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David A. Hyman

Charles Silver

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REGULATING HEALTH CARE: PERSPECTIVES FROM GOVERNMENT FAILURE DURING THE COVID-19 PANDEMIC

David A. Hyman & Charles Silver¹

INTRODUCTION

Health care is beset with an array of market failures (e.g., informational asymmetries, externalities, monopolization, and public goods). In theory, government can intervene to fix these market failures, allowing scarce resources to be devoted to their highest use at the lowest possible cost with the fewest possible distortions – thereby promoting life, liberty, and the pursuit of happiness. That theory has launched thousands of laws, tens of thousands of regulations, and hundreds of thousands of pages of law review articles – all premised on the assumption that markets are flawed but government is not.

Of course, it takes the willful suspension of disbelief to accept the premise that government failures do not occur. Even under the best of circumstances, government failures do occur. As one of us described the basic dynamics of regulatory government failure a few years ago:

Regulators are not always neutral, and most of them are not actually technocratic experts. Stated differently, expertise informs their judgments, but so does politics. Regulators can pick sides and use their sweeping regulatory authority to make life miserable for those who are on the outs. Regulators can also screw up. Sometimes regulators do not have the requisite information to understand (let alone fix) a problem. Sometimes, the tools regulators have are the wrong ones for the job (e.g., “if the only tool you have is a hammer . . .”) Regulators can also be too risk-averse or not risk-averse enough. They can have tunnel vision, or they can seek to use their power to

1. Hyman is the Scott K. Ginsburg Professor of Health Law & Policy, Georgetown University Law Center. Email: dah137@georgetown.edu. Silver is the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure and codirector of the Center on Lawyers, Civil Justice, and the Media at the University of Texas School of Law. A much earlier version of this piece focusing on the implications of government failure for Medicare For All appeared as Charles Silver & David A. Hyman, *COVID-19: A Master Class in Government Failure*, CATO INST. (Sept. 15, 2020), <https://www.cato.org/pandemics-policy/covid-19-case-study-government-failure>. We appreciate the helpful comments we received from Scott Burris, Seth Davis, Larry Gostin, Peter Jacobson, Steve Landsman, and Tim Lytton. This Article was prepared for a symposium held in May 2021.

leverage outcomes that lie far outside the scope of their properly delegated authority. Regulators can be too cozy with the industries they regulate or not cozy enough, and so on.²

When the article containing this language was published in 2017, no one had heard of SARS-CoV-2, the virus that causes COVID-19. But the paragraph anticipates/predicts some (but by no means all) of the forms of government failure that became apparent during the pandemic. Indeed, as we have noted previously, the United States' response to COVID-19 is a "master class in government failure" at the federal, state, and local levels.³ These failures ranged from inadequate and ineffective preparation for the pandemic to incompetent and irrational responses after COVID-19 emerged. This is what government failure (with a more visible than usual associated body count) looks like.⁴

America's health care system was not responsible for these failures. When patients arrived at hospitals, overworked doctors and nurses did the best they could with the available resources. Similarly, America's non-health care market was not responsible for the shortages of toilet paper, hand sanitizer, bottled water, face masks, Clorox wipes, and the like that struck in the spring of 2020. No system that is sensibly designed to meet the normal demand for goods and services can respond instantly to a massive surge. But those shortages are now a distant memory, as production rapidly scaled up to meet the increased demand. Indeed, in May 2021, Piggly Wiggly stores in Alabama and Georgia announced that they would be giving away hand sanitizer if their four-for-one special did not clear the excess inventory.⁵

In this Article, we focus on the failures of public health experts/professionals in the U.S. Department of Health & Human Services (HHS) – particularly the Centers for Disease Control and Prevention (CDC). We do not address the many failures of elected and appointed

2. David A. Hyman & William E. Kovacic, *Risky Business: Should The FDA Pay Attention to Pharmaceutical Prices?*, 11 N.Y.U. J. L. & LIBERTY 754, 755–56 (2017).

3. See Silver & Hyman, *supra* note 1.

4. Of course, other government failures have body counts as well – but rarely are the consequences so visible. This is just another example of Frederic Bastiat's apt description of what is seen vs. unseen. Those inclined toward Dick Armey and Milton Friedman will refer instead to the "invisible foot of government." See David Maraniss, *Armey Arsenal: Plain Talk and Dramatic Tales*, WASH. POST (Feb. 21, 1995), <https://www.washingtonpost.com/archive/politics/1995/02/21/armey-arsenal-plain-talk-and-dramatic-ales/e5bf6fdb-d183-4390-8083-96a486deb657/>; Bite-size Econ, *What Does "the Invisible Foot of Government" Mean?*, YOUTUBE (Jan. 30, 2017), <https://www.youtube.com/watch?v=PTG0039pRQ4>.

5. Jaewon Kang, *Retailers Couldn't Stock Hand Sanitizer Fast Enough. Now They Can't Give It Away*, WALL ST. J. (May 21, 2021, 11:00 AM), <https://www.wsj.com/articles/america-is-awash-in-hand-sanitizer-11621522829>.

federal and state officials (i.e., Presidents Trump and Biden and multiple governors). There was no shortage of incompetence, arrogance, stupidity, shortsightedness, self-dealing, bloviating, politics, and the like among this group of worthies – but no one should be surprised that politicians behave in this way. Similarly, we do not address the failings of state and local public health personnel in the United States, or the failings of foreign governments and of quasi-governmental entities like the World Health Organization (WHO). Finally, we do not discuss the failings of the news media and of online media (Facebook, Google, Twitter, and YouTube) as well as the various self-declared “fact-checking” organizations. That is not because we think these entities did not experience many of the same failures that we document in this Article.⁶ But describing those failures is a far larger task than we have time (or the reader has patience) to review.

Instead, we focus on a highly regarded and well-funded agency (at least by comparison to state and local government public health authorities in the United States) within our federal government. If any organization had the technical expertise and resources to do a good job responding to COVID-19, it was the CDC. If this agency was not up to the task of responding with a minimum amount of competence and diligence to COVID-19, then the case for expecting government to correct market failures without making things worse becomes far more tenuous. As Professor Richard Epstein concisely noted, “[i]t would be easy to assume that collective responses are preferred when

6. For example, the WHO was harshly criticized by multiple governments and commentators for its many failings during the COVID-19 pandemic. An independent panel recently issued a report identifying some of the WHO’s mistakes — while white-washing others. *Compare THE INDEPENDENT PANEL FOR PANDEMIC PREPAREDNESS & RESPONSE, COVID-19: MAKE IT THE LAST PANDEMIC* 25–26, 48–49 (2021), https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf, and Manfred Manera, ‘I Was Treated Like a Traitor’: An Interview with WHO Whistleblower Francesco Zambon, *THE SPECTATOR WORLD* (May 27, 2021, 11:01 AM), <https://spectator.us/topic/treated-traitor-interview-who-whistleblower-francesco-zambon/>. On the failings of the media and of online media companies, Dr. Joel Zinberg noted a repeated pattern:

We’ve seen this pattern play out time and again over the past year. From the value of lockdowns and masks to the likelihood of speedy and safe vaccine development, scientists and experts based their opinions more on intuition than on facts—until the facts finally forced a reversal. And journalists seemed remarkably incurious about those expert opinions, especially when they presented them with an opportunity to criticize conservatives. Both groups, who have frequently decried official “misinformation,” ought to look first to their own failings.

Joel Zinberg, *Following the Politics, Not the Science*, *CITY J.* (May 27, 2021), https://www.city-journal.org/on-covid-19-origins-elites-followed-politics-not-science?wallit_nosession=1. See also Matthew Yglesias, *The Media’s Lab Leak Fiasco*, *SLOW BORING* (May 26, 2021), <https://www.slowboring.com/p/the-medias-lab-leak-fiasco> (noting the emergence of a “fake consensus” on the source of SARS-COV-2 and “the perils of expert dialogue on social media”).

markets are corrupt and governments virtuous. It is far harder to reach that conclusion when self-interest and corruption create difficulties from both quarters.”⁷

Part I focuses on six distinct aspects of federal government failure: planning failures, preparation failures, implementation failures, tunnel vision, mission creep, and progressive public health groupthink. Part II responds to the standard defenses that have been offered in response to the government failures documented in Part I. Part III cautions against the risks of hindsight bias in evaluating both market failure and government failure and offers some observations on the role of federalism and the civil justice system in addressing the problems identified in Part II. Part IV offers some suggestions for reform, followed by a brief conclusion.

I. FEDERAL GOVERNMENT FAILURES

A. *Failure to Plan Effectively*

The Federal Emergency Management Agency (FEMA) exists because most people instinctively look to the federal government to handle emergencies.⁸ But, under our federalist system, most of the authority to deal with emergencies (particularly public health emergencies) actually resides in “more than 2,000 state, local, and tribal public health departments.”⁹ Given this reality, planning and coordination were widely understood to be critical components of an effective response to a pandemic.

As it happens, there was no shortage of planning or plans. The federal government “had dozens of such plans, totaling thousands of pages, issued by different agencies and different presidential administrations, with little thought to how they would be combined or who would implement them.”¹⁰ When the Trump administration was criticized for ignoring the plans for handling epidemics and pandemics left behind by the Obama administration, it responded by pointing to its own plans that had been developed more recently.¹¹

7. Richard A. Epstein, *Why is Health Care Special?*, 40 U. KAN. L. REV. 307, 311 (1992).

8. *About Us*, FEMA, <https://www.fema.gov/about> (last visited Feb. 27, 2022).

9. Sarah H. Gordon et al., *What Federalism Means for the US Response to Coronavirus Disease 2019*, JAMA HEALTH FORUM at 1, 1 (May 8, 2020), <https://jamanetwork.com/channels/health-forum/fullarticle/2766033>.

10. Judge Glock, *When Crisis Planning Doesn't Work*, CITY J. (Apr. 27, 2020), <https://www.city-journal.org/when-crisis-planning-doesnt-work>.

11. Dan Diamond & Nahal Toosi, *Trump Team Failed to Follow NSC's Pandemic Playbook*, POLITICO (Mar. 25, 2020, 8:00 PM), <https://www.politico.com/news/2020/03/25/trump-coronavirus-national-security-council-149285>.

