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Common Sense or Sensibility: Vaccine Hesitancy, *Parens Patriae*, and the Common Good

George P. Smith, II*

“Dr. Fauci, when is the time? In your written statement you say now is not the time to pull back on masking, physical distancing, and avoiding congregant settings. When do Americans get their freedom back?”¹

Introduction

On March 11, 2020, Dr. Tedros Adhanom Ghebreyesus, Director-General of the World Health Organization of the United Nations, declared that the outbreak of a novel coronavirus respiratory disease derived from SARS-CoV-2 and classified as Coronavirus Disease 2019 (COVID-19) had become a pandemic.² Two days later, on March 13th, President Donald J. Trump declared that this disease had become a national health emergency.³ In subsequent hearings conducted by the U.S. House of Representatives

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¹ Philip Bump, *Fauci Becomes the Potential Scapegoat Trump Always Wanted Him to Be*, WASH. POST. (Apr. 6, 2021, 12:23 PM), <https://www.washingtonpost.com/politics/2021/04/16/fauci-becomes-political-scapegoat-trump-always-wanted-him-be/>. Reporting on the U.S. House of Representatives Subcommittee on The Coronavirus of the House Committee on Oversight and Reform and quoting Representative Jim Jordan (R) Ohio, in his questioning of Dr. Anthony Fauci before the Subcommittee on April 15, 2021. *Id.* See generally, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY, Oxford Univ. Press (2006) [hereinafter POSNER, NOT A SUICIDE PACT].

² See Helen Branswell & Andrew Joseph, *WHO Declares the Coronavirus Outbreak a Pandemic*, STAT (Mar. 11, 2020), <https://www.statnews.com/202/03/11/who-declares-the-coronavirus-outbreak-a-pandemic>.

³ See Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020). Prior to President Trump’s Declaration, two significant federal actions were taken: a Declaration by the Secretary of Health and Human Services (DHHS) on January 31, 2020 that a public health emergency existed because of the outbreak of a novel respiratory coronavirus disease; the authorization for emergency use (Emergency Use Authorization) of vaccines classified as SARS-CoV-2, referred to later as COVID-19; and a guidance to the pharmaceutical industry for vaccine production and use issued on Feb. 22, 2020, by the DHS, Food and Drug Administration, and Center for Biologics Evaluation and Research. *Id.* See Joseph Clark, *Biden Extends Covid 19 Emergency Public Health Through Jan. 18, 2023*, WASH. TIMES (Oct. 14, 2022). President Joseph Biden declared that the pandemic had ended in October 2022 but revised himself on October 14, 2022, by extending the national corona virus emergency through January 18, 2023. *Id.* See U.S. FOOD & DRUG ADMIN., FDA-2020-D-1137, EMERGENCY USE AUTHORIZATION FOR VACCINES TO PREVENT COVID-19, GUIDANCE FOR INDUSTRY (2020). See also, Process for Making Available Guidance Documents Related to Coronavirus Disease 2019, 85 Fed. Reg. 16949 (Mar. 25, 2020).

Subcommittee on The Coronavirus in April, 2021, the ranking minority member of this Subcommittee, Congressman Jim Jordan (R) Ohio, framed the central issue before the Subcommittee as being the extent to which personal liberties and freedoms would be compromised as a result of this national emergency.⁴ This too is the fundamental issue that this Article investigates.⁵ From the analysis, the conclusion drawn is that when executive, legislative, or regulatory actions taken during national emergencies to safeguard the common good are challenged as abridgements to the Constitution, the courts must test their efficacy or reasonableness by use of a cost-benefit analysis test to determine whether such conduct is unreasonable under present circumstances.⁶ The ineluctable presumption, if not conclusion, is that state conduct that seeks to secure the common good—such as to safeguard public health—is constitutional.⁷ “The attainment and guarantee of this good, grounded in common sense, must always be preferred over an abridgement or temporary suspension of civil liberties.”⁸

The extent to which personal, fundamental freedoms are abridged in order to safeguard the common good has presented a historic quandary.⁹ Beginning in 1794, with President George Washington’s issuance of the very first proclamation of national emergency in an effort to quell rebellious activity among the citizenry of North Carolina and South Carolina, as well as among those of Pennsylvania and Virginia over efforts to collect a federal excise tax on whiskey.¹⁰ Whenever “emergencies” threaten the advancement of the public good, presidential action is recognized as justified.¹¹ Often, finding a bright line between normalcy and emergency is difficult because, in truth, there are no normative standards for determining chaos.¹² Thus, the extent of presidential power and its justification is today the subject of considerable debate¹³ and decided largely

⁴ Bump, *supra* note 1. Larry Cosme, the President of the Federal Law Enforcement Officers Association, refined the issue by observing that, “[f]orcing people to undertake a medical procedure is not the American way and is a clear civil rights violation no matter how proponents may seek to justify it.” See Michael D. Shear et al., *Biden Seeks to Revive Vaccine Effort with New Rules and Incentives*, N.Y. TIMES, <https://www.nytimes.com/2021/07/29/us/politics/biden-vaccine-mandates.html> (Sep. 9, 2021).

⁵ See *id.*

⁶ See POSNER, NOT A SUICIDE PACT, *supra* note 1; George P. Smith, II, Re-Shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage, 18 ANNALS HEALTH L. 1, 32-34 (2009).

⁷ See POSNER, NOT A SUICIDE PACT, *supra* note 1.

⁸ Smith, *supra* note 6 at 34. See Adrian Vermeule, *Posner on Security and Liberty: Alliance to End Repression v. City of Chicago*, 120 HARV. L. REV. 1251 (2007). See generally, POSNER, RISK AND RESPONSE, *supra* note 1.

⁹ See generally, POSNER, RISK AND RESPONSE, *supra* note 1.

¹⁰ L. Elaine Halchin, Cong. Rsch. Serv., 98-505, NATIONAL EMERGENCY POWERS 4 (2021).

¹¹ See *id.* For comprehensive statistical tables listing the times and circumstances under which Presidential Emergency Declaration were issued and remained in effect from 1979 through 2019. See *id.* at 12-17. See generally George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 NEW ENG. J. MED. 1337 (2002). See generally Wendy E. Parnet, *What is a Public ‘Emergency’*, 371 New. Eng. J. Med., 986 (2014).

¹² Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L. J. 1011, 1022 (2003) n. 467 (quoting Carl Schmidt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans. MIT Press 1985)(1933)).

¹³ See L. Elaine Halchin, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 2 (2021). See also Joshua L. Friedman, *Emergency Powers of the Executive: The President’s Authority When All Hell Breaks Loose*, 25 J. L. & HEALTH 265 (2012).

on the personal conception of each President as to the powers of his office.¹⁴ Mounting congressional concerns over the limits of these national emergency powers by the President and the extent to which congressional consultation was mandated culminated in 1976 with the passage of the National Emergencies Act.¹⁵ This legislation was an effort to “formalize” the spheres of power open to the President and the corresponding “checks and balances” on the exercises of that power during national states of emergency.¹⁶ This legislation is notable for its failure to codify both a definition “for, or requirements of,” national emergencies.¹⁷ Three other fundamental statutes have been enacted as efforts to clarify the constitutional boundaries of presidential powers.¹⁸

I. Defining the Common Good

Safeguarding the “public welfare” or common good, is central to the noble ideal of the Founding Fathers in the commencement and maintenance of a “more perfect Union.”¹⁹ Indeed, the Preamble to the United States Constitution codifies the steps

¹⁴ See Albert L. Sturm, *Emergencies and The Presidency*, 11 J. POLITICS 121, 125-126 (1949); Posner, *supra* note 1. About half of the states have codified the power to declare a public health emergency. Lainie Rukow, *An Analysis of State Public Health Emergency Declarations*, 104 AM. J. HEALTH 1601, 1605 (2014).

¹⁵ 10 U.S.C. § 2808 (1976) (as amended).

¹⁶ Sturm, *supra* note 14.

¹⁷ *Id.*

¹⁸ See Public Health Service Act, 42 U.S.C. § 247D (1944) (as amended); Defense Production Act, 50 U.S.C. § 4501 (1950) (as amended); Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 *et seq.* (1974) (as amended). See also *Selected Fed. Legal Auth. Pertinent to Pub. Health Emergencies*, PUB. HEALTH LAW PROGRAM, CENTER FOR DISEASE CONTROL AND PREVENTION (Aug. 2017) (listing other pertinent federal laws and authorities which assist in managing national emergencies) <https://www.cdc.gov/phlp/docs/ph-emergencies.pdf>. At the state level, two model laws have been developed and now serve as catalysts for law reform to standardize the reporting and surveillance system of infectious disease. *The Model State Emergency Health Powers Act, MSEHPA*, THE CTR. FOR LAW AND THE PUB. HEALTH AT THE GEO. UNIV. LAW SCHOOL AND JOHN HOPKINS UNIV. (Dec. 21, 2001), https://www.jhsph.edu/research/centers-and-institutes/center-for-law-and-the-public-health/model_laws/MSEHPA.pdf; *The Model State Public Health Act, Turning Point Model State Public Health Act*, THE TURNING POINT PUBLIC HEALTH STATUTE MODERNIZATION COLLABORATIVE, (Aug. 2003), [HTTPS://LAW.ASU.EDU/SITES/DEFAULT/FILES/PDF/TURNING-POINT-MODEL-ACT](https://LAW.ASU.EDU/SITES/DEFAULT/FILES/PDF/TURNING-POINT-MODEL-ACT). Provisions within each of these models are directed toward striking a balance between safeguarding the common good and preserving the liberties and rights of citizenship as well as laying out plans for distributing vaccines and anti-viral medications. Smith, *supra* note 6, at 29-33 (comparing in detail the differences between these two legislative models). By August 1, 2022, forty states have incorporated a version of the MSEHPA into their laws. Joseph Mishel, *The Model State Emergency Health Powers Act: Balancing Public Safety and Civil Liberties*, *Student Works*, SETON HALL 1, 6 (2019), [https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2019&context=student_scholarship](https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2019&context=student_scholarship;); Matthew Foley, *The Turning Point Model State Public Health Law Versus Civil Liberties*, JAMA. OF ETHICS (Sep. 2010), <https://journalofethics.ama-assn.org/article/turning-point-model-state-public-health-act-emergency-public-health-law-versus-civil-liberties/2010-09>.

¹⁹ U.S. CONST. pmb1.

necessary “to form a more perfect Union”²⁰ with the promotion of the general welfare being the foundational goal of writing and ratifying the Constitution.²¹

It was the ancient Greek philosopher, Zeno of Citium, who founded the philosophical school of thought Stoicism.²² Within the seedlings of this philosophy came the notion that empowerment through living cooperatively as a “member of a commonwealth” was the way to attain “a good life.”²³ Contributing to the common good, then, is an integral component—or empowerment—to advancing a “common humanity.”²⁴

A. Greco-Roman Antecedents

In history, both the Greek and Roman philosophers define—and thus shape—the notion of a common good.²⁵ For Plato, individuals attain “happiness (a private good) through the pursuit of justice (a public good)” with an absence of any tension between the two efforts.²⁶ The city-state or polis is seen, then, as existing for the sole purpose of supporting “a good life.”²⁷ Thus, by contributing “to the good of the community,” individuals are able to “lead a good life.”²⁸ Cicero, the Roman philosopher, recognizes that when people assemble in large numbers, thereby forming a republic, and are “in agreement with respect to justice,” they form a “partnership for the common good.”²⁹

²⁰ *Id.*

²¹ *See id.* The Constitution was signed September 17, 1787 and ratified June 21, 1788. See also Michael S. Paulsen et al., *THE CONSTITUTION OF THE UNITED STATES*, (3d ed. 2017).

²² *See* Nancy Sherman, *What Pop Stoicism Misses About Philosophy*, N.Y. TIMES (May 14, 2021), <https://www.nytimes.com/2021/05/14/opinion/stoics-self-help.html>; *see also* Nancy Sherman, *Stoic Wisdom: Ancient Lessons for Modern Resilience*, Oxford Univ. Press (2021).

²³ *Id.*

²⁴ *Id.* *See* V. Bradley Lewis, *The Common Good in Classical Political Policy*, CURRENT ISSUES IN CATH. HIGHER EDUC., 25-27 (2006); *see also* Gary Lawson, Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis, 87 B.U.L. REV. 289, 307 (2007).

²⁵ *See* Amitai Etzioni, THE COMMON GOOD, THE ENCYCLOPEDIA OF POL. THOUGHT, MICHAEL T. GIBBONS (2015) at 1.

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.*

²⁹ ETZIONI *supra* note 25.

B. Philosophical Underpinnings

Numerous efforts to reach a philosophical consensus for defining the common good have been made over the years.³⁰ Jacques Maritain defines the common good as “the good life of the multitude,”³¹ while Jeremy Bentham’s definition discusses its fundamental inextricability with the attainment of the greatest happiness “for the greatest number.”³² For Hegel, the common good derives from the norms and values of ethical life in a given society³³ and is furthermore drawn from “the worthwhileness of social cooperation.”³⁴ Hegel’s political philosophy derives from Plato’s position that the citizen’s personal aim is to support “the good of the whole.”³⁵ For Hegel, “the shared values of the common good” are removed from individual judgment.³⁶ Yet, a coherence between the individual and the community is sought because one’s full development as a social being is “bound up with the determination of the common good.”³⁷ In endeavoring to discern what is encompassed by the ideal of the common good, it has been suggested that the best barometer here is perhaps to understand simply that common sense is decisive.³⁸ In political science, the “common good” references faculties—cultural, institutional or material—which are provided by members of a community to everyone in the community so that a “relational obligation” that they have to care for all individuals who have certain shared interests is met.³⁹

C. The Constitution and Common Good Originalism

A new school of interpretative constitutional jurisprudence termed “Common Good Originalism” sees the Preamble to the U.S. Constitution as setting forth “the Nation’s enduring intergenerational compact,”⁴⁰ which, in turn, infuses “with meaning, statutes rules and regulations.”⁴¹ The Preamble, then, serves as the fundamental guideline

³⁰ See Glen N. Schram, *Pluralism and The Common Good*, 36 AM. J. JURIS. 119, 119 (2009); see also Daniel P. Sulmasy, *Four Basic Notions of the Common Good*, 75 ST. JOHN’S L. REV. 303, 307 (2009).

³¹ See Schram, *supra* note 30.

³² A. S. Watson, *Hegel, Utilitarianism and the Common Good*, 93 ETHICS 753 at 766 (1983).

³³ *Id.* at 776.

³⁴ *Id.* at 760-66.

³⁵ *Id.*

³⁶ *Id.* at 763.

³⁷ A. S. Watson, *Hegel, Utilitarianism and the Common Good*, 93 ETHICS 753, 767-70 (1983). See Jeffrey Church, *G.W.F. Hegel, Self-Determination and Democratic Theory*, 56 AM. J. POL. SCIENCE 102, 1034-35 (2021). While Hegel is committed to collective self-determination and to individual autonomy as well, he is not in support of what might be termed deliberative or participatory democracy and, rather, finds an “interdependency between individuals and state subjectivities.” *Id.* See Watson, *supra* note 32 at 770; see generally Donelson R. Forsyth & Crystal L. Hoyt, *For the Greater Good of All*, PALGRAVE MACMILLAN (2011).

³⁸ See Lewis, *supra* note 24; Lawson, *supra* note 24.

³⁹ HUSSAIN WAHEED, *The Common Good*, STANFORD ENCYCLOPEDIA OF PHIL. (Spring 2018).

⁴⁰ Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J. L. & PUB. POLY 917, 955 (2021).

⁴¹ *Id.*

for testing the limits of the common good.⁴² The Preamble to the Constitution sets seven aims which define the essence of the common good.⁴³ These constitutional aims are specifically: to establish a more perfect union and to establish justice; insure domestic tranquility; provide a common defense and safeguard the general welfare of the Nation; and, finally, secure the blessings of liberty which are necessary for prosperity.⁴⁴ Thus, under this common good principle, any assertion of private rights is overridden by the broad state power to protect the weak “from pandemics and scourges of many kinds.”⁴⁵ Individual “selfish claims” (e.g., a right not to be vaccinated) that seek to advance “the good of their class or milieu” are not recognized as superior to the preservation of the common good.⁴⁶ Seeking a resolution of this issue is tied, inextricably, to an understanding that “the Constitution is not suspended in times of crisis. We must therefore be vigilant to ensure its protections are preserved at the same time that the public is protected.”⁴⁷ Establishing a point of equilibrium between these two vectors of force will present a challenge—namely, attempting to reconcile libertarian principle with utilitarian thought.⁴⁸

At the core of libertarianism is a notion that a “pre-defined set of individual rights” must always be vindicated when the law challenges those rights.⁴⁹ Utilitarianism seeks to advance the ideal that resolutions to conflicts are best achieved if they meet a

⁴² *Id.* at 932-35. *But see* Garrett Epps, *Common-Good Constitutionalism Is An Idea As Dangerous As They Come*, THE ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/theatlantic> (warning that common good originalism acts to defy logical textual interpretation and liberal social policy).

⁴³ Hammer, *supra* note 40, at 927-28 “There are seven enumerated ends of government . . . each and every one of those seven mentioned aims represents the government’s view of desperation of the common good of the nation as a whole.” *Id.*

⁴⁴ *Id.*

⁴⁵ Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>. *But see* David B. Rivkin Jr. & Andrew M. Grossman, *The Temptation of the Common Good*, WALL ST. J.: WSJ | OP. (July 23, 2021, 1:58 PM), <https://www.wsj.com/articles/supreme-court-conservative-liberal-originalist-vermeule-11627046671>. To what extent does “common good” jurisprudence seek to find and justify “moral principles that conduce to the common good,” and the duty imposed upon judges “to test the underlying moral justification for why a law exists as determinative in each case”? *Id.*

⁴⁶ Vermeule, *supra* note 45.

