

# FOREWORD

## ADMINISTRATIVE LAW IN A TIME OF CRISIS: COMPARING NATIONAL RESPONSES TO COVID-19

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## INTRODUCTION

The COVID-19 pandemic and all of its second-order economic consequences constitute a historic, worldwide crisis that has moved through stages and led to millions of deaths, lost jobs, and untold suffering. The long-term effects will be deep and lasting. As the crisis has reached every aspect of human society, scholars across disciplines have found it necessary to reckon with its implications, trying to respond not only to the demands of the moment but also to learn how better to prevent or mitigate future viral outbreaks and their public health and economic effects.

For administrative law scholars, the fact that many different countries were subject to essentially the same threat at around the same time provides an opportunity to learn about, and from, the differences in these nations' regulatory responses—and to investigate how differences in nations' governmental structures have affected their ability to respond during a time of emergency. The widespread economic havoc, deaths, and illnesses that the novel coronavirus has inflicted, and will continue to inflict, around the world create more than just a learning opportunity for comparative administrative law: it creates a learning imperative. We must study the current crisis to be prepared to do better in the next one.

More precisely, both scholars and policymakers alike ought to learn more about the range of different legal responses available for addressing public health crises, as well as the likely consequences of choosing from within this range. They also need to consider the role that common administrative law values of procedural regularity, openness, and fairness should play in a time of crisis—and whether the legal doctrines that work well during normal times might prove counterproductive in times of crisis. They need to understand better the relationship between administrative law (as a set of doctrines and institutional designs) and other factors that likely affect governments' ability to perform well in response to public health crises—factors such as leadership and risk communication.

To foster scholarly dialogue around these vital issues, we initiated a global comparative administrative law project in the spring of 2020. Tapping into our respective scholarly networks, we first drew together nearly forty administrative law experts from around the world to write about the administrative law issues related to their countries' early regulatory responses to the global pandemic. Those initial interactions generated a collection of short essays published in *The Regulatory Review* that provide a remarkable snapshot of initial administrative law developments occurring in many countries throughout the industrialized world in response to the viral

outbreak.<sup>1</sup> Although the essays in that initial project stand out as some of the earliest comparative inquiries into the administrative law and regulatory dimensions of the COVID-19 crisis, they did not afford the opportunity for more in-depth and sustained consideration of these legal dimensions of the global pandemic. This special issue in the *Administrative Law Review* seeks to provide that needed depth and attention with respect to China, Chile, Germany, Italy, New Zealand, South Africa, and the United States, as well as the key international organization dedicated to global health, the World Health Organization (WHO).

All of the authors of the essays in this special issue are leading experts on administrative law in each country—or international institution, in the case of the WHO—about which they write. We draw inspiration from their excellent work, as well as that of the other contributors to *The Regulatory Review* series, in highlighting here some common issues that various countries have confronted and then offering some initial lessons learned. Of course, we put forth these synthetic insights with humility, as the pandemic remains far from over at the time of our writing and, indeed, may be taking new shape. Some countries continue to see wave after wave of viral spread, sometimes in connection with the emergence of troubling new variants of the coronavirus. And while the goal of developing effective vaccines has achieved success with remarkable speed, now the problem of implementing widespread *vaccination* has come into sharp relief, adding to the list of daunting governance challenges that nations must confront. The only conclusion one can presently draw with anything close to certainty is that governance challenges, and the best responses to them, will continue to evolve for some time.

## I. COVID-19 AND COMPARATIVE ADMINISTRATIVE LAW

Contemplating such governance challenges, we note that, regardless of how nations delegate regulatory power to their government officials, the manner in which those officials exercise their authority when confronting particular crises is a matter of shared and profound importance. In the United States, recent years have been marked by “a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal.”<sup>2</sup> Under the Trump Administration, this resurgence took the form of certain regulatory rollbacks under the Congressional Review Act and some

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1. For this collection of essays in *The Regulatory Review*, see *Comparing Nations' Responses to Covid-19*, REGUL. REV., <https://www.theregreview.org/2020/04/20/comparing-nations-responses-covid-19/> (last visited Jan. 31, 2021).

2. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017).

slowdowns in the issuance of “economically significant” rules,<sup>3</sup> the appointment of an unusually large number of acting officials to the highest level of government,<sup>4</sup> and the annual pursuit of steep cuts in funding for social welfare agencies.<sup>5</sup> Coupled with sharp rhetorical attacks on the so-called deep state, these policies and others like them helped to keep public trust in government at historic lows.<sup>6</sup>

Opposition to regulation has also gathered steam in otherwise liberal democratic countries—typically in connection with the ascendance of right-wing populist movements.<sup>7</sup> The United Kingdom’s recent departure from the European Union was first marketed, in large part, as a way to unshackle the British economy from the burden of European regulations.<sup>8</sup> Although Brexit itself remains an anomaly in Europe—at least for now—that same anti-regulatory vision has been prominent in the discourse of Matteo Salvini (former deputy Prime Minister) in Italy, Marine Le Pen (President of the National Rally Party) in France, and Geert Wilders (parliamentary leader of the Party for Freedom) in the Netherlands, among others.<sup>9</sup> Elsewhere,

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3. See Cary Coglianese, *Let’s Be Real About Trump’s First Year in Regulation*, REGUL. REV. (Jan. 29, 2018), <https://www.theregreview.org/2018/01/29/lets-be-real-trumps-first-year-regulation/> (debunking the idea that the Trump Administration had deregulated radically); Cary Coglianese et al., *Deceptive Deregulation*, REGUL. REV. (Nov. 2, 2020), <https://www.theregreview.org/2020/11/02/coglianese-sarin-shapiro-deregulatory-deceiving/> (showing that the Trump years resulted in much less deregulation than the Administration had claimed).

4. See John T. Bennett, *Frustrated by “My Generals,” Trump Turns to “My Actings,”* ROLL CALL (Jan. 14, 2019, 5:05 AM), <https://www.rollcall.com/2019/01/14/frustrated-by-my-generals-trump-turns-to-my-actings/> (discussing the legality of keeping acting officials in charge for undefined periods).