An enormous amount of effort went into these plans, but the federal government was still poorly prepared. For example, in a report issued just as COVID-19 was emerging in the United States, the Government Accountability Office (GAO) noted that “[s]ince 2009, [it had] identified broad, cross-cutting issues in leadership, coordination, and collaboration that arise from fragmentation throughout the complex interagency, intergovernmental, and intersectoral biodefense enterprise.”¹² Despite this series of reports from the GAO, HHS officials were still “unsure how decisions would be made, especially if addressing gaps or opportunities to leverage resources involved redirecting resources across agency boundaries.”¹³ As the GAO dryly noted, “[w]ithout clearly documented methods, guidance, processes, and roles and responsibilities for enterprise-wide decision-making,” a transition “from traditional mission stovepipes toward a strategic enterprise-wide approach that meaningfully enhances national capabilities” was unlikely to occur.¹⁴ When COVID-19 brought some of these shortcomings to the surface, a GAO representative told ABC News that it was “‘surreal’ to watch ‘many of the things we had predicted’ . . . take place.”¹⁵

In fairness, in dealing with an entirely new biological entity about which little was known, some (perhaps most) of the details in these plans might not have been applicable or useful. For example, a plan premised on the availability of widespread testing would only work if those tests were available – which turned out not to be the case for several months, for reasons we discuss below. Similarly, a plan premised on distributing ventilators and personal protective equipment (PPE) from the Strategic National Stockpile (SNS) would only work if the SNS had sufficient functional ventilators and an adequate supply of PPE – neither of which was the case, as we also discuss in greater detail below. But the more fundamental point is that although a great deal of time and effort was devoted to developing plans, too little time was spent taking the steps needed to ensure their effective implementation.

12. GOV’T ACCOUNTABILITY OFFICE, NATIONAL BIODEFENSE STRATEGY: ADDITIONAL EFFORTS WOULD ENHANCE LIKELIHOOD OF EFFECTIVE IMPLEMENTATION 48 (2020), <https://www.gao.gov/assets/gao-20-273.pdf>.

13. *Id.*

14. *Id.*

15. Pierre Thomas & Luke Barr, *Government Watchdog Group Warned of ‘Fragmented’ Response to a Pandemic in 2018*, ABC NEWS (Apr. 30, 2020, 4:01 PM), <http://www.1310kfka.com/abc-news/politics/04/government-watchdog-group-warned-of-fragmented-response-to-a-pandemic-in-2018/>.

B. *Failure to Prepare*

HHS oversees the SNS, which proved its value in responding to Hurricane Katrina (2005) and H1N1 (2009). Unfortunately, its inventory of masks and other PPE was depleted by the H1N1 pandemic, and neither President Obama nor President Trump was willing to expend the political capital needed to obtain sufficient funds to replenish it.¹⁶ Congress didn't care enough about the issue to take steps on its own, so the SNS was significantly depleted when COVID-19 arrived.

There were other signs of trouble with the SNS. Official government reports going back to the early 2000s warned that the supply of ventilators in hospitals and the SNS fell far short of the number that would be needed in the event of an epidemic or pandemic.¹⁷ In 2010, HHS sought to close the gap by hiring Newport Medical Instruments (NMI) to build a fleet of inexpensive portable devices.¹⁸ No ventilators were ever delivered.¹⁹ Before production started, NMI was purchased by Covidien, a large device maker, which backed out of the contract in 2014.²⁰ It took HHS five years to finalize a new contract – too late to have the ventilators ready for COVID-19.²¹ In addition, many of the ventilators that were in the SNS did not work, owing to a contract dispute between the government and the company that maintained them.²² Thus, when COVID-19 hit, the supply of working ventilators in the SNS was severely depleted because of a series of failures relating to government procurement.

Several government reports also noted that the SNS had far too few N95 masks. In 2015, the government projected that between 1 billion and 7 billion masks would be required in the event of a flu-like pandemic, depending on the severity of the outbreak.²³ When COVID-19

16. David Wright, *Fact Check: White House Says Trump Inherited “Bare Cupboard” of Medical Supplies. Here’s What We Know*, CNN (May 15, 2020, 3:26 PM), https://www.cnn.com/us/live-news/us-coronavirus-update-05-15-20/h_5987b61087f263efd96fd433de24f0a4.

17. Majlie de Puy Kamp, *Federal Officials Repeatedly Warned that US Hospitals Lacked Enough Ventilators*, CNN (Mar. 27, 2020, 7:33 PM), <https://www.cnn.com/2020/03/27/cnn10/ventilators-supply-government-warnings-coronavirus-invs/index.html>; Hsin-Chan Huang et al., *Stockpiling Ventilators for Influenza Pandemics*, 23 EMERGING INFECTIOUS DISEASES 914, 914 (2017).

18. Nicholas Kulish et al., *The U.S. Tried to Build a New Fleet of Ventilators. The Mission Failed.*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/03/29/business/coronavirus-us-ventilator-shortage.html>.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Wright, *supra* note 16.

reached America's shores, Secretary Alex Azar of the HHS reported that the SNS had "over" 10 million N95 masks – by which we assume he means not many more than that.²⁴ Unsurprisingly, in short order, there were shortages of PPE in hospitals and nursing homes, along with shortages of the swabs and transport media needed for COVID-19 testing to proceed.²⁵

When these problems surfaced, the federal government rushed to obtain ventilators and other medical equipment – waiving or ignoring government procurement rules designed to ensure quality standards and to protect the federal fisc. Unsurprisingly, there were problems, including allegations of excessive prices, failure to deliver the goods in question, and out-and-out fraud.²⁶ We expect fraud control personnel will be busy for the next several years sorting things out.

With the benefit of hindsight, ventilators turned out to be far less important in treating patients who fell ill with SARS-CoV-2 than seemed likely at the outset.²⁷ But it hardly follows that pervasive evidence of government failure involving the SNS should be ignored.

24. *Id.* (quoting Secretary Alex Azar). If there were materially more than 10 million N95 masks, Secretary Azar would undoubtedly have reported a higher figure.

25. Lauren Garnett et al., *Comparison Analysis of Different Swabs and Transport Mediums Suitable for SARS-CoV-2 Testing Following Shortages*, J. VIROLOGICAL METHODS, Nov. 2020, at 1, 1 (“[H]igh demand for testing has resulted in a depletion of commercially available consumables, including the recommended swabs and viral transport media (VTM) required for nasopharyngeal sampling.”).

26. Patricia Callahan & Sebastian Rotella, *The White House Paid Up to \$500 Million Too Much for These Ventilators*, CONGRESSIONAL INVESTIGATORS SAY, PROPUBLICA (Aug. 7, 2020, 3:40 PM), https://www.propublica.org/article/the-white-house-paid-up-to-500-million-too-much-for-these-ventilators-congressional-investigators-say?utm_source; Pamela Wood, *Maryland Seeks Investigation of Politically Connected Company That Hasn't Delivered Masks, Ventilators*, BALTIMORE SUN (May 2, 2020, 8:59 PM), <https://www.baltimoresun.com/coronavirus/bs-md-blue-flame-20200502-yowmpux5s5c7xf52wrjwb5dtp4-story.html>; Byrhonda Lyons & Laurel Rosenhall, *California's No-Bid Contracts for Pandemic Supplies Reveal Collapsed Deals, Untested Vendors*, CALMATTERS (June 15, 2020), <https://calmatters.org/health/2020/06/california-coronavirus-pandemic-government-contracts-vendors/>; J. David McSwane & Ryan Gabrielson, *The Trump Administration Paid Millions for Test Tubes — And Got Unusable Mini Soda Bottles*, PROPUBLICA (June 18, 2020, 11:23 AM), <https://www.propublica.org/article/the-trump-administration-paid-millions-for-test-tubes-and-got-unusable-mini-soda-bottles>; Ryan Gabrielson et al., *A Closer Look at Federal COVID Contractors Reveals Inexperience, Fraud Accusations and a Weapons Dealer Operating Out of Someone's House*, PROPUBLICA (May 27, 2020, 10:00 AM), <https://www.propublica.org/article/a-closer-look-at-federal-covid-contractors-reveals-inexperience-fraud-accusations-and-a-weapons-dealer-operating-out-of-someones-house>; Josh Salman & Nick Penzenstadler, *Hundreds of Millions of Dollars Goes to COVID-19 Contractors Accused of Prior Fraud*, USA TODAY (Jan. 26, 2021, 4:54 PM), <https://www.usatoday.com/in-depth/news/investigations/2020/07/07/covid-19-contracts-overlook-fraud-claims-masks-sanitizer-and-ppe/5352886002/>.

27. See Sharon Begley, *New Analysis Recommends Less Reliance on Ventilators to Treat Coronavirus Patients*, STATNEWS HEALTH (Apr. 21, 2020), <https://www.statnews.com/2020/04/21/coronavirus-analysis-recommends-less-reliance-on-ventilators/>.

Ventilators were not available when doctors reasonably thought they were needed, and the PPE that really were essential were in short supply as well.

C. Failure to Respond/Ineffective Responses

Within the federal government, the CDC has primary responsibility for responding to epidemics and pandemics. The CDC, originally called the Communicable Disease Center, was created in 1946 to address the problem of malaria.²⁸ Malaria was eradicated in the United States within two years – and like any sensible bureaucracy, the CDC started looking for new things to do.²⁹ Over time, it expanded its mission to include the full array of domestic communicable diseases, plus global public health and a variety of non-communicable diseases. (We discuss the CDC’s mission creep in greater detail below).

When COVID-19 emerged, the CDC was “an agency that ha[d] been waiting its entire existence for this moment,” observed Dr. Peter Lurie, a former associate commissioner at the FDA, who added the lament, “[a]nd then they flub[bed] it. It is very sad. That is what they were set up to do.”³⁰ Consider a few of the CDC’s “flubs,”³¹ starting with its attempt to screen passengers and facilitate contact tracing by designating a small number of airports as entry points for Americans returning from China. The effort was hampered by the CDC’s “decades-old notification system,” which could not handle the flood of information.³² When its system went offline in mid-February and the flow of data stopped, local officials who asked how to handle incoming passengers were reportedly told to “[j]ust let them go.”³³ After reviewing hundreds of pages of internal correspondence, ProPublica wrote, “[w]hat comes through clearly is confusion, as the CDC under-

28. *Our History – Our Story*, CDC (Dec. 4, 2018), <https://www.cdc.gov/about/history/index.html#:~:text=ON%20July%201946%20the,from%20spreading%20across%20the%20nation>.

29. *Elimination of Malaria in the United States (1947 – 1951)*, CDC (July 23, 2018), https://www.cdc.gov/malaria/about/history/elimination_us.html.

30. Eric Lipton et al., *The CDC Waited ‘Its Entire Existence for This Moment.’ What Went Wrong?*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/06/03/us/cdc-coronavirus.html>.