⁴⁷ Katie Pavlich, *Pavlich: The Democrats next “public health” power grab is coming*, THE HILL (Mar. 31, 2021, 8:15 AM), <https://thehill.com/opinion/healthcare/545656-pavlich-the-democrats-next-public-health-power-grab-is-coming/> (quoting former U.S. Attorney General William Barr).

⁴⁸ J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1775-76 (2021). Present disagreement in constitutional theory over the true purpose of originalism or of non-originalism, when pared down, reveals that this debate is about “the relationship between the individual and society and the limits of human reason It is fundamentally a debate about liberalism.” *Id.* See generally RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD (1998).

⁴⁹ Alison H. Eid, *Epistemic Torts: Richard A. Epstein*, *Cases and Materials on Torts*, 25 SEATTLE U. L. REV. 89, 91 (2001) (book review).

standard of social utility.⁵⁰ Utilitarians are recognized as consequentialists.⁵¹ Put simply, libertarians ignore consequences and utilitarians assert that only consequences matter.⁵² Failing to recognize the fact that, taken in isolation, virtually all laws “harm” to some degree a minority population foredooms any attempt to seek a marriage between libertarianism and utilitarianism.⁵³

II. The Provenance and The Application of *Parens Patriae*: An Open-Ended Principle?

Parens Patriae—seen alternatively as doctrine, principle, power, jurisdiction, concept or ideology—originated in Roman Law, specifically from the title given to the emperor as the pater patriae or “father of the state.”⁵⁴ At the conclusion of the Norman Conquest in 1075, this power, and indeed, responsibility was assumed by the British Crown and carried with a prerogative to care and protect children, the infirm, and the elderly.⁵⁵ The Crown delegated this mandate to the Courts of Chancery, commonly referred to as Equity.⁵⁶ This operational theory is designated as the “Sovereignty Transference Theory.”⁵⁷ The opposing theory is termed “The Universal Sovereignty Theory.”⁵⁸ This theory holds to the notion that, since the Statute of Elizabeth in 1601 and the British Bill of Rights in 1689, the Crown’s royal prerogatives came under the power of Parliament.⁵⁹ Consequently, during the period of the American Revolution, there were no prerogatives to transfer to a new body of American jurisprudence.⁶⁰ The *parens patriae* power then flows, necessarily, from universal principles of sovereignty, which today are an inherent power of the state.⁶¹ These powers are integrated into the American system of democracy through state police powers, which are seen as a reserved power of the states, limited by

⁵⁰ *Id.* at 92.

⁵¹ *See id.* at 92.

⁵² *See id.* at 93.

⁵³ *See* Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA L. REV. 1091, 1114-16 (2006). The way to resolve this issue is to enact less harmful laws. *Id.* *See* RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 246, Harv. Univ. Press (1990). Any attempt at marriage between libertarians and utilitarians is an uneasy one. *Id.*

⁵⁴ *See* ANN MCGILLIVRAY ET AL., *MULTIPLE LENSES, MULTIPLE IMAGES: PERSPECTIVES ON THE CHILD ACCESS, TIME, SPACE AND DISCIPLINES*, Univ. of Toronto Press (2004). *See generally* Jack Ratliff, *Parens Patriae: An Overview*, 74 Tul. L. Rev. 1847 (2000).

⁵⁵ *See* MCGILLIVRAY ET AL., *supra* note 54. *See generally* Ratliff, *supra* note 54. *See generally* MARC MORRIS, *THE NORMAN CONQUEST*, Pegasus Books (2012).

⁵⁶ *See* MCGILLIVRAY ET AL., *supra* note 54. *See* Margaret S. Thomas, *Parens Patriae and The States’ Historic Police Powers*, 69 SMU L. REV. 759, 769 (2016); WILLIAM Q. DEFUNIAK, *HANDBOOK ON MODERN EQUITY* 124, Little Publishing (1956). Today, equity is understood properly as signifying “natural justice or what is right and just as between man and man” *Id.* *See generally*, George B. Evans, *The Origin of English Equity*, 16 Colum. L. Rev. 96 (1916).

⁵⁷ *See* Thomas, *supra* 56.

⁵⁸ *See id.* at 780.

⁵⁹ *See id.* at 773-76. *See also* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1690). It remained for John Locke in 1690 to put forward a conflicting theory of prerogative power which gave the executive branch of government a discretionary power to promote and maintain public good “without prescription of law.” *Id.*

⁶⁰ *See* Thomas, *supra* note 56 at 730 and 774 *passim*.

⁶¹ *See id.* at 807-09.

the Supremacy Clause of the U.S. Constitution, which directs that in matters delegated by the Constitution to the federal-government, federal action is pre-eminent.⁶²

A. Historical Devolution

While the historical devolution of *parens patriae* is significant in understanding fully its genesis, modern scope, and application, historical antecedents are no longer determinative.⁶³ By the beginning of the 20th century *parens patriae* became *sui generis* and is accepted as “a quasi-sovereign right implied by the constitutional structure” of American federalism.⁶⁴ Today, *parens patriae* operates largely unfettered and, as a judicial construct, is applicable to “anything the courts decide worth protecting.”⁶⁵ There are, however, certain areas where *parens patriae* actions are becoming more commonplace: in Anti-Trust, Civil Rights, Consumer Protection and Environmental Protection, as well as Lead Paint, Health Maintenance and Tobacco.⁶⁶ Typically, when *parens patriae* actions are initiated, a state attorney general asserts a guardianship role to protect an exclusive state interest and/or the citizenry from harm.⁶⁷

B. Shaping the Course of Police Powers

1. John Locke, Executive Power and Safeguarding the Common Good

When used “appropriately,” John Locke argues that any exercise of prerogative power by the executive “is legitimate *per se* and *ex ante*”—since the public gives implicit acquiescence to any and all such exercises of power.⁶⁸ Accordingly, these exercises of executive action are given every “benefit of the doubt.”⁶⁹ The test of the legitimacy of any power is, then, “a functional one.”⁷⁰ Namely, determining whether the exercise of power “was directed at promoting the public good.”⁷¹ Notably, Locke’s theory calls for “a substantial degree of trust in government and particularly in times of emergency.”⁷²

Indeed, once acceptance is given to the understanding that extreme governmental actions taken to contain or manage an emergency crisis may be legal—so long as they are taken to advance the public good—it follows that no constitutional or legal limitations may be placed on that governmental exercise of power to advance the public good.⁷³

⁶² See *id.* at 765, 809 *passim*; Jorge E. Galva et. al., *Public Health Supremacy and The Police Power of the State*, 120 PUB. HEALTH REP. 20 (2005).

⁶³ See Thomas, *supra* note 56 at 791.

⁶⁴ See *id.* at 761, 765, 809-10.

⁶⁵ *Id.* at 797.

⁶⁶ Thomas, *supra* note 56, at 764-65, 796, 809. See also Ratliff, *supra* note 54, at 1847.

⁶⁷ Thomas, *supra* note 56, at 762. See George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895 (1976).

⁶⁸ Gross, *supra* note 12 at 1102-03.

⁶⁹ *Id.* at 1103.

⁷⁰ *Id.* at 1102.

⁷¹ *Id.*

⁷² Gross, *supra* note 12 at 1104.

⁷³ *Id.* at 1117. If actions taken under the police powers contribute to the welfare of the common good they will be adjudged reasonable. Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004).

Furthermore, once these powers are acknowledged as being terminated, a return to normalcy without marring the ordinary legal system should follow.⁷⁴

2. *Sic Utere and Salus Publicum: Enduring Applications*

For the greater part of the 19th century, many lawyers held the belief that the power of the state to safeguard the common good derived from the police power and were, essentially, Common Law doctrines of *Sic utere tuo ut alienum non laedas*⁷⁵ and *Salus populi est suprema lex*.⁷⁶ Accordingly, when public health issues arose, their settlement was tied, invariably, to a judicial assessment of the degree to which the Common Law mandated judicial deference to public health actions or policies and, more particularly, the extent to which “nuisance-like threats” justified the action undertaken by a public health authority.⁷⁷

The notion of police power was afforded “doctrinal” status by the early American colonists and was rooted in principles embodied in the English Common Law that established that securing the common good was pre-eminent even if private rights were compromised.⁷⁸ These two guiding principles of the Common Law give a foundational validation to this view of regarding the power of the state to act on behalf of sustaining the public good as controlling.⁷⁹ Under *Sic utere*, the state is empowered to restrict private use of property in order to prevent injury to others.⁸⁰ While *Salus publica* allows wide use of state police powers granted by state legislatures so long as those powers are exercised to preserve either a recognized constitutionally protected right or to seek to maintain “the principles of representative government.”⁸¹

In an effort to clarify the spirit and intent of the Common Law, states enacted statutes which specified the nature of the authority of public health officers to determine, conclusively, when unhealthy conditions were such nuisances.⁸² At this juncture in American history, the powers of local governments and of health administrators were

⁷⁴ Gross, *supra* note 12, at 1133.

⁷⁵ George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 680 (1995). Translated, this principle or doctrinal statement directs uses of private property be undertaken so as not to injure others. *Id.*

⁷⁶ Lawrence O. Gostin et al., *The Law and The Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 103 (1999). Translated, this principle states, “a public well-being is the supreme law of the land.” *Id.* at 78. See WILLIAM J. NOVAK, SALUS POPULI: THE ROOTS OF REGULATION IN AMERICA, 1787-1873, (1992 (Ph.D. dissertation, Brandeis University) (ProQuest).

⁷⁷ See Gostin et al., *supra* note 76 at 104.

⁷⁸ See Galva, et. al., *supra* note 62, at 20. “The doctrine of state ‘police power’ was adopted in early colonial America from firmly established English common law principles mandating the limitation of private rights when needed for the preservation of the common good.” *Id.*

⁷⁹ See Smith, *supra* note 75. See also, Novak, *supra* note 76.

⁸⁰ See Smith, *supra* note 75.

⁸¹ Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST’L L. Q. 511 (2000). See Gostin et al., *supra* note 76 at 103. See also Novak, *supra* note 76.

See Reynolds & Kopel, *supra* note 81. See also Galva et. al., *supra* note 62.

⁸² See Gostin et al., *supra* note 76 at 104.

stated broadly.⁸³ Those broad powers were essentially validated by courts' continued use of the doctrine of *Sic utere* as the test of equally broad police powers.⁸⁴ The implied scope of police powers evolved over time to preserve and protect "the public health, morals, or safety" together with "the general well-being of the community"; to enact and enforce laws essential to securing the general welfare; to control the exercise of "private rights in the public interest"; and, when necessary, to supervise those measures necessary to meet "all great public needs."⁸⁵

C. The Supremacy Clause and Pre-Emption

If there is a conflict among the federal government, the states, or both levels of government regarding the execution of state public health policy, under Article VI of the United States Constitution, which contains the Supremacy Clause, Congress has a power to either pre-empt or supersede public health regulation of states, regardless of whether a state "is acting squarely within its police powers."⁸⁶ The enumerated powers doctrine of the Constitution grants specific federal powers "to raise revenue for public health services, directly or indirectly private conduct endangering public health" as subsumed under the general power "to tax and spend and to regulate commerce."⁸⁷ There are, however, two specific powers reserved to states under the Tenth Amendment to the Constitution: the police power and the *parens patriae* power.⁸⁸ It remains that federalism, as ultimately interpreted by the courts, to determine which level of government—federal, state, or both—bear the responsibility for resolving public health issues.⁸⁹

1. What is Past is Prologue: *Jacobson v. Massachusetts*

As early as 1905 with the landmark case *Jacobson v. Massachusetts*, the United States Supreme Court through Justice John Marshall Harlan defined the scope and the legitimacy of state police powers and determined that state authorities have a "constitutional responsibility" to safeguard the "public good" as well as a co-ordinate responsibility not

⁸³ *Id.* at 105.

⁸⁴ See Reynolds & Kopel, *supra* note 81, at 516. In other words, when the use of property was "unreasonable" and caused harm or injury, it was deemed a violation of *Sic utere*. See *id.*

⁸⁵ Gostin et al., *supra* note 76 at 105-6. See also Barnett, *supra* note 73 at 472-76 (discussing the origins of the police powers doctrine).

⁸⁶ U.S. CONST. art. VI, § 2. Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint*, Univ of Cal. Press (2016), at 77.

⁸⁷ U.S. CONST. art. I § 1. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Dershowitz*, 312 U.S. 52, 67 (1940); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); GOSTIN & WILEY, *supra* note 86 at 77. The scope of federal pre-emption power is extensive and includes seven specific actions: express, implied, field, conflict, obstacle, fear, and ceiling pre-emptions. *Id.*

⁸⁸ GOSTIN & WILEY, *supra* note 86 at 77. See Santiago Legarre, *The Historical Background of the Police Power*, 9 J. CONST'L. 745 (2007).

⁸⁹ See GOSTIN & WILEY, *supra* note 86 at 77. Stated otherwise, "federalism limits the powers of the federal government while affording plenary powers to sovereign states." *Id.* at 79. See Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85 (2014). See also, James G. Hodge, Jr., *Implementing Modern Public Health Law Goals and Public Health*, 14 J. CONTEMP. HEALTH L. & POL'Y 93 (1997).

to unreasonably invade personal spheres of autonomy.⁹⁰ Although the Court was limited by jurisdiction and thus confined to a review of state administrative laws, this holding set, over time, the very contours of federalism and how courts respond when conflicts arise over the scope of state and federal administrative law.⁹¹

2. Shaping A New Constitutional Perspective: Beyond the Common Law

What has been termed “the constitutionalization of public health” was achieved at the end of the 19th century.⁹² Accordingly, the Common Law and its “necessity-based limits on the police power” was suspended by a new focus on “individual rights derived from the Fourteenth Amendment.”⁹³ The unambiguous direction of “the first generation of modern public health laws” was not on shaping policy and legal responses to future challenges to the use of police powers, but instead limited to present infractions.⁹⁴ Presently, no substantial limitation has been imposed by the United States Supreme Court on police powers to manage public health diseases.⁹⁵ Yet, when police powers are executed through state legislatures and municipal governments to benefit and safeguard public health and safety, secure the public welfare, and protect the morality of the citizenry, this legislation must have a rational basis for being enacted.⁹⁶ Furthermore, government actors must show that the challenged purpose and means for enforcement of the legislation are reasonably related to these broad police powers.⁹⁷

In today’s society, what were taken as traditional police powers are now being re-evaluated as to their scope and validity because of the growing recognition of individual rights which some view as conflicting with the scope of these powers.⁹⁸ The real concern or challenge is to find an equitable compromise between the valid exercise of the power to safeguard the common good and the preservation of constitutional freedoms.⁹⁹

⁹⁰ 197 U. S. 11, 35 (1905). The city of Cambridge, Massachusetts, followed empowerment by the state legislative to direct by ordinance – that all residents were to be vaccinated for smallpox. *Id.* The plaintiff refused to comply and was ordered to pay a fine of \$5.00 – that he refused to pay. *Id.* The Court determined that the local board of health did not abuse its authority in making determination that mandatory vaccinations were necessary in Cambridge and, furthermore, that the board did not arbitrarily nor unreasonably. *Id.*

⁹¹ See ALFRED C. AMAN, JR., & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW*, West Acad. (2014), chs. 1, 4, 7 & 12 at §§ 1.1-2-3; 7.2-3, 12.7 1-12.12.1.

⁹² Gostin et al., *supra* note 76, at 105.

⁹³ *Id.* at 105-06.

⁹⁴ *Id.* at 106.

⁹⁵ Edward P. Richards, *The Police Power and The Regulations of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 *ANNALS HEALTH L.* 201, 206 (1991).

⁹⁶ Jeffrey Rosen, *Class Litigation, Public Choice and the Structured Constitution*, 21 *HARV. J. L. & PUB. POL’Y* 181, 187 (1997).

⁹⁷ Reynolds & Kopel *supra* note 81 at 528. “The principle established by these cases is straightforward. State legislatures and local governments have a police power to enact laws for the benefit of public safety, health, welfare, and even morality. But those laws are subject to judicial review as to whether the legislation is reasonably related to those purposes.” *Id.* Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government*, Columbia Univ. Press (2005) at 180. “When the government’s emergency powers are invoked during a disaster, the inherent power to protect and safeguard the common good through exercise of the police powers, these powers are ‘free from principled constraint.’” *Id.*

⁹⁸ Galva et. al., *supra* note 62.

⁹⁹ *Id.*

III. Contemporary Politics and the Power to Require Vaccinations

Said to have been motivated in large part by the Trump White House calculations that an efficacious vaccine for COVID-19 would go far to “secure” President Trump’s re-election, the federal government committed to spending whatever amount of money necessary to eliminate “financial risks and bureaucratic road blocks” to producing a vaccine.¹⁰⁰ To that end, Moderna, a pharmaceutical and biotechnology company, received nearly \$2.5 billion dollars to develop, test with clinical trials, and then subsequently manufacture and sell to the federal government 100 million doses of an efficacious vaccine to combat the COVID-19 pathogen.¹⁰¹ On the contrary, Pfizer, another biopharmaceutical company, chose to keep an arm’s length relationship with the federal government in the scientific investigations and thus declined monies for research and testing.¹⁰² Chosen by the federal government from among six candidates, Moderna and Pfizer were the two principal drug makers to produce a COVID-19 vaccine.¹⁰³ When vaccines became available to the states in December of 2020, there was neither a unified plan nor money allocated for distribution.¹⁰⁴ Consequently, it remained for the states, their municipalities, and local health departments, to design equitable programs for allocating the vaccines.¹⁰⁵

A. The Trump Administration: Scientific-Based Evidentiary Proofs or Political Allegiance

The initial politicization of the vaccine process undertaken by the Trump Administration is seen as the genesis of the massive levels of national distrust by Americans today.¹⁰⁶ Repairing trust is exceedingly difficult and is best undertaken by

¹⁰⁰ Sharon LaFraniere et al., Politics, Science and The Remarkable Race for a Viable Vaccine, N.Y. TIMES (Nov. 22, 2020).

