The Case for Letting Crises Go to Waste

How an "Abuse-of-Crisis Prevention Act" Can Help Rein in Runaway Government Growth

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Executive Summary

An Abuse-of-Crisis Prevention Act to reaffirm boundaries of politicians and the legislation they can pass has become necessary to the survival of limited government, given the routine "flash policy" responses to crises—including the 2008 financial crash and the COVID-19 pandemic. Excessive government spending, magnified during crises, creates not just economic distortions, but also burdensome regulatory controls rooted in a presumed delegation by Congress to unelected agency officials. Conventional challenges to the constitutionally dubious administrative state are necessary, but not sufficient, to preserve a system of limited government. An alternative agenda of bolstered economic resilience and restoration of the rule of law is required. Encompassed in that program must be a rebalancing of shock readiness and responsibility vested in society at large as distinct from government emergency powers.

What is needed most urgently is for policy makers to adopt resilience-expanding policies that do not expand the size of government and help increase intergenerational wealth and self-reliance of households, businesses, and lower-level governments. In the case of the pandemic, regulatory interventions undermined some of the very businesses needed to fuel the economic recovery. Federal resources already come from private parties in the first place, so such policies must also reinforce the ability of businesses and lower-level governments to respond to crises without the creation of new government programs.

Expanding spending and regulation over the past few decades confirm that politicians' time preferences give them no incentive to preserve limited government unless obliged to do so. While tightly constrained crisis response can be necessary and appropriate, overly aggressive crisis response policies taken in haste weaken the nation's—and our descendants'—resilience for weathering subsequent crises without expanding government still further. America's tradition of limited government cannot survive repeated episodes of such policy making. A new approach to empower the various segments of society and the public instead of Washington is paramount.

This paper seeks to start the conversation necessary to course correct and build readiness for the next major economic shock and preserve constitutional republican government. It begins with a description of the flash-policy response to the coronavirus crisis and its motivations and enabling factors. It then outlines some of the conditions that have contributed to the expansion of federal power and undermined individual and business resilience. Finally, it goes on to identify core principles to enable a shift in crisis management toward an approach consistent with limited government.

I've been through a few of these. I was here at 9/11, I was here during the financial crisis in '08, I was here during the fiscal cliff. We occasionally have these great crises and when they occur we are able to rise above our normal partisanship, and many times our normal positions, because these are not ordinary times. This is not an ordinary situation and so it requires extraordinary measures.

—Senate Majority Leader Mitch McConnell upon being asked about "the moment when Republicans became OK" with spending trillions on the coronavirus response, March 17, 2020[1]

This pandemic has provided an opportunity for a reset. This is our chance to accelerate our pre-pandemic efforts to reimagine economic systems that actually address global challenges like extreme poverty, inequality, and climate change.[2]

—Canadian Prime Minister Justin Trudeau, speaking to the United Nations, September 29, 2020

Precedents established during extraordinary times tilt the constitutional balance even during ensuing normal times.

—Robert Higgs, *Crisis and Leviathan*[3]

And the question for us is going to be not just, do we have [an] essential workers bill of rights ... but whether this is going to make us rethink our economic compact, whether we're going to have a greater economic dignity compact and have a new, new deal. ... And I think if this moment doesn't push us towards that, I don't know what will.

—Gene Sperling, Economic Adviser to Presidents Clinton and Obama, May 4, 2020[4]

But even in an emergency, the authority of government is not unfettered. .... The Constitution cannot accept the concept of a "new normal" where the basic liberties of the people can be subordinated to open-ended emergency mitigation measures.[5]

—U.S. District Judge William Stickman IV in rejecting Pennsylvania COVID-19 restrictions, May 28, 2020

Introduction

Is a free society sustainable over centuries? History shows that a handful of decades may be enough to bury individual rights and responsibilities under collectivist programs and national plans.[6] The year 2020 brought the COVID-19 contagion, the third major economic shock of the 21st century. The crisis exposed a serious lack of preparation at both the national and state levels. Emergency federal spending in response rocketed, totaling several times that of the 2008 financial crisis, and rivaling recent fiscal years' federal tax receipts.[7] The first phase alone, the $2.9 trillion that Congress authorized for COVID-19 relief early in 2020, was equivalent to 13.5 percent of 2019 GDP.[8] The money supply increased dramatically and unprecedentedly.[9] That may have set a new baseline and altered expectations for expanded spending in future crises. Reflexive bipartisan spending escalation, now customary in response to crises, can be thought of as "flash policy"—aggressive actions undertaken in haste to be seen to "do something."

