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## Learning from South Korea's COVID-19 Response: Why Centralizing the United States Public Health System is Essential for Future Pandemic Responses

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### Cover Page Footnote

Meghan Ricci graduates from Seattle University School of law in May 2022. Meghan would like to thank her friends, family, SJTEIL editors, mentors, and faculty advisors for their continued support and helpful tips along the way. A special thanks to Brooke McCulloch for inspiring the article through long debates during lockdown and to Sienna Mathes for reading, editing, and calming throughout the publishing process.

# Learning from South Korea's COVID-19 Response: Why Centralizing the United States Public Health System is Essential for Future Pandemic Responses

By: Meghan Ricci\*

## I. INTRODUCTION

The COVID-19 pandemic revealed stark differences in governmental preparedness across the globe.<sup>1</sup> The United States, once thought of as a global leader in public health, had the theoretical skill and efficiency to handle the pandemic but failed to utilize those skills and resources during an actual health crisis.<sup>2</sup> In the spring of 2020, everyone watched the U.S.'s reaction to the unfolding of the COVID-19 pandemic due to its historic placeholder as a global leader and innovator. However, the performance of the U.S. in response to the global pandemic disappointed both global commentators and U.S. citizens.<sup>3</sup>

The Center for Disease Control (CDC) confirmed the first case of COVID-19 in the U.S. on January 17, 2020, just days after the first reports of positive cases outside of China occurred.<sup>4</sup> Dr. Anthony Fauci, the U.S.'s leading infectious disease expert and a member of the U.S. government's coronavirus response team, warned that the U.S. needed to make an "abrupt change" in its pandemic response.<sup>5</sup> He cautioned that the rate of new daily cases could rise above 100,000 if nothing changed; the rate of new daily cases predicted by Dr. Fauci came true on November 12, 2020.<sup>6</sup>

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<sup>1</sup> Xuefei Ren, *Pandemic and Lockdown: A Territorial Approach to COVID -19 in China, Italy, and the United States*, 61 EURASIAN GEOGRAPHY AND ECON. 423 (Apr. 13, 2020).

<sup>2</sup> See Drew Altman, *Understanding the US failure on coronavirus – an essay by Drew Altman*, THE BMJ, Sept. 14, 2020, <https://www.bmj.com/content/370/bmj.m3417> [https://perma.cc/X4FZ-3MQE].

<sup>3</sup> *Id.* It needs to be noted that the COVID response in the US exposed dramatic and repulsive longstanding racial inequalities. These inequalities need to be addressed but are beyond the scope of this paper.

<sup>4</sup> *CDC Museum COVID-19 Timeline*, Centers for Disease Control and Prevention (Aug. 4, 2021), <https://www.cdc.gov/museum/timeline/covid19.html#:~:text=January%202020%2C%202020%20CDC%20in%20Washington%20state>. [https://perma.cc/YTC9-KED3]; Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html> [https://perma.cc/JD7Y-QCKE].

<sup>5</sup> Josh Dawsey & Yasmeen Abutaleb, *'A whole lot of hurt': Fauci warns of COVID-19 surge, offers blunt assessment of Trump's response*, WASH. POST (Oct. 31, 2020), [https://www.washingtonpost.com/politics/fauci-covid-winter-forecast/2020/10/31/e3970eb0-1b8b-11eb-bb35-2dcfdab0a345\\_story.html](https://www.washingtonpost.com/politics/fauci-covid-winter-forecast/2020/10/31/e3970eb0-1b8b-11eb-bb35-2dcfdab0a345_story.html) [https://perma.cc/NXD8-K7H8].

<sup>6</sup> Dawsey, *supra* note 5; Julia Hollingsworth et al., *November 12 coronavirus news*, CNN (Nov. 13, 2020), [https://www.cnn.com/world/live-news/coronavirus-pandemic-11-12-20-intl/h\\_4f0e7093337d282647f59eec8f2de32b](https://www.cnn.com/world/live-news/coronavirus-pandemic-11-12-20-intl/h_4f0e7093337d282647f59eec8f2de32b) [https://perma.cc/2PHJ-LUVQ].

By the end of November, the number of COVID-19 cases in the U.S. had grown to over ten million positive diagnoses and 237,875 deaths.<sup>7</sup>

Meanwhile, the first case diagnosed in South Korea occurred on January 20, 2020.<sup>8</sup> South Korea had a total of only 27,427 positive cases and 478 deaths as of November 2020.<sup>9</sup> South Korea had an efficient, controlled, and timely response to the global pandemic. The country's emergency public health structure, tracing technology, and extensive security technologies allowed the South Korean government to control the spread of COVID-19 exponentially better than the United States.

### A. Comparing South Korea and U.S. COVID-19 Experience

The two countries' first positive tests were only days apart and both experienced similar upticks in cases during the summer. This shared timeline makes South Korea an ideal candidate to compare and contrast the two countries' responses and provides a potential guideline for the development of pandemic legislation in the United States. However, for this analysis to be worthwhile it requires the acknowledgement of the differences in population size, structure of government, and cultural differences between South Korea and the United States.

The United States is a democratic republic structured around the U.S. Constitution that separates the government into three branches: executive, legislative, and judicial.<sup>10</sup> Additionally, it is important to note the federalist structure of the U. S. government. This means that there is a central federal government that works with smaller state governments.<sup>11</sup> The federal government acts in six key areas related to public health: policy making, financing, protecting public health, collecting and disseminating information about U.S. health and health care delivery systems, capacity building for population health, and managing public health services.<sup>12</sup> However, the responsibility for implementing public health measures generally falls to the states.<sup>13</sup> In contrast, in South Korea the structure of government is a democratic unitary political system which only grants

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<sup>7</sup> *Covid in the U.S.: Latest Map and Case Count*, N.Y. TIMES (NOV. 8, 2020), <https://www.nytimes.com/interactive/2021/us/covid-cases.html> [<https://perma.cc/3ST4-MZHK>].

<sup>8</sup> Taylor, *supra* note 4.

<sup>9</sup> Taylor, *supra* note 4; *Coronavirus Resource Center*, JOHN HOPKINS UNIV. OF MED., <https://coronavirus.jhu.edu/map.html> [<https://perma.cc/6RYH-YB6M>] (last visited Nov. 8, 2020).

<sup>10</sup> *Branches of the U.S. Government*, USA gov, <https://www.usa.gov/branches-of-government> [<https://perma.cc/7VCC-G3P7>] (last visited Feb. 2, 2021).