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.* Johnson & Johnson’s vaccine was tested and distributed later. See Christine Vestal, *COVID-19 Vaccine Hesitancy Slows Race to Defang the Virus*, PEW (Mar. 2, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/03/02/covid-19-vaccine-hesitancy-slows-race-to-defang-the-virus>. Melissa Goldin & Angelo Fichera, *Fact Check: Pfizer Transmission European Parliament* (Oct. 13, 2022) <https://apnews.com/fact-check-pfizer-transmission-european-parliament-950413863226>. Janine Small, an officer of Pfizer, testified before the European Parliament’s Special Committee on the COVID-19 pandemic, that while Pfizer’s COVID-19 vaccine is efficacious in that when administered, those receiving it will decrease their chances of getting infected, the neutralizing antibodies provided by the vaccine “quickly wane.” *Id.* The extent to which the Pfizer vaccine is an effective transmission block of the COVID pathogens was never established during clinical trials conducted by Pfizer (which, in fact, Pfizer never asserted were a part of trials). *Id.*

¹⁰⁴ See Vestal, *supra* note 103.

¹⁰⁵ See *id.*

¹⁰⁶ See *PBS NewsHour* (PBS television Broadcast July 23, 2021). See also *Broken Arrow; Vaccine hesitancy*, THE ECONOMIST (Feb. 13, 2021) at 22; Peter Sullivan, *Vaccine rollout hits a snag*, THE HILL (Apr. 13, 2021), <https://thehill.com/policy/healthcare/548088-vaccine-rollout-hits-a-snag/>. The continuing politicization of the vaccine issue was seen in recent comments made by the Senate Minority Leader, Senator Mitch McConnell, regarding President Biden’s effort to mandate vaccinations of employees in businesses where there are more than one hundred employees.

having those in whom the average person trusts, such as a personal physician or health care provider (e.g., nurse, public officers, or national figure in the person of Dr. Anthony Fauci), delineating the scientific facts of vaccine usage.¹⁰⁷

More and more, interpretations of scientific evidence-based research are “colored by the suspicion that it is in the service of a political allegiance.”¹⁰⁸ As a consequence of this “political polarization,” distortions, misinterpretations and misinformation result and are seen as contributing to “bad science,” which also contributes to a “devaluation of scientific expertise.”¹⁰⁹ The scientific community itself also bears responsibility itself for failing to present its findings and its argumentative analysis to the public in a clear and understandable manner.¹¹⁰

B. Anti-Vaccination Concerns in the 18th and 19th Centuries: History Repeats Itself

As early as the 18th century, anti-vaccination concerns have been raised over approaches to deal with smallpox variola, and the morbidity and mortality of the disease.¹¹¹ A revitalized and more generally focused resurgence of what is now seen as an

¹⁰⁷ See PBS *NewsHour supra* note 106.

¹⁰⁸ Jay S. Kaufman, *Science Alone Can't Heal a Sick Society*, N.Y. TIMES (Sept 12, 2021), <https://www.nytimes.com/2021/09/10/opinion/covid-science-trust-us.html?searchResultPosition=2...> See MARC ZIMMER, *THE STATE OF SCIENCE: WHAT THE FUTURE HOLDS AND THE SCIENTISTS MAKING IT HAPPEN* (2020); Megan McArdle, *The Problem with the Johnson & Johnson Vaccine Pause*, WASH. POST (Apr. 13, 2021), https://www.washingtonpost.com/opinions/the-problem-with-the-johnson-and-johnson-vaccine-pause/2021/04/13/03b23f0e-9c96-11eb-9d05-ae06f4529ece_story.html. When vaccine regulations are halted – even temporarily – the European experience (and most by the United States experience as well) with such actions has been that such a suspension of regulations “sends a negative signal” to the general public which lingers. *Id.* See David Klepper, Poet finds most Americans say misinformation spurs extremism, hate, WASH. TIMES (Oct. 14, 2022) Reporting on a September 2022 poll of 1,003 adults by the Pearson Institute that found half of the participants in the poll hold to the view that misinformation reduces trust, 91% acknowledge misinformation as a serious problem, 77% believe crime rates are growing from the spread of misinformation and 73% believe this type of information provides “fodder” for extreme political views.” *Id.*

¹⁰⁹ Kaufman, *supra* note 108. Mark Zimmer, *Opinion: Science in a Time of Crisis*, THE SCIENTIST (Feb. 24, 2021), <https://www.the-scientist.com/reading-frames/opinion-science-in-a-time-of-crisis-67761>. See Walter Scheirer, *A Pandemic of Bad Science*, 76:4 BULL. ATOMIC SCIENTISTS (2020). <https://doi.org/10.1080/00963402.2020.1778361>. See Steven Lee Myers & Sheera Frankel, *Exploding Online, Disinformation Is Now a Feature of Main Stream Politics*, N.Y. TIMES (Oct. 21, 2022).

¹¹⁰ *Id.*

¹¹¹ See Gregory A. Poland & Robert M. Jacobson, *The Age-Old Struggle Against the Antivaccinationists*, 364 NEW ENG. J. MED. 97 (2011); see also Stuart Blume, *Anti-Vaccination Movements and Their Interpretations*, SOC. SCI. & MED. (2006), <https://www.sciencedirect.com/science/article/pii/S0277953605003047>; *Vaccine Hesitancy: Broken Arrow*, THE ECONOMIST (Feb. 13, 2021) at 20, <http://silabus.feb.unila.ac.id/lab/bib/The%20Economist%202021-02-13%20by%20The%20Economist.pdf...> Anti-Vaxxers during the Victorian period of British History were then – as those today – spreading misinformation about the efficacy of vaccinations. *Id.*

“anti-vaccine movement” appeared in the late 1990s and continues to this day.¹¹² The anti-vaccination mantras have also changed little over the course of time, now running the gamut from beliefs that vaccines are toxic—because they contain mercury, human aborted tissues, and an array of other dangerous chemicals—and are given to children whose immune systems are too immature to tolerate them, to the argument that vaccines are not given efficacious testing, allowing for studies of “vaccinated versus unvaccinated populations.”¹¹³ For well over a century, then, the same arguments – and the same fears—over vaccines have been used and are “merely recycled and updated to better reflect the modern science landscape and language.”¹¹⁴ Once “updated,” the fallacious information and the myths are then passed along to not only prominent individuals (made ever more influential because of social media and blogs), but also news media organizations, which do not always champion objective reporting.¹¹⁵

C. Today’s Knuckleheads or Civil Libertarians?

Are the anti-vaxxers, as Governor Phil Murphy of New Jersey termed them, “knuckleheads” who have “lost their minds” and think that “it’s their God-given right to put everybody else’s health at risk,” or are these naysayers merely expressing a view grounded in political philosophies which are validated by the notion of co-operative federalism and limited preemptive powers of the federal government?¹¹⁶ Is it a fundamental liberty of citizenship which allows an individual to refuse vaccination for whatever reason—rational or irrational?¹¹⁷ Alternatively, should anti-vaxxers be

¹¹² See Bernice L. Harrison, et al., *Poisonous, Filthy, Loathsome, Damnable Stuff: The Rhetorical Ecology of Vaccination Concern*, 87 YALE J. BIOL. MED. 403 (2014), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.780.3559&rep=rep1&type=pdf>. The common themes of vaccine concerns include fear of contamination; distrust of medical professionals; resistance to compulsory vaccinations and the local nature of vaccination concern. *Id.*; see also David R. Johnson, et al., *Barriers to Adult Immunizations*, 121 AM. J. MED. 28 (2008), <https://www.sciencedirect.com/science/article/abs/pii/S0002934308004683?via%3Dihub>. Yet, even with a level of distrust of medical professionals among the “most common reasons for non-vaccination,” is lack of recommendations for vaccinations given by physicians. *Id.*

¹¹³ See Tara C. Smith, *Vaccination Rejection and Hesitancy: A Review and Call to Action*, 4 OPEN F. INFECTIOUS DISEASE (July 18, 2017), <https://academic.oup.com/ofid/article/4/3/ofx146/3978712>.

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 3 (Table 2: Thought Influencers in the Anti-Vaccine Movement); see also, Brendan Nyhan et al., *Effective Messages in Vaccine Promotion: A Randomized Trial*, 133 PEDIATRICS 835 (2014), <https://publications.aap.org/pediatrics/article-abstract/133/4/e835/32713/Effective-Messages-in-Vaccine-Promotion-A?redirectedFrom=fulltext>. See also Myers & Frankel, *supra* note 109.

¹¹⁶ Reid J. Epstein & Lisa Lerer, *Vaccine Push Aligns Biden With A Frustrated Majority*, N.Y. TIMES (Sept. 11, 2021), at A14. (quoting Terry Orie of Fairfax, Virginia). Reid J. Epstein & Lisa Lerer, *Vaccine Push Aligns Biden With A Frustrated Majority*, N.Y. TIMES (Sept. 11, 2021), at A14. See PRINCIPLES FOR A FREE SOCIETY *supra* note 131; see also GOSTIN & WILEY, *supra* note 86 at 74-79, 101-02; Eleanor K. Kinney, *Clearing the Way for an Effective Federal State Partnership in Health Reform*, 32 UNIV. MICH. J. L. REFORM 899 (1999).

See RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY, Basic Books (2002) [hereinafter Principles For a Free Society].

¹¹⁷ See Epstein & Lerer, *supra* note 116.

recognized, as did President Biden, as individuals who have concluded that personal freedom is of a higher order than protecting the common good?¹¹⁸

In a 2021 poll of Americans' reasons for not being vaccinated against the coronavirus, the reasoning for these individuals' decisions are relatively consistent, with most of those polled choosing more than one.¹¹⁹ The most common reason, given by 53% of those polled, is that science is "untested" and that more time is needed "to see what happens."¹²⁰ Forty percent of Americans are concerned about allergic reactions and other side effects, and 36% worry about "reported problems" (e.g., blood clots) with some vaccines.¹²¹ Interestingly, this poll found that Republicans overall distrust the government's vaccination program, and doubt the vaccine's efficacy.¹²² Generally, Republicans trusted "the instincts of ordinary people."¹²³ Contrariwise, the attitudes of Democrats are consistent with, and driven by, "evidence-based-expert opinion" espoused by the federal government.¹²⁴

IV. Vaccine Hesitancy and Specious Sources of Information

In 2019, the WHO listed vaccine hesitancy as the eighth most significant global health threat. Presently, this national and global state of affairs continues to impede efforts to contain COVID-19.¹²⁵ The truth of the matter is understood easily when the fact is

¹¹⁸ See Shear et. al *supra* note 4.

¹¹⁹ See Kabir Khanna, *U.S. News Poll: COVID-19 Vaccine Hesitancy Ticks Down But Many Remain Opposed*, CBS NEWS (Apr. 26, 2021), <https://www.cbsnews.com/news/covid-19-vaccine-hesitancy-opinion-poll/>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See Mark Mellman, *Evidence and Experts or Common Sense*, THE HILL (June 9, 2021), <https://thehill.com/opinion/campaign/557458-mellman-evidence-and-experts-or-common-sense/> (drawing upon results of Canadian study). See Eugene Robinson, *Too Many Republicans are Taking COVID-19 Sides*, WASH. POST (Aug. 6, 2021), <https://www.washingtonpost.com/opinions/2021/08/05/too-many-republicans-are-taking-covid-19s-side-fight-against-pandemic/>.

¹²³ *Id.*

¹²⁴ *Id.* See David Leonhardt, *Covid Politics Are Walloping Red America: Concentration of Cases in Right-Leaning Areas*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2021/09/27/briefing/covid-red-states-vaccinations.html>. This article reports that the gaps among demographic groups such as Black Americans and Latinos are narrowing. *Id.* An August 2021 Pew Research Center study found that 86% of individuals claiming to be Democrats had submitted to taking at least one coronavirus vaccination, while only 60% of Republican voters had, in Red states, acted similarly. *Id.* But see Lynn Varreck, *\$100 as Incentive to Get a Shot? Experiment Suggests It Can Pay Off* (May 4, 2021), <https://www.nytimes.com/2021/05/04/upshot/vaccine-incentive-experiment.html>. This article reports on a U.C.L.A. COVID-19 Health and Politics Survey of some 7,249 people, finding that 34% of those interviewed would be more likely to get vaccinated for a payment of \$100.00, with unvaccinated Democrats in the statistical population saying that they would "more likely get vaccinated." *Id.* Democrats were found to be more incentivized if there was a cash reward. *Id.* For Republicans, they were motivated to get vaccinated if "safety guidelines were relaxed." *Id.* See also, Jim Saska, *More Republicans Have Died of COVID-19. Does That Mean The Polls Are Off?* (Mar. 30, 2022), rollcall.com/2022/03/30/republican-pardoning-deaths-pollsters/.

¹²⁵ See NEW ENG. J. MED., *Journal Watch* (Jan. 18, 2019), jwatch.org/fw114986/2019/01/18-who-releases-10threats-on-global-health.

accepted that the average person is apathetic, has “little interest in considering complex policy issues and have little aptitude for evaluating complex intellectual means, especially those involving medical science.”¹²⁶ This situation creates “intellectual disorder” and a complete breakdown of the notion of participatory democracy.¹²⁷

Vaccine hesitancy is defined as a “delay in acceptance or refusal of vaccines despite availability.”¹²⁸ It is said to be a euphemism which describes individuals who “selfishly ignore experts” regarding the efficacy of the COVID-19 vaccine.¹²⁹ A more balanced view sees this hesitancy as arising from complex variables and therefore describes this hesitancy as “delay in acceptance or refusal of vaccines despite availability of vaccination services.”¹³⁰ Those who are vaccine hesitant are often regarded as “fence sitters” who have not pledged to commit to either a “pro” or an “anti” vaccine stance.¹³¹ Multifactorial elements influence vaccine decision-making.¹³²

In addition to cultural, social, and political factors at both individual and group levels, a number of other factors contribute to the misinformation cycle, including: emotions, distrust, cognitive biases, racism, and xenophobia.¹³³ Possessing these qualities means

¹²⁶ George P. Smith, II, Policy Law Making and The New Medicine: Managing a Magnificent Obsession, 3 J HEALTH & BIOMEDICAL LAW 300, 310 (2007).

¹²⁷ See Drawing from RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 107 (2003); See William J. Broad & James Glanz, *Does Science Matter*, N.Y. TIMES (Nov. 11, 2003), <https://www.nytimes.com/2003/11/11/science/does-science-matter.html>.

¹²⁸ Noni E. McDonald, et al., *Vaccine Hesitancy: Definition, scope and determinants*, 33 VACCINE 4161 (2015).

¹²⁹ James Hohmann, *The Moral Hazard of Vaccine Giveaways*, WASH. POST (May 31, 2021), <https://www.washingtonpost.com/opinions/2021/05/19/dont-pay-people-get-covid-vaccine-shame-them/>. The vaccine hesitant are those viewed as fence setters who have not pledged commitment to either a “pro” or an “anti” vaccine stance. *Id.* See Allison Kennedy, Michelle Basket, et. al., *Vaccine Attitudes, Concerns and Information Sources Reported by Parents of Young Children: Results From the 2009 HealthStyles Survey*, PEDIATRICS (2011). See also Julie Leask, *Target the Fence Sitters*, 473 NATURE 443 (2011).

¹³⁰ See McDonald et. Al., *supra* note 128; Carmelia Betch, Robert Bohm, et. al., *Using Behavioral Insights to Increase Vaccination Policy Effectiveness*, 2 POLICY INSIGHTS BEHAVIORAL 7 BRAIN SCIENCES 61 (2015).

¹³¹ Allison A. Kenney, et. al., *Vaccine Attitudes, Concerns and Information Sources Reported by Parents of Young Children: Results From the 2009 HealthStyles Survey*, 127 PEDIATRICS S92 (2011) (discussing three categories of vaccine hesitancy). See E. Allison Hagood, & Stacy Mintzer Herlihy, *Addressing Heterogeneous Parental Concerns About Vaccination With a Multiple-Source Model*, 9 HUM. VACCINE IMMUNOTHERAPEUTICS 1780 (2013).

¹³² See *Vaccinate With Confidence: Strategy To Reinforce Confidence In Covid-19 Vaccines*, Ctr. for Disease Control and Prevention (Nov. 3, 2021), <https://www.cdc.gov/vaccines/covid-19/vaccinate-with-confidence.html>; Peggy Noonan, *Covid Anxiety and Fear of the Base*, WALL ST. J., (Aug. 14-15, 2021), <https://www.wsj.com/articles/biden-trump-desantis-mask-mandate-covid-19-coronavirus-teachers-union-remote-learning-delta-11628802163>.

¹³³ See McDonald et. al., *supra* note 128; Wen-Ying Sylvia Chou, et. al, *The Covid-19 Misinformation: Moving Beyond Fact Checking*, 48 HEALTH EDUC BEHAV. 9 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8685465/>.

that individuals are thus not only more vulnerable to certain types of misinformation, but also impervious to subsequent efforts to correct inaccuracies.¹³⁴

A. The Etiology of Suspicion and of Doubt

Social media is largely responsible for the flow of disinformation to the public regarding the efficacy and the safety of coronavirus vaccines and for promoting a “pandemic of mis-information.”¹³⁵ Opinions shaped by specious information arise from high levels of pre-existing anxiety and, in turn, gives rise to an “aura of national distrust.”¹³⁶ Opinions, to be informed, must be based on facts—in this case, scientific facts.¹³⁷ Yet, most people do not understand science and thus are easily confused and even confounded by scientific facts and analysis.¹³⁸

Vaccine hesitancy is an emotional issue based largely on anxieties arising over the consequences of submitting to be vaccinated with a vaccine that is not fully approved by the FDA.¹³⁹ It is speculated by some that once the coronavirus vaccines are fully approved, a major reason for distrust will be eliminated and hesitancy, also, will be largely eliminated.¹⁴⁰ A 2021 Kaiser Foundation poll found that only three out of every ten unvaccinated people said that they would most likely get vaccinated if and when the FDA fully approves the vaccines.¹⁴¹ One expert on vaccine hesitancy opined that “a vanishingly

¹³⁴ Id. See Craig Palosky, Covid-19 Misinformation is Ubiquitous: 78% of the Public Believes or is Unsure About At Least One False Statement, and Nearly a Third Believe At Least Four of Eight False Statements Tested, KAISER FAMILY FOUNDATION, (Nov. 8, 2021), <https://www.kff.org/coronavirus-covid-19/press-release/covid-19-misinformation-is-ubiquitous>.