In the "ratchet effect" described by economist Robert Higgs, following crises like war and economic shock, much of the recently accumulated government mass and power remains.[10] The expansion of financial dependence on government during the COVID crisis and the coattail actions of the Biden administration point to a country never getting back to normal, much as the U.S. government never returned to its former dimensions financially or constitutionally after the September 11, 2001 terrorist attacks or after the 2008 financial crisis and resulting bailouts. The COVID relief interventions were regarded as a combination of relief for economically distressed households—as in the case of "stimulus checks"—and economic stimulus for the broader economy, yet the federal government was already shattering spending records with a $27 trillion debt that, by fiscal stimulus logic, ought to already have provided ample stimulus.[11]

The spending comes with new controls and regulations to kickstart or accelerate previously sought progressive priorities, embodied most recently in the Biden administration's American Rescue Plan and Build Back Better. But note the bipartisan synergies. Former President Donald Trump's emergency executive actions suspending interest on student loans may help advance progressives' long-term goal of cancellation of student debt altogether.[12] The Families First Coronavirus Response Act (H.R. 6201, 116th Congress), which became law on March 18, 2020, imposed medical and family leave employer mandates on businesses at a time when they

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An expansive administrative state will always exploit crises to expand its reach.

could least afford it—leading them to seek rescue themselves to continue operating.[13]

During subsequent negotiations over the Coronavirus Aid, Relief, and Economic Security (CARES) Act, some lawmakers proposed requiring companies to adopt a variety of policies unrelated to the contagion in exchange for financial assistance.[14] Not all of that made it into the legislation, but a moratorium on evictions did, and the rest of the agenda may resurface elsewhere.

The CARES Act's eviction moratorium, which expired in summer 2020, punished landlords in way that is likely to aggravate housing shortages and leave higher rental costs in its wake. Yet, it was extended by the Centers for Disease Control and Prevention (CDC) via an "Agency Order" that was deemed "not a rule within the meaning of the Administrative Procedure Act ("APA") but rather an emergency action taken under authority of 42 CFR 70.2,"[15] which pertains to federal measures to be taken "in the event of inadequate local control."[16] The measures deemed allowable when "reasonably necessary" included "inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection," but not prevention of eviction. In August 2021, the Supreme Court rejected the Biden administration's further extension of the policy, which it inherited from the Trump administration.[17] As a progressive crown jewel, note how the eviction moratorium echoed then-Sen. Kamala Harris's (D-CA) concurrent Rent Emergencies Leave Impacts on Evicted Families, or RELIEF Act, which sought "to ban all evictions and foreclosures for a full year."[18]

None of this should be surprising. An expansive administrative state will always exploit crises to expand its reach. For that reason, maintenance of a free society requires stepping back and implementing robust safeguards to protect initiative by a resilient, self-reliant population. All proposals should be evaluated in terms of which behaviors they subsidize and which they punish and the incentives that they create.

Any society can get blindsided by a shock, but there had been several government warnings in recent years trumpeting the likelihood of a pandemic.[19] Regardless of the nature of any given shock, resilience and hardiness need to be baked into society. If classical liberal notions prevailed, a sound federal crisis agenda would have long since reined in open-ended emergency-powers statutes, dialed back the spending spigots, and replaced them with the fostering of individual and household resilience, such as rainy-year resources on the part of governments, corporations, and citizens.