5. See Brittany Renee Mayes et al., *What Trump Proposed in His 2021 Budget*, WASH. POST (Feb. 10, 2020), <https://www.washingtonpost.com/graphics/2020/business/trump-budget-2021/> (describing the Trump Administration’s proposed 2021 budget cuts in social welfare).

6. See *Public Trust in Government: 1958-2019*, PEW RSCH. CTR. (Apr. 11, 2019), <https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/> (demonstrating how public trust in government has declined in recent years).

7. See generally Cary Coglianese, *Law as Scapegoat*, in THE CRISIS OF CONFIDENCE IN LEGISLATION 337 (Maria De Benedetto, Nicola Lupo & Nicoletta Rangone eds., 2020) (explaining why some populist leaders blame legislation and regulation).

8. Anu Bradford, *No, Brexit Won’t Free the U.K. from EU Regulations*, WALL ST. J. (Feb. 7, 2020, 9:54 AM), <https://www.wsj.com/articles/no-brex-it-wont-free-the-u-k-from-eu-regulations-11581087277>.

9. See, e.g., Erin McLaughlin et al., *Salvini Says He Wants Pre-Maastricht EU Rules, Ahead of Far-Right Rally*, CNN, <https://www.cnn.com/2019/05/18/europe/matteo-salvini-european-union-rally-intl/index.html> (May 19, 2019, 4:11 PM) (describing a rally held by Matteo Salvini, and featuring Marine Le Pen and Geert Wilders, pushing against the rules and regulations of the Maastricht Treaty).

governmental leaders such as Scott Morrison in Australia and Jair Bolsonaro in Brazil have made aggressive deregulation, especially concerning environmental protection, a centerpiece of their political agendas over the past few years.<sup>10</sup>

In those democracies where the regulation of public health, safety, and welfare is most under siege, it appears that the early mitigation response to the COVID-19 pandemic was especially poor. Contributions to the series in *The Regulatory Review* document regulatory breakdowns in nations such as the United States,<sup>11</sup> the United Kingdom,<sup>12</sup> and Brazil,<sup>13</sup> each of which dramatically failed to contain the early spread of the coronavirus—and continue to struggle to this day. These failures seemed to flow naturally from the anti-regulatory trends that have prevailed in recent years in these countries.<sup>14</sup>

Meanwhile, the initial failure of Chinese authorities to detect and report coronavirus cases after they first emerged in the city of Wuhan—a failure addressed in *The Regulatory Review* series and now in greater depth in this special issue in the *Administrative Law Review*<sup>15</sup>—has been overshadowed, to a

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10. See Amy Remeikis, *Scott Morrison Flags Trump-Style Economic Plan in Pledge to Cut More Red Tape*, GUARDIAN (June 23, 2019, 11:29 PM), <https://www.theguardian.com/australia-news/2019/jun/24/scott-morrison-flags-trump-style-economic-plan-in-pledge-to-cut-more-red-tape> (noting how Scott Morrison planned to use Donald Trump's economic plan as inspiration); Sue Branford & Maurício Torres, *Bolsonaro Pledges Government Shakeup, Deregulation, Amazon Development*, MONGABAY (Nov. 19, 2018), <https://news.mongabay.com/2018/11/bolsonaro-pledges-government-shakeup-deregulation-amazon-development/> (describing Jair Bolsonaro's plan to deregulate and develop the Amazon).

11. See Alejandro E. Camacho & Robert L. Glicksman, *The Trump Administration's Pandemic Response Is Structured to Fail*, REGUL. REV. (May 19, 2020), <https://www.theregreview.org/2020/05/19/camacho-glicksman-trump-administration-pandemic-response-structured-fail/> (laying out the ways in which the Trump Administration's handling of the pandemic were exacerbated by misallocation of authority).

12. See Duncan Fairgrieve, *The U.K. Races to Catch Up on COVID-19*, REGUL. REV. (Apr. 30, 2020), <https://www.theregreview.org/2020/04/30/fairgrieve-uk-races-to-catch-covid-19/> (detailing the failures of the United Kingdom's handling of the pandemic).

13. See Bruno Queiroz Cunha, *Brazil's COVID-19 Response Is Caught Between Denialism and Technocratic Hubris*, REGUL. REV. (June 1, 2020), <https://www.theregreview.org/2020/06/01/cunha-brazil-covid-19-response-caught-between-denialism-technocratic-hubris/> (analyzing the disjointed and failed response of the Brazilian government to contain the coronavirus).

14. Cf. Coglianese, *supra* note 7, at 4 (“When mistrust festers, politicians with motives that are far from altruistic can exploit and deepen that distrust, sowing conditions for the dismantling of liberal, democratic governance.”).

15. Shen Kui, *The Delayed Response in Wuhan Reveals Legal Holes*, REGUL. REV. (Apr. 20, 2020), <https://www.theregreview.org/2020/04/20/delayed-response-wuhan-reveals-legal-holes/>; Jacques deLisle & Shen Kui, *China's Response to COVID-19*, 73 ADMIN. L. REV. 19, 19–20 (2021).

surprising degree, by the relative effectiveness of later containment efforts in the country.<sup>16</sup> For comparative scholars, this juxtaposition of performances by democratic and authoritarian regimes has raised uncomfortable questions about different governance models in the face of public health or other crises<sup>17</sup>—questions which are not lost on the general public as well.<sup>18</sup>

These questions become even more complicated when we take a broader look at how other nations have responded to COVID-19. A number of liberal democracies—including Germany,<sup>19</sup> South Korea,<sup>20</sup> Taiwan,<sup>21</sup> and New Zealand<sup>22</sup>—have managed to avoid autocratic tactics, and remain true to their own governance principles, while successfully containing their nations' early viral infection rates. At the same time, some autocracies, such as Russia and Iran, have struggled with the coronavirus, notwithstanding the robust surveillance and other control tools at their disposal similar to those

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16. Jacques deLisle, *China's Administrative State Is Both a Blessing and a Curse*, REGUL. REV. (June 30, 2020), <https://www.theregreview.org/2020/06/30/delisle-china-administrative-state-both-blessing-curse/>; deLisle & Shen, *supra* note 15, at 41–43.