31. To us, “flub” seems far too mild a term. Readers should feel free to suggest their own characterization.

32. Lipton et al., *supra* note 30.

33. *Id.*

estimated the threat from the virus and stumbled in communicating to local public health officials what should be done.”³⁴

The CDC also botched the testing process. Because SARS-CoV-2 is a new variant, a new test was needed to diagnose patients and track its spread. German researchers developed a test in mid-January, but the CDC decided not to use it and the Food and Drug Administration (FDA), another agency within HHS, prevented private laboratories from developing and using tests of their own.³⁵ The CDC’s initial test, which it released later that month, was faulty.³⁶ The CDC also equally distributed the few kits it produced to labs across the country, without regard to the size of local populations.³⁷ The result was a dramatic shortage of valid tests in populous areas, which created the false impression that the number of cases in the United States was low.³⁸

The initial version of the CDC’s diagnostic test was faulty because it had become contaminated as a result of the CDC’s inattention to basic protocols for maintaining sterility – and then skipped standard quality control checks even after seeing anomalies in the test results.³⁹ As the *Washington Post* reported:

At one point, a Food and Drug Administration official tore into [CDC] lab officials . . . telling them their lapses in protocol, including concerns that the lab did not meet the criteria for sterile conditions, were so serious that the FDA would “shut you down” if the CDC were a commercial, rather than government, entity.⁴⁰

The problem was compounded by the CDC’s failure to have a contingency plan that would enlist private labs, academic institutions, and other organizations to produce their own tests in the event of a problem with the CDC’s test.⁴¹ The CDC also underestimated the need to

34. Caroline Chen et al., *Internal Emails Show How Chaos at the CDC Slowed the Early Response to Coronavirus*, PROPUBLICA (Mar. 26, 2020, 12:18 PM), <https://www.propublica.org/article/internal-emails-show-how-chaos-at-the-cdc-slowed-the-early-response-to-coronavirus>.

35. Meg Kelly et al., *What Went Wrong with Coronavirus Testing in the U.S.*, WASH. POST (Mar. 30, 2020), https://www.washingtonpost.com/politics/2020/03/30/11-100000-what-went-wrong-with-coronavirus-testing-us/?utm_%E2%80%A6&utm_campaign=WP_post_most.

36. Rachana Pradhan, *CDC Coronavirus Testing Decision Likely to Haunt Nation for Months to Come*, KAISER HEALTH NEWS (Mar. 23, 2020), <https://khn.org/news/cdc-coronavirus-testing-decision-likely-to-haunt-nation-for-months-to-come/>.

37. *Id.*

38. *Id.*

39. Neel V. Patel, *Why the CDC Botched its Coronavirus Testing*, MIT TECH. REV. (Mar. 5, 2020), <https://www.technologyreview.com/2020/03/05/905484/why-the-cdc-botched-its-coronavirus-testing/>.

40. Yasmeen Abutaleb et al., *The U.S. Was Beset by Denial and Dysfunction as the Coronavirus Raged*, WASH. POST (Apr. 4, 2020), <https://www.washingtonpost.com/national-security/2020/04/04/coronavirus-government-dysfunction/?arc404=TRue>.

41. *Id.*

mass produce tests, since its plan for scaling up production “didn’t envision engaging commercial lab companies for up to six months.”⁴²

Remarkably enough, this was not the CDC’s first experience with screwing up testing during a pandemic. Four years earlier, it made similar mistakes with the test for Zika:

In both emergencies, the CDC pressured the public health labs to shelve the effective tests and to use less reliable kits manufactured by the agency that sought to detect multiple pathogens. The agency stood behind the troubled test kits despite internal data indicating they were flawed. Ultimately, the CDC notified the public lab officials that they could switch to more effective tests.⁴³

With Zika, it took a year for the CDC to reverse course – but along the way, it stripped Dr. Robert S. Lanciotti, who headed the diagnostic effort for Zika, of his position for blowing the whistle about the problem.⁴⁴

The CDC’s coordination with state and local public health authorities was also poor. For example, the CDC asked state officials to use a web platform called DCIPHER to report information about persons with infections that were suspected or confirmed. “But it wasn’t until the week of Feb[ruary] 24 — the same week that the [United States] would discover its first case of community-acquired COVID-19 — that the CDC scheduled a training [session] for states on how to use the platform”⁴⁵ Getting the names and email addresses of the state employees who would use DCIPHER took even longer.⁴⁶

Finally, the CDC botched the reporting of results of SARS-CoV-2 testing by combining the results of viral and antibody tests. The conflating of these two types of tests “distort[ed] several important metrics and provid[ed] the country with an inaccurate picture of the state of the pandemic.”⁴⁷

The New York Times (which would normally put a positive spin on the performance of federal agencies, particularly when the Democrats are in charge of the executive branch) summed up matters as follows:

42. *Id.*

43. David Willman, *Lessons Unlearned: Four Years before the CDC Fumbled Coronavirus Testing, the Agency Made Some of the Same Mistakes with Zika*, WASH. POST (July 4, 2020), https://www.washingtonpost.com/investigations/lessons-unlearned-four-years-before-the-cdc-fumbled-coronavirus-testing-the-agency-made-some-of-the-same-mistakes-with-zika/2020/07/03/c32ca530-a8af-11ea-94d2-d7bc43b26bf9_story.html.

44. *Id.*

45. Chen et al., *supra* note 34.

46. *Id.*

47. Alexis C. Madrigal & Robinson Meyer, ‘How Could the CDC Make That Mistake?’, THE ATLANTIC (May 20, 2020), <https://www.theatlantic.com/health/archive/2020/05/cdc-and-states-are-misreporting-covid-19-test-data-pennsylvania-georgia-texas/611935/>.

The [CDC], long considered the world's premier health agency, made early testing mistakes that contributed to a cascade of problems that persist today It failed to provide timely counts of infections and deaths, hindered by aging technology and a fractured public health reporting system. And it hesitated in absorbing the lessons of other countries, including the perils of silent carriers spreading the infection.

. . . .
The agency struggled to calibrate its own imperative to be cautious and the need to move fast as the coronavirus ravaged the country In communicating to the public, its leadership was barely visible, its stream of guidance was often slow and its messages were sometimes confusing, sowing mistrust.⁴⁸

Surely the CDC learned from these early mistakes and got its act together – right? If only. The CDC's mid-May 2021 guidance on summer camps “is notable for its rigidity and its strictness” and “strikes many experts in infectious diseases, pediatrics, epidemiology, and psychiatry as impractical, of dubious benefit, and punishing in its effects on children.”⁴⁹ Similarly, although it has long been clear that the risk of catching COVID-19 from surface transmission is so low that deep cleaning and surface disinfection provide no real benefit – it still took many months for the CDC to update its guidelines on the subject.⁵⁰ In like fashion, it took the CDC a year to acknowledge that SARS-CoV-2 was airborne – well after a scientific consensus on the subject had been reached.⁵¹ Even updated guidelines on mask wearing, travel, and reopening schools seem to be disconnected from the science on the subject.⁵² In the words of one commentator, this “caution and indeci-

48. Lipton et al., *supra* note 30. For a more typical example of *The New York Times's* “positive spin” regarding federal agencies when a Democrat is in the White House, see Apoorva Mandavilli, *The C.D.C.'s New Leader Follows the Science. Is That Enough?*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2021/06/10/health/walensky-cdc-covid.html>.

49. David Zweig, *Experts: CDC's Summer-Camp Rules Are 'Cruel' and 'Irrational'*, INTELLIGENCER (May 4, 2021), https://nymag.com/intelligencer/amp/2021/05/experts-cdcs-summer-camp-rules-are-cruel-irrational.html?_twitter_impression=True.

50. Nicholas Florko, *CDC's Slow, Cautious Messaging on Covid-19 Seems Out of Step with the Moment, Public Health Experts Say*, STATNEWS HEALTH (May 11, 2021), <https://www.statnews.com/2021/05/11/cdc-messaging-covid-19-seems-out-of-step-public-health-experts-say/>.

51. Compare Roni Caryn Rabin & Emily Anthes, *The Virus Is an Airborne Threat, the C.D.C. Acknowledges*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/05/07/health/coronavirus-airborne-threat.html>, with Tim Elfrink et al., *CDC Reverses Itself and Says Guidelines it Posted on Coronavirus Airborne Transmission Were Wrong*, WASH. POST (Sept. 21, 2020), <https://www.washingtonpost.com/nation/2020/09/21/cdc-covid-aerosols-airborne-guidelines/>. See also Florko, *supra* note 50; Scott Gottlieb, *Where's the Science Behind CDC's 6-Foot Social-Distance Decree*, WALL ST. J. (Mar. 21, 2021, 4:35 PM), <https://www.wsj.com/articles/wheres-the-science-behind-cdcs-6-foot-social-distance-decree-11616358952>.

52. Florko, *supra* note 50; see also Vladimir Kogan and Vinay Prasad, *New CDC School Opening Guidelines Fail to 'Follow the Science'*, STAT (Feb. 20, 2021), <https://www.statnews.com/2021/02/20/cdc-school-opening-guidelines-fail-to-follow-the-science/>.

sion . . . comes at a price”; when the CDC’s “advice is too disconnected from reality and . . . too slow, then they make themselves irrelevant.”⁵³ In addition, the CDC “isn’t always clear on when the science is unsettled . . . [and] doesn’t always identify the underlying science of its recommendations.”⁵⁴

Finally, for those who believe the CDC is always and invariably guided by science, the current director of the CDC appears to believe that her feelings of “impending doom” (if states open up more quickly than she would like) constitutes a valid argument in favor of her preferred timetable.⁵⁵ Going forward, does the CDC propose to make decisions based on whether the director is feeling optimistic or pessimistic about life? Of course, the emotional affect of agency personnel (whether positive or negative) is completely irrelevant to resolving the matters that come before the CDC – including its advisory opinions on the optimal timing for reopening the economy.

D. Tunnel Vision

Government bureaucracies are prone to tunnel vision. The Department of Defense cares a lot about national defense and not so much about environmental protection.⁵⁶ Consumer protection enforcers at the Federal Trade Commission (FTC) care a lot about putting scam artists out of business and do not think about the economic consequences that the resulting rules and regulations impose on honest businesses and ordinary consumers.⁵⁷ Public health personnel were “vehemently opposed to vaping, and focused tunnel-vision-like . . . [on the risk to children, while] ‘ignoring the adult smokers who are quitting by vaping.’”⁵⁸ And so on.

www.statnews.com/2021/02/20/new-cdc-school-opening-guidelines-dont-follow-the-science/?utm_content=buffer0066d&utm_medium=social&utm_source=twitter&utm_campaign=twitter_organic.

53. Florko, *supra* note 50 (quoting Dr. Leanna Wen).

54. Gottlieb, *supra* note 51.

55. Melissa Quinn, *CDC Director Rochelle Walensky Warns of “Impending Doom” Amid COVID-19 Spikes*, CBS NEWS (Mar. 30, 2021, 6:46 AM), <https://www.cbsnews.com/news/rochelle-walensky-cdc-chief-covid-concern/>. (“‘I’m going to pause here, I’m going to lose the script and I’m going to reflect on the recurring feeling I have of impending doom,’ Walensky said, appearing to grow emotional. ‘We have so much to look forward to But right now I’m scared.’”).