Even before this latest crisis, a century of big spending and big regulation had already expanded government beyond its constitutional bounds.[20] That cleared the way for progressives to approach COVID-19 relief legislation as, in the words of Rep. James Clyburn (D-SC), an "opportunity to restructure things to fit our vision" of long-sought mega-programs unrelated to virus recovery or the economic emergencies themselves.[21] Or, as one-time Office of Management and Budget (OMB) Director nominee and Biden advisor Neera Tanden put it:

> To fix what is broken and rebuild stronger than before, we need a new social contract for the 21st Century, one that updates the New Deal. … It is high time to rethink the relationship—the basic bargain—between the individual, companies, and our government.[22]

Indeed it is time to rethink that relationship.The flash-policy impulse is bipartisan and longstanding. Politicians from both parties want to be seen as "doing something" during a crisis, and thrive on transferring wealth back to their districts or states. Little of the COVID-related expansion of government will show up in official reports on regulatory costs. At most, these appear as budget or transfer rules that play little or no part in cost-benefit analysis. Yet, the COVID response ushered in new types of financial and banking intervention, federal allocation of credit, and calls for new investment in science and in infrastructure.[23]

We are well beyond the need for fencing in regulation and spending before the next economic shock.[24] Liberalization offers a better way forward. This paper presents some starting points for discussion on ways to move policy in that direction. It begins with a description of some motivations and enabling factors for flash policy. It then outlines some of the conditions that have expanded the federal state and undermined individual and business resilience. The report then specifies principles for discussion and action to enable a shift in crisis management policy toward an approach consistent with limited government. Policy makers should keep in mind Competitive Enterprise Institute founder Fred L. Smith Jr.'s admonition that capitalism does not merely make the world richer, but also fairer, safer, and cleaner—all the things that regulators claim they work to accomplish.[25] The same holds for resilience and preparation, which means ensuring that crises benefiting the ambitions of politicians from both parties, do, in fact, "go to waste."[26]

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Flash policy generally lurches in directions that undermine classical liberal principles and limited government.

North Star of Social Regulation: The Universal Basic Income

> *We are approaching a labor market in which entire trades and professions will be mere shadows of what they once were. I'm familiar with the retort: People have been worried about technology destroying jobs since the Luddites, and they have always been wrong. But the case for "this time is different" has a lot going for it.*
>
> —Charles Murray, Wall Street Journal op-ed, June 2016[27]

> *My concern is that we're in some ways building dikes for a major storm that has been brewing and will continue to brew. But what we really have is a tsunami on the way—one that is hard to imagine given the acceleration of technology and the way it will rearrange work and produce more and more low wage jobs. People will have work but not reliable jobs or incomes.*
>
> —Andy Stern, *American Prospect,* interview, June 2016[28]

> *So a new social contract needs to emerge from this crisis that rebalances deep inequalities that are prevalent across societies. To put it bluntly: The question should no longer be whether resources for effective social protection can be found—but how they can be found. UBI promises to be a useful element of such a framework.*
>
> —World Economic Forum, April 17, 2020[29]

Flash policy generally lurches in directions that undermine classical liberal principles and limited government, and the COVID-19 pandemic has been no exception. Calls for government intervention never stopped at emergency response measures. In fact, they extend to calls for enacting a universal basic income (UBI) scheme to remain in effect even in normal times.[30]

The UBI represents the pinnacle of both social and economic regulation, capable of irreversibly transforming the social contract. Rights bring responsibility, but what is one's responsibility in exchange for the UBI? Nothing, perhaps apart from the occasional calls for mandatory "national service" and the possibility of having to spend on government-favored vendors.[31] Payments that facilitated the shift from "flatten the curve" to staying closed during much of 2020 exposed the underlying motivations of the social architects who want the payments to be made permanent. Consider a few telling circumstances.

First, the rapidly deployed $600 weekly supplemental unemployment package benefit, at $15 per hour and over twice the federal minimum wage, reeked of UBI ambitions, particularly in combination with state benefits ranging from $235 to $823 per week.