¹³⁵ FACE THE NATION: Dr. Francis S. Collins, Director of the National Institutes of Health, Interview by Nancy Cordes, (CBS television broadcast Aug. 15, 2021). See Zeynep Tufekci, *The C.D.C. Needs to Stop Confusing the Public*, N.Y. TIMES, (Aug. 4, 2021). See *How to Address COVID-19 Vaccine Misinformation*, CTR. FOR DISEASE CONTROL AND PREVENTION, (Nov. 3, 2021), <https://www.cdc.gov/vaccines/covid-19/health/departments/addressing-vaccine-misinformation.html>; *Vaccinate With Confidence: Strategy to Reinforce Confidence in Cov-19 Vaccines*, CTR. FOR DISEASE CONTROL AND PREVENTION, (Nov. 3, 2021), <https://www.cdc.gov/vaccines/covid-19/vaccinate-with-confidence.html>; Wen-Ying Sylvia Chou, et. al., *Covid-19 Vaccination Communication: Applying Behavioral and Social Science to Address Vaccine Hesitancy and Foster Vaccine Confidence*, NAT'L INST. OF HEALTH (2020), https://obsr.od.nih.gov/sites/obsr/files/inline-files/OBSSR_VaccineWhitePaper_Final-508.pdf.

¹³⁶ See *Face the Nation: Representative Steve Scalise on "Face the Nation"* (CBS NEWS television broadcast Aug. 15, 2021) [hereinafter *Scalise*]; *COVID Misinformation is Ubiquitous*, *supra* note 135.

¹³⁷ See Interview with Francis Collins, *supra* note 135.

¹³⁸ Id. Often unreliable scientific studies – not fully verified by peer review before publication – add to misunderstanding and to levels of confusion by the public. See also John P. A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLOS MED. 691, 696 (2005), <https://doi.org/10.1371%2Fjournal.pmed.0020124>.

¹³⁹ See Ioannidis, *supra* note 138, at 697.

¹⁴⁰ See *Scalise*, *supra* note 136. See also Eli Alashi & I. Glenn Cohen, *SARS-COV-2 Laboratory-Developed Tests: Integrity Restored*, 327 JAMA 1229, 1229 (2022).

¹⁴¹ See Sharon LeFreniere & Noah Weiland, *F.D.A. Fully Approves Pfizer-BioNTech's Vaccine, a First for a COVID-19 Shot*, N.Y. TIMES (Aug. 23, 2021), <https://www.nytimes.com/2021/08/23/health/pfizer-vaccine-approval->

small number of people in real life” will actually change their minds even with the full approval by the FDA of the Pfizer vaccine.¹⁴² Yet, an important collateral advantage is that, if more businesses and other employers set mandates for employment, the approval of the Pfizer vaccine ultimately will be seen as successful.¹⁴³

It has been suggested that vaccine hesitancy is not the dominant issue in the distribution of COVID-19 vaccines; rather, the issue is accessibility of the vaccines.¹⁴⁴ For the most vulnerable, a “one-size-fits-all” approach to vaccine distribution is problematic.¹⁴⁵ Communicating for appointments is a significant hurdle for many.¹⁴⁶ While eighty percent of Caucasians own a computer, among African-Americans and in Latino communities, fewer than sixty percent do.¹⁴⁷ Furthermore, language translators for those who do not speak English must be provided.¹⁴⁸ Modes of personal transportation are limited and, thus, force a heavy reliance on public means.¹⁴⁹ Front line, low-income workers have inflexible work schedules and should be better accommodated by their employers with secured appointment times at multiple mobile vaccination sites.¹⁵⁰ Similarly, more outreach (and education) efforts should be extended to disproportionately impacted groups.¹⁵¹ Finally, historical fears of deception and mishandling by the government of other projects must be dealt with honestly and forthrightly.¹⁵²

B. Misinformation and/or Disinformation

Dr. Vivek H. Murthy, Surgeon General of the United States, issued an Advisory on July 15, 2020, related to the threat of misinformation regarding the efficacy of COVID-19 vaccines, and by so doing sought to warn the citizens of the nation of the dangers of

fda.html?searchResultPosition=1; *see also* Ed Silverman, *Poll: Most-Americans-Believe-The-Covid-19-Vaccine-Approval-Process-Is-Driven-By-Politics-Not-Science*, STAT NEWS (Aug. 31, 2021), <https://www.statnews.com/2020/08/31/most-americans-believe-the-covid-19vaccine-approval-process-is-driven-by-politics-not-science>; Douglas J. Opel, et al., *Building Trust to Achieve Confidence in COVID-19 Vaccines*, 3 JAMA NETW OPEN., no. 10, 2020, doi 10.1001/jamanedtworopen.2020.25672.

¹⁴² LeFreniere & Weiland, *supra* note 141 (quoting Alison Buttenheim).

¹⁴³ *See id.*

¹⁴⁴ *See* Karen Bass et al., *Vaccine Hesitancy Is Not the Problem Among People of Color. It's Vaccine Access*. WASH. POST, Mar. 10, 2021, at A21.

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ Bass et al., *supra* note 144.

¹⁵⁰ *See* Bass, et al., *supra* note 144, at A21.

¹⁵¹ *See id.*

¹⁵² *Id.* *See* Fred D. Gray, *THE TUSKEGEE SYPHILIS STUDY: THE REAL STORY AND BEYOND* (1998) (examining the 1932 U.S. Public Health's Service “testing” of 623 African-American males with syphilis). In order to study the effects of this disease and how it might be combatted with penicillin. *Id.* Some anti-vaxxers even have fears that the present COVID-19 vaccinations are both experimental and harken back to the Nazi human experimentations during WW II and, as well, view the vaccines as a form of altering the individual DNA of each person. *See* GERALD ASTRO, *THE LAST NAZI: THE LIFE AND TIMES OF DR. JOSEPH MENGELE*; Sheera Frenkel, *Misinformation Deepens a Gap in Vaccination*, N.Y. TIMES, Mar. 10, 2021 at 1; *see also*, Noonan, *supra* note 132 (observing that many people have become neurotic as a consequence of vaccine hesitancy).

health misinformation.¹⁵³ Calling misinformation an “urgent threat” to the public health of all Americans, General Murthy acknowledged the pernicious effect misinformation was not only causing confusion, but also sowing mistrust of the public health system and the government in general.¹⁵⁴ While laudable, this Advisory is but an unusually broad attempt to present a “blueprint” for developing local strategies against misinformation. For example, the Surgeon General calls upon citizens to “verify accuracy of information by checking with trustworthy and credible sources.”¹⁵⁵ Additionally, when uncertainty arises regarding the veracity of information, “don’t share it with others” is another admonition of note.¹⁵⁶ Whether this Advisory has any significant effect in aiding individuals, families, and communities in combatting the spread of misinformation remains to be seen.

Disinformation is defined as the “dissemination of deliberately false information, especially when supplied by the government.”¹⁵⁷ Misinformation is defined as an “action of misinforming, or condition of being misinformed . . . erroneous or incorrect information.”¹⁵⁸ Both of these sources impact vaccine sentiment which is, in turn, “dynamic” and capable of changing dramatically within a short span of time.¹⁵⁹ Social media campaigns reaching some 59.2 million followers have proven to be the bellwethers of vaccine confusion, distrust, and “emotional contagion.”¹⁶⁰ Facebook and Instagram

¹⁵³ See surgeongeneral.gov/healthmissinginformation. A report by the Government Accounting Office released in September, 2021, detailed the “breakdown” over some 10 or more federal agencies and found an inadequate commitment to “sustaining a public health system and infrastructure.” *Id.* The CDC coronavirus testing regulating were found to be lacking in transparency and lead to confusion and the erosion of trust in the government. *Id.* Joe Davidson, *U.S. Agencies, failed to learn from years testing pandemic responses*, GAO finds. *Id.*

¹⁵⁴ *Id.*; see also Drew Altman, *Persistent Vaccine Myths*, KFF (May 26, 2021), <https://www.kff.org/coronavirus-covid-19/perspective/persistent-vaccine-myths>. Sixty-seven percent of all unvaccinated adults were found, in May, 2020, to have heard at least one vaccine myth and either accepted its truth or were not sure of its veracity. *Id.*

¹⁵⁵ See Gao, *Report on Missing Information*, surgeongeneral.gov/healthmissinginformation, at 8. See also Philip Pullella, *Pope Says False News Disinformation on COVID, Is Human Rights Violation*, REUTERS (Jan. 28, 2022, 5:53 AM), <https://www.reuters.com/world/pope-says-fake-news-disinformation-covid-is-human-rights-violation-2022-01-28/>.

¹⁵⁶ See Davidson, *supra* at 153, at 8.

¹⁵⁷ OXFORD ENGLISH 2nd ed. 1998, Volume IV at p. 784. See e.g., Julian E. Barnes, *Russian Disinformation Targets Vaccine Fears*, N.Y. TIMES, Aug. 6, 2021 at A15 (discussing disinformation campaigns as a way to play the various fears of some). The coronavirus inoculation are dangerous, and the side effects are very risky together with the mishandling of the pandemic by the Biden Administration. *Id.* See generally, JENNIFER KAVANAUGH ET AL., FIGHTING DISINFORMATION ONLINE: BUILDING THE DATA BASE OF WEB TOOLS (2020).

¹⁵⁸ “Misinformation” vs. “Disinformation”: *Get Informed on the Difference*, DICTIONARY.COM, <https://www.dictionary.com/e/misinformation-vs-disinformation-get-informed-on-the-difference/> (last visited Oct. 6, 2022). In contrast, disinformation is “misinformation that is knowingly spread,” specifically when one spreads “wrong information on purpose . . . with intent to mislead.” *Id.* See, e.g., Sheera Frenkel, *Black and Hispanic communities are confronted with vaccine misinformation*, N.Y. TIMES, Mar. 2021, at A1. See Steven Lee Myers and Sheera Frenkel, *Exploring Online is Now a Fixture of U.S. Politics*, N.Y. TIMES, Oct. 21, 2022, at A1.

¹⁵⁹ *Vaccine Hesitancy: Broken Arrow*, THE ECONOMIST, Feb. 13, 2021, at 20. [hereinafter *Vaccine Hesitancy*]

¹⁶⁰ See *id.* at 22. See, e.g., Sheera Frenkel, *The Most Influential Spreader of Coronavirus Misinformation Online*, N.Y. TIMES, July. 24, 2021, <https://www.nytimes.com/2021/07/24/technology/joseph->

alone were found to have 425 anti-vaccine accounts in 2021, which sought to sow doubt not only about the seriousness of COVID-19, but also about vaccine safety and the trustworthiness of scientific experts dealing with the disease.¹⁶¹ In early February of 2021, Facebook, together with Twitter and YouTube, sought to remove all accounts presenting patently false information related to the coronavirus pandemic.¹⁶²

Changing false attitudes through education is difficult and often not sufficient to foster change.¹⁶³ Once a negative impression of vaccine efficacy and purpose becomes widespread, changing that impression becomes problematic.¹⁶⁴ It is far easier to establish fear and uncertainty than to build trust and confidence.¹⁶⁵

It has been suggested that direct appeals to vaccine hesitant communities, rather than media campaigns, is a strong approach to accurately informing the public.¹⁶⁶ Appeals to “shared responsibility,” unity, common purpose, and altruism go a long way toward building trust.¹⁶⁷

C. Establishing Trust

mercola-coronavirus-misinformation-online.html (reporting osteopathic physician’s spread of COVID misinformation) (updated Oct. 6, 2021). *See generally* JENNIFER KAVANAUGH & MICHAEL D. RICH, *TRUTH DECOY: AN INITIAL EXPLORATION OF THE DIMINISHING ROLE OF FACTS AND ANALYSIS IN AMERICAN PUBLIC LIFE* (2018).

¹⁶¹ See Vaccine Hesitancy: Broken Arrow, *supra* note 159 at 20. See HOLLY GREENET AL., *Immunization Information Systems to Increase Vaccination Rates: A Community Guide Systematic Review*, 21 J. PUB. HEALTH MGMT. & PRAC. 227 (2015).

¹⁶² See Vaccine Hesitancy: Broken Arrow, *supra* note 159; EAMON FERGUSON & LAURA GALLAGHER, *Message Framing With Respect to Decisions About Vaccination: The Role of Frame Valence, Frame Method and Perceived Risk*, 98 BRIT. J. PSYCH. 667 (2007). See also Davey Alba, *YouTube Bans All Anti-Vaccine Misinformation*, N.Y. TIMES, Sept. 29, 2021.

¹⁶³ See Vaccine Hesitancy: Broken Arrow, *supra* note 159.

¹⁶⁴ *Id.* at 22.

¹⁶⁵ *Id.* Supported by a grant from The National Science Foundation, twelve academics from four institutions – Harvard University, Northwestern University, Rutgers and Northeastern Universities – formed “The COVID-19 Consortium for Understanding the Public Policy Preferences Among States,” which examined the attitudes and behavior of 21,196 individuals across 50 states and the District of Columbia in August of 2020. MATTHEW A BAUM ET AL., *THE STATE OF THE NATION: A 50 STATE COVID-19 SURVEY, REPORT #13: PUBLIC TRUST IN INSTITUTIONS AND VACCINE ACCEPTANCE* (2020). The extent to which 15 institutions and individual leaders, such as Dr. Fauci, social media, scientists, political parties, were handling vaccination programs and taking steps to abate the pandemic were surveyed. *See* NORTHWESTERN, <https://news.northwestern.edu/stories/2020nationalsurvey-public-trust-and-americans-willingness-to-vaccinate-for-covid-19/> (last visited Oct. 6, 2022).

¹⁶⁶ See *The Right and Wrong Ways to Reduce Vaccine Hesitancy*, THE ECONOMIST (July 24, 2021).

¹⁶⁷ See Jill Suttie, *Five Ways to Respond to People Who Don’t Want the COVID-19 Vaccine*, GREATER GOOD MAGAZINE (May 26, 2021), https://greatergood.berkeley.edu/article/item/five_ways_to_respond_to_people_who_don't_want-the-covid-19-vaccine. *See also* David A. Fleming, *Mandating Vaccination – Is It Justified*, 5 AM. J. HOSP. MED. (2021), (encouraging physicians to advocate for those in leadership roles to be vaccinated). *See also* Fran Kritz, *Trusted Messengers, Trusted Messages: How to Overcome Vaccine Hesitancy*, NATIONAL PUBLIC RADIO (Dec. 24, 2020), <https://www.npr.org/sections/health-shots/2020/12/24/948776228/trusted-messengers-trusted-messages-how-to-overcome-vaccine-hesitancy> (explaining how individuals can overcome vaccine hesitancy).

According to a Pew Research poll conducted in 2021, about one-quarter of Americans hold the opinion that, as to the government in Washington, D.C., only two percent trust it “to do what is right, ‘just about always,’ while 22% of those polled believe the government ‘most of the time.’”¹⁶⁸ Given this statistical profile and the realization that 72% of Americans have no trust at all in federal government decision-making, it is obvious that the government’s challenge to establish a wider level of support for its COVID-19 vaccination policies is daunting, if not insurmountable.¹⁶⁹ As shown, establishing public confidence in the healthcare systems that monitor and assure the efficacy and the safety of these vaccines is an exceedingly complex undertaking.¹⁷⁰

D. Sense and/or Sensibility

Sense is seen as “the endowment of natural intelligence possessed by rational beings.”¹⁷¹ It is regarded, simply, as “plain wisdom” inherited by everyone, “good sense”, in other words, common sense.¹⁷² Contrariwise, sensibility is defined as a quality which is rooted in “sensation and emotion as distinguished from cognition and will.”¹⁷³ Sensibility is the “power of feeling” and is regarded as “emotional consciousness.”¹⁷⁴

It is widely assumed that human behavior is rational.¹⁷⁵ This notion has, however, been proved to be false.¹⁷⁶ Indeed, the goal of rational decision-making has been eclipsed by “cognitive deficits,” which are now accepted as a “general human phenomenon.”¹⁷⁷ Nevertheless, people generally act in their own self interest.¹⁷⁸ Because of this selfishness, some individuals are unwilling to realize or understand the “potential dangers” that their action or inaction may cause to others.¹⁷⁹ In these cases, education is to avail.¹⁸⁰ Coercion—or incentivizing conduct in order to achieve positive (i.e., rational) results—

¹⁶⁸ See *Public Trust in Government: 1958-2021*, PEW RESEARCH CENTER (May 17, 2021), <https://pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2-21>. See also Dalmeet Singh Chawla, *Most People Say They Don't Trust Others. So What?*, UNDARK (Jul. 18, 2017), <https://undark.org/2017/07/18/global-trust-world-value-survey/> (explaining how individuals typically do not trust one another). See also Cary Wu, *Education and Social Justice Trust in Global Perspective Commonly Thought That Education Leads to Higher Trust*, 64 SOCIOLOGICAL PERSPECTIVES 1166 (2021) (finding that better educated individuals are less willing to trust authority figures).