56. See David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1472 (2014).

57. See *id.* at 1491.

58. Sally Satel, *The E-Cigarette Revolution That Wasn’t*, NAT’L AFF., Spring 2020, at 70, 76, <https://www.nationalaffairs.com/publications/detail/the-e-cigarette-revolution-that-wasn’t>.

In this case, tunnel vision took the form of a laser-like focus on preventing the spread of COVID-19. More specifically, public policy focused on reducing infections, hospitalizations, and deaths from COVID-19 and gave little or no consideration to the costs and consequences of these efforts in other domains, including access to health care for people with other medical conditions; the health consequences (including weight gain and depression) among those who were no longer able to go about their lives; the educational losses among those who were no longer able to attend school in person; the moral and morale consequences for those who were unable to attend church as usual; the health consequences for children who failed to receive their normally scheduled immunizations because pediatricians had closed their offices; financial losses for landlords who were unable to evict non-paying tenants as a result of a CDC edict that was (at best) of highly questionable legality; and the economic consequences for those who lost their businesses or jobs (often along with their health insurance) as a result of the lockdowns. All of these problems were compounded by the lock-in effects of these policies, as government agencies found it politically and psychologically difficult to reverse course or moderate the lockdowns, even as new information became available that cast doubt on their value and illuminated their harms. Obviously, there was variation in how individual states responded to COVID-19 – with much of the variation developing over time – but it seems clear that tunnel vision was still an important factor affecting the recommendations made by public health personnel throughout the pandemic.

Any fair assessment of our response to COVID-19 should take account of *all* the benefits and *all* the costs. To focus only on the COVID-19-related benefits and costs is simply the wrong way to approach the issue. Of course, conducting a cost-benefit analysis would have been extremely challenging, given the limited information that was available—another reason that it would have made sense to evaluate the costs and benefits of lockdowns before imposing them, by drawing on past epidemics and pandemics for data. The difficulty of constructing a counterfactual baseline given voluntary mitigation efforts is also an important complication. But the alternative is to simply assume that any and all interventions are cost-justified – and the evidence that has accumulated on extended mandatory lockdowns is flatly inconsistent with that sunny assumption.⁵⁹

59. Casey B. Mulligan, *The Backward Art of Slowing the Spread? Congregation Efficiencies During COVID-19* 10 (Becker Friedman Inst., Working Paper No. 2021-51, 2021), https://bfi.uchicago.edu/wp-content/uploads/2021/04/BFI_WP_2021-51-1.pdf; Eran Bendavid et al., *As-*

E. Mission Creep

Government bureaucracies are also prone to mission creep – and the CDC provides a textbook example of the phenomenon.⁶⁰ Over time, it broadened its mission well beyond its original portfolio of communicable diseases to encompass such health-related topics as birth defects and developmental disabilities, alcohol and tobacco use (including vaping), athletic injuries, traffic accidents, and gun violence.⁶¹ The CDC’s mission creep paralleled the rise of the “new public health,” which rationalized these expansions in the name of improving population health.⁶² Congress was persuaded to go along with this shift in emphasis, dramatically expanding the CDC’s funding and headcount, even as the share and amount spent on communicable diseases declined.⁶³

The CDC’s expanded portfolio meant that the agency was no longer focused on its original job of communicable diseases. Once the CDC stopped treating communicable diseases as “Job 1,” it took its eye off the ball that justified its existence. The “new public health” was doubtless more glamorous and exciting, but the resulting mission creep caused the CDC to be unprepared for problems with the “old public health” – including Ebola and COVID-19.⁶⁴

sessing Mandatory Stay-At-Home and Business Closure Effects on the Spread of COVID-19, 51 EUR. J. CLINICAL INVESTIGATION, Apr. 2021, at 1, 4.

60. Ian Platz, *#Reviewing Mission Creep*, REALCLEAR DEF. (June 16, 2016), https://www.realcleardefense.com/articles/2016/06/16/reviewing_mission_creep_109452.html; William M. Arkin, *Mission Creep Hits Home*, L.A. TIMES (Nov. 23, 2003), <https://www.latimes.com/archives/la-xpm-2003-nov-23-op-arkin23-story.html>; see also Chris Edwards, *Did Mission Creep Cause the Failures at the CDC?*, NAT’L INT. (May 16, 2020), <https://nationalinterest.org/blog/reboot/did-mission-creep-cause-failures-cdc-154511>. On mission creep in public health, see Wendy K. Mariner, *Mission Creep: Public Health Surveillance and Medical Privacy*, 87 B.U. L. REV. 347, 353 (2007).

61. Eric Boehm, *Mission Creep and Wasteful Spending Left the CDC Unprepared for an Actual Public Health Crisis*, REASON (May 13, 2020 2:15 PM), <https://reason.com/2020/05/13/mission-creep-and-wasteful-spending-left-the-cdc-unprepared-for-an-actual-public-health-crisis/>; see also Michelle Minton, *Narrow the Focus of the Centers for Disease Control and Prevention and Food and Drug Administration*, COMPETITIVE ENTERPRISE INST. (May 12, 2020), <https://cei.org/studies/narrow-the-focus-of-the-centers-for-disease-control-and-prevention-and-food-and-drug-administration/>.

62. Richard Allen Epstein, *Let the Shoemaker Stick to His Last: A Defense of the “Old” Public Health*, 46 PERSP. BIOLOGY & MED. S138, S138–39 (2003). For a response defending the merits of the new public health, see Lawrence O. Gostin & Maxwell Gregg Bloche, *The Politics of Public Health: A Response to Epstein*, 46 PERSP. BIOLOGY & MED. S160, S162–63 (2003).

63. Michael Hiltzik, *More on Why the U.S. Was Unprepared for Ebola*, L.A. TIMES (Oct. 13, 2014, 3:43 PM), <https://www.latimes.com/business/hiltzik/la-fi-mh-unprepared-for-ebola-20141013-column.html>.

64. See, e.g., Lawrence O. Gostin et al., *Is the United States Prepared for Ebola?*, 312 JAMA 2497, 2497–98 (2014); Edwards, *supra* note 60.

Of course, when it comes to agency design, not all mission creep is bad. It often makes more sense to assign new tasks to an existing agency with the skills and equipment to address a particular problem rather than create an entirely new agency (with the associated start-up costs and delays) to handle things. Unoccupied policy terrain will usually end up being assigned to someone – and it makes sense for agencies in adjoining policy space to move quickly to stake their claim. Finally, mission creep has the (useful) potential to offset tunnel vision, at least with respect to the issues that are now within the bailiwick of the agency, post-mission creep.

That said, public and congressional support for the CDC will erode quickly if it proves itself unable to handle all of the issues that are now on its plate – particularly if inadequate performance emerges in what was once a core competency of the agency. This problem is compounded by the reality that the CDC was already skating on thin ice among voters who believed public health should not intervene in divisive disputes over topics with strong political, moral, or religious valences – including gun ownership, dietary choices, vaping, human sexuality, and the like.

F. *Progressive Public Health Groupthink*

Popular rhetoric notwithstanding, the promotion of public health is not simply a technical matter of “following the science.” Instead, public health requires the making of difficult and contestable value-laden choices.⁶⁵ Even if public health personnel did their best to make these choices in good faith, their positions sometimes seem to be the result of progressive public health groupthink.

For starters, consider the public health position on travel bans. Public health practitioners all know that travel bans should not be used in responding to pandemics.⁶⁶ That is what the WHO guidelines say, and that is what is taught in schools of public health.⁶⁷ Unsurprisingly, the result is that the “global health community [has an] ‘almost religious belief that travel restrictions are bad.’”⁶⁸ As the title of a Vox piece from January 2020 described the consensus, “[t]he evidence on travel

65. Edwards, *supra* note 60.

66. Julia Belluz & Steven Hoffman, *The Evidence on Travel Bans for Diseases Like Coronavirus Is Clear: They Don't Work*, Vox (Jan. 23, 2020, 9:10 AM), <https://www.vox.com/2020/1/23/21078325/wuhan-china-coronavirus-travel-ban>.

67. *Id.*

68. Julia Belluz, *Vietnam Defied the Experts and Sealed its Border to Keep Covid-19 Out. It Worked.*, Vox (Apr. 23, 2021, 4:00 AM), <https://www.vox.com/22346085/covid-19-vietnam-reponse-travel-restrictions>.

bans for diseases like coronavirus is clear: They don't work, They're political theater, not good public health policy."⁶⁹

When the White House "requested" the CDC to order the closure of U.S. borders and a halt to asylum processing, the professional staff at the CDC flatly refused to sign the necessary paperwork, arguing that there was no valid public health reason to do so.⁷⁰ That decision was reversed by the director of the CDC, who was then harshly criticized by various champions of public health, all insisting that there was no evidence to support travel bans and pointing to the WHO guidelines that reflected that consensus.⁷¹ As other countries closed their borders, travel bans gradually became less controversial, even though public health personnel stuck by their original position.

Over time, it became clear that at least under some circumstances, travel bans could actually reduce the spread of infections.⁷² Of course, this does not mean that travel bans are automatically a good idea – but it seems clear that the uniform opposition to travel bans went too far in the opposite direction. What explains the mismatch between the universal consensus against travel bans among public health personnel and the objective evidence of their efficacy in the real world? Public health personnel appear to have opposed travel bans because they were inconsistent with prevailing progressive attitudes about the obligations that rich countries owed to poorer countries – and not because there was strong empirical evidence supporting the claim that travel bans were ineffective.⁷³ This dismissal of travel bans became dogma within the public health community – even though the belief was effectively "evidence-free."⁷⁴

Our second example comes from the CDC's Advisory Committee on Immunization Practices (ACIP), which makes non-binding recommendations on which vaccines should be given and when. ACIP pro-

69. Belluz & Hoffman, *supra* note 66.

70. Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, AP NEWS (Oct. 3, 2020), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae>.

71. Belluz & Hoffman, *supra* note 66. In fairness, this was not the first round of criticism of the then-director of the CDC. See Brett Murphy & Letitia Stein, *The CDC Chief Lost His Way During COVID-19. Now His Agency is in the Balance*, USA TODAY (Jan. 26, 2021, 4:53 PM), <https://www.usatoday.com/in-depth/news/investigations/2020/11/11/covid-19-cdc-director-buckled-politics-tarnishing-agency/3755324001/>.