<sup>11</sup> *Federalism*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/federalism> [<https://perma.cc/S76U-BARJ>] (last visited Feb. 2, 2021).

<sup>12</sup> INST. OF MED. (US) COMM. ON ASSURING THE HEALTH OF THE PUBLIC IN THE 21<sup>ST</sup> CENTURY, THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21<sup>ST</sup> CENTURY, 103 (2002) (citing another source Jo Ivey Boufford & Phillip R. Lee, *Health Policies for the 21st Century: Challenges and Recommendations for the U.S. Department of Health and Human Services*. New York: Milbank Memorial Fund. 2001; <https://www.ncbi.nlm.nih.gov/books/NBK221231/> [<https://perma.cc/4FW7-HU5V>](last visited Feb. 5, 2021).

<sup>13</sup> *Id.*

local governments limited autonomy from the federal government.<sup>14</sup> As such, the federal government holds strict control over health crisis management.<sup>15</sup>

While the size of population between the U.S. and South Korea is not directly comparable, it is an important statistic when calculating the death rate for COVID-19.<sup>16</sup> South Korea had a significantly lower fatality rate from the coronavirus than the United States.<sup>17</sup> On November 26, 2020, there were 10.06 COVID-19 related deaths per million people in South Korea; however, in the United States there were 797.66 deaths per million people.<sup>18</sup>

In addition to the population and governmental differences, the United States historically has a culture of individualism, whereas South Korea's culture practices collectivism.<sup>19</sup> South Korea's practice of collectivism expects people to develop and maintain loyalty to larger groups of people. In contrast, the U.S. population is taught self-reliance above all else.<sup>20</sup> The loyalty and awareness of the larger community in South Korean culture has a direct impact on the way that communities come together to handle public health crises.<sup>21</sup> The differences in culture, government, and population drastically impacted the reactions that each country took in response to the COVID-19 outbreak.<sup>22</sup> Because significant differences exist between the U.S. and South Korea, important lessons can be learned from the actions taken by both countries during the COVID-19 crisis.

This paper will compare the COVID-19 response in South Korea to the COVID-19 response in the United States. This paper will also address potential legal issues with employing South Korean tactics in the U.S. due to the following issues: (1) the highly valued individual rights found throughout American culture; (2) the privacy protections provided by the Health Insurance Portability and Accountability Act (HIPAA); (3) the subsequent electronic privacy protections provided by the Health Information Technology for Economic and Clinical Health Act (HITECH); and (4) the heavy politicization of the COVID-19 virus in U.S. politics. Finally, this paper will offer suggestions for potential legislative and technological strategies the U.S. could borrow from South Korea to

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<sup>14</sup> Jongeun You, *Lessons from South Korea's COVID-19 Policy Response*, 506-7 AM. REV. PUB. ADMIN. 801, 803-04 (2020).

<sup>15</sup> *Id.*

<sup>16</sup> *Population Total*, THE WORLD BANK, [https://data.worldbank.org/indicator/SP.POP.TOTL?locations=KR-US&name\\_desc=true](https://data.worldbank.org/indicator/SP.POP.TOTL?locations=KR-US&name_desc=true) [<https://perma.cc/46ZM-VSGZ>] (last visited Nov. 26, 2020); The population of South Korea totaled 51,709,098 people in 2019; the United States totaled 328,329,523 people.

<sup>17</sup> Hannah Ritchie et al., *Coronavirus (COVID-19) Deaths*, Our World in Data, <https://ourworldindata.org/covid-deaths> [<https://perma.cc/ZC74-HHUZ>].

<sup>18</sup> *Id.*

<sup>19</sup> 3 IRWIN ALTMAN, ET AL., *HANDBOOK OF CROSS-CULTURAL PSYCHOLOGY*, 4 (John W. Berry et al. eds., 2nd ed. 1996).

<sup>20</sup> *Id.* at 4, 7.

<sup>21</sup> *Id.*

<sup>22</sup> Jay J. Van Bavel, et al., *Using social and behavioral science to support COVID-19 pandemic response*, 4 NATURE HUM. BEHAV. 460, 463 (May 2020) <https://www.nature.com/articles/s41562-020-0884-z.pdf> [<https://perma.cc/4BPB-Q3N9>].

improve its response to future pandemics. These strategies include implementing a centralized public health system, funding, and refunding government agencies dedicated to preparing for future public health crises, and implementing technological innovations that will assist in the tracking and monitoring of infected individuals.

## II. THE DECENTRALIZATION OF THE U.S. PUBLIC HEALTH SYSTEM DOOMED A SUCCESSFUL PANDEMIC RESPONSE

Former President Donald Trump's decisions to decentralize the pandemic crisis response to individual states led to inconsistent regulation by local and state governments.<sup>23</sup> A lack of federal leadership resulted in a failure to provide consistent and comprehensive testing, regulation, and pertinent prevention information to the public.<sup>24</sup> The floundering by the U.S. federal government to provide a clear and comprehensive pandemic response plunged the country into political and economic turmoil.<sup>25</sup>

The U.S. federal government was slow to limit the freedoms of its citizens and showed a late interest in technology that could have helped contain and control the spread of COVID-19.<sup>26</sup> Additionally, some governmental responses contradicted the information and regulations placed and recommended by the CDC.<sup>27</sup> This reluctance to limit freedom and adopt technology resulted in an exponentially higher infection and death rate in the U.S. compared to South Korea.<sup>28</sup>

The confusing and contradictory messages that came from the U.S. government forced state and local governments to find their own way through the complexities of creating successful public health crisis plans.<sup>29</sup> These plans often reflected partisan lines instead of public health concerns.<sup>30</sup> This confusion caused many citizens to ignore CDC guidelines and prevented local and state governments from adequately regulating their communities.<sup>31</sup> The failure of the federal government to protect U.S. citizens from preventable exposure draws the question: should the

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<sup>23</sup> Altman, *supra* note 2.

<sup>24</sup> Ed Young, *How the Pandemic Defeated America*, ATLANTIC (Aug. 4, 2020), <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/> [https://perma.cc/J9ND-FSX3]; Alex Fitzpatrick, *Why the U.S. Is Losing the War on COVID-19*, TIME (Aug. 13, 2020), <https://time.com/5879086/us-covid-19/> [https://perma.cc/9LKZ-K9JN].

<sup>25</sup> Patricia Cohen, *Struggling in a Good Economy, and Now Struggling in a Crisis*, N.Y. Times (Oct. 5, 2020),

<https://www.nytimes.com/2020/04/16/business/economy/coronavirus-economy.html> [https://perma.cc/8Y4A-ECQG].