¹⁶⁹ See *id.*

¹⁷⁰ See Saad B. Omer et. al., *Vaccine Refusal, Mandatory Immunizations and the Risks of Preventable Disease*, 360 N. ENG. J. MED. 198 (2009). See also Alberto Giubilini, *An Argument for Compelling Vaccination: The Taxation Analogy*, 37 J. APPL. PHILOS. 446 (2020).

¹⁷¹ See *Sense*, III OXFORD ENGLISH DICTIONARY at 573 (2nd ed. 1998).

¹⁷² See *id.*; XIV at 977-980 (explaining how the word sense has 29 numbered definitions). See also <http://www.daily-writingtips.com/sense-vs-sensibility>.

¹⁷³ See *Sensibility*, XIV Oxford English Dictionary at 982 (2nd ed. 1998).

¹⁷⁴ See *id.*

¹⁷⁵ See Richard A. Posner, *Economic Analysis of Law*, Aspen Publishers (2010) at 20-22.

¹⁷⁶ See *id.* See also Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (2008).

¹⁷⁷ Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism*, Cambridge University (2013) at 2.

¹⁷⁸ POSNER, *supra* note 175, at 25.

¹⁷⁹ Conly, *supra* note 177, at 13.

¹⁸⁰ *Id.* at 13.

is, however, not regarded as coercion.¹⁸¹ It simply is not a “fail safe” course of conduct.¹⁸² It has been suggested that the sounder approach is to foster paternalism in law-making “that forces people to act, or refrain from action according to their best interests.”¹⁸³ The rationale for allowing poor choices is simply that the very essence of autonomous action is that people must “suffer the results of their own actions for good or evil.”¹⁸⁴ When acts of suffering harm others and threaten the stability of the common good, such a rationale as this is simply unsatisfactory.¹⁸⁵

E. Common Sense Decision-Making

Today, in order for good, sound (i.e. logical) judgments to be made, common sense is required as the baseline for decision-making.¹⁸⁶ And, within this baseline are “cost benefit analysis and practical usefulness” that are recognized as the “points of interaction” or vectors of force, which in turn give rise to sound or good judgment.¹⁸⁷ Stated otherwise, “economics become the standard by which the quality of common sense is determined” and thereby serves as an algorithm for determining whether common sense has been used.¹⁸⁸ By far, this approach to decision-making is the most pragmatic and logical to follow.

F. A Right to be Ignorant?

Responsible, informed decision-making cannot be undertaken behind a “veil of ignorance.”¹⁸⁹ Indeed, it has been submitted “no one is entitled to be ignorant.”¹⁹⁰ One is entitled to an opinion, but that opinion must be informed in order to maintain participatory democracy.¹⁹¹ All too often, apathy and ignorance crowd out the “responsibilities” of citizenship to be engaged and informed.¹⁹² Given the fact that some 30 million adults in the United States cannot read, write, or do basic mathematics above

¹⁸¹ *Id.* at 2.

¹⁸² *Id.*

¹⁸³ Conly, *supra* note 177.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 2-3.

¹⁸⁶ See Joe Sery, *Richard A. Posner and The Rhetoric of (Economic) Common Sense*, 16 *COMMC’N L. REV.* 1, 1 (2017); POSNER, *supra* note 175 at 19 *passim* (8th ed. 2010).

¹⁸⁷ Sery, *supra* note 186. See generally Sandro Galea & George Annas, *An Argument for a Common-Sense Global Public Health Agenda*, 2 *LANCET PUB. HEALTH*, 445 (2017), [https://doi.org/10.1016/S2468-2667\(17\)30164-0](https://doi.org/10.1016/S2468-2667(17)30164-0).

¹⁸⁸ Sery, *supra* note 186 at 6-9 (analyzing the history of common sense as a normative standard of conduct). In *Peek v. United States*, Justice William O. Douglas acknowledged that “common sense often makes good law. *Id.*

¹⁸⁹ See John Rawls, *A Theory of Justice* (1971). See generally, Steven Pinker, *Rationality: What It Is, Why It Seems Scarce, Why It Matters* (2021).

¹⁹⁰ Harlan Ellison, *Harlan Ellison Quotes*, GOODREADS, <https://www.goodreads.com/author/quotes/7415> (last visited Oct. 10, 2022).

¹⁹¹ See Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (2018). See also, Zsuzsanna Chappell, *Deliberative Democracy: A Critical Introduction* (2012). See generally, James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (2009). It has been asserted that every American citizen has a duty of citizenship to participate in a democracy by voting in local and national elections. *Id.* E. J. Dionne & Miles Rapport, *100% Democracy: The Case For Universal Voting* (2022).

¹⁹² See William J. Lederer, *A Nation of Sheep* (1961).

a third grade level, it is understandable why so many consumers in America make decisions that defy common sense and are clear departures from rationality.¹⁹³ A distinction between being uninformed and being misinformed needs to be drawn here.¹⁹⁴ Lacking factual knowledge, one is uninformed.¹⁹⁵ It has been postulated that even though voters know that they are uninformed, they use information shortcuts, or heuristics, as “substitutes” for detailed, factual material.¹⁹⁶ Misinformed citizens are those who choose their policy preferences based on false, misleading, or unsubstantiated information which they “believe” to be true.¹⁹⁷

1. *Responsibilities of Citizenship to be Informed*

Drawing from Thomas Jefferson’s letters to Richard Price in 1789 and to Charles Yancey in 1816, regarding the responsibilities of citizenship, President Ronald Reagan warned that, “[i]f we are to guard against ignorance and remain free, as Jefferson cautioned, it is the responsibility of every American to be informed.”¹⁹⁸

¹⁹³ See Posner, *supra* note 144 at 20-23. Education is insufficient to change the minds of some individuals who are cognitively impaired and – thus – irrational in their thought processing which in turn often leads to harmful conduct affecting others and requires the government to undertake remedial action in order to prevent “obvious harm” to others. See George P. Smith, II & William R. Lane, *Re-evaluating the Demise of the Average, Ordinary Reasonable Person: Unintended Consequences in the Law of Nuisance*, 67 CATH. U. L. REV. 669, 732 (2018); Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard 2* (Oxford University Press) 1st ed. 2003). See *Crisis Point: The State of Literacy in America*, EDXEDNYC, <https://www.edxednyc.com/single-post/2018/03/09/crisis-point-the-state-of-literacy-in-america> (last visited Oct. 10, 2022). Since half of the population of the United States have I.Q.s of below 100, it is understandable that there is little-if-any-interest in complex socio-legal issues. See also Nicholas Rule, *Snap Judgment Science*, Association for Psychological Science (Apr. 30, 2014), Aug. 30, 2014, <https://www.psychologicalscience.org/observer/snap-judgment-science>. CONLY, *supra* note 177, at chs. 2, 3. See generally, PINKER, *supra* note 189.

¹⁹⁴ See James H. Kuklinski & Paul J. Quirk, *Elements of Reason: Cognition, Choice, and the Bounds of Rationality*, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY (Arthur Lupia & Matthew D. McCubbins, & Samuel L. Popkin eds., 2000).

¹⁹⁵ See *id.* at 194.

¹⁹⁶ Arthur Lupia & Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?*, Cambridge University Press (1998). See National Academy of Science, *Engineering and Medicine, Securing the Vote: Protecting American Democracy* (2018).

¹⁹⁷ Kuklinski & Quirk, *supra* note 194 at 798.

¹⁹⁸ Thomas Jefferson, *Thomas Jefferson Letter to Charles Yancey* (Jan. 6, 1816), <https://founders.archives.gov/documents/Jefferson/03-09-02-0209>. *If We Are to Guard Against Ignorance (Spurious Quotation)*, THOMAS JEFFERSON FOUNDATION, <https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/if-we-are-guard-against-ignorance-spurious-quotations/#fn-src-2> (last visited Oct. 11, 2022). Ronald Reagan, *Ronald Reagan’s Statement for National Library Week*, referenced in Budget Reconciliation Hearings Before the Committees on Post Office and Civil Service (Washington: GPO, 1981), 179. Drawing, no doubt, upon *The Book of Proverbs*, Mark Twain cautions that arguments with stupid people should never be undertaken because, “[t]hey will drag you down to their level and beat you with experience.” *Id.* Proverbs 26:4 states, “[d]o not answer a fool accruing to his folly, or you yourself will be just like him.” *Id.* See E. J. Dionne & Miles Rapport, *supra* note 191.

It is difficult for the average citizen to understand that “autonomy is not inviolable”¹⁹⁹ because autonomy or self-determination is seen as the fundamental tenet of American democracy and is the very justification used by anti-vaxxers to resist vaccination for COVID-19.²⁰⁰ To embrace liberty is to assert that one is a “pre-eminently rational” agent and fully capable of “determining what goes in our own life” and should be, therefore, the hallmark of sound cognitive behavior in contemporary society.²⁰¹ It is a given, then, that the average person—in order to maximize self-interest—should act rationally.²⁰² But sadly, today, human behavioral patterns of conduct are recognized as “non-rational and the product of reflex, habit or snap judgment” that are shaped by a plethora of factors—emotions, biases, and risk aversion.²⁰³

G. Behavioral Economics and Determinants of Choice

Theories of motivational behavior are regarded colloquially as having had their genesis in what is referenced as the Carrot and Stick approach to motivation.²⁰⁴ More specifically, the provenance of this idiom is derived from the notion that the best way to entice a work donkey, long known for the trait of obstinacy, to move is by holding a carrot in front of the animal’s muzzle or, alternatively, to take a stick to the animal’s posterior.²⁰⁵

¹⁹⁹ See Conly, *supra* note 177, at 1. See Richard A. Posner, *supra* note 175, at 76. See generally, Richard A. Epstein, *supra* note 48.

²⁰⁰ See Gov. McMaster, *Who Wants to Prohibit “Door to Door” Vaccine Efforts*, ASSOC. PRESS (July 9, 2021), <http://www.wltx.com/article/news/local/south-carolina-prohibit-door-to-door-vaccine-efforts/101-f9b8a35a-9a9c-4069-a435-0e4105eb-4c25>. See generally, George P. Smith, II, *Law and Bioethics: Intersections along the Mortal Coil*, (2012). See also, George P. Smith, II, *Social Justice and Health Care Management: An Elusive Quest*, 9 HOUSTON J. HEALTH L. & POL’Y 1 (2009).

²⁰¹ Conly, *supra* note 177, at 2.

²⁰² E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 85 (1985) (stating economists theorize “people are rational maximizers of self-interest”).

²⁰³ William H. Rodgers, Jr., *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. CAL. L. REV. 1, 6 (1980); RICHARD A. POSNER, *supra* note 175, at 22-23; George P. Smith, II, *supra* note 200, at 73 (stating “[i]t is not surprising people do not make decisions in objective, rational ways”). See Nicholas Rule, *Snap-Judgment Science*, ASSOCIATION FOR PSYCHOLOGICAL SCIENCE (Aug. 30, 2014), <https://www.psychologicalscience.org/observer/snap-judgment-science> (discussing the human tendency to make “snap judgments”). See Patrick H. Huang, *Pandemic Emotion: The Good, The Bad and The Unconscious – Implications for Public Health, Financial Environment, Law and Leadership*, 16 NW. J. L. & SOC. POL’Y 81, 86 (2021). “Crises produce emotions that impact decision-making. Pandemics can cause certain emotions, or the lack thereof, which can in turn lead to outcomes with their own emotional consequences.” *Id.* See *How to frame public health messages so people hear them*, THE ECONOMIST (Apr. 4, 2020), <https://www.economist.com/books-and-arts/2020/04/03/how-to-frame-public-health-messages-so-people-hear-them>. See Jessica Nordell, *The End of Bias: A Beginning: The Science and Practice of Overcoming Unconscious Bias* (2021). See generally Amos Tversky & Daniel Kahneman, *Prospect Theory: An Analysis of Decision-Making Under Fire*, 47 ECONOMETRICA 263 (1970).

²⁰⁴ See generally ROBERT C. BECK, *MOTIVATION: THEORIES AND PRINCIPLES* (5th ed. 2008). See also JESSICA NORDELL, *THE SCIENCE AND PRACTICE OF OVERCOMING UNCONSCIOUS BIAS* (2021).

²⁰⁵ *Id.* See *Carrot and Stick Approach of Motivation*, BUSINESS JARGONS, <https://businessjargon.com/carrot-and-stick-approach-of-motivation.html> (last visited Oct. 13, 2022). See Hohmann, *supra* 129. “Politicians have relied on carrots because they’re overly reluctant to use sticks that could prompt a public outcry, such as requiring vaccine passports to travel or attend sporting events.” *Id.*

A basic underlying assumption is that an individual's behavior can be modified by administering punishment if a desirable alternative behavior is not selected.²⁰⁶

An in depth analysis of behavioral economics and the methodologies to deal with decision-making and biases is far beyond the scope of this Article. Yet, it is important to understand that behavioral economics has shown that “bad outcomes loom larger in people's minds than positive ones.”²⁰⁷ Viewed as a negativity bias, this behavioral attitude interacts with another factor, namely, an “unwillingness to gamble.”²⁰⁸ Behavioral economics has also shown that when confronted with two options, both of which are equally at producing “bad” consequences, many people select the option which holds less risk for negative consequences.²⁰⁹ Rather than embrace rational decision-making, all too often heuristics—or, “mental short cuts”—are commonly relied upon, and surprisingly often lead to “good decisions.”²¹⁰ Prominent among these “shortcuts” are decisions based on “probabilities,” which in turn are shaped by personal biases.²¹¹ Nudges, also seen as a component in behavioral decision-making, are viewed as improving heuristic decisions or, alternatively, as lessening heuristics altogether.²¹² Thus, nudges may not only lead people in a direction but also assist them in choosing their own way.²¹³ They may further serve as “reminders” or as “warnings.”²¹⁴

V. Enforcement Powers of the Government

There is no constitutional right to stay unvaccinated from COVID-19.²¹⁵ Thus, there is no legal reason why businesses and colleges, for example, cannot require their customers and students to be vaccinated to use their respective facilities.²¹⁶ All of the fifty states have

²⁰⁶ See BECK, *supra* note 204; see also *Carrot and Stick Approach of Motivation*, BUSINESS JARGONS, <https://businessjargons.com/carrot-and-stick-approach-of-motivation.html> (last visited Oct. 16, 2022). But see Stephen Armstrong, *Research on COVID-19 is Suffering Imperfect Incentives at Every Stage*, 369 BRIT. MED. J. 2045 (2020); see John Hohmann, *supra* note 129.

²⁰⁷ See Corona-Speak, *supra* note 203.

²⁰⁸ See *id.*

²⁰⁹ See generally Beck, *supra* note 204. See also Richard J. Herrnstein, *Behavior, Reinforcement and Utility*, 1 PSYCH. SCI. 217 (1990).

²¹⁰ See Cass R. Sunstein, *Valuing Life: Humanizing the Regulatory System* 137 (2014).

²¹¹ See *id.* at 55; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1112, 1124 (1974). See also Osamudia James, *The Innocence of Bias*, 119 MICH. L. REV. 1345 (asserting studying unconscious bias as structural problem among dominant groups rather than among individuals is superior); Nordell, *supra* note 203.

²¹² See Narucha Tanaiutchawoot, et al., *Nudges: An Assisted Strategy for Improving Heuristic Decision in PGE - Product Generation Engineering*, 84 PROCEDIA CIRP JOURNAL 820 (2019). See Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. REGULATION 413, 417 (2015).

²¹³ See *id.*

²¹⁴ See *id.*

²¹⁵ See Jamal Greene, *America's Legalistic Culture is About to Become a Problem*, THE ATLANTIC (March 4, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/during-a-pandemic-rights-aren't-just-for-individuals/618198/>; see also JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021); see also Lawrence O. Gostin, Daniel A. Salmon & Heidi Larson, *Mandating COVID-19 Vaccines*, 325 JAMA 532 (Dec. 29, 2020); Dorit Rubinstein Reiss, *The Law and Vaccine Resistance*, 363 SCIENCE 795 (Feb. 22, 2019).

²¹⁶ See Lawrence O. Gostin, *People Don't Have the Right to Stay Unvaccinated: Georgetown's Gostin*, BLOOMBERG TV (Aug. 9, 2021, 9:52 AM), <https://www.bloomberg.com/news/ideas/2021-08->

long had immunization legislation requiring certain vaccinations (e.g., diphtheria, pertussis and tetanus, measles, mumps and rubella, chicken pox, and polio) to be administered to all students before they enter local school systems.²¹⁷ Forty-four states and the District of Columbia grant religious exemptions for those expressing religious objections to immunizations.²¹⁸ Currently, fifteen states allow philosophical exemptions for kids whose parents object to immunizations because of personal, moral, or other beliefs.²¹⁹

A. Shaping Federal-State Responses

President Biden’s actions to tighten federal “powers” over the states in enforcing coronavirus vaccinations are driven by scientific research underscored by a deep conviction among scientists that vaccine hesitancy and refusal have prolonged

09/people-don't-have-the-right-to-stay-unvaccinated-georgetown-gostin-video; *see also* Michael A. McRobbie, *College Must Require Vaccination*, 373 SCIENCE 945 (Aug. 26, 2021) (observing that on some 753 campuses, vaccinations are now required); *see also* Nicole Acevedo, *University of Virginia Disenrolls More Than 200 Students Who Didn't Meet Vaccine Mandate*, NBC NEWS, <https://www.nbcnews.com/news/us-news/university-virginia-disenrolls-more200students-who-didn-t-meet-n1277367> (*last updated* Aug. 21, 2021, 8:40 PM). After granting 335 vaccine waivers to students with valid religious or medical reasons to be excused from coronavirus vaccinations—on condition that they be tested weekly and wear a mask in common spaces both indoors and outdoor campus venues—the University of Virginia “disenrolled” some other 238 students who refused to be in compliance with a university mandate requiring vaccinations before being admitted as students at the University. *See* Don Dimmel, Mary Beth Gathan & Mark Jacobson, *Few Americans get New Covid Booster Shot Ahead of Projected Winter Surge*, WASH. POST (Oct. 7, 2022) Led by Howard University many colleges and universities are requiring boosters in the spring term, 2023 Howard is requiring a flu vaccination and bivalent omicron specific COVID-19 booster for all students. *Id.*

²¹⁷ *See* <https://www.ncls.org/research/health/school-immunizations-exemption-state-laws.apex>; *see also* Jacqueline Howard, *These Routine Shots Already Are Required in Schools, As More States Ban COVID-19 Vaccine Requirements*, CNN (July 21, 2021), <https://www.cnn.com/2021/07/21/health/school-vaccines-requirements-covid-19-wellness-index.html>); Varun K. Phadke, Robert A. Bednarcy, et. al., *Association Between Vaccine Refusal and Vaccine Preventable Diseases in the United States*, 315 JAMA 1149 (2016).