17. See Rachel Kleinfeld, *Do Authoritarian or Democratic Countries Handle Pandemics Better?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 31, 2020), <https://carnegieendowment.org/2020/03/31/do-authoritarian-or-democratic-countries-handle-pandemics-better-pub-81404> (contrasting the responses in COVID-19 containment between democratic and authoritarian countries).

18. See, e.g., Li Yuan, *In a Topsy-Turvy Pandemic World, China Offers Its Version of Freedom*, N.Y. TIMES, <https://www.nytimes.com/2021/01/04/business/china-covid19-freedom.html> (Jan. 14, 2021).

19. Johannes Saurer, *COVID-19 and Cooperative Administrative Federalism in Germany*, REGUL. REV. (May 13, 2020), <https://www.theregreview.org/2020/05/13/saurer-covid-19-cooperative-administrative-federalism-germany/> [hereinafter Saurer, *COVID-19 and Cooperative Administrative Federalism*]; Johannes Saurer, *Patterns of Cooperative Administrative Federalism in the German Response to COVID-19*, 73 ADMIN. L. REV. 139 (2021) [hereinafter Saurer, *Patterns of Cooperative Administrative Federalism*].

20. Seung-Youn Oh, *South Korea's Success Against COVID-19*, REGUL. REV. (May 14, 2020), <https://www.theregreview.org/2020/05/14/oh-south-korea-success-against-covid-19/>.

21. Cheng-Yi Huang, *Soft Regulation and Hard Compliance in Taiwan*, REGUL. REV. (June 11, 2020), <https://www.theregreview.org/2020/06/11/huang-soft-regulation-hard-compliance-taiwan/>; see also Raymond Zhong, *How Taiwan Plans to Stay (Mostly) Covid-Free*, N.Y. TIMES, <https://www.nytimes.com/2021/01/02/world/asia/taiwan-coronavirus-health-minister.html> (Jan 11, 2021).

22. Richard W. Parker, *Lessons From New Zealand's COVID-19 Success*, REGUL. REV. (June 9, 2020), <https://www.theregreview.org/2020/06/09/parker-lessons-new-zealand-covid-19-success/> [hereinafter Parker, *Lessons from New Zealand*]; Richard W. Parker, *Why America's Response to the COVID-19 Pandemic Failed: Lessons from New Zealand's Success*, 73 ADMIN. L. REV. 77, 77–79 (2021) [hereinafter Parker, *Why America's Response to the COVID-19 Pandemic Failed*].

deployed in China.<sup>23</sup> And for other autocratic regimes, including Vietnam and Singapore, their relative success in managing the outbreak appears to rest instead on non-autocratic elements of their governance models—more open and transparent regulation in the case of Vietnam,<sup>24</sup> and carefully restricted emergency measures in the case of Singapore.<sup>25</sup>

The essays in our initial series in *The Regulatory Review*, and now in this special issue, may not resolve debates over the relative merits and efficacies of regime type in times of crisis. However, in the granularity of each scholarly account presented here, readers will find much to learn about state regulatory capacity and responsiveness. In addition, the essays in this special issue reveal the regulatory challenges that nations have in common, as well as those regulatory tools or approaches that may be transferable across jurisdictions notwithstanding political or cultural differences.

## II. LESSONS LEARNED FROM PANDEMIC RESPONSES

What overarching lessons can be gleaned from the comparative study of regulatory and administrative responses to COVID-19? We believe we can learn much from how different countries have responded to the pandemic, but we also recognize that circumstances around the world remain fluid. They will likely remain so even for some time until a sufficient number of effective vaccines are administered. In some countries, the virus appeared to have been brought under control in the summer of 2020 only to resurge months later in the fall and winter, sometimes forcing governments to impose new lockdowns and other public health regulatory measures.<sup>26</sup>

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23. On the difficulties Russia and Iran have confronted, see Michele A. Berdy, *How Russia's Coronavirus Crisis Got So Bad*, POLITICO (May 19, 2020, 4:30 AM), <https://www.politico.com/news/magazine/2020/05/19/moscow-coronavirus-vladimir-putin-265227>; Virginia Pietromarchi, *Iran Braces for a New Coronavirus Wave After Surge in Infections*, AL JAZEERA (June 6, 2020), <https://www.aljazeera.com/news/2020/06/iran-braces-coronavirus-wave-surge-infections-200605211903567.html>. For a discussion of the methods China has used to control and contain the spread of COVID-19, see Amy Gadsden, *The Post-COVID-19 Future of Surveillance in China*, PERRY WORLD HOUSE (May 20, 2020), <https://global.upenn.edu/perryworldhouse/news/post-covid-19-future-surveillance-china>.

24. See Trang (Mae) Nguyen, *Vietnam's Astonishing Success at Curbing COVID-19 Outbreaks*, REGUL. REV. (June 4, 2020), <https://www.theregreview.org/2020/06/04/nguyen-vietnam-astonishing-success-curbing-covid-19-outbreaks/>.

25. See Kevin Y.L. Tan, *Singapore's Regulatory Response to COVID-19*, REGUL. REV. (June 15, 2020), <https://www.theregreview.org/2020/06/15/tan-singapore-regulatory-response-covid-19/>.

26. See, e.g., Reuters Staff, *Special Report: 50,000 COVID-19 Deaths and Rising. How Britain Failed to Stop The Second Wave*, REUTERS (Nov. 24, 2020, 4:34 AM), <https://www.reuters.com/article/us-health-coronavirus-britain-newwave-sp/special-report-50000-covid-19-deaths-and->

As a result, no definitive account of the efficacy of any specific legal measures can even pretend to be offered as of this writing. Moreover, no introduction such as this one can do justice to the richness of the comparative scholarship reflected in this special issue, nor of all the essays in *The Regulatory Review* series upon which this issue builds. Nevertheless, it is vital for scholars and policymakers to learn from each other—and for cross-fertilization to occur between disciplines and across countries—to improve our understanding of how administrative law and regulatory policy can respond effectively to public health crises.<sup>27</sup> To this end, we offer here at least four lessons that emerge from the essays in this special issue.