72. Belluz, *supra* note 68.

73. *Id.*

74. *Id.* ("I have now realized that our belief about travel restrictions was just that — a belief. It was evidence-free." (quoting Professor Larry Gostin)). See also Lawrence O. Gostin & Meryl Justin Chertoff, *Lockdowns, Quarantines, and Travel Restrictions, During COVID and Beyond: What's The Law, and How Should We Decide?*, HEALTH AFF. BLOG (Mar. 24, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210322.450239/full/>.

posed in late-2020 that after health care professionals and those seventy-five and older had been immunized, the next group should be front-line essential workers, rather than those aged sixty-five to seventy-four.⁷⁵ The theory behind this sequence of vaccination priority was that front-line essential workers were more racially diverse than those aged sixty-five to seventy-four, and prioritizing vaccination of the former group would help compensate for past disparities in access to treatment.⁷⁶ It is not entirely clear whether those involved in the decision understood that deferring vaccinations for those sixty-five to seventy-four would result in significantly *more* deaths, since the decision took fewer than ten minutes of discussion, and everyone involved stated their support in conclusory terms, based on the policy's anti-racist motives and consequences.⁷⁷ Once the recommendation became public, it was met with a firestorm of criticism and was quickly reversed at the next ACIP meeting.⁷⁸

75. Abby Goodnough & Jan Hoffman, *The Elderly vs. Essential Workers: Who Should Get the Coronavirus Vaccine First?*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2020/12/05/health/covid-vaccine-first.html>; Betsy McCaughey, *Stop the 'Public Health' Drive to Racialize Vaccine Distribution*, N.Y. POST (Dec. 20, 2020, 7:40 PM), <https://nypost.com/2020/12/20/stop-the-public-health-drive-to-racialize-vaccines>.

76. Goodnough & Hoffman, *supra* note 75; McCaughey, *supra* note 75.

77. As Megan McArdle noted in a piece published in the *Washington Post*:

[T]he discussion of whether to prioritize essential workers was anything but robust. The committee left only 10 minutes for it, during which not one of those 14 intelligent and dedicated health professionals suggested adopting the plan that kills the fewest people. Nor did anyone run out of time to make that point. Ten minutes was actually a little too much for what turned out to be a pro forma opportunity to get on the record endorsing the plan, and particularly its emphasis on racial and economic equity in health care.

...

It's striking how many people commented on this question, and with such otherwise-content-free affirmations. It's also striking that the same group reversed itself 13 to 1 only a month later, after it turned out there were also reputational consequences for endorsing this particular quest for equity.

Megan McArdle, *Public Health Bodies May Be Talking at Us, but They're Actually Talking to Each Other*, WASH. POST (Dec. 27, 2020), https://www.washingtonpost.com/opinions/public-health-bodies-may-be-talking-at-us-but-theyre-actually-talking-to-each-other/2020/12/27/2c5064a2-4626-11eb-975c-d17b8815a66d_story.html.

78. *Id.* Similarly, Professor Yascha Mounk noted:

In one of the most shocking moral misjudgments by a public body I have ever seen, the CDC invoked considerations of 'social justice' to recommend providing vaccinations to essential workers before older Americans even though this would, according to its own models, lead to a much greater death toll. After a massive public outcry, the agency has adopted revised recommendations.

Yascha Mounk, *Why I'm Losing Trust in the Institutions*, PERSUASION (Dec. 23, 2020), https://www.persuasion.community/p/why-im-losing-trust-in-the-institutions?utm_campaign=post&utm_medium=email&utm_source=twitter.

Finally, Matthew Yglesias, a well-known blogger, highlighted how bizarre the recommendation actually was:

Public health practitioners wholeheartedly embraced treating racism as a public health priority and explicitly pointed to that objective as a justification for the original ACIP decision.⁷⁹ But the speed with which the decision was reversed when it was made public indicates that the values and value-based choices of the ACIP members (and of the broader public health community) are not widely accepted outside progressive public health circles – meaning it is just another example of progressive public health groupthink.⁸⁰

Our final (and most egregious) example of progressive public health groupthink involves the views of public health professionals on the desirability of enforcing prohibitions on public gatherings.⁸¹ When COVID-19 emerged in the United States, public health personnel strongly advocated for universal masking, social distancing, and the prohibition of public gatherings. Schools, churches, sporting events, theaters, restaurants, bars, gyms, non-essential stores, and anywhere else where more than a few people might gather were shuttered. Those who argued for less restrictive measures, attended rallies for President Trump, demonstrated at state capitals, or otherwise sought to petition the government for relief from the lockdowns were treated

Last but by no means least, note the weird racecraft here. We know the people who've been dying the most from Covid are Black senior citizens. The decision here is to *not* prioritize vaccinating them, but to instead vaccinate a *different, less vulnerable group of people* and then assert that this creates some kind of abstract collective racial benefit.

There have been a lot of takes lately about woke liberals prioritizing symbolic racial issues over the concrete needs of non-white people, but this idea really takes the cake.

Matthew Yglesias, *Give the Vaccine to the Elderly*, SLOW BORING (Dec. 18, 2020), https://www.slowboring.com/p/vaccinate-elderly?utm_source=url.

79. See Goodnough & Hoffman, *supra* note 75; see also Harald Schmidt et al., *Is it Lawful and Ethical to Prioritize Racial Minorities for COVID-19 Vaccines?*, 324 JAMA 2023, 2023–24 (2020); Nancy M. McClung et al., *The Advisory Committee on Immunization Practices' Ethical Principles for Allocating Initial Supplies of COVID-19 Vaccine — United States, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1782, 1784 (2020).

80. Robby Soave, *To Mitigate Racial Inequity, the CDC Wants to Vaccinate Essential Workers Before the Elderly*, REASON (Dec. 18, 2020, 5:36 PM), <https://reason.com/2020/12/18/vaccine-cdc-essential-workers-elderly-racial-covid-19/>.

81. We do not address the frequent instances in which government officials, including some public health personnel, did not observe the rules and practices they were imposing on their fellow citizens. For a catalog of such events, see Tristan Justice, *Rules For Thee But Not For Me: A Rundown Of Lockdown Leftists Ignoring Their Own Rules*, THE FEDERALIST (Dec. 3, 2020), <https://thefederalist.com/2020/12/03/rules-for-thee-but-not-for-me-a-rundown-of-lockdown-leftists-ignoring-their-own-rules/>. It does not take much of this behavior for ordinary people to conclude they are being treated like chumps. Although Governor Gavin Newsom was not recalled, his attendance at a celebratory dinner at the French Laundry after he had locked down his fellow citizens of California certainly fueled the drive to throw him out of office.

as cranks who should be fined or arrested for placing public health and safety in peril.⁸²

When demonstrations erupted across the United States in response to the death of George Floyd, public health personnel (including the former director of the CDC) completely reversed course and argued that these protests should be allowed (and even encouraged).⁸³ In fairness, the CDC itself did not take a position on this particular issue, but the agency has long made it clear that it views racism as a public health problem. Public health personnel have offered exceptionally weak arguments attempting to justify the egregious double standard, but the overt viewpoint discrimination is undeniable.⁸⁴ It takes a remarkable degree of groupthink to argue for protests and free speech for me, but not for thee.

The pretensions of public health to be a neutral scientific enterprise would be more credible if it were not so easy to catalog these and other examples of progressive public health groupthink.⁸⁵ Framed in

82. David Lim, *Study Links Trump Rallies to More Than 700 Covid Deaths*, POLITICO (Oct. 31, 2020, 5:58 PM), <https://www.politico.com/news/2020/10/31/trump-study-coronavirus-rallies-433760>.

83. See, e.g., Open Letter from Public Health Professionals, Infectious Disease Professionals, and Community Stakeholders Advocating for an Anti-racist Public Health Response to Demonstration Against Systemic Injustice Occurring during the COVID-9 Pandemic (June 2020) (on file with author); Tom Friedman (@DrTomFriedman), TWITTER (June 2, 2020, 7:32 AM), <https://twitter.com/DrTomFriedman/status/1267796218496901121>; Jennifer Nuzzo (@JenniferNuzzo), TWITTER (June 2, 2020, 1:25 PM), <https://twitter.com/jennifernuzzo/status/1267885076697812993?lang=EN>. See also Tanya Lewis, *How to Evaluate Coronavirus Risks from Black Lives Matter Protests*, SCIENTIFIC AM. (June 22, 2020), <https://www.scientificamerican.com/article/how-to-evaluate-coronavirus-risks-from-black-lives-matter-protests/>.

84. Tara Haelle, *Risking Their Lives to Save Their Lives: Why Public Health Experts Support Black Lives Matter Protests*, FORBES (June 19, 2020, 6:22 PM), <https://www.forbes.com/sites/tarahaelle/2020/06/19/risking-their-lives-to-save-their-lives-why-public-health-experts-support-black-lives-matter-protests/?sh=A836d9e851b5>; see also Lewis, *supra* note 83 (“I think there’s a stark difference between [the Black Lives Matter] protests, where there’s an explicit messaging around social distancing and masks, and the anti-lockdown protests, which were explicitly against the public health measures—they encouraged people not to wear masks and not to social distance. That intentional messaging does matter.” (quoting Professor Caroline Buckee, epidemiologist at Harvard T.H. Chan School of Public Health)). That said, the good news is that the protests appear not to have triggered further spread of COVID-19, in part because non-protesters appear to have shifted their activities in response to “heightened risk of contagion and protest-related violence.” Dhaval M. Dave et al., *Black Lives Matter Protests and Risk Avoidance: The Case of Civil Unrest During a Pandemic* ii (Nat’l Bureau of Econ. Res., Working Paper 27408, 2021), https://www.nber.org/system/files/working_papers/w27408/w27408.pdf. But, the public health personnel who advocated for a different set of rules for handling the Black Lives Matter protests had no idea that would happen. Instead, their position on whether protests were permissible or not was based on whether they agreed with the protesters and their (political) goals. A more straightforward case of viewpoint discrimination is hard to imagine.

85. Cf. David A. Hyman, *Constitutional Prognostication: Does Anybody Know Anything?*, 2014 U. ILL. L. REV. 1279, 1292 n.68 (“[I]f elite con law professors don’t want to be dismissed as political hacks, maybe they shouldn’t sound so much like political hacks.”).

government failure terms, credibility is a critical but exceptionally fragile asset for public agencies like the CDC.⁸⁶ As Mark Carney, the former Governor of the Bank of Canada, put it in a speech, “[t]rust arrives on foot, but leaves in a Ferrari.”⁸⁷ If people come to believe that the CDC’s judgments reflect nothing more than progressive public health groupthink, they are likely to respond to the next round of recommendations and dictates with “that’s just like your opinion, man.”⁸⁸

II. THE CASE FOR THE DEFENSE

Those who defend public health (and the CDC) have offered four distinct arguments to explain away the agency’s failings during the COVID-19 pandemic. All are generic in that they have been used repeatedly when problems arise that involve public health agencies (including the CDC). We also provide a fifth argument that has not typically been offered but that we think is far more plausible than the other four arguments.