The package made it more difficult for many businesses to hire employees, thanks to some individuals earning more by staying home than working.[32] According to the Congressional Budget Office, which looked at effects of the payment over six months, "Roughly five of every six recipients would receive benefits that exceeded the weekly amounts they could expect to earn from work during those six months."[33] Biden's response to America's suffering businesses unable to fill positions was simply, "Pay them more."[34]

Second, keeping kids out of school requires a parent to remain home, out of work, which in turn increases pressure for more rounds of cash payments for households and dependents. In keeping with that, Biden's American Rescue Plan, passed along party lines in early 2021, not only increased the Child Tax Credit but also made it payable in advance. As the U.S. Department of the Treasury put it:[35]

> The credit increased from $2,000 per child in 2020 to $3,600 for each child under age 6. For each child ages 6 to 16, it's increased from $2,000 to $3,000. It also makes 17-year-olds eligible for the $3,000 credit. To get money to families sooner, the IRS is sending out half of the 2021 Child Tax Credit this year in monthly payments.

The statement quoted Treasury Secretary Janet Yellen as follows:

> For the first time in our nation's history, American working families are receiving monthly tax relief payments to help pay for essentials like doctor's visits, school supplies, and groceries. … This major middle-class tax relief and step in reducing child poverty is a remarkable economic victory for America—and also a moral one.[36]

Third, The American Rescue Plan also increased Supplemental Nutrition Assistance Program (SNAP) benefits by 15 percent through September 2021. On top of other payments, notes the Department of Agriculture: "The 15 percent increase in SNAP benefits will provide about $27 more per person, per month, or more than $100 more per month for a household of four, in additional SNAP benefits."[37]

Fourth, the pandemic did not dampen the push to raise the minimum wage to at least $15 at a time when employers could least afford it.[38] A $15 minimum wage sought as part of the American Rescue Plan ultimately was not included following a ruling by the Senate parliamentarian that its inclusion would have violated Senate

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A spoils system works best with support of 51 percent of the population, and crisis creates the ideal conditions for implementing one.

budget rules.[39] The fight for the wage increase seems likely to continue for some time, yet it is largely moot economically, as labor shortages and inflation have pushed up wages as employers try to hire workers. As of February 2022, starting hourly wages for workers at retailers like Target ranged from $15 to $24,[40] and in early March, average nonfarm payrolls sat at $31.58, up 5 percent over the previous year.[41]

Fifth, CARES Act stimulus payments went out indiscriminately to some well-off and employed households that had not experienced a loss or interruption of income, with no requirement to repay or to pay federal tax.[42] While making payments to everyone regardless of need is a key UBI tenet in theory, it also might be seen as a political imperative. A spoils system works best with support of 51 percent of the population, and crisis—whether COVID or something else—creates the ideal conditions for implementing one. Stimulus cash payments were made to individuals who were not out of work, including people teleworking during the crisis who no longer had to pay commuting costs, and to retirees whose incomes had not been disrupted. Funds were not made repayable or refundable above a threshold (which could have been done based upon filing taxes for 2020 if income maintained or surpassed 2019 levels). The reasons are complex and would include "precautionary measures" as the Kansas City Fed put it, but savings as a percentage of disposable personal income set records, rising from 7.2 percent in December 2019 to a record 33.7 percent in April 2020, and remained at 13.6 percent as of October 2020.[43] Meanwhile, essential workers had to carry on in public-facing jobs no matter what.

At the height of the pandemic, additional state and national UBI-like proposals were introduced,[44] including California giving $500 to the undocumented.[45] Sens. Kamala Harris (D-CA), Bernie Sanders (I-VT), and Ed Markey (D-MA) introduced a bill to pay $2,000 to workers for the duration of the crisis.[46] Alongside progressives' advocacy of the UBI is some prominent conservatives' acquiescence and even endorsement of the concept. Even the Trump administration, which had supported a payroll tax cut early on, shifted toward endorsing the idea of larger one-time payments checks regardless of whether recipients were working or not.[47] Cash support has happened during prior crises, such as the 2008 financial meltdown.[48] The tradition has continued in bipartisan fashion with proposals from Republicans, including from Sens. Mitt Romney (R-UT)[49] and Tom Cotton (R-AR).[50]