²¹⁸ Phadke, *supra* note 217.

²¹⁹ *Id.* *See* Saad B. Omer et al., *Exemption From Mandatory Immunization After Legally Mandated Parental Counseling*, 141 PEDIATRICS (Jan. 2018), <https://doi.org/10.1542/peds.2017-2364> (stressing the importance of more stringent policies for obtaining immunization exemptions especially on the grounds of religious or personal belief). *But see*, Hilary Brueck & Julia Naftalia, *New York is Eliminating Religious Exemptions For Vaccines. Here's a full state-by-state guide to vaccine exemptions in the US.* INSIDER (June 14, 2019), <https://www.insider.com/vaccine-exemptions-by-state-map-2019-2>. A three judge U.S. federal appeals court in New York quashed a temporary injunction allowing health care workers (here, three nurses) to be granted an exemption from the state’s COVID-19 vaccination mandate which was sought initially because the Christian plaintiffs asserted that submitting to the mandate was developed from tissue taken from aborted fetuses and being vaccinated would be in conflict with their beliefs against abortion. Though a spokesperson for the Catholic bishops, the Vatican position was stated “that in the absence of ethically irresponsible COVID-19 vaccines, it is morally acceptable to get the existing COVID-19 shots.” Jimmy Vielkind, *N.Y. Mandate on Vaccines Is Upheld*, WALL ST. J. (Oct. 30, 2022), at A3.

pandemic.²²⁰ A number of Republican governors—notably Governor Henry D. McMaster (South Carolina), who said that he would fight President Biden and the Democratic party “to the gates of hell”—are united in their opposition to the Draconian measures of the Biden Plan to stop the pandemic.²²¹ In a word, the *parens patriae* powers are, for some, being exercised too broadly at the cost of compromising the volitional powers of citizens.²²²

B. Frontal Attacks by the Biden Administration

In July 2021, President Biden termed COVID-19 “a pandemic of the unvaccinated” and an “American tragedy.”²²³ In an effort to show a national spirit of good faith, the President ordered all federal civilian employees to either get vaccinated or be subject to regular testing, practice social distancing, wear a mask, and have limits imposed on official travel.²²⁴ Lloyd Austin, Secretary of Defense, subsequently mandated all members of the U.S. military to be vaccinated in September 2021.²²⁵ With 1.5 million troops affected, it is seen as but a prudent safety measure designed to prevent an

²²⁰ Apoorva Mandavilli & Roni Caryn Rabin, *Biden’s Orders Deepen Conflicts: G.O.P. Vows Legal Fight, 11 Times as Likely to Die Without Shots*, N.Y. TIMES (Sept. 11, 2021), at A1. On July 16, 2021, Dr. Rochelle P. Walensky, the Director of the Centers for Disease Control and Prevention, cautioned that – in the United States – the present COVID-19 situation “is becoming a pandemic of the unvaccinated.” At that time, approximately 60 percent of the adult population in the United States had “been vaccinated fully” – with fewer “than 50 percent of all Americans remaining unvaccinated.” Emily Anthes & Alexandra E. Petri, *C.D.C. Director Warns of a ‘Pandemic’ of the Unvaccinated*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/2021/07/16/health/covid-delta-cdc-walensky.html>.

²²¹ Jack Healey et. al., *President Tells Rivals to ‘Have At It’* (Sept. 11, 2021), at A1. Previously, Governor McMaster remarked that “[a] South Carolinian’s decision to get vaccinated is a personal one for them to make and not the government’s.” The Governor continued by stating “[e]nticing, coercing, intimidating, mandating or pressuring anyone to take the vaccine is a bad policy which will deteriorate the . . . and confidence in the state’s vaccination efforts.” AP, *Gov. McMaster Wants to Prohibit ‘Door to Door’ Vaccine Efforts*, WTLX (July 9, 2021), <https://www.wltx.com/article/news/local/south-carolina-prohibit-door-to-door-vaccine-efforts/101-f9b8a35a-9a9c-4069-a435-0e4105eb4c25>.

²²² Reid J. Epstein & Lisa Lerer, *Biden’s Vaccine Push Aligns Him With a Fed-Up, Vaccinated Majority*, N. Y. TIMES (Sep. 11, 2021), at A14.

²²³ Shear et al., *supra* note 4.

²²⁴ *Id.* See *infra* note 225. re Executive Orders compelling vaccinations. *But see* Eric C. Yoder & Lisa Reis, *Federal Vaccine Holdouts Aren’t Facing Job Losses Just Yet*, WASH. POST, Dec. 1, 2001, at 49. In January 2022, Judge Jeffrey Brown of the U.S. Southern District Court in Texas enjoined continued enforcement of the federal mandate requiring that all federal civilian employees be vaccinated against the coronavirus – thus, coming some four months after President Biden issued that mandate and after 95% of this federal workforce is vaccinated. Adeel Hassom, *Judge Blocks Biden Order for Workers to Get Shots*, N.Y. TIMES, Jan. 22, 2022 at A12.

²²⁵ Lolita C. Baldor, *COVID Vaccines to be Required For Military Under New U.S. Plan* (Aug. 9, 2021), <https://apnews.com/article/coronavirus-vaccine-us-military-requirement-pentagon-3975940c732352f72e41f6e34a3a2669>. *But see*, Alex Horton, *National Guard Troops Refusing Vaccination Will Lose Pay Pentagon Warns*, WASH. POST (Dec. 1, 2021), <https://www.washingtonpost.com/national-security/2021/11/30/oklahoma-national-guard-vaccine-mandate/> (reporting Defense Secretary rejected Oklahoma Governor’s request to exempt state’s National Guard from vaccine requirement).

uncontrolled outbreak of COVID-19 among service members, which ultimately would jeopardize the Nation's ability to protect itself during a time of crisis.²²⁶

Exasperated by the reluctance of two-thirds of American workers who remained unvaccinated for COVID-19, President Biden announced a new policy—regarded by some as Draconian—to mandate vaccinations for various classes of American workers on September 9, 2021.²²⁷ The effect of the anti-vaxxers' conduct has resulted in large segments of a society reluctant to return to work and consume goods and services, which then forces an “economic downturn.”²²⁸ Travel, especially airline travel, has been

²²⁶ See Shear, et al., *supra* note 4; Baldor, *supra* note 225.

²²⁷ See also Sheryl Gay Stolberg, *Biden's New Plan to Tame COVID-19 Pivots to Testing*, N.Y. TIMES (December 3), 2021, at A1. Another “new” strategy for combating the coronavirus pandemic's expected winter surge was addressed by the White House in December 2021 and includes provisions for opening “hundreds” of more vaccine sites, giving “booster” to all adults, imposing upon international travelers higher testing requirements before entering the country and providing free home tests for all citizens. *Id.* See also Sheryl Gay Stolberg, *Biden's New Covid Plan: Preparing for New Variants and Avoiding Shutdowns*, N.Y. TIMES, Mar. 2, 2022, at A1. Another “new” strategy was announced on March 2, 2022, which called upon Congress to appropriate up to 30 million dollars in order to sustain the coronavirus pandemic response by not only preparing for new variants, avoid shutdowns and combating the virus abroad. *Id.* NATIONAL COVID-19 PREPAREDNESS PLAN, [whitehouse.gov/covidplan](https://www.whitehouse.gov/covidplan). Interestingly, in 2005, President George W. Bush submitted his National Strategy for Pandemic Influenza which was drafted for the purpose of guiding the Nation in its preparedness and response to an influenza pandemic, <https://www.whitehouse.gov/homeland/nspi.pdf>... Following the release of this strategy, the U.S. Department of Human Services released its detailed Pandemic Influenza Plan, <https://www.hhs.gov/news/press/2005pres/200511.02.html>. An update of this Plan was undertaken and released in 2007, <http://www.whitehouse.gov/homeland/nspi-oneyear.pdf>. Both the 2005 Plan and its 2007 update show glaring weaknesses in the government's capacity to not only develop an operational nation-wide surveillance system to track a pandemic – but to set standards for pandemic care. See George P. Smith, II, *supra* note 6, at 17-28. Given the deficiencies of a National Influenza “Plan,” it can only be speculated whether the Biden Plan for dealing with the COVID-19 pandemic will be more effective in maintaining its goals. See Lolita C. Baldor, *Air Force Discharge 27 for Refusal to get COVID Vaccine*, PBS (Dec. 2021, 6:51 P.M.), <https://www.pbs.org/newshour/politics/air-force-discharges-27-for-refusal-to-get-covid-vaccine>... Later in December, it was reported that 98% of the army had received at least one vaccination while roughly 1.7% of the members of the navy had not received any vaccination. Jennifer Steinhauer, *Unvaccinated in Army and Navy Will Be Dismissed*, N.Y. TIMES (Dec. 17, 2021), at A19.

Katie Rogers & Sheryl Gay Stolberg, *Biden Mandates Vaccines for Workers, Saying, 'Our Patience is Wearing Thin'*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/2021/09/09/us/politics/biden-mandates-vaccines.html>. See also The White House, *National COVID-19 Preparedness Plan*, (March 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/03/NAT-COVID-19-PREPAREDNESS-PLAN.pdf>. See also Jim Tankersley, *New Threat Compelling the President: A Sagging Economy*, N.Y. TIMES (Sept. 10, 2021), at A1. See also, Jennifer Steinhauer, *Federal Agencies That Issued Mandates Before Biden's Push Show Some Early Success*, N.Y. TIMES (Sept. 11, 2021), at A16 (noting the success of Pentagon and Department of Veteran Affairs's increase in active-duty personnel vaccinations).

²²⁸ Tankersley, *supra* note 227.

curtailed significantly just as restaurant and retail business has been as well.²²⁹ Thus, consumer confidence in the whole economy is being shown.²³⁰

1. *Employment Mandates for Federal Employers and the Private Sector*

The Biden Plan directs businesses with more than 100 workers to direct their employees to either be vaccinated or be tested weekly.²³¹ For hospitals and other health care operations that accept Medicare and Medicaid, all federal contractors, and most other federal workers, vaccinations will be required.²³² In total, there are 17 million healthcare workers.²³³ The Department of Commerce, and specifically the Occupational Safety and Health Administration (“OSHA”), is charged with developing and implementing rules that will affect the President’s goal of getting more American citizens vaccinated.²³⁴ On

²²⁹ Niraj Chokshi & Ceylan Yeginsu, *Virus Slows Air Travel Anger at Strong Summer*, N.Y. TIMES, ((Sept. 10, 2021) at B4. See Tankersley, *supra* note 227.

²³⁰ *Id.*

²³¹ Rogers & Stolberg, *supra* note 227. See Holly Fernandez Lynch & Govind Persad, Yes, It’s Legal for Businesses and Schools to Require You to get a Coronavirus Vaccine, WASH. POST (May 4, 2021). *But see* Emily Cochrane, *Senate Votes to Reject Vaccine Mandate as Republicans Eye Midterms*, WASH. POST (Sept. 9, 2021), at A18. Guaranteeing that this issue of vaccination mandates remains a political issue, the Senate Minority Leader, Senator Mitch McConnell, charged that the federal government was altering and micromanaging “citizens’ personal choices without a legitimate basis in law and the Constitution.” *Id.*

²³² Rogers & Stolberg, *supra* note 227. See Exec. Order No. 14043, 86 F.R. 50989 (Sept. 9, 2021) (requiring Coronavirus Disease L019 Vaccinations for Federal Employees); Exec. Order No. 14042 (requires all contract institutions working for the federal government to have their employees vaccinated). See also, Azi Paybarah & Reed Abelson, *Judge Blocks Biden’s Vaccine Mandate for Health Care Workers*, WASH. POST (Dec. 1, 2021), at A14 (describing block of federal vaccination requirement for 10.3 million workers as not Congressional action).

²³³ Rogers & Stolberg, *supra* note 227. See Austin Williams, Biden signs 10 executive orders on pandemic, warns things will “get worse before they get better (Jan. 21, 2021) www.foxnews.com.

²³⁴ Lauren Hirsch & Coral Murphy Marcos, *Varying Approaches As More Companies Require Vaccine*, WASH. POST (Sept. 10, 2021) at B3. See Ahmad Chelab et al., *Appellate Ct. Halts OSHA’s Emergency Temporary Standard Requiring Mandatory COVID-19 Vaccination or Testing*, NATIONAL LAW REVIEW (Nov. 15, 2021), <http://www.natlawreview.com/article/appellate-court-halts-osa-s-emergency-temporary-standard-requiring-mandatory-covid>; Lauren Hirsch et al., *Appeals Court Reinstates OSHA’s Vaccine Mandate*, N.Y. TIMES (Dec. 18, 2021) at B1 (explaining overturning earlier ruling ensuring case moves to Supreme Court). See also AP, *Judge blocks Biden’s vaccine mandate for federal contractors*, POLITICO (Dec. 9, 2021) at 3. Reports on pending federal lawsuits in seven jurisdictions – Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia - challenging the Biden Administration’s COVID-19 mandate for employees of federal contractors to comply with workplace safety guidelines developed by a federal task force. *Id.* AP, *Judge blocks Biden’s vaccine mandate for federal contractors*, POLITICO (Dec. 9, 2021) at 3. *But see* Tom Frieden, *The Problem With Vaccine Records*, WASH. POST (Sept. 22, 2021) at A22 (explaining the need for an immunization verification system); 29 CFR 1910.5d(h); 86 FR 32376 (Nov. 4, 2021). On November 4, 2021, OSHA issued a COVID Emergency Temporary (Vaccination) Standard which requires employers who have work force of 100 or more employees, to establish, implement, and enforce a written mandatory vaccination policy. 29 CFR 1910.5d(h); 86 FR 32376 (Nov. 4, 2021). Yet, the U.S. Senate, on December 8, 2021 – 5 U.S.C. § 8801 (2000) – voted to strike down the proposed OSHA regulation which was an integral part of President Biden’s mandate requiring employers employing more than 100 employees to require

January 13, 2022, the Supreme Court of the United States issued two *per curiam* opinions: *National Federation of Independent Business et. al., v. Department of Labor, Occupational Safety and Health Administration et. al.* and *Joseph R. Biden, President of the United States v. Missouri*.²³⁵ In the first case, with a 5-4 decision, the Court found that OSHA lacked sufficient congressional authority to require employees of businesses with 100 or more employees to be vaccinated, wear masks, and/or be tested for the coronavirus weekly.²³⁶ In the second case, with a 6-3 decision, the Court held that the Secretary of the Department of Health and Human Services acted properly when he issued regulations requiring vaccination of those employed not only at hospitals but also in health care facilities supporting the Medicare and Medicaid programs.²³⁷

A number of national companies are endeavoring to either mandate or entice their employees to be vaccinated.²³⁸ Vaccination has been made a requirement for employment, for example, at Tyson Foods. In fact, United Airlines has announced that it will dismiss employees who do not adhere to the vaccine mandate or who do not seek

their work forces to be vaccinated for the COVID-19 pathogen. Jacob Pramuk and Spencer Kimball, Senate Notes to Block Biden Vaccine Mandate, Which Has Already Hit Roadblocks in Court, www.enbc.com/2021/12/08/biden-vaccine-mandate-senate-notes-to-overturn-osha-rule.html; *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021). On November 12, 2021, the U.S. Court of Appeals for the 5th Circuit, issued an opinion in the case of *BST Holdings, L.L.C. et al., v. OSHA*, No. 21-60845, which stayed OSHA's Emergency Temporary Standard on Covid-19, because the standard was found to be an over-reach of the federal government's powers under the Commerce Clause, and a violation of the separation of powers principles under the Constitution. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021).

²³⁵ 595 U.S. ____ (2022) (*per curiam*) (slip op.). This case was consolidated with the case of *Ohio et al., v. Department of Labor, Occupational Safety and Health Administration, et. al.* 595 U.S. ____ (2022) (*per curiam*) (slip op.). *Id.* This case was consolidated with the case of *Xavier Becerra, Secretary of Health and Human Services et al., v. Louisiana*. 595 U.S. ____ (2022) (*per curiam*) (slip op.).

²³⁶ *National Federation of Independent Business v. OSHA*, 595 U.S. ____ (2022) (*per curiam*) (slip op.) at 9. See generally Nathan Richardson, Antideference: COVID, and the Rise of the Major Questions Canon, 108 VA. L. REV 174 (2022)

²³⁷ *Biden v. Missouri*, 595 U.S. ____ (2022) (*per curiam*) (slip op.) at 9; See Eli Rosenberg, OSHA Pursues Permanent Covid Safety Rule For Health-Care Facilities After Previous Efforts Faltered, Expired, WASH. POST (Jan. 30, 2022), at A10. Inasmuch as this ruling by the Supreme Court applied only to facilities administering Medicare and Medicaid programs as healthcare providers (e.g., not-for-profit hospitals, nursing homes, etc.), OSHA is now seeking to draft a permanent rule requiring COVID-19 vaccinations for those for some 1,233 for profit hospitals that are not covered by this Supreme Court decision. *Id.*; see also American Hospital Association, Fact Facts on U.S. Hospitals, (2022), aha.org/statistics/fast-factors-us-hospitals.