A. Budgetary Constraints

Public health personnel invariably complain that they are unable to obtain sufficient funding to do everything that needs to be done.⁸⁹ In fairness, the funding of public health at the state and local level (which accounts for a substantial majority of spending on public health) has been flat for many years.⁹⁰ The same cannot be said of the CDC’s

86. See, e.g., Libby Cathey et al., *CDC Director Grilled over Mask Guidance in Heated Capitol Hill Hearing*, ABC NEWS (May 11, 2021, 12:40 PM), <https://abcnews.go.com/Politics/fauci-walensky-push-covid-19-vaccinations-defend-cdc/story?id=77620790> (“I always considered the CDC to be the gold standard. I don’t anymore.” (quoting Senator Susan Collins)). Similarly, Senator Bill Cassidy noted that the “American people ‘are beginning to disregard what you [the CDC] say is true.’” *Id.* See also Jacob Sullum, *Why Americans Can’t Trust the CDC’s COVID-19 Advice*, REASON (May 19, 2021, 12:01 AM), <https://reason.com/2021/05/19/why-americans-should-not-trust-the-cdcs-covid-19-advice/> (“Kavita Patel, health policy director during the Obama administration, expressed similar disappointment, telling CNBC ‘the CDC’s credibility is eroding as quickly as our cases of coronavirus are eroding.’”).

87. Gordon Isfeld, *Carney Urges Banks to Win Back Trust by Rediscovering ‘Core Values’*, FIN. POST (Feb. 25, 2013), <https://financialpost.com/news/fp-street/carney-urges-banks-to-win-back-trust-by-rediscovering-core-values>.

88. THE BIG LEBOWSKI (Working Title Films 1998) (quoting The Dude, who abides). There is some evidence suggesting that is already happening. See *supra* note 86.

89. See, e.g., TRUST FOR AM.’S HEALTH, THE IMPACT OF CHRONIC UNDERFUNDING ON AMERICA’S PUBLIC HEALTH SYSTEM: TRENDS, RISKS, AND RECOMMENDATIONS 4–10 (2021), https://www.tfah.org/wp-content/uploads/2021/05/2021_PHFunding_Fnl.pdf.

90. Boehm, *supra* note 61; see also Y. Natalia Alfonso et al., *US Public Health Neglected: Flat or Declining Spending Left States Ill Equipped to Respond to COVID-19*, 40 HEALTH AFF. 664, 664–66 (2021) (noting that “state governmental public health spending saw no statistically significant growth between 2008 and 2018 except in injury prevention”).

budget, which has dramatically expanded over the past several decades and is currently on the order of \$8 billion per year.⁹¹

That said, over the same time period, the portfolio of matters handled by public health agencies has steadily expanded – so there was certainly a growing mismatch in funding versus priorities.⁹² However, the portfolio expansion was a deliberate (political) choice – so it seems unlikely that the mismatch in funding versus priorities and expectations was simply an oversight. Instead, it probably reflected the financial constraints and competing objectives that federal, state, and local governments face when funding the services that taxpayers say they want but for which they are unenthusiastic about paying. The shortfall forces the agencies to triage the various items in their portfolio:

Confronted with major gaps between policy duties and means, agencies must engage in policy triage . . . Some policy areas will flourish, and others will languish—even if budgets keep pace with new responsibilities (which they almost never do). The agency must perform triage to survive, but the process of regulatory triage is often only weakly observable or completely shrouded.⁹³

Of course, agencies that engage in triage are risking “legislative re-cremations if a sidetracked issue blows up.”⁹⁴ Nevertheless, the CDC seemingly had plenty of money and headcount to work on multiple trendy initiatives involving non-communicable diseases – so complaints about the CDC’s budgetary constraints ring somewhat hollow.

Finally, if federal, state, and local public health agencies are unable to persuade politicians to provide the necessary budget to do their jobs, that is actually an admission (against interest) that we should expect lots of government failure on their watch. The primary justification for governmental interventions is to correct for market failures – but does the same conclusion follow quite so readily if agency personnel believe their budget will inevitably be insufficient to do the job?⁹⁵

91. Boehm, *supra* note 61; *see also* TRUST FOR AM.’S HEALTH, *supra* note 89, at 14 fig. 1.

92. TRUST FOR AM.’S HEALTH, *supra* note 89, at 20.

93. Hyman & Kovacic, *supra* note 2, at 1475. To be sure, “an agency that engages in triage without explicit or implicit backing from its congressional oversight committee is effectively playing Russian roulette with its future.” *Id.* at 1485.

94. *Id.* at 1475.

95. Epstein, *supra* note 7, at 307. Of course, there are reasons for governmental intervention other than correcting for market failures, and certain public health interventions do not map neatly (or even at all) onto market-failure based justifications for regulation. But even here, if the budget and headcount are inadequate to perform the needed tasks, it is far from obvious that partial measures will improve matters.

B. Political Interference

We have already noted the criticism that resulted when the director of the CDC overruled professional staff on closing the border and suspending asylum proceedings. But, at various points during the Trump administration, there were also loud complaints about political interference with the CDC's public statements and messaging and loud criticism of President Trump's off-the-cuff observations and suggestions.⁹⁶ These disputes are part of a larger debate over what Democrats call the Republicans' "war on science," and what Republicans call reining in "'unaccountable bureaucrats' . . . who are 'imposing their private agenda on our citizens.'"⁹⁷

Now that the shoe is on the other foot, similar incidents have resulted in far more muted criticisms. Two prominent FDA vaccine regulators have resigned because the Biden administration set a schedule for booster vaccines that was not supported by the science as the FDA staff sees it — "triggering turmoil within the Food and Drug Administration, frustrating regulators and sparking fear that political pressures will once again override the agency's expertise."⁹⁸ Tensions were raised further by President Biden's off-hand remark that boosters could be administered five months after the initial round of vaccinations, rather than the eight month period that had seemingly been decided.⁹⁹ President Biden's remarks "fueled worries that an administration that had pledged to 'follow the science' was letting politics dictate outcomes."¹⁰⁰ In September 2021, the director of the CDC compounded the problem by reversing the recommendation of

96. See, e.g., Will Feuer, *CDC Director Says He's 'Deeply Saddened' by Allegations of 'Sedition' from Trump HHS Appointee*, CNBC (Sept. 16, 2020, 1:38 PM), <https://www.cnbc.com/2020/09/16/cdc-director-says-he-was-deeply-saddened-by-allegations-of-sedition-from-trump-hhs-appointee.html>; see also *Coronavirus: Outcry After Trump Suggests Injecting Disinfectant as Treatment*, BBC (Apr. 24, 2020), <https://www.bbc.com/news/world-us-canada-52407177>.

97. Eric Katz, *Trump Signs Orders to Restrict 'Unaccountable Bureaucrats' from Creating 'Backdoor Regulations'*, GOV'T EXEC. (Oct. 9, 2019), <https://www.govexec.com/management/2019/10/trump-signs-orders-restrict-unaccountable-bureaucrats-creating-backdoor-regulations/160493/>; Jonathan Chait, *American Death Cult: Why Has the Republican Response to the Pandemic Been So Mind-bogglingly Disastrous?*, INTELLIGENCER (July 20, 2020), <https://nymag.com/intelligencer/2020/07/republican-response-coronavirus.html>; Scott Andes, *Trump's CDC Directive Isn't Just a War on Words. It's a War on Science.*, BROOKINGS METRO. REVOLUTION (Dec. 18, 2017), <https://www.brookings.edu/blog/metropolitan-revolution/2017/12/18/trumps-cdc-directive-isnt-just-a-war-on-words-its-a-war-on-science/>. There is actually a Wikipedia page on the Trump administration's "political interference with science agencies." *Trump Administration Political Interference with Science Agencies*, WIKIPEDIA, https://en.wikipedia.org/wiki/Trump_administration_political_interference_with_science_agencies (last visited Jan. 5, 2022).

98. Sarah Oweremohle, *Biden's Top-down Booster Plan Sparks Anger at FDA*, POLITICO (Aug. 31, 2021, 6:04 PM), <https://www.politico.com/news/2021/08/31/biden-booster-plan-fda-508149>.

99. *Id.*
100. *Id.*

ACIP that boosters not be offered to those aged eighteen to sixty-four, even if their occupation placed them at high risk of exposure to COVID-19.¹⁰¹ Once again, there were muted complaints, and far less coverage than similar incidents involving the prior administration.¹⁰² Sauce for the gander anyone?

In fairness, there is something unseemly about young staffers with limited substantive expertise overruling highly trained public health personnel – but no one seems to get exercised when Congress relies on young staffers with limited substantive expertise to write our nation’s laws and put together oversight hearings – let alone when Article III judges rely on recent law school graduates with no substantive experience to write their opinions. In addition, although neither of us specialize in constitutional law, we have been unable to find anything in the U.S. Constitution that empowers executive branch government agencies and their personnel to operate free of political oversight.¹⁰³ For better and worse, that is the system that we have.

C. *We Are Just Following the Science*

When they are criticized, public health personnel invariably claim they are just following the science.¹⁰⁴ Science is rarely so dispositive. Science is a process whose results should inform policy – but the framing of that policy routinely requires balancing multiple considerations

101. .See, e.g., Apoorva Mandavilli & Benjamin Mueller, *C.D.C. Chief Overrules Agency Panel and Recommends Pfizer-BioNTech Boosters for Workers at Risk*, N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/2021/09/24/world/covid-boosters-vaccine-cdc-director.html>.

102. See Michael D. Shear & Benjamin Mueller, *Biden Promised to Follow the Science. But Sometimes He Gets Ahead of the Experts*, N.Y. TIMES (Sept. 24, 2021), <https://www.nytimes.com/2021/09/24/us/politics/biden-science-boosters-vaccine.html> (The “announcements by Mr. Biden and Dr. Walensky did not sit well with all of the scientists who advise them, raising questions about the president’s pledge to always ‘follow the science’ as he fought the pandemic.”).

103. Congressional efforts to insulate certain executive branch officials from political oversight by the President have faced tough sledding in recent years. And Congress has not even tried to insulate the CDC from political oversight. See Josh Blackman, *A Booster Shot for Presidential Administration*, VOLOKH CONSPIRACY (Sept. 26, 2021), <https://reason.com/volokh/2021/09/26/a-booster-shoot-for-presidential-administration/> (“The accountable President is in charge. Not an obscure panel of scientists.”).

104. National Institute of Allergy and Infectious Diseases (NIAID) Director Anthony Fauci has taken this strategy to peak absurdity, asserting that his critics are “really criticizing science because I represent science.” Ramesh Ponnuru, *Fauci Can’t Use Science to Excuse His Missteps*, WASH. POST (Dec. 1, 2021, 6:29 PM), https://www.washingtonpost.com/business/fauci-cant-use-science-to-excuse-his-missteps/2021/12/01/d64d8b30-52c6-11ec-83d2-d9dab0e23b7e_story.html; see also Carlie Porterfield, *Dr. Fauci on GOP Criticism: ‘Attacks On Me, Quite Frankly, Are Attacks On Science’*, FORBES (June 9, 2021, 4:32 PM), <https://www.forbes.com/sites/carlieporterfield/2021/06/09/fauci-on-gop-criticism-attacks-on-me-quite-frankly-are-attacks-on-science/?sh=1f888b2d4542>.

that lie far beyond the expertise of public health personnel.¹⁰⁵ Even when a decision appears to lie solely within the domain of public health, attitudes about the range of acceptable risks and defensible distributions of costs and benefits are actually moral and political matters, which are not subject to resolution on technical grounds.¹⁰⁶ Smart people reading the same data can come to very different conclusions about the range of acceptable policies – let alone the optimal policy.