<sup>26</sup> Paul Biasco, *All the things that George W. Bush said we should do to prepare for a pandemic that Donald Trump ignored*, INSIDER (May 31, 2020), <https://www.businessinsider.com/george-bush-said-prepare-for-a-pandemic-that-trump-ignored-2020-5> [https://perma.cc/G9XC-74FK].

<sup>27</sup> Fitzpatrick, *supra* note **Error! Bookmark not defined.**

<sup>28</sup> John Hopkins Univ. of Med., *supra* note 9.

<sup>29</sup> Fitzpatrick, *supra* note **Error! Bookmark not defined.**; Altman, *supra* note 2.

<sup>30</sup> Fitzpatrick, *supra* note **Error! Bookmark not defined.**; Altman, *supra* note 2.

<sup>31</sup> Jeff Tollefson, *How Trump damaged science—and why it could take decades to recover*, NATURE (Oct. 7, 2020), <https://www.nature.com/articles/d41586-020-02800-9> [https://perma.cc/9XJF-ZESW].

structures of the U. S. public health governance allow political party loyalty to outweigh protecting the country's public health?

III. THE U.S. SHOULD RESTRUCTURE THEIR PUBLIC HEALTH RESPONSE TO ALLOW FOR CENTRALIZED CRISIS PLANS AND THE IMPLEMENTATION OF NEW TECHNOLOGIES

While it would be easy, and largely accurate, to blame the former Trump Administration for the rapid spread and devastating impact of the COVID-19 disease, it is important that we try to understand the failures that took place in order to prevent them from reoccurring.<sup>32</sup> With the evolution of technology and the current health risks, the U.S. needs to re-evaluate its approach to emergency power and the patchwork structure of the country's federal and state public health systems. To create an effective public health crisis plan, the federal government must establish a centralized crisis structure that allows for one cohesive plan. This plan would provide comprehensive and non-negotiable steps for local and state governments to follow reducing confusion. The plan should include space for mandatory testing, tracking, and treatment technologies so public health officials can have a fast and efficient disease response. To accomplish this feat, the U.S. government must prioritize pandemic response planning (similar to the Bush and Obama Administrations) by refunding key public health agencies. Additionally, this restructuring cannot occur by executive order, which allows for repeal by a new administration, instead the solution needs to arise in the legislature and have sufficient safeguards to prevent abuse and disbandment.

IV. COMPARING THE UNITED STATES' COVID-19 RESPONSE TO SOUTH KOREA'S

A. *United States' COVID-19 Response*

The U.S. response to the COVID-19 pandemic was disastrous in comparison to global peers.<sup>33</sup> The federal government responded slowly to reports of the spreading global pandemic.<sup>34</sup> This slow response, partnered with the reluctance of the federal government to create a cohesive national plan, revealed the consequences of honoring and protecting a federalist approach to government.<sup>35</sup> The outcome of the jerry-rigged responses from local and state governments led to the rapid spread of the disease and much higher numbers of infections than typically expected of such a highly developed nation.<sup>36</sup>

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<sup>32</sup> Gavin Yamey & Gregg Gonsalves, *Donald Trump: a political determinant of covid-19*, 369 *BMJ* (Apr. 2020), <https://www.bmj.com/content/bmj/369/bmj.m1643.full.pdf> [https://perma.cc/8M4J-7V6T].

<sup>33</sup> Fitzpatrick, *supra* note **Error! Bookmark not defined.**

<sup>34</sup> Rebecca L. Haffajee & Michelle M Mello, *Thinking Globally, Acting Locally – The U.S. Response to COVID-19*, 382 *NEW ENG. J. MED* e75(1), e75(2) (May 28, 2020).

<sup>35</sup> *Id.*

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

The Trump administration first implemented country-wide travel bans on China as an initial response to the spread of COVID-19.<sup>37</sup> Studies of pandemic responses, however, show that travel bans are largely ineffective and even detrimental to the prevention of communicable diseases like COVID-19.<sup>38</sup> Simply banning non-nationals does not allow for an individualized risk assessment (ex. individual screening based on symptoms instead of national origin) of potentially symptomatic individuals.<sup>39</sup>

The early implementation of less effective prevention techniques paired with heavy politicization of the COVID-19 pandemic and the refusal of the federal government to provide a broad plan of attack led to inconsistent guidelines, varied beliefs in informational media regarding the pandemic, increased racial tensions, higher rates of infection (compared with neighboring countries), and drastically different rates of compliance to basic preventative guidelines.<sup>40</sup>

### B. South Korea's COVID-19 Response

In South Korea, the local governments lack autonomy from the national government. This allowed governmental agencies to act quickly to implement emergency controls at a national and local level.<sup>41</sup> The use of surveillance and contact tracing allowed the government to protect and warn their citizens of potential exposure, which increased the country's success in controlling the spread of the virus.<sup>42</sup>

Korea's successful public health response came, in part, from the lessons that the country learned during the Middle East Respiratory

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<sup>37</sup>Geoff Whitmore, *When did President Trump Ban Travel from China? And Can You Travel to China Now?*, FORBES (Oct. 19, 2020), <https://www.forbes.com/sites/geoffwhitmore/2020/10/19/when-did-president-trump-ban-travel-from-china-and-can-you-travel-to-china-now/?sh=d4764ef74847> [<https://perma.cc/PH46-L593>]; the administration put this ban into place on January 31<sup>st</sup> of 2020.

<sup>38</sup>Wendy E. Parmet, et al., *COVID-19 – The Law and Limits of Quarantine*, 382 NEW ENG. J. MED. e28(1), e28(2) (Apr. 9, 2020).

<sup>39</sup>Lawrence O. Gostin & James G. Hodge Jr., *US Emergency Legal Responses to Novel Coronavirus: Balancing Public Health and Civil Liberties*, 323 JAMA 1131 (Feb. 13, 2020), <https://jamanetwork.com/journals/jama/article-abstract/2761556> [<https://perma.cc/6V6Y-PKJL>]. The authors suggest that compulsory powers should be evaluated using five elements: “(1) individuals must pose a significant risk of spreading a dangerous, infectious disease; (2) interventions must be likely to ameliorate risks; (3) least-restrictive means necessary to achieve public health objectives are required; (4) use of coercion should be proportionate to the risk; and (5) assessments must be based on the best available scientific evidence. In emerging crises when the science is uncertain, adoption of the “precautionary principle” is reasonable to ensure public safety.” They also noted that health emergency responses do not allow for policy that is “indiscriminate, overbroad, excessive, or without evidentiary support.”