#### A. *Global Pandemics Call for Effective National and Local Governance*

It goes without saying that a global pandemic naturally demands a coordinated global response. Countries need to cooperate to share information, conduct research, and develop robust global supply chains to provide needed medical supplies and the distribution of vaccines. Oswald Jansen's essay outlines very real challenges that the WHO must meet to facilitate needed global cooperation.<sup>28</sup>

And yet, just as former Speaker of the U.S. House of Representatives Tip O'Neill once noted that "[a]ll politics is local,"<sup>29</sup> it is also the case that the governance capacity needed to fight a contagious viral outbreak

rising-how-britain-failed-to-stop-the-second-wave-idUSKBN284112; Crispian Balmer & Angelo Amante, *Why Us Again? Italy Suffers Disproportionate Toll in Second COVID Wave*, REUTERS, <https://www.reuters.com/article/health-coronavirus-italy-dead/why-us-again-italy-suffers-disproportionate-toll-in-second-covid-wave-idUKKBN28O20I> (Dec. 14, 2020, 10:24 AM); Dave Lawler, *Special Report: Europe Braces for Monster 2nd Coronavirus Wave*, AXIOS (Oct. 15, 2020), <https://www.axios.com/europe-second-wave-covid-lockdowns-de426ae5-e1c5-4855-9023-633842f96615.html>; Jason Horowitz, *For Europe, It's Wave After Wave*, N.Y. TIMES (Dec. 22, 2020), <https://www.nytimes.com/interactive/2020/12/22/world/europe/covid-europe-hospitals.html>; Dasl Yoon & Miho Inada, *Covid-19 Surge Hits South Korea and Japan, After They Had Contained Virus*, WALL ST. J., <https://www.wsj.com/articles/covid-19-surge-hits-parts-of-asia-seen-as-pandemic-success-stories-11607523625> (Dec. 9, 2020, 11:21 AM); Yuri Kageyama, *Japan Declares Emergency For Tokyo Area As Cases Spike*, ASSOCIATED PRESS (Jan. 7, 2021), <https://apnews.com/article/tokyo-emergency-coronavirus-spike-japan-01e0916762eaa06d3d65510bcd271967>.

27. Cary Coglianese, *What Regulators Can Learn from Global Health Governance*, GLOB. HEALTH GOVERNANCE (forthcoming 2021) (manuscript at 1, 3, 7) (on file with author).

28. See Oswald Jansen, *Administrative Law Rules and Principles in Decisionmaking of the World Health Organization During the COVID-19 Pandemic*, 73 ADMIN. L. REV. 165, 166–69 (2021) (discussing the changes needed to the WHO illustrated by the COVID-19 pandemic).

29. TIP O'NEILL & GARY HYMEL, ALL POLITICS IS LOCAL, AND OTHER RULES OF THE GAME, at xvi (1994).

resides mainly within countries' borders, not between them. The primary legal responses to the COVID-19 pandemic have been—and necessarily so—from within individual countries. After all, only domestic law can impose restrictions on social gatherings or economic activities when doing so is necessary to stem an outbreak or hold down the curve of a viral spread.

Coordination must take place within each country too. National leaders need the cooperation of local and regional officials to make policies stick or to make sure needed supplies are distributed. National actions must bolster local efforts to test, trace, and isolate exposed individuals. When exposed individuals do get sick, they need appropriate health care, which also must be delivered within the communities where those sick people reside.

Even when the spread of a communicable disease goes global, it only makes its way around the world one individual at a time. Containing that spread and responding to the needs of infected individuals demands governance at the local level, where actions can be taken to respond to individual behaviors and needs. The individual nature of viral infection spread highlights the crucial coordinating function that only domestic governments can provide—starting from the national level all the way down to the local level. The extensive disease spread in the United States, along with unconscionably high levels of fatalities the nation has experienced, tragically show what can happen when national leaders duck their coordinating responsibility.<sup>30</sup>

In the end, notwithstanding decades of pronounced globalization, the bulk of governing capacity around the world still resides *within* countries, not across them. The world may now be interconnected, and that interconnectedness does permit the rapid global spread of a contagious disease. But most governance capacity remains at the level of the nation-state and below. There is no substitute for strong and responsible governance by national institutions and their subnational counterparts.<sup>31</sup>

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30. Parker, *Lessons from New Zealand*, *supra* note 22; see also Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to Covid-19*, 382 NEW ENG. J. MED., May 28, 2020, at e75(1)–(3) (highlighting the correlation between lack of a uniform response and increasing COVID-19 cases in the United States).

31. In recognizing here the practical primacy of national and state governance, we do not mean to overlook the structural inequities of the world order nor to suggest that each country should be simply left to fend for itself. Wealthier nations have both moral and interest-based reasons to support public health infrastructure in other countries and to support effective global public health governance. For especially illuminating analysis of issues of global health justice and equity, see, for example, JENNIFER PRAH RUGER, *GLOBAL HEALTH JUSTICE AND GOVERNANCE* (2018), and Matiangai Sirleaf, *Responsibility for Epidemics*, 97 TEX. L. REV. 285 (2018).

### B. *Regulatory Law Must Adapt Quickly*

A second lesson is that law must change, sometimes significantly and almost always quickly, to fight a deadly communicable disease. In response to the pandemic, most countries around the world passed new laws, issued new regulations, or made regulatory modifications to address the pandemic. Governments declared emergencies and made exceptions to existing rules and patterns of governing.<sup>32</sup> In some countries, governments significantly restructured their legal authority.<sup>33</sup> State and society have flexed and bent in varying and changing ways throughout the pandemic, forging new balances between regulation and liberty and new relationships between business and government.

The law's flux in a time of disease marks a major theme running through the essays in this special issue. Nations require nimble legal dynamism not merely because of the novelty of this particular virus itself, but also because the behaviors, attitudes, and interests of individuals within society are themselves so varied and changing. At its core, a pandemic is a sociological problem as much as a medical problem, because the initial responses that are most effective—such as social distancing and mask-wearing—call for governments to induce behavioral changes among their populations of people. But people and their behaviors are far from static—even sometimes in the most regimented of societies. As a result, lawmakers and public health officials need to be prepared to adapt their strategies and their rules.