Sen. Josh Hawley would have the federal government cover up to 80 percent of worker wages,[51] as has occurred in the United Kingdom.[52]

Some UBI supporters tout libertarian luminary Charles Murray's support.[53] The Pope is on board.[54] The UBI is popular with tech executives who see the UBI as a solution to other social ills, including coping with technological job displacement. Tech bosses like previous Twitter supremo Jack Dorsey have donated millions to UBI test projects,[55] so it is only fitting that many of the same super-wealthy call for taxing themselves.[56] Some billionaires take a somewhat intermediate step of calling for a federal jobs program.[57]

There is a debate over whether the UBI would render the populace it supports lazy or creative.[58] From the glass-half-full perspective, the Internet has eased the crisis and protected many by making shopping and working from home feasible. From the half-empty perspective, it has allowed unprecedented shutdowns that would have been otherwise intolerable. Part of the answer depends upon the independent streak people retain or lose. As for the likely effects of increased UBI payments on continuing voluntary unemployment, analysis of a Stockton, California UBI pilot program claims that employment increased.[59] Meanwhile, the CARES Act's federal supplemental weekly unemployment benefit discouraged work among recipients who could make more income from such payments.[60]

UBI proponents make dubious promises regarding ways to contain its negative effects and costs. But they know that populations will agitate for more such income. As United Nations Assistant Secretary-General Kanni Wignaraja proclaimed:

> Moving to such a system would need to ensure that the incentives to have a job remain intact. That is relatively simple to do: A UBI should be sufficient, to sustain a person at a modest minimum, leaving sufficient incentives to work, save, and invest. …
> The alternative to not having UBI is worse—the rising likelihood of social unrest, conflict, unmanageable mass migration, and the proliferation of extremist groups that capitalize and ferment on social disappointment.[61]

The contribution of the payments discussed above to increasing the money supply and fueling inflation makes the case for a UBI more difficult. Does Congress reset the UBI every month to prevent its value eroding? That would institutionalize flash policy into a recurring cycle. The solution, as ever, has to be to control inflation and let the market provide wages to healthy workers.

When caught in the crisis spotlight glare, it takes extraordinary fortitude to say "no" to benevolent-sounding programs that expand the size of government.

Outflanking the Left, Republicans Enable Flash Policy

And people want to go big … everybody seems to want to go big.[62]

—Donald Trump, referring to himself a "wartime president" with respect to the coronavirus, March 18, 2020

Our nation needed us to go big, and go fast, and [the Senate] did.[63]

—then-Senate Majority Leader Mitch McConnell

When caught in the crisis spotlight glare, it takes extraordinary fortitude to say "no" to benevolent-sounding programs that expand the size of government. No senators did so in the 96-0 vote to pass the CARES Act.[64] Accordingly, the crisis prescriptions we saw in real time would typically mirror that articulated by the *Financial Times*' editorial board during the pandemic's early days:

> Radical Reforms … will need to be put on the table. Governments will have to accept a more active role in the economy. They must see public services as investments rather than liabilities, and look for ways to make labour markets less insecure. Redistribution will again be on the agenda; the privileges of the elderly and wealthy in question. Policies until recently considered eccentric, such as basic income and wealth taxes, will have to be in the mix.[65]

Upon nearly any major crisis, Republicans eagerly endorse bigger government as a solution, from making peace with the New Deal to President George W. Bush presiding over the creation of the Department of Homeland Security and later blaming the market for creating the supposed need for the 2008 financial bailouts.[66] The COVID-19 lockdowns opened the door for Republicans to support policies like family and medical leave paid for by strapped employers ill-equipped to afford it,[67] universal student loan relief, and the federal eviction moratorium.[68]

There was no suggestion that policy makers should have been prepared for contingencies.[69] In a March 16, 2020 statement on coronavirus relief, Sen. Mitch McConnell proclaimed:

> Senate Republicans are absolutely convinced that the House's bill can only be the beginning of Congress's efforts to secure our economy and support American families.[70]