²³⁸ Hirsch and Marcos, *supra* note 234; see Kenneth Terrell, *These Companies Are Paying Employees to Get Vaccinated*, AARP (Sept. 10, 2021), <https://www.aarp.org/work/companies-paying-employees-covid-vaccine/> (giving an analysis of the wide scope of incentive vaccination programs among some state and local governments); See also, Jordan Williams, *New York City to Pay People \$100.00 for Getting COVID-19 Vaccine*, THE HILL (Jul. 28, 2021), <https://thehill.com/homenews/state-watch/565239-new-york-to-pay-people-100-for-getting-covid-19-vaccine>; Nicole Hong, *Coaxing and \$1000 Bonuses: A Workplace Struggle to Vaccinate*, N.Y. TIMES (Aug. 6, 2021); Alex Gangitano, *Pressure Builds for Companies to Incentivize Vaccines for Workers*, THE HILL, at 15 (Mar. 3, 2021); Vareck, *supra* note 124. But see, Hohmann, *supra* note 129 (reviewing the incentives offered by some or more states and criticizing their use); Julian Sevaescu, *Good Reasons to Vaccinate: Mandatory or Payment for Risk?*, 47 J. MED. ETHICS 78, 84 (2020) (observing that remunerating citizens to execute a civil duty to secure the common good undermines community values such as solidarity and trust).

an exemption.²³⁹ Although the National Football League (“NFL”) has taken the position that it will not mandate vaccinations for all players within the League, a strong incentive for owners, coaches, and team members to be vaccinated has been set.²⁴⁰ It was announced July 22, 2021, that major consequences will result if an outbreak of COVID-19 among unvaccinated players occurs, and a football game cannot be rescheduled during the season schedule.²⁴¹ Specifically, “the team with the outbreak will forfeit and be credited with a loss.”²⁴² All team players in the particular game scheduled “will not be paid for the lost contest.”²⁴³ Furthermore, “the team responsible for the cancelled game due to unvaccinated players” will cover financial losses sustained by the NFL.²⁴⁴

President Barack Obama’s former head of the Council on Economic Advisers has cautioned that government restrictions will not be the driving force for recovery.²⁴⁵ Rather, such restrictions will be resolving fears over the dire consequences resulting from the disease—with a death toll of 650,000 presently.²⁴⁶ The Biden Plan is “on extremely strong legal ground,” especially since the U.S. Equal Employment Opportunity Commission has determined that companies may require their employees to be vaccinated.²⁴⁷

²³⁹ Kroger Food Stores have offered bonuses for its employees to get vaccinated. At Delta Airlines, all unvaccinated employees will pay an extra \$200.00 a month to remain on the corporation’s health plan. *Id.* See David J. Lynch, *As Biden’s Foes Fume, Many Businesses Back Vaccine Edict*, WASH. POST, at A1 (Sept. 12, 2021). At the state level, various state laws are being enacted to limit, drastically, any mandate that employee’s compliance with require vaccinations can be dictated. *Id.* See Husch Blackwell, *50-State Update on Pending Legislation Pertaining to Employer-Mandated Vaccinations* (Mar. 5, 2021) (updated April 20, 2021), <https://www.huschblackwell.com/newsandinsights/50-state-update-on-pending-legislation-pertaining-to-employer-mandated-vaccinations>. *But see*, Catharine Rampell, *No, Woke Corporations Are Not Going to Save Us*, WASH. POST (Aug. 5, 2021) (observing that many corporations, as for example, Walmart and Walgreen, have issued vaccination mandates to white collar corporate management and office support employees, but not for store and warehouse workers who most likely would be holdouts).

²⁴⁰ See Kevin Patra, *NFL Informs Clubs That COVID-19 Outbreaks Among Unvaccinated Players Could Lead to Forfeited Games*, NFL (July 22, 2021), <https://www.nfl.com/news/nfl-covid-19-outbreaks-unvaccinated-players-forfeit-cancelled-game>.

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See *id.* See also Andrew Beaton, *The NFL’s Unofficial Vaccine Mandate*, WALL ST. J. (Aug. 13, 2021), <https://www.wsj.com/articles/nfl-vaccine-mandate-covid-players-coaches-11627206268>.

²⁴⁵ See Tankersley, *supra* note 227.

²⁴⁶ See Tankersley, *supra* note 227; see also Rogers & Stolberg, *supra* note 227.

²⁴⁷ See Lauren Hirsch & Coral Murphy Marcos, *What You Need to Know About Corporate Vaccine Mandates*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/09/09/business/corporate-vaccine-mandates.html>; see also Press Release, U.S. Equal Employment Opportunity Commission, EEOC Issues Updated COVID-19 Technical Assistance (May, 28, 2021), <https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance> (permitting employers to exclude employees posing direct threat to health and safety of other employees); Jennifer C. Everett et al., *Legal and Practical Considerations for Employers Weighing COVID-19 Vaccination as a Condition of Continued Employment*, COMMENTARY, JONES DAY (December 2020), <https://www.jonesday.com/en/insights/2020/12/legal-and-practical-considerations-for->

C. Judicial Responses

One of the first federal court cases challenging a mandatory COVID-19 vaccine directive was filed in the federal district court of New Mexico in March 2021.²⁴⁸ An employee sought injunctive and declaratory relief—both of which were denied.²⁴⁹ The plaintiff, an employee at the Dona Ana Detention Center in Mule Creek, New Mexico, challenged the legality of a vaccine directive issued by the Detention Center as a condition of ongoing employment.²⁵⁰ The court determined that the plaintiff would suffer no job loss if he was not in compliance with the directive and, instead, merely would be required to be “coached,” take counseling, and acknowledge the legitimacy of the directive.²⁵¹

Judge Jeffrey Zimmerman, a judge in a Bronx County Criminal Court, ruled in August 2021 that the COVID-19 vaccine was a “form of rehabilitation,” which he ordered a defendant who had committed four crimes to undergo.²⁵² Having shown no regard for the common good and the public, the judge asserted that the defendant would be forced to show respect for the public welfare by being vaccinated.²⁵³

In a Federal District Court in Manhattan, Judge Jed S. Rakoff ruled that his wide discretion to determine what endangered the community allowed him the authority to order a defendant to be vaccinated because the defendant posed “a danger to the community” if unvaccinated.²⁵⁴

D. Clarity and Guidance from the Supreme Court?

It has been asserted consistently that there “is a link between law and mistrust” in that law steps in during conflict and “fills a void when social trust is low.”²⁵⁵ If law is not focused clearly, however, and resists setting fair legal rules and adopts standard-like norms of conduct which have the effect of codifying political values, law erodes “whatever

employers-weighing-covid19-vaccination (“[S]ignificant harm . . . by having someone with COVID-19, or symptoms of it, present in the workplace . . .”); Lisa Nagele-Piazza, *When Does a COVID-Vaccine Accommodation Cause an Undue Hardship?, Resources & Tools*, SHRM, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/covid-19-vaccine-accommodation-undue-hardship.aspx> (EEOC anti-discrimination laws permit employers to mandate employee vaccination); Lauren Hirsch & Emma Goldberg, *Bosses Mull Quarantines for Workers*, N.Y. TIMES (Dec. 26, 2021), <https://www.nytimes.com/2021/12/24/business/workers-covid-isolate.html> (discussing challenges facing employers because CDC has no uniform policies regarding staff exposure and isolation).

²⁴⁸ See *Legaretta v. Macias*, 2021 U.S. Dist. LEXIS 44474 (D.N.M. Mar. 4, 2021).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See Johan E. Bromwich, *2 New York Judges Ordered Defendants to Get Vaccinated. Can They Do That?*, N.Y. TIMES (Aug. 24, 2021), <https://www.nytimes.com/2021/08/23/nyregion/covid-vaccine-judge-order.html>.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703, 765 (2021).

trust exists.”²⁵⁶ “Law is not an end in itself;” rather, law should be seen as “a tool, a means” to resolve real—not hypothetical—problems.²⁵⁷ The arbiters of whether laws meet the standards of constitutional efficacy and reasonableness are the courts.²⁵⁸ Recently, Chief Justice John G. Roberts has cautioned decision makers to acknowledge the fact that, generally, they should “avoid second guessing decisions” put forward by the medical and scientific communities, especially with COVID-19 cases.²⁵⁹ In a *per curiam* opinion in the case of *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court reminded judges that they are not experts in public health and consequently should respect those who have “special expertise and responsibility in this area.”²⁶⁰ These admonishments by the Supreme Court should resonate with the public when they consider their responsibilities to act reasonably in evaluating the medical and scientific conclusions regarding the state of the COVID-19 pandemic.

A sharper insight into the judicial philosophy of a majority of the Court on the legitimacy of vaccination mandates was revealed on December 13, 2021, by an unsigned order of denial of injunctive relief issued in the case of *We The Patriots, U.S.A. Inc. v. Hochel*.²⁶¹ Plaintiffs’ action was maintained in an effort to block a state requirement that directed health care workers (here, physicians, nurses and other health care employees) be vaccinated even though they asserted a religious objection to vaccinations.²⁶² The past admonishments, together with the action by a majority of the Court in *We The Patriots*, show clearly that the Court has accepted a policy of deference to state action in matters of public health when that action is based on scientific evidence.²⁶³

As seen in the consolidated cases of *National Federation of Independent Business et al., v. Department of Labor, Occupational Safety and Health Administration*²⁶⁴ and *Joseph R. Biden, President of the United States et al., v. Missouri, et al.*,²⁶⁵ the Supreme Court tackled the

²⁵⁶ See *id.*; *What the Pandemic Disaster Teaches for Next Time. Masks, Sure, but also Trust*, WASH. POST (Dec. 13, 2021), <https://www.washingtonpost.com/opinions/2021/12/13/what-pandemic-disaster-teaches-next-time-masks-sure-also-trust/> (emphasizing that trust and confidence by the public in governmental actions is essential).

²⁵⁷ *Id.*

²⁵⁸ George P. Smith, II, *supra* note at 33.

²⁵⁹ See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-1614 (2020).

²⁶⁰ See *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); see also Ruth Marcus, *Supreme Court Cases Over Vaccine Mandates Are Really About Whether Government Can Protect Us*, WASH. POST (Dec. 23, 2021) <https://www.washingtonpost.com/opinions/2021/12/23/supreme-court-cases-over-vaccine-mandates-are-really-about-federal-vs-state-authority/> (talking about cases deciding the extent government can protect citizens during health emergency). One journalist summarized the cases over vaccine mandates as – in essence – being little more than cases regarding the extent to which the government can respond to emergency situations to protect citizens. *Id.*

²⁶¹ *We the Patriots USA, Inc. v. Hochel*, 17 F.4th 368 (2d Cir. 2021), *rev’d We the Patriots USA, Inc. v. Hochel*, 142 S. Ct. 7341 (Dec. 13, 2021) (denying application for injunctive relief).

²⁶² *Id.*

²⁶³ *We The Patriots USA, Inc. v. Hochel*, 142 S. Ct. 734. See *S. Bay United Pentecostal Church*, 141 S. Ct. 716; *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. 63. See Adam Liptak, *Supreme Court Allows Vaccine Mandate for New York Health Care Workers*, N.Y. TIMES (Apr. 14, 2022).

²⁶⁴ *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety and Health Admin.*, 142 S. Ct. 661.

²⁶⁵ *Biden v. Missouri*, 142 S. Ct. 647.

vexatious issue of the extent to which “ambiguous statutes” can be interpreted by the executive branch of government under its emergency powers.²⁶⁶

When interpreting statutory ambiguities, the Court will examine the extent to which any mandate infringes unreasonably upon civil liberties.²⁶⁷ In *Occupational Safety and Health Administration*, the Court did not find in the enabling statute under which OSHA issued its workplace vaccination regulations that “fit” under the statutory powers given to the Secretary of Commerce to protect “workplace hazards.”²⁶⁸ Contrariwise, in *Biden v. Missouri*, the Court determined that the issuance of vaccine regulations by the Secretary of Health and Human Services was consistent with the power that Congress gave to the Secretary to regulate the health and safety of hospital patients and “to ensure the ‘efficiency’ of the Medicare and Medicaid programs.”²⁶⁹

Lacking a defined judicial “algorithm” that sets clear boundaries for executive action in times of national emergency, these two consolidated cases fail to establish a clear national policy for promoting the general welfare.²⁷⁰ Because of this indecisive action by the Court, challenges against federal regulatory schemes may now be the new “normal.”²⁷¹ While the Court’s heavy insistence on limiting administrative discretion is laudable, this new emphasis on the principle of non-delegation of various congressional duties in practice will severely restrict the functioning of federal agencies because they will not know the limits of their lawmaking authority.²⁷²

E. Reaching Herd Immunity: A Noble but Unrealistic Goal

Herd immunity is essential for both the preservation and the maintenance of society. It is an obligation that communities must preserve as a “public good.”²⁷³ When

²⁶⁶ Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety and Health Admin., 142 S. Ct. 661; *Biden v. Missouri*, 142 S. Ct. 647. See The Editorial Board, *Supreme Stakes on Vaccine Mandates*, WALL ST. J. (Jan. 7, 2022), at A14.

²⁶⁷ See Liptak, *supra* note 263.

²⁶⁸ Liptak, *supra* note 263.

²⁶⁹ *Id.* But see Lawrence Gostin, *The Supreme Court’s Ruling on Vaccine Mandates Threatens The Federal Government’s Ability to Protect Public Health*, forbes.com/sites/coronavirusfrontlines/2022/01/19.

²⁷⁰ See Gostin, *supra* note 269.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* See generally, Alberto Guibileni, *supra* note 170. More than ten emergency applications to the U.S. Supreme Court challenging the legality of the Biden Administration’s vaccination mandates are to be heard on January 7, 2022. The four consolidated cases are *Becerra v. Louisiana and Biden v. Missouri*, addressing concerns they will have on health care workers under *Medicare and Medicaid Services and National Federation of Independent Businesses v. OSHA and Ohio v. OSHA*, addressing the challenges of employers with more than 100 employees. These cases represent the interests of more than half the states together with business and religious group coalitions requesting emergency action by the Court to invalidate the federal vaccination mandate. Robert Barnes, *Vaccine Mandates Take Center Stage at High Court*, WASH. POST ((Dec. 21, 2021)), at A27. Even if the Court overturns the vaccine mandates, it has nonetheless “been clear that employers still have the right to keep their own vaccine mandates in place and so do individual states,” Kent Endahl, *Supreme Court Will Decide Biden Vaccine Cases in Early January*, <https://www.kare11.com/article/news/health/coronavirus/supreme-court-will-decide-biden->

a significant percentage of a population achieves immunity to an infectious disease, this immunity provides a type of indirect protection, termed “herd immunity” or “herd protection,” to members the population who are not immune to the disease.²⁷⁴ Depending upon the degree of contagiousness of a particular infection, 50% to 90% of a designated population must attain immunity before a decline in the infection rate occurs.²⁷⁵ Nevertheless, not all vaccines are held to this percentage, especially novel viruses such as COVID-19.²⁷⁶ Changes in how people interact significantly impact the degree of viral evolution, resulting in higher or lower rates of infection.²⁷⁷ Returning to a pre-pandemic lifestyle would require the population to reach at least a 70% immunity rate in order to prevent pernicious restrictions being imposed on life activities.²⁷⁸

There are presently over 2.5 billion people in 91 developing countries, with the expectation by some that in 2022, 60% of these population bases will be vaccinated, the “acute phase” of the pandemic could then be contained.²⁷⁹ If developing countries were to receive even half of the surplus vaccines expected in 2021, almost 40% of these populations could be vaccinated.²⁸⁰

There will never be a herd immunity declaration day when society returns immediately to a state of normalcy as it is “very unlikely” COVID-19 will be eradicated.²⁸¹ However, it is speculated that if getting back to normal is a goal, the world needs to be

vaccine-mandate-cases-in-early-january/89-49c1b615-8241 (quoting Prof. Tim Johnson, University of Minnesota Law School). See *supra* note 251, 265-268 for an analysis of lower court holdings the vaccination mandates.

²⁷⁴ Gypsyamber D’Sousa & David Dowdy, *What is Herd Immunity and How Can We Achieve It With COVID-19*, JOHN HOPKINS SCHOOL OF PUBLIC HEALTH (Apr. 6, 2021), <https://www.jhsph.edu/covid-19/articles/achieving-herd-immunity-with-covid19.html>.

²⁷⁵ *Id.* As of February 12, 2022, 64.4% of all Americans were fully vaccinated and 75.9% have received one dose. *Id.*

²⁷⁶ See D’Sousa, *supra* note 274.

²⁷⁷ See *id.*

²⁷⁸ *The Best Public Investment Ever: What Will It Cost To End The Pandemic*, THE ECONOMIST, (May 29, 2021). See Rebecca Rollins & Stephanie Nolan, Race to Vaccinate Loses Nomination, N.Y. TIMES, (Apr. 23, 2022), (reporting vaccination rates among low-income population fall short of the goal of 70% threshold).

²⁷⁹ *Id.* By the end of 2021, the WHO has set a target of 40% of every country to be vaccinated. Others have set a target of 70% by September 2022. *Id.* See *The Coronavirus COVID-19’s Rocky Road*, THE ECONOMIST, (Oct. 16, 2021). A nation by nation vaccine, updated each morning, may be found at: ourworldinonly.org/covid-vaccinations. *Id.* See Lazaro Gamio, Albert Sun & Alexandria Symoda, *Global Virus Rate Exceeds One Million Per Day*, N.Y. TIMES, (Dec. 31, 2021).