<sup>40</sup>Hank Rothgerber, et al., *Politicizing the COVID-19 Pandemic: Ideological Differences in Adherence to Social Distancing*, PSYARXIV, (Sept. 27, 2020), <https://psvarxiv.com/k23cv/> [<https://perma.cc/PMU5-WGDB>]; Lucy Wang Halpern, *The Politicization of COVID-19*, 120(11) AM. J. NURSING 19-20 (Nov. 2020).

<sup>41</sup>Jongeeun You, *supra* note 14, at 802.

<sup>42</sup>*Id.* at 803; South Korea: Legal Response to Health Emergencies, LIBR. CONG., <https://www.loc.gov/law/help/health-emergencies/southkorea.php> [<https://perma.cc/6TWH-KYU8>] (July 24, 2020).



Syndrome (MERS) outbreaks in 2015 and 2018.<sup>43</sup> Organizations criticized South Korea for its failure to control the spread of the MERS disease; in response, the country upgraded its standard procedures for emerging infectious diseases and clarified the roles and responsibilities of the government regarding infectious diseases.<sup>44</sup> South Korea's pandemic response largely revolved around prevention and preparedness.<sup>45</sup> The country focused on proactive testing, transparency in test results, and working with private actors to ensure the development of efficient and effective testing centers and testing kits.<sup>46</sup>

Intergovernmental cooperation and the public-private partnership model developed by the Moon administration made South Korea's mass testing possible.<sup>47</sup> The agreement between the national government and Korean biotech corporations allowed for rapid development and distribution of detection kits.<sup>48</sup> These tests, paired with South Korea's numerous testing sites and extensive surveillance technology, allowed the country to track and inform the public about the spread of the disease.<sup>49</sup>

The South Korean government repurposed the technology typically used by law enforcement to trace and capture criminals for public health use.<sup>50</sup> The government gathers this information in three main ways: (1) credit and debit card tracking, (2) phone location logs, and (3) surveillance cameras.<sup>51</sup> These different tracking methods allow the South Korean government to track and warn those exposed to someone who has tested positive.<sup>52</sup> This ability resulted from the 2015 MERS outbreak.<sup>53</sup> Following the 2015 public health crisis, the South Korean government altered the Infectious Disease Control and Prevention Act (IDCP) to allow the government to access and share an individual's private health data during an infectious disease emergency.<sup>54</sup> Once the emergency resolves, this information is deleted.<sup>55</sup> It is important to note that South Korea did not use a typical contact tracing app to achieve this information sharing but instead used an even more severe model that allowed the government to enforce a mandatory download of a contact tracing app.<sup>56</sup> This app

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<sup>43</sup> Jongeun You, *supra* note 14, at 802; *See generally* Kyoo-Man Ha, *A lesson learned from the MERS outbreak in South Korea in 2015*, 92(3) J. HOSP. INFECTION 232 (2016).

<sup>44</sup> *See generally* Kyoo-Man Ha *supra* note 43 explaining South Korea's failures in and suggesting changes that were later implemented.

<sup>45</sup> Jongeun You, *supra* note 14, at 802.

<sup>46</sup> *Id.* at 802-03.

<sup>47</sup> *Id.* at 803.

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

<sup>49</sup> *Id.*

<sup>50</sup> Rory Cellan-Jones, *Tech Tent: Can we learn about coronavirus-tracing from South Korea?*, BBC (May 15, 2020), <https://www.bbc.com/news/technology-52681464> [<https://perma.cc/GP5E-GZ93>].

<sup>51</sup> *Id.*

<sup>52</sup> Jongeun You, *supra* note 14, at 803-04.

<sup>53</sup> *Id.* at 803.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Salvador Babones, *Countries Rolling out Contact Tracing Apps Show Why They Can't Work*, FOREIGN POLICY, (May 12, 2020).

allowed the government to monitor and share every citizen's information in a public database in order to control and track the spread of the virus.<sup>57</sup>

With the health information of individuals who tested positive, the South Korean government could better control and warn their citizens without imposing massive travel lockdowns.<sup>58</sup> After the government collected information from individuals that tested positive, it then issued warnings to potentially exposed citizens. If an individual merely crossed paths with a positive individual they followed the prescribed options of conducting symptom monitoring, visiting a testing center, or self-quarantining.<sup>59</sup> The government notified citizens in close proximity to an individual who tested positive and they are subsequently tested and possibly quarantined.<sup>60</sup> A quarantined individual uses the app "Self-Quarantine Protection App" to connect the patient with health care professionals.<sup>61</sup> If a person violates a mandatory self-quarantine, the government can enforce a heavy fine or potentially a year in prison.<sup>62</sup>

### C. Criticism of The South Korea COVID-19 Response

At the beginning of South Korea's response, the world expressed concern with sharing individual health information even to prevent the spread of a highly infectious disease.<sup>63</sup> In March 2020, the BBC pointed to a potential social stigma surrounding sharing personal health information reporting that "South Koreans now fear the stigma as much as they fear the virus itself."<sup>64</sup> To balance the privacy and civil liberties concerns, the South Korean government worked to update the IDCP to better protect those who tested positive by modifying patient disclosure guidelines in order to exclude any individually-identifying personal information.<sup>65</sup>

Even with the restrictions on data sharing, many still refer to this level of response as draconic and extreme.<sup>66</sup> Western countries in particular find government-run mandatory contact tracing apps too big a threat to privacy to consider it a viable option.<sup>67</sup> Early in the pandemic, experts warned that the world as a whole might need to implement more drastic techniques to adequately control the spread of the disease.<sup>68</sup> Since these early assessments, researchers have found measures typically considered

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<sup>57</sup> *Id.*

<sup>58</sup> Jongeun You, *supra* note 14, at 803-04.

<sup>59</sup> *Id.* at 804.

<sup>60</sup> *Id.*

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

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

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

<sup>64</sup> Hyung Eun Kim, *Coronavirus privacy: Are South Korean's alerts too revealing*, BBC (March 5, 2020), <https://www.bbc.com/news/world-asia-51733145> [https://perma.cc/U4L3-4NJ3].

<sup>65</sup> Jongeun You, *supra* note 14, at 804.

<sup>66</sup> June Park, *Striking a Balance between Data Privacy and Public Health Safety*, THE NAT'L BUREAU OF ASIATIC RESEARCH (Apr. 29, 2021), <https://www.nbr.org/publication/striking-a-balance-between-data-privacy-and-public-health-safety-a-south-korean-perspective/> [https://perma.cc/X93W-24XJ].