McConnell even chastised Democrats for not spending as much money as fast on the CARES Act's Paycheck Protection Program (PPP), stating in April 2020:

> Republicans never wanted this crucial program for workers and small businesses to shut down. We tried to pass additional funding a week before it lapsed. But Democratic leaders blocked the money and spent days trying to negotiate extraneous issues that were never on the table.[71]

Then in September 2020, McConnell protested:

> In the week-plus while our Democratic colleagues delayed the urgent PPP funds, additional federal help for hospitals and healthcare providers became urgent as well. Republicans have always supported more medical funding as soon as necessary.[72]

Donald Trump called for even more stimulus spending than did most Republican legislators[73] and early on enlisted the Defense Production Act (DPA) of 1950, which authorizes the government to expand the supply of materials and services from U.S. industry needed for national defense.[74] That does not mean the choices will be wise ones. The U.S. forced the production and stockpiling of ventilators early during COVID-19, many of which wound up unused.[75] Government procurement seems to excel at buying too many of the wrong item or the wrong kind of the correct item. Along with stimulus spending and emergency rollouts, Trump was not reliably averse to certain regulation. Sen. Ron Johnson (R-WI), who had protested Trump's regulatory impulses on workplace paid leave programs prior to the outbreak,[76] offered an amendment to substitute temporary federal support through existing state-administered unemployment programs for the new paid sick leave and expanded family and the medical leave mandates of the Families First Coronavirus Response Act and CARES Act.[77]

Some of the Trump administration's COVID-justified interventions were unprecedented, such as the degree to which government entered the credit markets and supported some businesses, but not others, through Federal Reserve direct lending to companies and a Paycheck Protection Program with loan forgiveness. Given the administrative state's pervasiveness, even supposed deregulatory efforts aim less at deregulation than at making government programs, even questionable ones, work "better," which can preempt efforts by future generations to move those programs or functions out of government hands.

Finally, Trump's August 2020 pandemic-related executive orders expanded regulation and executive overreach. These were in part meant to

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extend lapsed components of the CARES Act when negotiations on a new stimulus agreement with House Democrats failed. Perhaps most invasive and detrimental to property rights was the executive order extending the prevention of residential evictions and foreclosures, which unfairly forced landlords, who can themselves be struggling members of the middle class, to bear the burden of the crisis. Trump's late-term actions, unlike other actions taken to roll back the expansion of government, expanded federal authority at the expense of state sovereignty, individual rights, and local communities' ability to adapt and respond to the next crisis or disaster.

Deregulatory Stimulus: The Importance of Eliminating Never Needed Rules

Now, I'm going to sign this, and it's a great honor—$6.2 trillion. I've never signed anything with a "T" on it. I don't know if I can handle this one, Mitch. We can't chicken out at this point, can we? I don't think so, huh?

—President Donald Trump upon signing the CARES Act, to sounds of laughter, March 27, 2020[78]

Missing from the coronavirus relief packages, as well as from prior bailouts, has been deregulatory stimulus—the easing or removing of unnecessary rules and regulations that can impede the response to a given crisis and hinder economic recovery from it.[79] The Trump administration made some progress in that regard.[80] Emergency powers can be used not just to compel in the manner that the Defense Production Act forced manufacturers to shift production toward presumed needed medical items, but also to remove burdensome rules to aid economic recovery. As Competitive Enterprise Institute Attorney Devin Watkins points out:

> As we recover from this epidemic, the president has the authority under the Defense Production Act to enact regulations for the restoration of the domestic industrial base. A key part of this should be considering which existing regulations are harming the restoration of our economy. The DPA provides the president with the power to end such regulations to help restore our economy. This includes, under the Supremacy Clause, state regulations that harm interstate commerce.[81]

The Trump administration implemented numerous waivers and suspensions to streamline regulation and treat businesses and enterprises subject to rules and regulations more fairly. An example of that was Trump's May 2020 Executive Order 13924 on Regulatory Relief to Support