²⁸⁰ D’Sousa, *supra* note 274. See *Jabs and Jab-Nots*, THE ECONOMIST, (Feb. 13, 2021).

²⁸¹ *Id.* See Nicholas Casey, Constant Meheut & Jose Boutista, *Europeans Exhausted By An Unyielding Virus, Consider Living With It*, N.Y. TIMES (Dec. 25, 2021), Virus fatigue or “exhaustion” among a growing number of Europeans has given rise to an attitude of defeat or just giving up” – a resignation to the “fact” that the coronavirus will simply not be eradicated and simply must be lived with over succeeding years. *Id.* Joel Ackenbach & Fenit Nirappil, *Fatalism Is In The Air For Virus-Weary Americans*, WASH. Post, (Dec. 24, 2021). See also Joe Davidson, *GAO Warns That Pandemic Could Have Another National Health Crisis: Anxiety*, WASH. Post, (Dec. 22, 2021); Marissa Iati, *As Virus Rages On: Many At Wit’s End: Impact Seen From Collective Trauma, Some Americans Act Out Anger In Public Outbursts*, WASH. POST (Dec. 25, 2021).

vaccinated.²⁸² With widespread vaccination and behavioral modifications such as social distancing, this coronavirus can be contained.²⁸³ Even then, the vaccine will have to be updated with booster doses required on a regular basis because COVID-19 “will continue to spread and mutate, and additional variants will emerge in the U.S. and elsewhere,” so long as global segments of the world population remains unvaccinated.²⁸⁴

Eradicating COVID-19 “is impossible.”²⁸⁵ Eventually, however, “all pandemics burn out” when a sufficient number of people develop an immunity to the virus, thus preventing it from finding “new hosts . . . to sustain growth.”²⁸⁶ It is expected that COVID-19 will follow this pattern.²⁸⁷ The central concern is what point in time this virus actually becomes endemic or prevalent in a specific locality, region, or population.²⁸⁸ A state of endemicity exists when “a virus circulates at a steady rate.”²⁸⁹ Although infections may occur as the virus circulates, “transmission is generally constant, stable and predictable.”²⁹⁰ The disease neither overwhelms nor disappears.²⁹¹ “Infections reach an equilibrium where the proportion of the population become susceptible is in balance with the likelihood of transmissions.”²⁹² It is thought that, in time, any harm arising from endemic COVID-19 may “fall somewhere between that of influenza and other common coronaviruses.”²⁹³ One immunologist has opined that “it will take decades for humanity to reach a level of immunity to [COVID-19]” comparable to other endemic respiratory diseases.²⁹⁴

²⁸² See Eugene Robinson, *We Should Vaccinate The World*, WASH. POST, (Mar. 23, 2021); Alexa Corse, *Vaccine Hesitancy Worries Officials*, WALL ST. J., (April 26, 2021). Dr. Francis Collins, Director of The National Institutes of Health, urged all Americans to take part in the coronavirus vaccination program “if we wish to put COVID-19 behind us.” *Id.*

²⁸³ See D’Sousa & Dowdy, *supra* note 274.

²⁸⁴ See *id.* State by state vaccine rates may be found at [mayoclinic.org/coronavirus-covid-19/vaccine-tracks](https://www.mayoclinic.org/coronavirus-covid-19/vaccine-tracks). As of December 16, 2021, the total share of the population fully vaccinated in the United States is 60.72%.

See also *The Worst Virus Variant Just Arrived. The Pandemic is Not Over*, WASH. POST (July 7, 2022), <https://www.washingtonpost.com/opinions/2022/07/07/worst-virus-variant-just-arrived-pandemic-is-not-over/>.

²⁸⁵ *How the World Learns To Live With COVID-19*, THE ECONOMIST (Oct. 16, 2021), <https://www.economist.com/briefing/2021/10/16/how-the-world-learns-to-live-with-covid-19> [hereinafter *How the World Learns*].

²⁸⁶ *Id.*

²⁸⁷ See *id.*

²⁸⁸ See *Endemicity*, <https://www.dictionary.com/browse/endemicity> (last visited Oct. 12, 2022).

²⁸⁹ *How the World Learns*, *supra* note 285.

²⁹⁰ *Id.*

²⁹¹ See *id.*; see also Apoorva Mandavilli, *How Often Can I be Infected with the Coronavirus*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/16/health/covid-reinfection.html>; Gabriel Pietrorazio, *Fauci Advises Assessing Personal Risk Amid COVID-19 Uptick*, ABC NEWS (April 10, 2022), <https://abcnews.go.com/Politics/fauci-individuals-continue-assess-covid-risks/story?id=83983897>. Dr. Anthony Fauci has concluded that the present coronavirus pandemic “is not going to be eradicated and it’s not going to be eliminated.” *Id.*

²⁹² *How the World Learns*, *supra* note 285 at 17.

²⁹³ See THE ECONOMIST, *supra* note 285.

²⁹⁴ *Id.* (quoting Dr. Ali Ellebedy, Washington University School of Medicine). See Roger Cohen, *Exhausted World Wonders: Will the Covid Era End Now?*, N.Y. TIMES (Dec. 14, 2021) at A1. Some scientists predict that it will take “at least five years” for COVID-19 to become endemic. *Id.* See

CONCLUSION

In contemporary society, all too often, a wish becomes a want, then a need, an entitlement, a basic liberty, and proceeds to morph into a fundamental right. Indeed, civil liberties are frequently viewed as synonyms for constitutional rights.²⁹⁵ When “rights” of this character “no longer strike a sensible balance between competing constitutional values, such as personal liberty and public safety,” they may be—and should be—modified.²⁹⁶ In a system of liberties and constitutional rights, national emergencies invariably force drastic dis-equilibria.²⁹⁷ It should be remembered that there is “no right to be free of restraint” in American democracy; rather, it is “but the right to be free of particular restraint that is not justified under the circumstances.”²⁹⁸

By virtue of its centrality to life, health and security must be acknowledged as the superseding common good which takes precedence over all other considerations encompassed by the “common good.”²⁹⁹ Public safety, by necessity, assumes a paramount social and legal importance eclipsing what were previously regarded as unassailable fundamental values.³⁰⁰ New points of balance are required by national emergencies, and these adjustments may compromise what were previously accepted as civil liberties; nevertheless, these adjustments further the goal of promoting safety and the maintenance of the common good.³⁰¹ Some perceive that “a crisis of the common good” exists today because mature people have not shown commitment—beyond their private interests—to “sustain commitments and offer human solidarity.”³⁰² President Biden has

also Hannah Devlin, *Living With COVID: Planning Beyond Virus Does Not Mean Dropping All Precautions*, THE GUARDIAN WEEKLY (Jan. 14, 2022) at 21; Lawrence O. Gostin, *Life After the COVID-19 Pandemic*, JAMA HEALTH FORUM (Feb. 10, 2022); 3(2): e220323. doi: 10.1001/amohealthforum.2022.0323. See Kelly Garrity, *Fauci: “We are not where we need to be if we are going to quote ‘Live with the Virus’”*, POLITICO, Sept. 19, 2022, at 1. *But see* Ariana Eunjung Ena, *Study: Covid reinvention can still be dangerous*, WASH POST, Nov. 11, 2022, at A4.

²⁹⁵ RICHARD POSNER, NOT A SUICIDE PACT, *supra* note 1. See also MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 1993) (where direct criticism is made of the careless proliferation of an infinity of absolute “rights”); Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918-19). This work discusses whether legal rights are “only the hypostasis of a prophecy – the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it.” *Id.*

²⁹⁶ See POSNER, NOT A SUICIDE PACT, *supra* note 1.

²⁹⁷ *Id.*

²⁹⁸ *Id.*; see also Gostin, *supra* note 269, at 627.

²⁹⁹ See Sulmasy, *supra* note 30, at 305. See also Sharona Hoffman, *Respondents’ in Public Health Emergencies*, 96 GEO. L. J. 1913, 1920 (2008); MARK LUTZ, ECONOMICS FOR THE COMMON GOOD: TWO CENTURIES OF SOCIAL ECONOMIC THOUGHT IN THE HUMANISTIC TRADITION (1999) (applying the common good to economic policy).

³⁰⁰ See Posner, *supra* note 175. See also Jorge E. Galva, *et. al.*, *supra* note 62.

³⁰¹ See generally, Gary Lawson, *supra* note 24, at 307.

³⁰² WALTER BRUEGGEMANN, JOURNEY TO THE COMMON GOOD 1 (2010). Tai Donovan, Selma Yusif & Wilson Mundo, *Toxic Individualist Syndrome Inquiries in the United States*, 29 COMMON SENSE 23 (Sep.- Oct. 2022) A comparable notion in Emerging Medicine to the common good has been charted and is referred to as the Toxic Individuality Syndrome. *Id.* Those within this syndrome are “selfish” [and lacking] empathy for others. *Id.* They are also eccentric and choose to do without considering the consequences of their actions. *Id.* Furthermore, they exhibit no

stressed the need for unvaccinated citizens to exhibit a simple “common sense can-do-it optimism”³⁰³ by fulfilling their “patriotic duty” to get vaccinated.³⁰⁴

The notion of a “common good” is no longer an eternal verity.³⁰⁵ Indeed, the *zeitgeist* of altruism and the social contract have given way to “a long-term loss of solidarity,” to “estrangement,” and even to “hostility toward one another.”³⁰⁶ This new attitude has been labeled “an-every-man-for-himself” approach to life, and its mantra is egoism and self-interest.³⁰⁷ What is forgotten, seemingly, is the fact that “in the end, every legitimate act of government works with some conception ... of the common good.”³⁰⁸

There is no justifiable claim of invidious discrimination of healthcare measures when they are shown to be reasonable and when they minimize interference with personal liberties.³⁰⁹ So long as public health and safety measures have been proven to have efficacious epidemiological and scientific bases, and are shown to be the least restrictive measures available for policy implementation, they should be acknowledged as reasonable.³¹⁰ Stated otherwise, when the personal costs of health care actions are less than the positive benefit accruing to the common good, these actions must be recognized as valid³¹¹ and recognition given that all laws and policies harm a minority population to some degree.³¹²

The quest remains to avoid over reaching by the state and “reasonably balance the public good to be achieved against the degree of personal invasion.”³¹³ Ideally, laws “equip the public health system to meet” the challenges of a system in total disarray, which is unavoidable owing to the bifurcated character of public health as both a goal and a

respect or regard for civic responsibility under any concept of social contract. *Id.* The argument of COVID has shown glowing public health protections which disproportionately injure minorities and those of low socio-economic status.

³⁰³ Inkoo Kong, *President’s Message Could Not Be Clearer*, WASH. POST (Dec. 22, 2021), at C4.

³⁰⁴ Tyler Pager et al., *Biden’s Signals Strategy Shift Against Virus*, WASH. POST (Dec. 22, 2021), A1-A4.

³⁰⁵ Liane Jackson, *Liberty’s Limits*, 107 ABA J., 9(2021-22); David Brooks, *Why Are So Many Of Us Behaving So Badly*, N.Y. TIMES (Jan. 13, 2022).

³⁰⁶ *Id.*

³⁰⁷ See Jackson *supra* note 305. See Kate Cohen, *What Happened to Masking for the Common Good?* WASH. POST (Apr. 8, 2022) at A21. See Hugh LaFollette, *The Truth in Psychological Egotism in Reason*, REASON AND RESPONSIBILITY, Joel Feinberg ed. (7th ed. 1988).

³⁰⁸ Adrian Vermeule, *Common Good Constitutionalism: Reviving the Classical Legal Tradition* (2022).

³⁰⁹ See David P. Fidler, *Global Health Jurisprudence: A Time for Reckoning*, 96 GEO. L. J. 393, 402-403 (2008). When the emergency powers of the government to protect the common good, are assaulted in times of disaster, the police powers are “free from principled constraint.” Dubber, *supra* note 97.

³¹⁰ See David P. Fidler, *Global Health Jurisprudence: A Time for Reckoning*, 96 GEO. L. J. 393, 402-403 (2008).

³¹¹ See Mark A. Lutz, *Economics for the Common Good: Two Centuries of Social Thought in Humanistic Tradition* (1999) (applying “common good” to economic policy making).

³¹² See generally Eric Posner & Adrian Vermeule, *supra* note 63.

³¹³ Gostin et al., *supra* note 76, at 125-26. See POSNER, *supra* note 1.

practice that is “inherently political and technological.”³¹⁴ When strong legislative and administrative guidelines to resolve disarray are absent, courts must test the efficiency and the reasonableness of a challenged law or regulation. When trust is lacking in government action and in the individual decisions of healthcare policy makers, the government must make a concerted effort to “educate.”³¹⁵ Yet, there must be an understanding that some citizens will either be guided by “misinformation,” their own beliefs or the ideal of unassailable civil liberties that, to them, trump policies to safeguard the common good.³¹⁶ In situations of this nature, the government is justified in incentivizing or “coercing” rational conduct necessary to achieve the goal of containing the COVID-19 pandemic through vaccination.³¹⁷ In the final analysis, without trust in government action and in

³¹⁴ See *id.*; Ed Yong, *How The Pandemic Defeated America*, THE ATLANTIC (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/>. See also José E. Alvarez, *The WHO in The Age of The Coronavirus*, 114 AM. J. INT’L LAW 578 (2020) (analyzing the failures of the WHO in managing the global response to the coronavirus pandemic). See Scott Gotlieb, UNCONTROLLED SPREAD (2020); see Larry Gostin, Analyzing the COVID-19: Make It The Law Pandemic Report, GEORGETOWN LAW CENTER (May 11, 2021), <https://oniel.law.georgetown.edu/analyzing-the-covid-19-make-it-the-last-pandemic-report/>; Ellen Johnson Sirleaf, *Report of the Independent Panel for Pandemic Preparedness and Response: Making COVID-19 the Last Pandemic*, THE LANCET (May 12, 2021); Gostin, et al., *supra* note 76 at 120; Wendy K. Mariner et al., *Public Health Law* (3d ed. 2019); see also Sheryl Gay Stolberg, *Plans for Commission to Investigate Has Bipartisan Support in the Senate*, N.Y. TIMES (Feb. 1, 2022) (reporting on draft legislation to create committees to investigate origins of coronavirus and presidential responses). see also JEFFREY SCHLEGELMILCH, RE-THINKING READINESS (2020) (criticizing the international community for its failure to surveil networks detecting new diseases). See Erich Bonow, *Biden administration unveils new pandemic preparedness and biodefense strategy*, POLITICO (Oct. 19, 2022) In order to prepare for future biological emergencies and corresponding societal disasters, the Biden Administration has requested Congress to commit \$88 billion over the next five years for federal plans for some 20 federal agencies to execute national biodefense strategies.

³¹⁵ See Conly, *supra* note 177; Colbert I. King, *It’s Not About Masks and Mandates. It’s About Public Trust*, WASH. POST (Feb. 19, 2022), <https://www.washingtonpost.com/opinions/2022/02/18/browser-dc-vaccine-mask-mandate-fights/>. Often times, “education is insufficient to change people’s behavior,” and to show them – with clarity – the potential damages of their irrational and harmful conduct. *Id.* at Ch. 2. All sound paternalistic (health) policies include a consideration of the costs of action over the benefits of inaction or maintenance of the status quo. *Id.* at 12.

³¹⁶ Holmes, *supra* note 294, at 43. Oliver Wendell Holmes concluded that “[m]en to a great extent believe what they want to.” *Id.* See Conly, *supra* note 177. at Ch. 2. John Stuart Mill asserted that “paternalistic” legislation will invariably serve as a tool for educating. *Id.*; PINKER, *supra* note 189.

³¹⁷ Conly, *supra* note 177, at Ch. 3. If decision making is irrational and harmful, it remains for the government to take action to prevent “obvious harm.” *Id.* at Ch. 3. “Soft incentivizing,” which imposes a course of action one would want to follow if informed, is preferable to “hard incentivizing,” which imposes a standard of conduct that – even if aware of the facts – one would choose not to undertake. *Id.* at Ch. 3. See Geir Moulson, *Austrians Who Flout Vaccine Mandates Face Fines Up To \$4,000.00*, ABC NEWS (Dec. 9, 2021, 9:52 AM), <https://abcnews.go.com/Business/wireStory/austrians-flout-vaccine-mandate-face-fines-4000-81650332> (explaining imposition of financial penalty or fine for failure to vaccinate could be seen as negative incentive). See also Aaron Gregg, *At Least 5 GOP-Led States Offer Jobless Benefits to Workers Who Refuse Vaccines; Others May Follow*, WASH. POST (Dec. 27, 2021), <https://www.washingtonpost.com/business/2021/12/27/5-gop-led-states-extend->

decisions made by health care policy makers, fidelity to the rule of law through voluntary cooperation is illusory, and consequently, there is no other effective alternative to managing this present pandemic other than through the imposition of governmental mandates to preserve and protect the common good.³¹⁸

unemployment-aid-workers-who-lose-jobs-over-vaccine-mandates/. There is, however, little incentive to be vaccinated when those who lose their jobs because of their refusal to be vaccinated, are granted unemployment compensation under the laws of Arkansas, Florida, Iowa, Kansas and Tennessee. See generally GRIFFIN TROTTER, *THE ETHICS OF COERCION IN MASS CASUALTY MEDICINE* (2007).

³¹⁸ Gostin et al., *supra* note 76, at 120. See Nancy J. Krause, *The Federal Response to COVID-19: Lessons From the Pandemic*, 73 *HASTINGS L. REV.* 48 (2022). See generally, ANDY SLAVITT, *THE INSIDE STORY OF HOW LEADERSHIP FAILURES, POLITICS, AND SELFISHNESS DOOMED THE U.S. CORONAVIRUS RESPONSE* (2021).