<sup>67</sup> *Id.*

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

draconian by western cultures necessary to prevent the continued spread of COVID-19.<sup>69</sup>

Ultimately, although privacy was a secondary concern of the South Korean government, the efficiency of the government-run contact tracing cannot be denied.<sup>70</sup> While other less invasive possibilities exist, most of the applications, even if voluntary, center around contact tracing and monitoring people who have tested positive.<sup>71</sup> These methods are less effective than the “draconic” government run systems found in South Korea.<sup>72</sup>

## V. AVAILABLE TECHNOLOGY

Many technological innovations occurred in the last century. Logically, countries had many systems available when they implemented contact tracing applications during the early stages of the pandemic. These technologies fall into two main architectural structures: centralized and decentralized.<sup>73</sup> Both models use Bluetooth signals in smartphones that interact with each other when their owners’ cross paths.<sup>74</sup> Once an individual receives a positive diagnosis, the user will then update the application to include their diagnosis.<sup>75</sup> Centralized and decentralized apps differ in the steps they take after users update the application with new information.<sup>76</sup>

### A. Basic Structures

Developers design a centralized model to gather protected health information and upload it onto a remote server.<sup>77</sup> Once an individual who has tested positive updates their information on the app, centralized databases upload the information, as well as additional codes received

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<sup>69</sup> Wung Lik Ng, *To lock down? When to peak? Will there be an end? A macroeconomic analysis on COVID-19 epidemic in the United States*, (65) J. MACROECONOMICS, (Sept. 2020), <https://reader.elsevier.com/reader/sd/pii/S0164070420301567?token=0CBF519149CB64C368D87E754E60FAB3A25FD582937348F1DA6B9A4F466E8A18E5A6F077591CC8E695FABF3FE445341C> [https://perma.cc/ZXD4-CLV6?type=image]; ultimately to have any chance at fully halting the spread of COVID-19 there needs to be a combination of approaches applied.

<sup>70</sup> Rory Cellan-Jones, *supra* note 50; Choe Sang-Hun, et al., *Major Security Flaws Found in South Korea Quarantine App*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/technology/korea-coronavirus-app-security.html> [https://perma.cc/EU36-B8RJ].

<sup>71</sup> Nadeem Ahmen et al., *A Survey of COVID-19 Contact Tracing Apps*, 8 IEEE ACCESS 134577 (2020).

<sup>72</sup> See Ahmen, *supra* note 71; Parmet, *supra* note 38 (although travel bans do not qualify as a technology, but governments often see them as a first step to pandemic containment).

<sup>73</sup> Christina Criddle & Leo Kelion, *Coronavirus contact tracing: World Split between two types of apps*, BBC NEWS, <https://www.bbc.com/news/technology-52355028> [https://perma.cc/2926-D2FC] (last visited Feb. 5<sup>th</sup>, 2021); Choe Sang-Hun, et al., *Major Security Flaws Found in South Korea Quarantine App*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/technology/korea-coronavirus-app-security.html> [https://perma.cc/EU36-B8RJ].

<sup>74</sup> Criddle & Kelion, *supra* note 73.

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

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

<sup>77</sup> *Id.*

from other phones, in the form of an anonymous ID.<sup>78</sup> Once uploaded to the centralized database, the server uses the database to perform contact matching and notify those who have potentially been exposed.<sup>79</sup>

A decentralized model follows a similar process up until the uploading of the anonymous ID.<sup>80</sup> In a decentralized model, once the individual updates the application the centralized database only uploads an anonymous ID without any additional code.<sup>81</sup> Once processed, the individual's phone downloads the database and performs contact tracking and risk analysis.<sup>82</sup>

### *B. The Obstacles to Implementation of Centralized and Decentralized Systems May Hinder Their Effectiveness*

Although these processes seem incredibly similar, how to implement them is proving to be very divisive in the global community.<sup>83</sup> Singapore, Norway, and France all implemented a centralized process but have encountered resistance from technology developers like Google and Apple.<sup>84</sup> This tension arises from the app's inability to function properly with Apple and Google's restrictions on Bluetooth for their phones.<sup>85</sup> Additionally, the centralized app's user base had large percentages of its users drop out due to privacy concerns.<sup>86</sup> In Norway, only 20.5% of its 1.5 million users actively use the app.<sup>87</sup>

Comparatively, the decentralized style apps have garnered larger global support. However, due to its delay in implementation, countries have gathered less information on this style of app, so it is impossible to know if this style will work any better than its counterpart.<sup>88</sup> In the U.S., the cooperation of state governments and their efficiency of releasing their state-specific apps to work in tandem with Apple or Google's technologies will determine the effectiveness of the apps.<sup>89</sup>

## VI. THE CONSTITUTIONAL AND LEGISLATIVE BARRIERS IN THE U.S. THAT HINDER EFFECTIVE PANDEMIC RESPONSES

A tension exists in the United States between the protection of individual personal liberties and the protection of the overall public health.

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

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

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

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

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

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

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

<sup>89</sup> Jefferson Graham, *Tracking coronavirus: Are Apple and Google contact tracing apps available in your state?* USA TODAY, (Oct. 5, 2020), <https://www.usatoday.com/story/tech/2020/10/02/apple-google-coronavirus-contact-tracing-apps/3592355001/> [https://perma.cc/99HX-72SJ].

The Fourteenth Amendment protects U.S. citizens' life, liberty, and property. It states that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>90</sup>

The right to liberty in the U.S. is a fundamental component of the American dream.<sup>91</sup> The right to life, liberty, and happiness has been a historically protected right and something that many Americans hold above all else.

Additionally, the Fourth Amendment protects the right to security in both person and belongings from search and seizure. Many Americans fear that they will lose these rights with the increased government regulation during the COVID-19 pandemic.<sup>92</sup> The adversarial political climate in the U.S. at the beginning of the pandemic further exacerbated this fear.<sup>93</sup> Many Americans, regardless of their party affiliation, told the New York Times that they feared the demise of American democracy.<sup>94</sup> The COVID-19 pandemic and accompanying antagonistic governmental climate has thrown the country's drastically differing opinions on the importance of public health and individual rights into the spotlight.

#### A. Protected Health Information

The U.S. government protects health information by both legal and personal necessity. In response to the need to keep health information protected, the U.S. government has created both the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH).<sup>95</sup> Both acts uniquely impacted the U.S. government and health care systems' COVID-19 response.<sup>96</sup>

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<sup>90</sup> U.S. CONST. amend. XIV § 1.

