19 Mask Mandates*, U.S. NEWS (Mar. 28, 2022, 4:16 PM), <https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates>.

<sup>558</sup> *Munza v. Ivey*, 334 So. 3d 211 (Ala. 2021).

<sup>559</sup> *Id.* at 220.

<sup>560</sup> *Id.*

<sup>561</sup> Brandon O. Moulard & Laura Lashley, *Masks Up, Pens Down: (Still) Litigating Mask Mandates in 2021*, XII THE NAT'L L. REV. 293 (2021).

<sup>562</sup> *Denis v. Ige*, 538 F. Supp. 3d 1063, 1079 (D. Haw. 2021) ("The mask mandates do not impose more than an incidental burden on speech. To the contrary, individuals can still engage in expressive activity. They just have to wear masks while they do").

<sup>563</sup> *Oakes v. Collier Cnty.*, 515 F. Supp. 3d 1202, 1215 (M.D. Fla. 2021) ("This claim is a head scratcher. As noted, anyone can freely assemble and associate at a business within the County if they are socially distanced. And if they cannot do so, a mask must be worn. So Order 7 does not prohibit assemblies; rather, it places a minor restriction on the way they occur.").

<sup>564</sup> *Stewart v. Just.*, 502 F. Supp. 3d 1057, 1068-69 (S.D.W. Va. 2020).

<sup>565</sup> Monica Hersher, *Nearly half of state mask mandates have ended in the past 3 weeks*, NBC NEWS, <https://www.nbcnews.com/news/us-news/mask-mandate-map-february-2022-n1289093> (last updated Feb. 17, 2022, 5:20 PM).

the Biden administration implemented a federal mask mandate for public transportation, including airlines, through Executive Order.<sup>566</sup>

*ii. Vaccine Mandates*

With the development of vaccines, some businesses in the United States have implemented vaccine mandates.<sup>567</sup> Vaccine mandates became commonplace in the healthcare industry among healthcare workers once COVID-19 vaccines became available.<sup>568</sup> A number of major corporations and businesses have implemented vaccine mandates, from American Express to The Walt Disney Company to Ford to General Electric.<sup>569</sup> Even a number of colleges and universities have implemented vaccine mandates for students, faculty, and staff.<sup>570</sup> In a significant decision in August 2021 upholding the vaccination requirement at Indiana University, the United States Court of Appeals for the Seventh Circuit in *Klaasen v. Trustees of Indiana University* held that the vaccination requirement was constitutional and did not violate the Due Process Clause.<sup>571</sup>

During the fall of 2021, the Occupational Safety and Health Administration (“OSHA”) announced a rule which required vaccination for entities of 100 or more employees, or, if not vaccination, then weekly testing of employees would have been required.<sup>572</sup> In addition, a vaccination mandate was announced for employees of facilities that participate in

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<sup>566</sup> Exec. Order No. 13,988, 86 Fed. Reg. 7205 (Jan. 26, 2021) (promoting COVID-19 safety in domestic and international travel).

<sup>567</sup> Nadia Kounang, *Major medical groups call for employers to mandate Covid-19 vaccines for health care workers*, CNN, <https://www.cnn.com/2021/07/26/health/vaccine-mandate-health-care-workers/index.html> (last updated July 26, 2021, 4:48 PM).

<sup>568</sup> *Id.*

<sup>569</sup> Haley Messenger, *From McDonald’s to Goldman Sachs, here are the companies mandating vaccines for all or some employees*, NBC NEWS, <https://www.nbcnews.com/business/business-news/here-are-companies-mandating-vaccines-all-or-some-employees-n1275808> (last updated Nov. 16, 2021, 4:22 PM).

<sup>570</sup> Elissa Nadworny, *Full FDA Approval Triggers More Universities to Require The COVID-19 Vaccine*, NPR (Sept. 1, 2021, 8:29 AM), <https://www.npr.org/2021/09/01/1031385629/full-fda-approval-triggers-more-universities-to-require-the-covid-19-vaccine>.

<sup>571</sup> *Klaasen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (“Each university may decide what is necessary to keep other students safe in a congregate setting. Health exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenza, and more) are common requirements of higher education. Vaccination protects not only the vaccinated persons but also those who come in contact with them, and at a university close contact is inevitable”).

<sup>572</sup> Jason Hoffman, *Vaccine rule for large employers, federal contractors and certain health care workers to take effect January 4*, CNN, <https://www.cnn.com/2021/11/04/politics/vaccine-rule-large-employers-federal-contractors-health-care-workers/index.html> (last updated Nov. 4, 2021, 6:12 PM).