We have already noted the criticism that the recent CDC guidance ignored the relevant science. When even the *New York Times* publishes scathing articles on the CDC's failure to follow the science and its extreme risk aversiveness, this defense also rings hollow.¹⁰⁷

D. *Better Safe Than Sorry*

The fourth defense is simply a restatement of the precautionary principle – when in doubt, take the most cautious approach to public health problems like pandemics. There is something to be said for this approach, but at least as much to be said against it. For one thing, it may be unclear what the most cautious approach actually is. Should beaches, parks, and other outdoor recreational facilities be closed or left open? Closing them may seem more prudent, until one considers that transmission of a disease may be more likely when people spend time together in close quarters. For another, precautions in one domain can cause huge collateral consequences in other domains – and those collateral consequences can readily exceed those associated with the original problem if it had been addressed using something other than the precautionary principle. At best, the precautionary principle is little more than a slogan – and not a sensible policy.

105. See, e.g., Jeffrey Miron & Peter Van Doren, *Balancing Tradeoffs Between Liberties and Lives*, CATO INST. (Sept. 15, 2020), <https://www.cato.org/publications/pandemics-policy/balancing-tradeoffs-between-liberties-lives> (arguing that policymaking for COVID-19 requires tradeoffs, including an evaluation of “how much a society should be willing to pay to mitigate death and suffering caused by the disease.”)

106. Peter Van Doren, *When and How We Should “Trust the Science”*, CATO INST. (Sept. 15, 2020), <https://www.cato.org/publications/pandemics-policy/when-how-we-should-trust-science>.

107. See, e.g., David Leonhardt, *A New C.D.C. Story*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/05/26/briefing/CDC-outdoor-covid-risks-guidelines.html> (“[M]ore than once during this pandemic, C.D.C. officials have acted as if extreme caution has no downsides.”). See also David Leonhardt, *A Misleading CDC Number*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/2021/05/11/briefing/outdoor-covid-transmission-cdc-number.html>; see also Jacob Sullum, *The CDC’s Ever-Shifting COVID-19 Advice Shows the Agency Is Ill-Suited to Decide Which Risks Are Acceptable*, REASON (May 14, 2021, 3:20 PM), <https://reason.com/2021/05/14/the-cdcs-ever-shifting-covid-19-advice-shows-the-agency-is-ill-suited-to-decide-which-risks-are-acceptable/> (“The CDC’s recommendations have never been purely a matter of science.”).

E. *Blame the Bureaucracy*

The final defense (which somewhat surprisingly, the CDC's defenders almost never offer) is that the problems we have identified are primarily attributable to the CDC's bureaucracy. Indeed, when you find smart people doing dumb things, bureaucracy is usually to blame.¹⁰⁸ Viewed through this lens, bureaucratic risk aversion explains the CDC's initial slow response to COVID-19, its tardy updating of guidelines, and the overly conservative nature of those guidelines/recommendations relating to COVID-19 and other health issues.¹⁰⁹ We think this is actually the best explanation of the CDC's failings in dealing with COVID-19 – but it also suggests the difficulty of fixing the underlying problem, even if the CDC has become the “poster child for bureaucratic incompetence.”¹¹⁰

III. HINDSIGHT BIAS, FEDERALISM, AND CIVIL JUSTICE

A. *Hindsight Bias*

When evaluating a tragedy like the COVID-19 pandemic, it is important to guard against hindsight bias. After the fact, it is easy to identify steps that ought to have been taken but were not. Matters are rarely so clear *ex ante*, however, especially with a new biological entity like SARS-CoV-2. At the outset, it was reasonable to think there was a risk of surface transmission – and so deep-cleaning was a plausible response. Similarly, until we had clear evidence on the mortality risk age gradient, it was plausible to assume that everyone was equally at risk and to take only limited steps to protect the elderly living in nursing homes. Finally, it was sensible to worry about access to ventilators, even though that turned out to be mostly a non-issue. It is actually good news that each of these decisions was revisited and updated as

108. Cf. Todd Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis*, 101 Nw. L. Rev. 861, 861–62 (2007) (“‘Why is it that the smart and conscientious people on IRBs are so prone to making such poor decisions?’ [This article argues that the problem is that] IRBs are fundamentally bureaucracies, and that this bureaucratic structure explains much of their frequent suboptimal decision-making.”)

109. Robby Soave, *Go Back To Ignoring the CDC's Impractically Cautious Guidance*, REASON (Mar. 3, 2021, 4:53 PM), <https://reason.com/2021/03/03/cdc-guidance-cautious-coronavirus-experts-ignore-them/> (“It’s important to keep in mind that the CDC has *always* urged people to follow impractically cautious health guidelines The truth is that people should be prepared for government health experts to preach excessive caution indefinitely because that’s what the experts have always done.”).

110. Peter Suderman, *The CDC is Still Botching the Coronavirus Testing Process*, REASON (May 22, 2020, 10:28 AM), <https://reason.com/2020/05/22/the-cdc-is-still-botching-the-coronavirus-testing-process/>.

more and better information became available.¹¹¹ Labeling these initial decisions as flawed is a textbook example of hindsight bias, because the judgment is based on what we know now, rather than what we knew then.

But plenty of other things look like government failure even without the benefit of hindsight bias. The failure to replenish the SNS. The failure to effectively implement a plan to deal with a pandemic. The flip-flop regarding masking to prevent the spread of COVID-19 – which was a bad idea until it was suddenly the best imaginable idea. The escalating commitment to lockdowns, which started as a very temporary strategy to protect hospital and ICU capacity, but quickly became a semi-permanent solution to COVID-19 until a viable vaccine was developed, tested, approved, and widely distributed. The decision to protect hospital capacity by transferring patients who had been exposed to COVID-19 from hospitals to poorly staffed and poorly equipped nursing homes – where they seeded the population, causing many deaths.¹¹² And the decision to “pause” use of the Johnson & Johnson vaccine, based on an incredibly rare side effect – which appears to have caused more vaccine hesitancy than it prevented.¹¹³ Even this partial list makes it clear that we should not dismiss these government failures as artifacts of hindsight bias.

B. *Federalism and the Role of Civil Justice*

Public health personnel don't seem to like federalism. If there is a right way to treat something, the entire nation should fall into line – and state-level variation in funding, expertise, and approach are all problems that should be eliminated.¹¹⁴ For example, National Institute

111. Or, in words often (but mistakenly) attributed to John Maynard Keynes, “[w]hen the facts change, I change my mind. What do you do, sir?” Jason Zweig, *Keynes: He Didn't Say Half of What He Said. Or Did He?*, WALL ST. J. (Feb. 11, 2011, 9:19 AM), <https://www.wsj.com/articles/BL-MB-32547>.

112. For those inclined to take a historical perspective, something similar happened during the Spanish Flu pandemic, when army and navy personnel transfers (via railroad and naval ships) seeded the virus throughout the United States. See generally JOHN M. BARRY, *THE GREAT INFLUENZA* (2004).

113. Alex Tabarrok, *The Disastrous J&J Pause*, MARGINAL REVOLUTION (Apr. 29, 2021, 7:24 AM), <https://marginalrevolution.com/marginalrevolution/2021/04/the-disastrous-jj-pause.html>.

114. See Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally – The U.S. Response to Covid-19*, 382 N. ENG. J. MED. e75, e75 (2020) (stating that “SARS-CoV-2 is exactly the type of infectious disease for which federal public health powers and emergencies were conceived,” that “[s]trong, decisive national action is therefore imperative,” and that “the lack of interjurisdictional coordination has and will cost lives”); Howard Bauchner & Phil Fontanarosa, *Thinking of Risk in the Era of COVID-19*, 324 JAMA 151, 152 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2767022> (arguing that federal agencies should take the lead, and ensure that “rigorous scientific evidence and epidemiological assessments . . . serve

of Allergy and Infectious Diseases (NIAID) director Anthony Fauci gave an interview where he stated:

The states are very often given a considerable amount of leeway in doing things the way they want to do it, as opposed to in response to federal mandates, which are relatively rarely given What we've had was a considerable disparity, with states doing things differently in a non-consistent way. . . . There have been a lot of factors that have led to the fact that, unfortunately for us, the United States has been the hardest-hit country in the world, *but I believe that disparity among how states do things has been a major weakness in our response.*¹¹⁵

What such complaints ignore is that when there is uncertainty or variation in preferences (let alone both), federalism is an important engine for generating knowledge, improving performance, and avoiding nationwide catastrophes.¹¹⁶ Of course, there are risks of spillovers, but what would we know about the merits of aggressive lockdowns if we did not allow individual states to develop their own approach to these (and other) problems? Georgia and Florida were harshly condemned for loosening the reins, while New York and California were hailed for their bold leadership in locking down – but it is hard to think both have the “right” approach. Should the attorney who dressed up as the Grim Reaper have gone to Florida beaches (as he did), or should he have stationed himself outside then-Governor Cuomo’s mansion?¹¹⁷

It matters which of these approaches has a higher mortality – and which has more modest collateral impacts. Both measures are important in evaluating the optimal response to COVID-19. A national approach eliminates the possibility of learning from variation. Finally, as detailed previously, it is not like the performance of the federal government in the areas where it had exclusive responsibility was anything to write home about.¹¹⁸

as the basis for objective discussion, fact-based decisions, and optimal determination of the best path forward for individuals and for society”).

115. Jacob Sullum, *Is Anthony Fauci Right That Federalism Undermined the U.S. Response to COVID-19?*, REASON (Dec. 28, 2020, 1:40 PM), <https://reason.com/2020/12/28/is-anthony-fauci-right-that-federalism-undermined-the-u-s-response-to-covid-19/> (emphasis added).

116. Suderman, *supra* note 110.

117. *See generally* Martin Pengelly, *Florida Man Stalks Beach as Grim Reaper to Protest Reopening Amid Pandemic*, THE GUARDIAN (May 2, 2020), <https://www.theguardian.com/us-news/2020/may/02/florida-grim-reaper-beach-video-coronavirus>.

118. *See* Sullum, *supra* note 115 (“In the areas where the federal government has taken the lead . . . its performance has been characterized by striking incompetence, bureaucratic intransigence, bewildering inconsistency, and lethal foot dragging. Given that track record, trusting the feds to decide every detail of COVID-19 control measures seems ill-advised, even if the Constitution permitted it.”)