Even in normal times, let alone in a pandemic, “[r]egulating well necessitates ‘obligation management:’ the adjusting and adapting of both rules and unrules in the face of changing risks, technologies, economic conditions, and knowledge of the world’s conditions.”<sup>34</sup> Country after country has exhibited some degree of dynamism in their obligation management. Most countries—China,<sup>35</sup> Germany,<sup>36</sup>

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32. Cary Coglianese, *Obligation Alleviation During the COVID-19 Crisis*, REGUL. REV. (Apr. 20, 2020), <https://www.theregreview.org/2020/04/20/coglianese-obligation-alleviation-during-covid-19-crisis/>.

33. See Andrew Edgar, *Disrupting Administrative Law in a Public Health Crisis*, REGUL. REV. (Apr. 24, 2020), <https://www.theregreview.org/2020/04/24/edgar-disrupting-administrative-law-public-health-crisis/> (discussing how judicial review of administrative action was disrupted in Australia during the COVID-19 pandemic).

34. See Coglianese, *supra* note 32. For further discussion of unrules, see Cary Coglianese et al., *Unrules*, 73 STAN. L. REV. (forthcoming 2021) (on file with author).

35. See deLisle, *supra* note 16 (discussing the lockdown in Wuhan); deLisle & Shen, *supra* note 15 (analyzing the lockdown in virus hotspots in China).

36. See Saurer, *COVID-19 and Cooperative Administrative Federalism*, *supra* note 19 (discussing lockdown measures in Germany); Saurer, *Patterns of Cooperative Administrative Federalism*, *supra* note 19 at 148–50 (same).

Italy,<sup>37</sup> Israel,<sup>38</sup> and South Africa,<sup>39</sup> to name just a few—locked down large portions of their population in an effort to flatten the curve in the initial stages of the outbreak. Each of these governments has subsequently faced the need to make decisions about when and how to reopen their economies. In some countries, after governments lifted lockdowns, the virus has reemerged, forcing officials again to confront hard decisions about whether to close down economic and social activity.<sup>40</sup>

Rapid responsiveness is paramount. Sometimes it has taken a prior encounter with an epidemic for countries' leaders—and their citizens—to learn the importance of a quick response. Judging from their relative early successes in response to COVID-19, countries such as Singapore,<sup>41</sup> South Korea,<sup>42</sup> Taiwan,<sup>43</sup> and Vietnam<sup>44</sup> have clearly learned from past experiences. Each of these countries previously experienced SARS, MERS, or other serious viral outbreaks, and they based their responses to COVID-19 on lessons they learned from the past. Overall, we can conclude that learning from the past and adapting to the present are keys to

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37. See Fernanda G. Nicola, *Exporting the Italian Model to Fight COVID-19*, REGUL. REV. (Apr. 23, 2020), <https://www.theregreview.org/2020/04/23/nicola-exporting-italian-model-fight-covid-19/> (analyzing the lockdown in Codogno, Italy); see also Fernanda Nicola & Gino Scaccia, *The Italian Model to Fight COVID-19: Regional Cooperation, Regulatory Inflation and the Cost of One-Size-Fits-All Lockdown Measures*, 73 ADMIN. L. REV. 53, 58–61 (2021) (examining the lockdown in the regions of Northern Italy).

38. Elena Chachko & Adam Shinar, *Israel Pushes its Emergency Powers to Their Limits*, REGUL. REV. (Apr. 28, 2020), <https://www.theregreview.org/2020/04/28/chachko-shinar-israel-pushes-emergency-powers-limits/>.

39. See Geo Quinot, *Regulatory Justification and Coordination in South Africa*, REGUL. REV. (Apr. 29, 2020), <https://www.theregreview.org/2020/04/29/quinot-regulatory-justification-coordination-south-africa/> (highlighting the lockdown restrictions in South Africa); Geo Quinot, *Justification, Integration and Expertise: South Africa's Regulatory Response to COVID-19*, 73 ADMIN. L. REV. 105, 111–13 (2021) (same).

40. See Nectar Gan, *China's New Coronavirus Outbreak Sees Beijing Adopt 'Wartime' Measures as Capital Races to Contain Spread*, CNN, <https://www.cnn.com/2020/06/15/asia/coronavirus-beijing-outbreak-intl-hnk/index.html> (June 16, 2020, 2:10 AM) (discussing the reintroduction of lockdown measures in Beijing); Jill Lawless, *England to Enter New Lockdown; UK Virus Cases Pass 1 Million*, ASSOCIATED PRESS (Oct. 31, 2020), <https://apnews.com/article/virus-outbreak-england-london-boris-johnson-371b19c116876d9fe2052bf96010bfd6>.

41. See Tan, *supra* note 25 (highlighting the effective response to COVID-19 in Singapore).

42. See Oh, *supra* note 20 (elaborating on the effective South Korean campaigns against COVID-19 based on the lessons learned from MERS).

43. See Huang, *supra* note 21 (highlighting the legal infrastructure already in place in Taiwan from the SARS outbreak in 2003).

44. See Nguyen, *supra* note 24 (discussing Vietnam's effective response to COVID-19).

the effective deployment of administrative governance, especially during times of crisis.<sup>45</sup>

### C. *Emergency Powers Need Oversight and Limitations*

A third lesson follows directly from certain types of legal changes that some countries have made in response to COVID-19—namely, changes to how they structure their governments and allocate legal authority.<sup>46</sup> Often these changes give executives new or greater authority. In this light, the lesson is more of a caution about the potential for abuse of executive power, as some legal changes that give executive officials greater regulatory powers may also allow them to short-circuit ordinary processes or give them certain escapes from regular legislative or judicial oversight. These kinds of changes risk allowing executive officials to use the pandemic as a pretext for accumulating power that they will seek to abuse, either during the pandemic or later. As Alexander Cooley and Daniel Nexon have noted, “[i]lliberal governments worldwide are using the pandemic as cover for restricting media freedom and cracking down on political opposition and civil society.”<sup>47</sup>

As temporary public health measures, some emergency changes in both substantive and structural rules, such as the centralization of authority, might well be justified to address the major risks presented by a pandemic. But this does not mean that the exercise of such centralized authority should go unchecked during the time the government deals with the outbreak of disease. After all, emergencies can be exploited by governmental leaders to deploy their newly acquired powers in unjustified ways to achieve goals or adopt measures unrelated to the public health crisis.<sup>48</sup>

45. For an argument that regulators need to assume the role of “vigilant” overseers during pandemics, see Maciej M. Sokołowski, *Regulation in the COVID-19 Pandemic and Post-Pandemic Times: Day-Watchman Tackling the Novel Coronavirus*, TRANSFORMING GOV'T: PEOPLE, PROCESS & POL'Y (forthcoming 2021), <https://www.emerald.com/insight/content/doi/10.1108/TG-07-2020-0142/full/html>. Of course, vigilance is needed more broadly by regulators, even outside of public health emergencies. Cary Coglianese, *Regulatory Vigilance in a Changing World*, REGUL. REV. (Feb. 25, 2019), <https://www.theregreview.org/2019/02/25/coglianese-innovation-regulatory-vigilance/>.