Medicare and Medicaid Services, covering approximately seventeen million healthcare workers.<sup>573</sup>

Both vaccine mandates have now been reviewed by the United States Supreme Court.<sup>574</sup> In *National Federation of Independent Business v. Department of Labor*, the United States Supreme Court placed a stay on the OSHA vaccination or testing requirement for private employers.<sup>575</sup> The Supreme Court ruled that the rule exceeded the Department of Labor's statutory authority and remarked that the Department of Labor can implement "workplace safety standards, not broad public health measures."<sup>576</sup> The Supreme Court stated, "Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly."<sup>577</sup>

However, in *Biden v. Missouri*, the United States Supreme Court upheld the interim final rule of the Department of Health and Human Services requiring vaccinations of workers at healthcare facilities that receive Medicare and Medicaid funding.<sup>578</sup> The Court found that not only did the rule fall within the statutory authority granted to the Department of Health and Human Services, but it also noted that "vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella."<sup>579</sup>

In essence, both the *National Federation of Independent Business v. Department of Labor* and *Biden v. Missouri* decisions created a situation where the Supreme Court "split the baby" on vaccine mandates.<sup>580</sup> Both of these decisions, however, left open the question of whether private employer vaccine mandates are constitutional. Given the ruling of the United States Court of Appeals for the Seventh Circuit in the *Klaasen* case, it is more likely than not that private enterprise initiation on mask and vaccine mandates will be ruled a constitutional exercise of protecting health, welfare and safety.<sup>581</sup>

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<sup>573</sup> *Id.*

<sup>574</sup> Nadia Kounang, *Major medical groups call for employers to mandate Covid-19 vaccines for health care workers*, CNN, <https://www.cnn.com/2021/07/26/health/vaccine-mandate-health-care-workers/index.html> (last updated July 26, 2021, 4:48 PM).

<sup>575</sup> Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 664 (2022).

<sup>576</sup> *Id.* at 664-65.

<sup>577</sup> *Id.* at 664, 666.

<sup>578</sup> *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022).

<sup>579</sup> *Id.* at 653.

<sup>580</sup> Brian D. Pedrow, Shannon D. Farmer & Lila A. Sevener, *The Supreme Court Has Ruled on the OSHA and CMS Vaccine Mandates – What Now?*, BALLARD SPAHR (Jan. 18, 2022), <https://www.ballardspahr.com/insights/alerts-and-articles/2022/01/the-supreme-court-has-ruled-on-the-osh-a-and-cms-vaccine-mandates>.

<sup>581</sup> *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 664, 666.



## 2. The “Grand Balance” of Economic and Personal Freedom Versus Pandemic Suppression

The case of the cruise line industry and its approach to COVID-19 is an example of private enterprise initiation in seeking to mitigate the virus and, at the same time, keep the business fully operational.<sup>582</sup> The cruise line industry has been hit especially hard by the COVID-19 pandemic, from lost jobs to billions in lost economic activity.<sup>583</sup> COVID-19 has also hit the cruise industry with “superspreader” type of events, with cruise ships presenting a particularly higher risk of individuals for transmission of the virus.<sup>584</sup>

With the risk of the spread of the virus on cruise ships, many customers have had their confidence in cruise line safety shaken.<sup>585</sup> With the particular risks involved with cruise line travel, major companies in the cruise line industry, including Royal Caribbean,<sup>586</sup> Carnival,<sup>587</sup> and Norwegian Cruise Lines,<sup>588</sup> have implemented vaccine requirements for traveling on board their cruise ships. Acknowledging that vaccine requirements are arguably beneficial to the profitability of the cruise line industry, in November 2021, the CEO of Norwegian Cruise Lines remarked that the vaccine requirements gave a “competitive advantage” to their brands.<sup>589</sup>

On April 2, 2021, the Governor of Florida issued Executive Order 21-81, which prohibits vaccine passports in the State of Florida.<sup>590</sup> Following the Executive Order, in 2021, the Florida Legislature enacted a statute that read that “A business entity . . . may not require patrons or customers to

<sup>582</sup> *Id.* at 665.

<sup>583</sup> Morgan Hines, ‘Devastating’ impact’: Cruise industry says 254,000 American jobs, \$32 billion in economic activity lost, USA TODAY (Nov. 19, 2020, 2:20 PM), <https://www.usatoday.com/story/travel/cruises/2020/11/19/cruising-faces-254000-american-jobs-32-billion-lost-pandemic/3776982001/>.