Economic Recovery[82]—followed by a June 2020 guidance memorandum from Office of Management and Budget Director Russell Vought[83]—that encouraged agencies to implement rules using emergency powers to make regulatory waivers permanent and to provide regulatory leniency for business acting in good faith. Similar streamlining at the state and local level is also important, such as the suspension of scheduled minimum wage increases and elimination of barriers in occupational licensing, zoning, housing, child care, nurse-provided home care.[84] Locally, regulations covering alcohol and takeout delivery were relaxed.[85]

Federal COVID-related relief tended to be temporary and emergency-specific, affecting concerns like loosening of certain environmental regulations, telemedicine, cross-border state recognition of medical licensing,[86] occupational licensing barriers (involving state actions),[87] marketing of test kits without prior Food and Drug Administration (FDA) approval,[88] and flexibility for truckers hauling essential cargo,[89] sale of tests and hand sanitizer, ease of small business loan access, relief for credit unions and community banks.[90] Trump's Stafford Act-based emergency declaration opened some of these early doors to deregulation.[91] In October 2020, the FDA announced streamlined public availability of COVID-related guidance documents, noting that those would forgo prior public comment in order to speed things up.[92]

Vought's June 2020 memo asked agencies for "[a] list of temporary regulatory actions the agency has taken in response to COVID-19, along with analysis of whether each such action is suitable for issuance as a permanent measure to promote economic recovery."[93] An August 2020 Brookings Institution report estimated that agencies undertook 85 federal emergency administrative actions in the first four months of the COVID crisis.[94] These often took the form of interim final rules. Not all were deregulatory, however, such as standards and loan forgiveness requirements under the PPP government lending-support program. The Brookings report noted:

> Several such rules eased capital requirements, leverage ratios, earnings retention mandates, and liquidity rules during the crisis. Other rules allowed financial institutions to access a central lending facility (a source of government-backed loans) to maintain their liquidity during the crisis.[95]

The administration's economic deregulatory toolkit included suspending penalties, easing permitting,

Streamlining at the state and local level is also important.

The executive branch is not a lawmaking body, and congressional leadership on regulatory streamlining has been lacking.

and employing the Administrative Procedure Act's (APA) "good cause" exemption to provide for reduction of regulation without going through the notice-and-comment process provided for in the APA. Near the end of Trump's term, the introduction to the Fall 2020 *Unified Agenda and Regulatory Plan of Regulatory and Deregulatory Actions* encapsulated COVID-related regulatory liberalization and the centrality of the regulatory relief executive order:

> Under the President's direction to focus all available resources on the fight against COVID-19, agencies rapidly identified and streamlined, suspended, or eliminated regulations that stood in the way of the most effective response to the virus. Agencies enabled innovative medical strategies, such as widespread deployment of telemedicine; removed restrictions on scope of practice to increase the supply of qualified medical staff; allowed swifter transportation of critical goods such as food and medicine; and moved many in-person agency services to electronic platforms. The success of these temporary flexibilities called into question the need for some of the waived regulations in the first place; pursuant to President Trump's Executive Order 13924 and in order to support America's economic recovery, agencies are pursuing or considering approximately one hundred deregulatory actions to make many of these flexibilities permanent.[96]

The executive branch is not a lawmaking body, of course, and congressional leadership on regulatory streamlining has been lacking. There remains abundant streamlining of the Code of Federal Regulations—and of rulemaking restraint—that depends on Congress.[97] For example, the Pandemic Preparedness, Response, and Recovery Act, introduced by Rep. Virginia Foxx (R-NC) in the 116th Congress, would have created a bipartisan streamlining commission tasked with combing through the Code of Federal Regulations and then submitting a repeal package to Congress, which would either approve or reject the package in an up-or-down vote without opportunity for amendment.[98] A related effort in 2021 was the Unnecessary Agency Regulations Reduction Act, sponsored by Sen. Rick Scott (R-FL), which aimed to "reduce burdensome government regulations and more efficiently dispose of outdated, duplicative or unnecessary agency regulations." This bill would have OMB compile an inventory of major regulations planned, take into account the Government Accountability