46. See, e.g., Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, N.Y. TIMES, <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html> (April 14, 2020).

47. Alexander Cooley & Daniel H. Nexon, *How Hegemony Ends: The Unraveling of American Power*, FOREIGN AFFS. (July/Aug. 2020), <https://www.foreignaffairs.com/articles/United-States/2020-06-09/how-hegemony-ends?>

48. As one of us has noted elsewhere:

[R]egulators and elected officials can . . . overreact in times of emergency. They can go too

Moreover, once a crisis is over, some of the power reconfigurations that governments implemented during the emergency period will need to be deliberately reconsidered. Without such reconsideration, which could be facilitated by formal sunset of emergency powers, it is far from clear that governmental executives who were given new powers to respond to a crisis will voluntarily return those powers afterwards. Especially when executives have been granted temporary reprieve from normal forms of oversight, they may resist resubmitting themselves to such oversight. It is possible that legal changes made in response to COVID-19 could, in at least some countries, hold longstanding consequences for democratic accountability and the rule of law.

Experiences in countries as diverse as France,<sup>49</sup> Israel,<sup>50</sup> India,<sup>51</sup> Chile,<sup>52</sup> and Switzerland<sup>53</sup> have already presented these concerns. The very changes to constitutions and democratic procedures that leaders and their publics have found acceptable, even necessary, to deal with COVID-19 in the short

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far in the extremes of either obligation imposition or alleviation. Just as officials can use emergencies as an excuse to trample liberty and aggrandize power, so too can leaders fall prey to “unregulatory capture” and use emergencies to undo valuable regulations only to serve the interests of their friends or political benefactors. Or they can cite an emergency as an excuse to put in place a preferred policy which bears little connection to the crisis at hand.

Coglianese, *Obligation Alleviation During the COVID-19 Crisis*, *supra* note 32. For an insightful account of such overreaction in Hungary following the COVID-19 outbreak, see David E. Pozen & Kim Lane Scheppele, *Executive Underreach, In Pandemics and Otherwise*, 114 AMER. J. INT’L L. 608, 611–12 (2020) (discussing Prime Minister Viktor Orbán’s use of new powers to issue emergency decrees, “many [of which] had little to do with the pandemic”).

49. See Thomas Perroud & Emma Guernaoui, *France’s Health Crisis Is a Democracy Crisis, Too*, REGUL. REV. (Apr. 21, 2020), <https://www.theregreview.org/2020/04/21/perroud-guernaoui-frances-health-crisis-democracy-crisis/> (discussing the new legal measures employed by the government in France in response to the COVID-19 pandemic).

50. See Chachko & Shinar, *supra* note 38 (examining the measures taken by the Israeli government in response to the COVID-19 pandemic without oversight).

51. See Gautam Bhatia, *India’s Executive Response to COVID-19*, REGUL. REV. (May 4, 2020), <https://www.theregreview.org/2020/05/04/bhatia-indias-executive-response-covid-19/> (noting that the executive authority is running the COVID-19 response in India).

52. See Josefina Court & José Tomás Correa, *Chile’s Political and Institutional Response to COVID-19*, REGUL. REV. (June 24, 2020), <https://www.theregreview.org/2020/06/24/court-correa-chile-political-institutional-response-covid-19/> (analyzing the effects of the state of emergency on administrative authority in Chile).

53. See Odile Ammann, *Regulatory Uncertainty over Emergency Powers in Switzerland*, REGUL. REV. (May 29, 2020), <https://www.theregreview.org/2020/05/29/ammann-regulatory-uncertainty-over-emergency-powers-switzerland/> (highlighting areas of regulatory uncertainty in Switzerland’s COVID-19 response).

term may end up remaining in place over a much longer term.<sup>54</sup> New powers given to presidents, prime ministers, and other executive officials could be used for years to deny protections for minorities or commit other abuses of power. Already, the COVID-19 crisis may be contributing to looming challenges to democracy and human rights in a variety of countries.<sup>55</sup> Appropriate oversight of the exercise of executive power is needed both during and after a state of emergency.<sup>56</sup>

#### D. Leadership Matters

Although this special issue is organized around a comparison of administrative law issues, we should not forget how much the law depends on responsible leadership for its effective design and implementation. The difference that leadership makes could hardly be clearer from the contrast between how effectively Prime Minister Jacinda Ardern was able to bring under control the initial viral outbreak in New Zealand and how woefully then-President Donald J. Trump abdicated leadership over COVID-19 during his time in office, contributing to needless and profoundly tragic loss of life.<sup>57</sup>

In addition to the importance of leaders who can exercise authority nimbly and responsibly, sound leadership is needed to inspire public trust. Citizens need to trust their leaders if they are to follow their instructions in a time of crisis.<sup>58</sup> Only with honest, scientifically informed, and active

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54. In some countries, of course, constitutional provisions may provide citizens with additional protections during times of emergency. See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 J. CONST. L. 1001, 1079 (2004).

55. See Perroud & Guernaoui, *supra* note 49 (highlighting threats to constitutional democracy in France due to the COVID-19 pandemic).

56. Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic* (Univ. of Chi. Pub. L. Working Paper, Paper No. 747, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3608974](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608974).