<sup>584</sup> Alex Christian, *Cruises have a cunning plan to stop superspreaders*, WIRED (June 8, 2021, 6:00 AM), <https://www.wired.co.uk/article/cruise-ships-covid-superspreader>.

<sup>585</sup> Irene S. Levine, *What Will It Take to Restore Consumer Confidence in The Cruise Industry?*, FORBES (Apr. 4, 2020), <https://www.forbes.com/sites/irenelevine/2020/04/04/what-will-it-take-to-restore-consumer-confidence-in-the-cruise-industry/?sh=771100f6d542>.

<sup>586</sup> Melissa Alonso & Aya Elamroussi, *Royal Caribbean cruise ship prevented from entering 2 island nations due to Covid-19 outbreak*, CNN (Dec. 23, 2021), <https://www.cnn.com/travel/article/royal-caribbean-covid-outbreak-port-entry-denied/index.html>.

<sup>587</sup> Eric Glasser, *Some cruise lines vow to defy Florida’s ban on proof of vaccination*, WTSP (June 15, 2021, 6:15 PM), <https://www.wtsp.com/article/news/health/coronavirus/vaccine/cruise-lines-tampa-florida-vaccination/67-3c580e14-bb22-4285-8744-1973004b460d>.

<sup>588</sup> Chris Isidore, *Norwegian Cruise Line wants CDC to let vaccinated passengers sail*, CNN (Apr. 8, 2021), <https://www.cnn.com/2021/04/06/business/norwegian-cruise-line-resumption-plans-cdc/index.html>.

<sup>589</sup> Morgan Hines, *Norwegian Cruise Line updates policy, passengers will need to prove COVID vaccination ‘indefinitely’*, USA TODAY (Nov. 3, 2021, 1:51 PM), <https://www.usatoday.com/story/travel/cruises/2021/11/03/norwegian-require-vaccine-proof-cruises-indefinitely-ceo-says/6265813001/>.

<sup>590</sup> Fla. Exec. Order No. 21-81 (Apr. 2, 2021).

provide any documentation certifying COVID-19 vaccination or postinfection recovery to gain access to, entry upon, or service from the business operations in this state.”<sup>591</sup> The statute and Norwegian Cruise Lines’ requirement for vaccinations conflicted with each other and created a legal conflict.<sup>592</sup> Norwegian Cruise Lines filed suit against the State of Florida and challenged the statute and vaccine passport ban.<sup>593</sup>

The case of the cruise line industry and vaccine mandates presents a unique case of analysis of the tradeoffs of economic freedom and liberty and pandemic suppression.<sup>594</sup> It is often thought that pandemic suppression also corresponds with restrictions on economic activity and that mandates will place restrictions on business activity.<sup>595</sup> However, this is more complicated since, in the case of the cruise lines, the cruise lines are actually advocating for the mandates as a private business as a business measure.<sup>596</sup> In the case of Florida’s statutory scheme, there would be a restriction upon private enterprise initiation.<sup>597</sup>

In *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, the United States District Court for the Southern District of Florida granted Norwegian’s request for a preliminary injunction against Fla. Rev. Stat. § 381.00316.<sup>598</sup> The Court found that the cruise line was likely to succeed on its First Amendment claim against the statute since it did not, in its view, “materially advance a substantial government interest.”<sup>599</sup> The Court also concluded that the cruise line would likely succeed on its Dormant Commerce Clause claim, noting that the statute places a burden on interstate commerce.<sup>600</sup> The Court specifically remarked:

[a]mid myriad, rapidly-changing requirements regarding quarantining and testing, there is one constant that facilitates cruise line customers’ access to advertised ports of call: documentary proof of vaccination will expedite passengers’ entry into virtually every single country and port where Plaintiffs intend to sail. On the other hand, without documentary proof of vaccination, protocols vary so markedly – and change so frequently, especially as the Delta Variant becomes more widespread – to make it not

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<sup>591</sup> FLA. STAT. § 381.00316 (2022).

<sup>592</sup> Tom Hudson, *The cruise line boss who is challenging Florida’s vaccine passport ban*, NPR (Nov. 8, 2021), <https://www.npr.org/templates/story/story.php?storyId=1053568968&ft=nprml&f=1053568968>.