<sup>91</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

<sup>92</sup> Micheal Tarm, *Fears for civil rights mount amid fight against COVID-19*, FOX5 N.Y. (Mar. 26, 2020), <https://www.fox5ny.com/news/fears-for-civil-rights-mount-amid-fight-against-covid-19> [https://perma.cc/MS2C-MZN3].

<sup>93</sup> Emily Badger, *Americans Are Afraid. Not for Themselves, but for the Country*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/11/01/upshot/election-democracy-fear-americans.html> [https://perma.cc/B79L-XQFF].

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

<sup>95</sup> *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* CTR. DISEASE CONTROL PREVENTION (Sept. 14, 2018),

<https://www.cdc.gov/php/publications/topic/hipaa.html> [https://perma.cc/84JS-9A49]; Howard Burde, *The HITECH Act: An Overview* (Mar. 2011), <https://journalofethics.ama-assn.org/article/hitech-act-overview/2011-03> [https://perma.cc/76LW-TZ25].

<sup>96</sup> Leslie Lenert, *Balancing Health Privacy, Health Information Exchange, and Research in the Context of the COVID-19 Pandemic*, 27(6) J. AM. MED. INFORMATICS ASS'N 963, (2020); Sirina Keesara et al., *COVID-19 and Health Care's Digital Revolution*, 382(82) N. ENGL. J. MED. E28, (2020); Molla R. Hussein et al., *Digital Surveillance Systems for Tracing COVID-19: Privacy and Security Challenges with Recommendations*, ARXIV: 2007.13182, (2020).

### B. HIPAA and HITECH: Overview and COVID-19 Related Challenges

The U.S. Congress enacted HIPAA in 1996 and it required the development of national standard for sharing protected health information (PHI).<sup>97</sup> The U.S. Department of Health and Human Services (HHS) enforces HIPAA and requires compliance from healthcare related businesses and practitioners.<sup>98</sup> The HITECH act works in conjunction with HIPAA as a rule enacted in the economic stimulus package issued by the Obama administration in 2009.<sup>99</sup> HITECH regulates the use and protection of PHI in the form of electronically transmitted health data.<sup>100</sup>

A notable portion of HIPAA is the privacy rule, which addresses the use of PHI by “covered entities.”<sup>101</sup> Covered entities can be individuals or corporations.<sup>102</sup> The CDC states main goal of the privacy rule as: ensur[ing] that individuals’ health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public’s health and well-being. The Privacy Rule strikes a balance that permits important uses of information while protecting the privacy of people who seek care and healing.<sup>103</sup> COVID-19 has challenged this, and many believe HIPAA did not successfully achieve its purpose.<sup>104</sup>

HIPAA regulations have exceptions for a public health crises, but the exceptions are limited.<sup>105</sup> If both the President and the Secretary of Health declared a public emergency, then the Secretary may waive sanctions and penalties against hospitals who do not comply with certain sections of the HIPAA Privacy Rule.<sup>106</sup>

The current patchwork of state laws and HIPAA imposed regulations have complicated the path that healthcare providers, corporations, and legislatures can take to circulate valuable COVID-19 data.<sup>107</sup> The current law focuses on the anonymization of PHI, not the patient’s continued

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<sup>97</sup> *Health Insurance Portability and Accountability Act of 1996* (HIPAA) CDC (Sept. 14, 2018), <https://www.cdc.gov/php/publications/topic/hipaa.html> [https://perma.cc/PV4Y-GEEP].

<sup>98</sup> *Id.*

<sup>99</sup> *HITECH Act Enforcement Interim Final Rule*, U.S. DEP’T HEALTH & HUM. SERV. (June 16, 2017), <https://www.hhs.gov/hipaa/for-professionals/special-topics/hitech-act-enforcement-interim-final-rule/index.html> [https://perma.cc/FLD8-76KM].

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

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

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

<sup>104</sup> Lenert, *supra* note 96, at 963.

<sup>105</sup> *Is the HIPAA Privacy Rule suspended during a national or public health emergency?*, U.S. DEP’T HEALTH & HUM. SERV. (Jul. 26, 2013), <https://www.hhs.gov/hipaa/for-professionals/faq/1068/is-hipaa-suspended-during-a-national-or-public-health-emergency/index.html> [https://perma.cc/XDW6-XSRC].

<sup>106</sup> *Id.* The provisions that may be waived are: (1) the requirements to obtain a patient’s agreement to speak with family members or friends involved in the patient’s care (45 CFR 164.510(b)); (2) the requirement to honor a request to opt out of the facility directory (45 CFR 164.510(a)); (3) the requirement to distribute a notice of privacy practices (45 CFR 164.520); (4) the patient’s right to request privacy restrictions (45 CFR 164.522(a)); (5) the patient’s right to request confidential communications (45 CFR 164.522(b)).

<sup>107</sup> Lenert, *supra* note 96, at 963.

care.<sup>108</sup> To successfully respond to the threat of COVID-19, experts recommend the government take immediate legislative action that shifts the focus away from privacy and towards an equal balance that allows for the safe, secure, and standardized health care exchange between multiple parties.<sup>109</sup>

C. *Historic Acknowledgment of Privacy Rights Regarding Protected Health Information*

Historically, the federal government possessed the power to share personal health information to aid in protecting the greater community.<sup>110</sup> In *Whalen v. Roe*, the Supreme Court acknowledged the flexible approach taken when dealing with privacy and healthcare.<sup>111</sup> The Court determined the constitutionality of New York legislation that required the existence of a computer record of all individuals given a prescription for a Schedule II narcotic.<sup>112</sup> The Court noted that:

some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.<sup>113</sup>

In the majority opinion, Justice Stevens acknowledged three things that allowed for future litigation in regards to an individual's privacy: (1) an individual interest in privacy of health information; (2) this kind of information is entitled to protections because it is "personal in character and potentially embarrassing or harmful if disclosed and; (3) the right to collect this type of information should typically be accompanied by "a concomitant statutory or regulatory duty to avoid unwarranted disclosures," even if collected for public purposes.<sup>114</sup> This conclusion allowed future litigators and courts to apply a balancing test that measured

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

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

<sup>110</sup> See *Whalen v. Roe*, 429 U.S. 589, 591, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

<sup>111</sup> *Id.* at 602.