57. See Tom Frieden, *Which Countries Have Responded Best to Covid-19?*, WALL ST. J. (Jan. 1, 2021, 11:00 AM) <https://www.wsj.com/articles/which-countries-have-responded-best-to-covid-19-11609516800> (“Prime Minister Jacinda Arden has exemplified empathetic, clear communication, which greatly increased New Zealanders’ willingness to cooperate and was essential to the country’s success.”); see also Parker, *Lessons From New Zealand*, *supra* note 22 (noting the aggressive, yet effective, COVID-19 response strategy in New Zealand); Parker, *Why America’s Response to the COVID-19 Pandemic Failed*, *supra* note 22 at 108–24 (comparing the COVID-19 responses of New Zealand and the United States).

58. See Maria De Benedetto, *Regulating in Times of Tragic Choices*, REGUL. REV. (May 6, 2020), <https://www.theregview.org/2020/05/06/de-benedetto-regulating-times-tragic-choices/> (commenting that trust in government is required for a successful pandemic response).

leadership can nations even hope to keep a viral outbreak at bay.<sup>59</sup>

Active leadership is needed to ensure the law's responsiveness in the face of a public health emergency.<sup>60</sup> Often, legal systems and bureaucratic organization take on a life of their own, running on routines that have been deeply rooted in periods of relative equilibrium. Yet, the routines designed to function during such normal times need to be actively managed, even jolted out of existing patterns of practice, during periods of disequilibrium. Flexibility and constant vigilance are needed in the face of new threats and changing circumstances. Moreover, strong and reliable leadership is needed to coordinate effectively between various regional and local governing authorities,<sup>61</sup> as well as to ensure cooperation between the public and private sectors.<sup>62</sup>

Leadership failures have plagued a number of countries and institutions as they confronted the coronavirus outbreak. When the virus first emerged, Chinese leaders initially acted defensively and tried to limit the spread of information about the new virus.<sup>63</sup> Leaders at the WHO displayed their own tentativeness about issuing initial warnings.<sup>64</sup> Brazil and the United States have suffered from the abdication of leadership, with both countries' Presidents doing much throughout 2020 to deny the seriousness of the public health threat.<sup>65</sup> President Bolsonaro and then-President Trump did not only fail to

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59. See Mauricio Guim, *Mexico's Untimely Fight Against Coronavirus*, REGUL. REV. (May 27, 2020), <https://www.theregreview.org/2020/05/27/guim-mexico-untimely-fight-against-coronavirus/> (noting that effective governmental COVID-19 response strategies rely on scientific expertise).

60. Agile leadership and regulatory vigilance are needed even in so-called normal times. See generally Cary Coglianese, Book Review, 79 PUB. ADMIN. REV. 794 (reviewing F.C. SIMON, *META-REGULATION IN PRACTICE: BEYOND NORMATIVE VIEWS OF MORALITY AND RATIONALITY* (2017)).

61. See Nicoletta Rangone, *Italy's Complex Legislative Framework Impairs Its COVID-19 Response*, REGUL. REV. (June 8, 2020), <https://www.theregreview.org/2020/06/08/rangone-italy-complex-legislative-framework-impairs-covid-19-response/> (discussing the relationship between national and regional COVID-19 responses in Italy).

62. See Oh, *supra* note 20 (highlighting the effective national and private response to COVID-19 in South Korea).

63. See Shen, *The Delayed Response in Wuhan Reveals Legal Holes*, *supra* note 15 (highlighting the delayed response to COVID-19 in Wuhan); deLisle & Shen, *supra* note 15 at 29–40 (recognizing the lack of transparency in the COVID-19 response in Wuhan).

64. See Oswald Jansen, *Increasing the Legitimacy of the World Health Organization*, REGUL. REV. (Apr. 22, 2020), <https://www.theregreview.org/2020/04/22/jansen-increasing-legitimacy-world-health-organization/> (explaining the WHO's response to COVID-19).

65. See Mariana Urban & Eduardo Saad-Diniz, *Why Brazil's COVID-19 Response Is Failing*, REGUL. REV. (June 22, 2020), <https://www.theregreview.org/2020/06/22/urban-saad-diniz-brazil-covid-19-response-failing/> (detailing the failed COVID-19 response in Brazil); Cunha, *supra* note 13 (noting President Bolsonaro's failure to respond to COVID-19 in Brazil);

step up to take control of the viral outbreak; they actually made matters worse by muddying public health officials' risk communication efforts by making contradictory statements about the virus and recommended behavioral practices.<sup>66</sup> At least in the United States, the change of presidential administration in 2021 offers a new way forward in terms of pandemic response.

The United States has suffered the needless loss of lives due to the country's sluggish response to the virus in 2020 and its inconsistent state and local responses throughout much of the year. As word of the virus first emerged, the U.S. Centers for Disease Control and Prevention (CDC) and the U.S. Food and Drug Administration (FDA) initially approached the development of testing by following their normal tendencies to err on the side of caution<sup>67</sup>—tendencies that are appropriate in normal times, but which proved consequential by losing about three to four pivotal weeks' time that allowed the virus to take root and spread throughout the population. What the United States lacked in those early days was a competent and well-meaning White House intervention to break an otherwise well-intentioned bureaucratic leadership at the Centers for Disease Control and Prevention and the Food and Drug Administration out of their normal modes of operation, urging them to act quickly and approve alternative test methods to build up the nation's testing capacity.<sup>68</sup>

President Trump not only failed to provide such needed leadership but also, in early March 2020, openly resisted testing to identify cases of infections<sup>69</sup>—a position he maintained for months, apparently on the belief

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Camacho & Glicksman, *supra* note 11 (highlighting the failures of the Trump Administration's response to COVID-19).

66. See Urban & Saad-Diniz, *supra* note 65; Camacho & Glicksman, *supra* note 11. See generally Ed Yong, *How the Pandemic Defeated America*, ATLANTIC, <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/> (Aug. 4, 2020, 1:12 PM) (“Trump is a comorbidity of the COVID-19 pandemic.”).

67. See Coglianesi, *Obligation Alleviation During the COVID-19 Crisis*, *supra* note 32 (discussing the initially cautious approach taken by the U.S. Centers for Disease Control and Prevention and U.S. Food and Drug Administration in response to COVID-19). For helpful further discussion, see Walter G. Johnson & Gary E. Marchant, *Legislating in the Time of a Pandemic: Window of Opportunity or Invitation for Recklessness?*, J.L. & BIOSCIENCES 1, 4–5 (2020), <https://academic.oup.com/jlb/article-pdf/7/1/lsaa042/33744178/lsaa042.pdf>.