<sup>593</sup> *Id.*

<sup>594</sup> Chris Isidore, *supra* note 588.

<sup>595</sup> Morgan Hines, *supra* note 589.

<sup>596</sup> Fla. Exec. Order No. 21-81 (Apr. 2, 2021).

<sup>597</sup> FLA. STAT. § 381.00316 (2022).

<sup>598</sup> *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143, 1148 (S.D. Fla. 2021).

<sup>599</sup> *Id.* at 1169.

<sup>600</sup> *Id.* at 1176.

only impractical, but also financially, legally, and logistically onerous for cruise lines like NCLH to comply.<sup>601</sup>

The Court concluded that the cruise line would suffer irreparable injury, agreeing with the cruise line's arguments that they would suffer loss, trust, and goodwill from being unable to enforce its vaccination policy.<sup>602</sup> The Court also agreed with the cruise line's arguments that they would suffer monetary damages if they dropped the vaccination requirement, damages the Court mentioned could not be recovered against the State due to sovereign immunity.<sup>603</sup>

The case of the cruise line industry and its response to the COVID-19 pandemic illustrates that private enterprise is well-situated to strike the "Grand Balance" between economic and personal freedom and remedial measures to suppress the pandemic.<sup>604</sup> One of the main purposes of Medical Martial Law is to suppress the pandemic, and the example of the cruise line industry exemplifies that there is not a complete tradeoff between the values of economic freedom and pandemic suppression.<sup>605</sup> Instead, private enterprise initiation both furthers the goal of Medical Martial Law to suppress the pandemic and lower the number of cases, but yet also furthers the interests of businesses to stay operational, safe, and profitable.

## VII. CONCLUSION

The COVID-19 pandemic is one of the most tragic events in recent American history. At this writing, nearly one million Americans have perished from the virus.<sup>606</sup> But one undeniable truth is that the manner in which the pandemic has been managed by federal, state, and local governments has been consistently inconsistent, uncoordinated, and generally ineffective.<sup>607</sup> Our governments have handled other catastrophic

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<sup>601</sup> *Id.* at 1174.

<sup>602</sup> *Id.* at 1178.

<sup>603</sup> *Id.* at 1179.

<sup>604</sup> *Rivkees*, 553 F. Supp. 3d at 1156.

<sup>605</sup> *Id.* at 1180.

<sup>606</sup> Sergio Hernandez et al., *Tracking COVID-19 cases in the US*, CNN (Oct. 13, 2022), <https://www.cnn.com/interactive/2020/health/coronavirus-us-maps-and-cases/#>.

<sup>607</sup> Although our research focuses on the actions of governments and businesses during the pandemic, the personal behavior of the American people has undeniably had an effect on the outcome of the pandemic's successes and failures too. Nearly every day the popular press reports incidents in which many Americans fail to use masks and socially distance for a variety of personal or political reasons. More research will undoubtedly be forthcoming on this important subject. One direction may to examine the role the individualistic nature of Americans has played out during the pandemic. A recent Time Magazine article reported a "2011 Pew survey found that 58% of Americans said that 'freedom to pursue life's goals without interference from the state' is more important than the state guaranteeing 'nobody is in need,' compared to just 38% of Britons, 36% of Germans and the French, and 30% of Spaniards. It's easy to view that trait as a root cause of the country's struggles with

events for decades, ranging from deep economic depressions and recessions, hurricanes and floods, world wars, and a previous pandemic a century ago.<sup>608</sup> However, governments in the United States appeared to be unprepared and incompetent<sup>609</sup> to address the COVID-19 pandemic, with only a few isolated examples to the contrary.<sup>610</sup> This is in contrast to other democratic governments around the world, from South Korea to New Zealand, which more skillfully handled the pandemic with much fewer outbreaks and deaths in actual and relative terms.<sup>611</sup> Predictably, authoritarian regimes exercising strong central control and lockdown enforcement have seen some notable successes as well during the COVID-19 pandemic.<sup>612</sup>

This article attempts to accomplish a number of goals. To offer some useful policy and legal analysis that will serve to better understand and manage the present and future pandemics, events that scientists feel are inevitable as climate change, deforestation, and greater interaction with animals cause future even more dangerous and aggressive zoonotic diseases than COVID-19.