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

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

<sup>114</sup> Anthony Simmons, *The Right to Suffer as Individuals or the Necessity to Survive as a Society: HIV Status and the Constitutional Right of Privacy*, 68 UNIV. MO. KAN. CITY L.J. 195, 199 (1999).

the need of the government to obtain records in the interest of public health and the individual's interest to keep that information private.<sup>115</sup>

In *Doe v. City of New York*, the court applied this balancing test and concluded that "individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition."<sup>116</sup> The court further explained that:

Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over. Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself.<sup>117</sup>

This privacy right is not absolute, however. The court in *US v. Westinghouse Electric Corporation* found that courts and legislatures could find that public health concerns (or other public concerns in general) outweigh the interests of an individual and allow for access to otherwise protected information.<sup>118</sup>

## VII. GOVERNMENTAL QUARANTINE POWERS AND CURRENT STATE ACTION PLANS

### A. *The Tools that Might have been Available if not for Defunding*

In times of public health crisis, the tools available to the federal government began to notably expand under President Clinton in 1998 through a presidential directive intended to build a stockpile of vaccines in anticipation of bioterrorism.<sup>119</sup> President Bush continued the work to better prepare the United States following the 9/11 attacks due to the rising fear of chemical warfare.<sup>120</sup> President Bush acknowledged the real threat of potential viral pandemics, stating in 2005 that "a pandemic is like a forest fire, if caught early, it might be extinguished with limited damage; if allowed to smolder undetected, it can grow to an inferno that spreads quickly beyond our ability to control it."<sup>121</sup>

From 2002 to 2005, the Bush administration increased the budget of the National Pharmaceutical Stockpile (NPS) and spent roughly \$1.24

<sup>115</sup> *Id.*

<sup>116</sup> *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994).

<sup>117</sup> *Id.*

<sup>118</sup> *Simmons*, *supra* note 114; *US v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3d Cir. 1980).

<sup>119</sup> Kapil Kumar Bhanot, *What Defines a Public Health Emergency? An Analysis of the Strategic National Stockpile and the National Childhood Vaccine Injury Act: The Need for Nonterror National Medical Emergencies*, 21 J. CONTEMP. HEALTH L. POL'Y 137, 139 (2004).

<sup>120</sup> *Id.* at 150.

<sup>121</sup> *Biasco*, *supra* note 26.



billion, focusing on expanding the stockpile of pharmaceuticals, medical devices, and personal protective equipment that could be made available to U.S. citizens in the time of a pandemic.<sup>122</sup> Additionally, President Bush announced the adoption of a three-pronged national public health strategy: (1) early pandemic detection, (2) increased stockpile of critical supplies, and (3) an emphasis on preparedness.<sup>123</sup> Following the Bush administration, President Obama established the Biodefense unit tasked with the continuation of pandemic preparedness.<sup>124</sup> Unfortunately, under the leadership of President Trump, most, if not all, of these programs and structures were defunded or altered to the point of ineffectiveness.<sup>125</sup>

### *B. The Reality of the Federal Response to Public Health Crisis*

The U.S. government and the Center for Disease Control and Prevention (CDC) technically have the power to mandate strict lockdowns.<sup>126</sup> However, to impose a broad and strict lockdown, the government must satisfy several constitutional requirements.<sup>127</sup> Courts have held that those constitutional requirements include: (1) quarantines cannot be imposed in a racially discriminatory manner; (2) the government must prove a strong basis for restrictions; (3) any person who is detained, or who has their liberty restricted, has a right to judicial review; and (4) the government must meet the basic needs of any such person detained or restricted.<sup>128</sup>

In addition to the powers given to the CDC, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), allows the president to declare a state of emergency and reallocate emergency funds from Congress to states in need.<sup>129</sup> Through a Stafford Act declaration, the

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<sup>122</sup> Karl Rove, *Clinton and Bush Prepared for Pandemics: Their legacy includes the National Strategic Stockpile and other important tools*, WALL STREET JOURNAL (Apr. 8, 2020), <https://www.wsj.com/articles/clinton-and-bush-prepared-for-pandemics-11586387379> [https://perma.cc/B9TU-S5SL].

<sup>123</sup> *Id.*

<sup>124</sup> Biasco, *supra* note 26.

<sup>125</sup> Biasco, *supra* note 26; *see also* Chris Morris, *Trump administration budget cuts could become a major problem as corona virus spreads*, FORTUNE (Feb. 26, 2020),

<https://fortune.com/2020/02/26/coronavirus-covid-19-cdc-budget-cuts-us-trump/>

[https://perma.cc/AP97-4S7E]. President Trump's decision to downplay the spread of COVID-19 directly countered President Bush's commitment to early detection of pandemic events. On January 30, 2020, Trump referred to the virus as "a very little problem." The President or his advisors did not acknowledge the true danger of the disease until mid-March of 2020, three months after the White House received initial warnings. In September of 2019 the Trump administration defunded the PREDICT program that worked with foreign researchers to discover threatening diseases and train others how to do so as well. The program was refunded in April of 2020 but rendered mostly pointless as President Trump ordered the US to halt its funding of the World Health Organization. In 2018 President Trump's National Security Advisor John Bolton defunded the Biodefense unit. In the same year the Complex Crisis fund (a \$30 million fund that allowed the Secretary of State to deploy disease experts) was cut.

<sup>126</sup> Parmet et al., *supra* note 38.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Robert T. Stafford Disaster Relief and Emergency Assistance Act*, ASS'N OF STATE AND TERRITORIAL HEALTH OFF., (May 2013), <https://www.astho.org/programs/preparedness/public->

Secretary of Health, may, in times of emergency, waive certain federal regulations like HIPAA and HITECH.<sup>130</sup> The Stafford Act allows the federal powers to broaden during a time of emergency and could remove roadblocks that prevent research and patient care.<sup>131</sup> However, this act does not remedy the issue of conflicting state and federal law. Instead, the act only allows the allocation of emergency funds to states.<sup>132</sup> The Stafford Act, while useful in granting state and local government funds to fight pandemic emergencies, does not resolve the conflicting information coming from the state and local governments regarding preventative health and safety measures. Until a cohesive and comprehensive standard of citizen directives exist, a tool like the Stafford Act may not be as effective as it appears.

### C. *The Dangers of Politics in Times of Crisis*

In addition to the strict requirements placed on the implementation of federal restrictions, political infighting and mixed messages from all levels of government hampered the U.S.'s response.<sup>133</sup> The most successful state responses reflect both major political parties' willingness to work together.<sup>134</sup> For example, in Vermont, the moderate Republican Governor and Democratic legislature worked together to create a joint effort to control the disease.<sup>135</sup> The failure of other states' legislatures to follow suit hampered those states' responses.<sup>136</sup>

Creating a functional public health response for future public health crises will require understanding how to work with the strong sense of federalism in America.<sup>137</sup> Until the political parties cooperate, the continued confusion born from inconsistent information and regulation will proceed, and many more Americans will die as a result. When the next public health crisis arises, the U.S. government must have a public health plan in place that will allow the government to issue rapid, efficient, and understandable rules and regulations that will protect U.S. citizens from infection and death rates like those in the COVID-19 pandemic. This solution, ultimately, will need to go beyond having a cohesive federal and

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[health-emergency-law/emergency-authority-and-immunity-toolkit/robert-t--stafford-disaster-relief-and-emergency-assistance-act-fact-sheet/](https://perma.cc/D67K-GMNY) [https://perma.cc/D67K-GMNY].