In like fashion, federalism allows us to evaluate the actual performance of the civil justice system by comparing states that go their own way on a range of issues (i.e., judicial elections vs. appointments; caps on damages; and rules for juror disqualification and the admission of expert testimony). Variation is not a problem – it is the key to developing a learning system that more closely tracks differences in state-level preferences. All that said, we think it unlikely that we can litigate our way out of COVID-19.¹¹⁹

IV. WHAT IS TO BE DONE?

To reduce (but not eliminate) the likelihood of repetition of the specific government failures we detail, we should start by restoring the CDC to its original mission – which was focused solely on communicable diseases. To accomplish that objective, the CDC should be renamed the Communicable Disease Center (its original name). Everything the CDC currently does that does not involve communicable diseases should be transferred (along with the associated budget and headcount) to a newly created entity within HHS called the Center for Non-Communicable Diseases (CNCD). That way, agency personnel can be rewarded for their successes and held accountable for their failings in the communicable disease domain, without getting into debates about offsetting performance in the non-communicable disease domain.¹²⁰ Similarly, if Congress elects to inadequately fund investments in communicable diseases, it will not be able to point to its aggressive funding of non-communicable diseases, such as heart disease and cancer, as the justification for their decisions when the communicable disease butcher's bill comes due.

119. *But see* Alex Gregory, *Your Infection May Be Antibiotic-Resistant, But Let's See How It Responds to Intensive Litigation*, CARTOONSTOCK (Oct. 30, 2018), <https://www.cartoonstock.com/cartoon?searchID=CC43863>.

120. Those interested in other ideas for improving the performance of the CDC might profitably consult Lawrence O. Gostin et al., *The CDC is on Top of the Science, but Muddying the Message*, DAILY BEAST (Apr. 30, 2021, 4:53 AM), <https://www.thedailybeast.com/the-cdc-is-on-top-of-the-science-but-muddying-the-message?ref=author>; Sandro Galea et al., *Eight Operational Suggestions for a Renewed CDC*, MILBANK Q. (Jan. 5, 2021), <https://www.milbank.org/quarterly/opinions/eight-operational-suggestions-for-a-renewed-cdc/>; Lawrence O. Gostin, *Reforming and Strengthening the Centers for Disease Control and Prevention: Five Key Reforms to Renew the Agency's Stature and Effectiveness*, MILBANK Q. (Nov. 30, 2020), https://www.milbank.org/quarterly/opinions/reforming-and-strengthening-the-centers-for-disease-control-and-prevention-five-key-reforms-to-renew-the-agencys-stature-and-effectiveness/?utm_medium=email&utm_campaign=Revitalizing%20the%20CDC%20%20Improving%20V; *see also* Lawrence O. Gostin et al., *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, 324 JAMA 837, 838 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2769440>.

Second, all public health personnel should be required to undergo annual mandatory training on (i) the benefits of federalism as a source of experimentation and feedback and on (ii) the (sometimes limited and dated) evidence base for a rotating series of standard and well-accepted public health interventions.¹²¹ To counter progressive groupthink, the training should be conducted by “red teams” whose primary job is to point out weaknesses in the conventional wisdom on any given issue.¹²² Public health institutions should also be required to institute red teams to periodically reevaluate existing programs and scrutinize proposed new initiatives and mandates.

Third, to minimize public resistance, public health personnel should respond to pandemics with at most three or four narrowly tailored policies – and they should rigorously explain the basis, logic, and judgment calls associated with those policies.¹²³ They should also commit to a transparent process for routinely reevaluating those responses and the associated messaging based on the best available information. These steps will help avoid inertia and lock-in effects.

Fourth, public health personnel should also take all necessary steps to ensure that senior government officials are adhering to the policies that they impose on the general public.¹²⁴ Violators should be named and shamed. We should similarly name and shame those who seek to limit disagreement and debate about the sources of any given pandemic or other public health emergency – and the best way to address it.¹²⁵ There is no doubt that “misinformation” can cause all sorts of

121. We suspect training about the merits of federalism is more appropriate and necessary for federal health personnel than for those at the state level. But, better safe than sorry.

122. DEF. SCI. BD. TASK FORCE, *THE ROLE AND STATUS OF DoD READ TEAMING ACTIVITIES 2* (2003), <https://fas.org/irp/agency/dod/dsb/redteam.pdf>. We expect that economists and heterodox public health personnel would be prominent members of these red teams.

123. Scott Burris et al., *The “Legal Epidemiology” of Pandemic Control*, 384 *NEW ENG. J. MED.* 1973, 1973–75 (2021); see also Gottlieb, *supra* note 51 (“When trying to contain a pandemic, it’s essential to focus on the precautions likely to make the biggest difference [E]xperts can ask people to sacrifice only so much before resistance starts to form, given the social and economic hardship.”).

124. For examples of the problem, see *supra* note 81.

125. See, e.g., Jacob Sullum, *Vivek Murthy’s Demand for Data on COVID ‘Misinformation’ is Part of a Creepy Crusade to Suppress Dissent*, REASON (Mar. 3, 2022, 2:35 PM), <https://reason.com/2022/03/03/vivek-murthys-demand-for-data-on-covid-misinformation-is-part-of-a-creepy-crusade-to-suppress-dissent/> (noting that the Biden administration’s attempts to encourage censorship “is especially chilling given the administration’s highly elastic definition of misinformation, which includes criticism of controversial pronouncements by agencies such as the Centers for Disease Control and Prevention (CDC). The CDC itself has a long track record of misrepresenting scientific evidence and misleading the public.”); Jacob Sullum, *Biden Charges Facebook with Homicide, While His Surgeon General Recommends ‘Legal and Regulatory Measures’ to Suppress COVID-19 ‘Misinformation’*, REASON (July 19, 2021, 10:45 AM), <https://reason.com/2021/07/19/biden-charges-facebook-with-homicide-while-his-surgeon-general->

problems in responding to a pandemic – but the supposed cure (i.e., censorship) is far worse than the underlying disease – particularly given the impact of politics and public health groupthink on the conventional wisdom of the moment – let alone on implementation of the supposed “cure.”¹²⁶

Finally, we should lower our expectations. Failures (both government and market) are to be expected.¹²⁷ In both domains, durable solutions are more likely to emerge from aggressive adaptation of existing capacity and from innovation, rather than from top-down planning.¹²⁸ COVID-19 will become a distant memory not because of the traditional public health litany of test, trace, and isolate – let alone because of anything the CDC has done – but because decades of public and private investment in mRNA made it possible for pharmaceutical companies to develop multiple vaccines when the need arose – and to do so with breathtaking speed.¹²⁹

CONCLUSION

COVID-19 came out of the blue, but epidemics are an old problem. Since yellow fever killed about ten percent of Philadelphia’s population in 1793, the United States has experienced over a dozen major epidemics, including scarlet fever, typhoid fever, Spanish flu, polio,

recommends-legal-and-regulatory-measures-to-suppress-covid-19-misinformation/ (cataloging the problems raised by the Biden administration’s hostility to free speech and noting that “[o]nce you get beyond clear examples like warnings about vaccine-induced mass sterility, misinformation is in the eye of the beholder”); Editorial Board, *How Fauci and Collins Shut Down Covid Debate*, WALL ST. J. (Dec. 21, 2021, 6:47 PM), https://www.wsj.com/articles/fauci-collins-emails-great-barrington-declaration-covid-pandemic-lockdown-11640129116?mod=opinion_trending_now_opn_pos2.

126. See, e.g., Jonathan Chait, *The Groupthink That Produced the Lab-Leak Failure Should Scare Liberals*, INTELLIGENCER (June 3, 2021), <https://nymag.com/intelligencer/article/lab-leak-hypothesis-covid-liberal-media-science-biden-trump-china.html> (“Health experts who understood all along that it was entirely possible that the virus emerged from a lab simply refused to examine the hypothesis because it had become associated with the likes of Donald Trump.”). See also Katherine Eban, *The Lab-Leak Theory: Inside the Fight to Uncover COVID-19’s Origins*, VANITY FAIR (June 3, 2021), <https://www.vanityfair.com/news/2021/06/the-lab-leak-theory-inside-the-fight-to-uncover-covid-19s-origins> (“Throughout 2020, the notion that the novel coronavirus leaked from a lab was off-limits. Those who dared to push for transparency say toxic politics and hidden agendas kept us in the dark.”).

127. PETER SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER* 1–6 (2014).

128. Yuval Levin, *What We Have Gotten Right in the COVID Fight*, COMMENTARY (Sept. 2021), <https://www.commentary.org/articles/yuval-levin/americas-record-during-covid/>.

129. Damian Garde & Jonathan Saltzman, *The Story of mRNA: How a Once-Dismissed Idea Became a Leading Technology in the Covid Vaccine Race*, STAT (Nov. 10, 2020), <https://www.statnews.com/2020/11/10/the-story-of-mrna-how-a-once-dismissed-idea-became-a-leading-technology-in-the-covid-vaccine-race/>.

measles, whooping cough, HIV, and H1N1.¹³⁰ Even though the federal government has dealt with epidemics for more than a century, and even though the CDC had ample warning of its shortcomings in handling Ebola in 2014, it was not ready for COVID-19. Worse still, despite the pervasive evidence of government failure in responding to COVID-19, there is little reason to hope that the United States will be materially more prepared for the next epidemic, unless we make some changes – and even then, the prospects are not all that great.

Politicians don't get elected or reelected by making low-probability disasters policy imperatives.¹³¹ To the contrary, they lose support by diverting funds away from near-term projects that voters care about more.¹³²

Public health personnel (like all government employees) have their own incentives, which do not map all that well onto pandemic preparedness either. During the often-lengthy periods between pandemics, it is hard for agency personnel to retain focus on them – even if the bureaucracies in question are functioning well (which they almost never are).

Government failure comes in many varieties, and we have only scratched the surface in this Article. But, if we want to make our government and civil society stronger, we should start by creating durable incentives that motivate the federal agencies that were responsible for the country's fragmented and ineffective response to COVID-19 (as well as all the other problems with our health and our health care system) to perform better. Otherwise, come the next pandemic, we will experience *déjà vu* all over again – and the body count could easily be much higher.

130. Dana Robinson & Ann Battenfield, *The Worst Outbreaks in U.S. History*, HEALTHLINE (Mar. 24, 2020), <https://www.healthline.com/health/worst-disease-outbreaks-history#hiv>.

131. Andrew Healy & Neil Malhotra, *Myopic Voters and Natural Disaster Policy*, 103 AM. POL. SCI. REV. 387, 404 (2009).

132. Of course, the portfolio of near-term projects can change; when bioterrorism became a concern post-9/11, it was exceptionally well-funded, and there were large investments in preparedness against that threat. When the issue fell off the near-term agenda, the funding went away and so did much of the capacity. Private Telephone Communication with Peter Jacobson, Professor Emeritus of Health Law & Policy, Univ. of Michigan Sch. of Public Health (July 2021).