More specifically, we first attempt to present, categorize, and critique the relevant state and federal laws and doctrines, including important Constitutional provisions that have a potential role in how our various levels of government may mobilize under the rubric of Medical Martial Law to better manage and control pandemic injury while not trammeling on important Constitutional rights. We also attempt to synthesize the valuable research cited here that produces knowledge from other disciplines, such as political science, and political and economic geography, to create improved

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COVID-19. After all, a pandemic requires individuals to make temporary sacrifices for the collective good, whether it's wearing a mask they find uncomfortable or canceling a planned birthday party." Alex Fitzpatrick, *Why the U.S. Is Losing the War on COVID-19*, TIME (Aug. 13, 2020), <https://time.com/5879086/us-covid-19/>.

<sup>608</sup> Sonali Deraniyagala, *Economic Recovery after Natural Disasters*, UN (May 2016), <https://www.un.org/en/chronicle/article/economic-recovery-after-natural-disasters>.

<sup>609</sup> Observers have singled out a number of early mistakes including a slow response to the serious nature of COVID-19, overhyped treatments, lack of PPE production and supply, testing shortcomings, and inefficiency in economic aid. See Anthony Zurcher, *Coronavirus response: Things the U.S. has got right—and got wrong*, BBC NEWS (May 13, 2020), <https://www.bbc.com/news/world-us-canada-52579200>.

<sup>610</sup> Some of the early examples of responses that have been positive include a flattening of the curve in a number of places, a ventilator surplus, expanding hospital capacity in a few hard hit places and the beginnings of trials for new vaccines and treatments. *Id.*

<sup>611</sup> According to the World Health Organization's COVID-19 Dashboard, as of November 15, 2020, the U.S. was first in the world with 10.7 million confirmed cases over second place India by about 2 million cases and first in deaths with over 243,000 over second place Brazil at over 165,000. On the other hand, South Korea at this same date had just over 28,000 confirmed cases and just under 500 deaths, while New Zealand has suffered only about 1,600 confirmed cases and 25 deaths. See *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last visited Nov. 15, 2020).

<sup>612</sup> See e.g., Stephen Thomson & Eric C. Ip, *COVID-19 Emergency Measures and the Impending Authoritarian Pandemic*, 4 J. L. & BIOSCIENCES 1 (2020).

efficiencies spatially. One of our contributions is to propose the creation of *Special Quarantine Districts* to manage the cross-border spread of disease. We feel this to be a reasonable proposition since a COVID-19-like virus does not respect and obey man-made boundaries drawn in some cases over two centuries ago. This becomes necessary since states vary meaningfully in their politics and laws, which, in turn, have caused palpable harm to neighboring states during the present pandemic.<sup>613</sup>

Some may view the response to the pandemic as having to choose between one of two goals—to either maximize personal liberty, freedom, and businesses being able to operate completely normal during a pandemic or the goal of suppressing the pandemic through the closure of businesses and the implementation of remedial measures through government action. But these goals may not necessarily be mutually exclusive. Private enterprise initiation in implementing remedial measures to the pandemic offers a “Grand Balance” between all these goals and, at the same time, allows businesses to stay operational. Both Republican<sup>614</sup> and Democratic<sup>615</sup> leaders have espoused the belief that small businesses are a key to the American economy, and it is those same small businesses, and larger companies as well, that hold the future of taking leadership to operate in a way to mitigate pandemics. The failure to address and manage our existing and possibly future pandemics properly and efficiently is simply not an option. An American society that wishes to continue to be prosperous and free in the future must have legal institutions and policies that work. All constituencies of business and all levels of government ignorant of Medical Martial Law authorities are exhorted to “skill up” in this area and reform the current discredited system. If this does not occur, the possible consequences will be dire and unprecedented for both public health and the national economy.

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<sup>613</sup> *The territorial impact of COVID-19: Managing the crisis across levels of government*, *supra* note 7.

<sup>614</sup> Linda McMahon, *Small businesses are the heart of our communities*, U.S. SMALL BUS. ADMIN. (Feb. 14, 2018), <https://www.sba.gov/blog/small-businesses-are-heart-our-communities>.

<sup>615</sup> Katelyn Sabochik, “*Small Businesses Are the Backbone of Our Economy and the Cornerstones of Our Communities*”, THE WHITE HOUSE, PRESIDENT BARACK OBAMA (Aug. 17, 2010, 6:02 PM), <https://obamawhitehouse.archives.gov/blog/2010/08/17/small-businesses-are-backbone-our-economy-and-cornerstones-our-communities> (quoting President Barack Obama, who remarked that small businesses “are the backbone of our economy and the cornerstones of our communities”).