<sup>130</sup> Lenert, *supra* note 96, at 964.

<sup>131</sup> *Id.*

<sup>132</sup> Stafford Act, *supra* note 129.

<sup>133</sup> 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> [https://perma.cc/4E9E-FCDB].

<sup>134</sup> Tucker Doherty, et. al., *Which states had the best pandemic response?*, POLITICO (Oct. 14, 2020), <https://www.politico.com/news/2020/10/14/best-state-responses-to-pandemic-429376> [https://perma.cc/BY8G-T55A].

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Philip Rocco et al., *Stuck in Neutral? Federalism, Policy Instruments, and Counter-Cyclical Responses to COVID-19 in the United States*, 39 POL'Y SOC'Y 458, 460 (2020).

state government public health plan but will require more permanent systems shielded from political bias.

VIII. ADOPTING TOOLS USED IN SOUTH KOREA TO BETTER RESPOND TO FUTURE HEALTH CRISES IN THE UNITED STATES

A. *Legislative Change is Essential to Effective Pandemic Responses*

A policy and structure to guide law makers in future health crises can help alleviate the political pressures that sway the decisions of many state leaders. Legislatures could potentially improve the use of technology in health crises and eliminate barriers that make efficient responses impossible. Similar to South Korea, creating legislation that centralizes the public health responses to crises and clarifies the federal government's role in public health situations, can allow for the more efficient use of mass public data to contain and regulate infectious diseases. Having a clear guideline to the expectations of governmental agencies in times of crisis establishes trust in governmental orders and allows for a more cohesive plan of attack. Having a standard and a centralized approach to public health crises would also improve the complexities of state and federal public health regulations. It would make it easier for patients, providers, and medical technology corporations to work together with the government to better control future public health emergencies. Additionally, the establishment of relationships between private biotech companies and the government would help to ensure a greater ease in the production of testing material as well as any other medical technology needed to prevent and track any future diseases.

The use of COVID-19 as a political bargaining chip has convoluted the clarity of public health recommendations from the CDC and local governments. Identifying the failures experienced in the COVID-19 pandemic and learning from other countries' responses can shape how the U.S. responds to future public health crises. The U.S. should draft legislation similar to South Korea's IDCP that reallocates the funding of public health responses to particular government agencies and leaves no room for political game play. Legislation that reallocates funding to the CDC to allow for more effective power and legitimate control in an emergency response would remove the fear of political influence and allow a more effective and rapid governmental response.

Additionally, any legislation that has the power to remove an individual's liberty needs to have an adequate and established system of checks and balances to ensure no abuse of the legislation.<sup>138</sup> The system could use extensive judicial review and politically neutral decision makers to ensure protection of the public health from those seeking to corrupt and abuse the system. Reallocating and clarifying the roles of governmental bodies in times of crisis increases trust in governmental response and

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<sup>138</sup> Marcin Orzechowski, et. al., *Balancing Public Health and Civil Liberties in Times of Pandemic*, 42 J. PUB. HEALTH POL'Y 145 (2021).

allows for more efficient outcomes.<sup>139</sup> The clear lines of responsibility would also make the formation of effective checks and balances easier to accomplish.<sup>140</sup>

### *B. Tipping the Scale*

The importance that Americans place on their right to choose and their right to privacy is an intimidating hurdle in effective pandemic responses. However, if new legislation reduced or eliminated the politicization of emergency responses to public health crises, this might spark a needed shift in public opinion.

The U.S.'s current political climate makes a cohesive and effective response almost impossible. The desire to have choice must not outweigh the necessity to protect the greater population from preventable illness. To move forward, the U.S. must remove the political pressure of partisan governance from public health measures.

However, Bill writers must develop any legislation with a clear awareness of the complexities of the U.S. legislative branch. On November 27<sup>th</sup>, 2020, the Republican party held the U.S. Senate. The Republican party presented the popular federalism arguments against potential COVID-19 regulations. These arguments emphasize the right of states to form and lead their own public health responses. However, this pandemic revealed the failures of a federalist-styled public health response. The U.S. government must weigh the protection of the country's public health above any individual's right to liberty, privacy, and choice. South Korea's response demonstrated how shifting the lens of public health response from individual protection to the collective health of the community can drastically improve the containment of highly communicable diseases.

## IX. CONCLUSION

The United States was poised to have one of the most effective pandemic responses in the world because of the work put in by former presidential administrations to emphasize the importance of pandemic preparedness. However, due to the politicization of COVID-19 and consequent illogical and inconsistent governmental information, the country's handling of the pandemic was disappointing at best. The public health crisis created by the rapid spread of COVID-19 threw the failures of the U.S. government into sharp relief. A growing mistrust in government-issued information and regulation has led to varying levels of compliance with CDC guidelines. Further, as the government relied on ineffective measures like travel bans, the government failed to issue an effective pandemic response, cementing the need for an upheaval of the current public health emergency response plan. South Korea, alternatively,

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<sup>139</sup> You, *supra* note 14, at 802.

<sup>140</sup> *Id.*

has been hailed as one of the creative leaders in pandemic responses. The country's use of surveillance clearly established governmental roles, and data sharing allowed the country to handle the virus with remarkably effective results. Although western countries saw some of the country's methods as overly oppressive, the U.S. could use guidelines within the overall plan to design an effective and improved pandemic response in the future.

To ensure adequate preparation by the U.S. for future public health crises, they should borrow lessons from the South Korean COVID-19 response. The most effective elements that the U.S. government should implement are to: (1) reallocate funds and governmental power for future health emergencies; (2) establish bipartisan cooperation in times of global health crisis or create a separation of public health and political gamesmanship; and (3) create emergency legislation to outline attack plan for future pandemics. While the United States' response to COVID-19 can fairly be described as a failure, correcting the damages to our public health systems, learning from our global peers, and adapting effective foreign pandemic prevention techniques for the U.S., will allow the country to be better prepared for any future public health crisis.