68. For an illuminating account of the testing fiasco, see Lawrence Wright, *The Plague Year*, NEW YORKER (Dec. 28, 2020), <https://www.newyorker.com/magazine/2021/01/04/the-plague-year>. Wright notes that “America never made up for the lost February.” *Id.*

69. See Morgan McFall-Johnsen, *Trump Said He Wants to Keep Grand Princess Cruise Passengers on the Ship so that US Coronavirus Numbers Don't 'Double.' That Strategy Failed in Japan*, BUS. INSIDER (Mar. 6, 2020, 8:16 PM), <https://www.businessinsider.com/trump-keep-passengers-on-grand->

that testing, rather than serving as an essential ingredient to viral containment, only hurt his political image.<sup>70</sup> Instead of helping to coordinate responses throughout the federal government and across the states, President Trump “largely punted to the states” the responsibility for dealing with an interstate epidemic.<sup>71</sup> The Biden Administration has signaled that it will be taking a much more active approach.

## CONCLUSION

As scholars, policymakers, and concerned citizens of the world continue to grapple with the COVID-19 crisis and its consequences, the essays in this special issue offer valuable comparative insights about how law can be adapted and deployed to respond to public health crises. As an exercise in comparative administrative law, this special issue builds on a rich tradition founded upon Frank Goodnow’s direction that “only by study, and by comparison of our own with foreign administrative methods” can we adequately meet the “enormous demands of the administrative side of the government” posed by “[o]ur modern complex social conditions[.]”<sup>72</sup> Goodnow’s perspective gained traction in the immediate aftermath of World War II, arguably the last shared global experience even remotely analogous to the present moment.<sup>73</sup> The comparative study of administrative law carries new relevance today, as the world confronts a devastating pandemic and palpably needs to understand how law interacts with and can shape governmental politics, individual behavior, and economic activity to advance public welfare.

Looking forward, we can hope that lessons learned from this current crisis will feed into positive dynamics of regulatory innovation and diffusion across jurisdictional boundaries—and escape the bonds of “exceptionalis[t]”

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princess-cruise-ship-coronavirus-2020-3 (discussing Trump’s response to the Grand Princess COVID-19 outbreak).

70. See Eric Litke, *Yes, Trump Said Positive COVID-19 Tests are Making the U.S. “Look Bad,” Referenced Slowing Testing*, POLITIFACT (June 24, 2020), <https://www.politifact.com/factchecks/2020/jun/24/priorities-usa-action/trump-positive-coronavirus-tests-slowdown-look-bad/> (discussing Trump’s pushback on COVID-19 testing).

71. Allison K. Hoffman & Simone Hussussian, *COVID-19 and Access to Medical Care in the United States*, REGUL. REV. (May 26, 2020), <https://www.theregreview.org/2020/05/26/hoffman-hussussian-covid-19-access-medical-care-united-states/>. For an enlightening discussion of the difficulties that law confronts in addressing such leadership punting—or executive “underreach”—see Pozen & Scheppele, *supra* note 48, at 615–17.

72. FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS, NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY*, at iv (1893).

73. See Roberto Scarciglia, *Reconsidering Comparative Methodology in Administrative Law*, 10 BEIJING L. REV. 1051, 1053 (2019) (discussing the rise in administrative law following World War II).

national thinking.<sup>74</sup> Lawmakers and policy advisors around the world should seek to pursue a “race to the top” by borrowing best practices and seeking to learn from each other about effective regulatory responses to global health crises. The best kind of regulatory competition would be one that sees all nations produce meaningful changes to their domestic regulations and governmental institutions that can better combat the next viral outbreak.<sup>75</sup>

Furthermore, as scholars and policymakers increasingly recognize the negative spillover effects that regulatory failures associated with the coronavirus can have on other nations, another lesson that we hope will be learned from this global pandemic is about the importance of international regulatory and public health cooperation.<sup>76</sup> This lesson takes on a particular urgency at present with respect to the distribution of effective vaccines, as the prospect of a virulent “vaccine nationalism” may only prolong the pandemic further.<sup>77</sup> Ultimately, when the crisis subsides, we hope that reflection on how different countries responded and fared may help renew momentum toward the strengthening of international public health institutions and enhancing regulatory cooperation.<sup>78</sup>

As the world struggles even today from the “very long tail of negative political consequences” set in motion by the 2008 global financial crisis<sup>79</sup>—and as it will likely experience even more profound negative consequences from the current pandemic for many years to come—let us hope that this special issue in the *Administrative Law Review*, and the further scholarship that we hope it inspires, can play even a small role toward improving how nations respond in the face of global health threats, now and in the future.

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74. See Jeremy Konyndyk, *Exceptionalism Is Killing Americans*, FOREIGN AFFS. (June 8, 2020) <https://www.foreignaffairs.com/articles/united-states/2020-06-08/exceptionalism-killing-americans> (commenting on the negative effects of American exceptionalism).

75. See CARY COGLIANESE & ROBERT A. KAGAN, *REGULATION AND REGULATORY PROCESSES*, at xi, xiii (2007) (discussing the benefits of responsible regulatory competition).

76. See Elizabeth Golberg, *Regulatory Cooperation to Combat Public Health Crises*, REGUL. REV. (Apr. 27, 2020), <https://www.theregreview.org/2020/04/27/golberg-regulatory-cooperation-combat-public-health-crises/> (noting that regulatory cooperation and public health crisis go hand in hand).

77. Thomas J. Bollyky & Chad P. Bown, *Vaccine Nationalism Will Prolong the Pandemic*, FOREIGN AFFAIRS (Dec. 29, 2020), <https://www.foreignaffairs.com/articles/world/2020-12-29/vaccine-nationalism-will-prolong-pandemic>.

78. See Reeve T. Bull et al., *New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements*, 78 LAW & CONTEMP. PROBS. 1, 1, 20, 26–27, 29 (2015).

79. Frances Z. Brown et al., *How Will the Coronavirus Reshape Democracy and Governance Globally?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Apr. 6, 2020), <https://carnegieendowment.org/2020/04/06/how-will-coronavirus-reshape-democracy-and-governance-global> y-pub-81470.