Office's assessment of unnecessary duplication, and engage Congress in eliminating multiple executive branch regulations via joint resolution.[99]

Congress needs to reassert its primary lawmaking role with respect to over-delegation, but it also needs to purge laws that undermine resilience and private citizens' ability to maneuver in response to crises. For example, the Dodd-Frank financial law's "conflict minerals" provisions impede production of resources needed for pandemic response.[100] America never needed government to so thoroughly dominate retirement, banking, the electromagnetic spectrum, and much else. Rather, the natural evolution toward moving resources and infrastructure into the voluntary sector via the expansion of private property rights would do much to boost resilience in the face of crises.

Regulatory expansions contained in the COVID legislation, from financial intervention to the CDC eviction moratorium to SNAP increases, clearly outweigh the removal of never-needed rules. Agencies that drove the federal COVID response can also take additional license by emphasizing guidance rather than formal rulemaking. Expansive and counterproductive efforts in COVID's wake escalated under Biden and have included enactment of the American Rescue Plan Bipartisan infrastructure legislation and negotiations over the costly—and again, bipartisan—America COMPETES Act, which purportedly aids U.S. technology competitiveness with more spending.[101]

Congress needs to reassert its primary lawmaking role.

Time for an Abuse of Crisis Prevention Act

Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

—Daniel Webster, (1782-1852) U.S. Senator[102]

Eliminating never-needed regulation and statutes is necessary but not sufficient as far as recovery and resilience are concerned. Resilience rests upon a foundation of limited government and will require a rediscovery of property rights as the foundation of liberal democracy. To that end, an Abuse of Crisis Prevention Act should seek to bolster the voluntary sector's resilience, preparedness, and self-reliance needs, including healthy "rainy-year" components. In contemplating principles for such a program, three notable challenges present themselves.

1. ***No regulation capable of being cut compares to sweeping actions such as localities forcibly shutting down some businesses entirely***. Regulatory relief is a moot point when businesses are shut down. Government does not even need bureaucracy to shut things down, only police power. Despite questions about their experimental nature and effectiveness, lockdowns occurred rapidly and sometimes arbitrarily without anything resembling the notice-and-comment process that accompanies federal regulation. Moreover, "essential" vs. "non-essential" designations led to disparate impacts on different businesses. Debate and assessments will continue for years over whether states with expansive definitions of "essential" fared better or worse than states with more restrictive definitions.

There was a definable population at grave risk from COVID, yet there was little inclination by officials to place daily updates in perspective with such metrics as fatalities by age group.[103] Even assuming lockdowns massively save lives, there remains reluctance to acknowledge tradeoffs and relative risks.[104] For decision makers, social costs for protection and risk-mitigation could be spread across the population in countless ways, all the way down to an assertion that those most vulnerable should bear more costs of self-help.[105] We rarely saw cogent comparisons with tradeoff markers such as lives lost to accelerated overdoses early in the crisis,[106] including how drug deaths of the under-50 population eclipsed those from COVID (even as opioid prescriptions have dropped significantly).[107] Such tradeoff questions are inherently difficult and contentious. A virus brings social costs, but individuals' personal responses and a vaccine allow the "privatization" of some of those costs.

So, are lockdowns justified? They certainly can be, but they should happen with full awareness of all factors. Unnecessary disruption of lives cannot be remedied by dialing back a bit on the inventory of pre-existing regulations.

2. ***Some ostensibly deregulatory policies instead make administrative programs work more "efficiently" and fail to relieve burdens on the public.*** Some COVID-related administrative actions involved not deregulation as such, but easing of the operation of existing federal programs or hastening of action on new ones like PPP. Changes like these can ease government's own internal bureaucracy or paperwork, but do not necessarily relieve the public's regulatory burdens.

Regulatory waivers included more rapid FDA drug approvals and COVID-related deregulatory rulemakings at the Centers for Medicare and Medicaid

Services and the Department of Health and Human Services. In addition, the Trump Department of Labor's (DOL) rollback of Obama anti-gig economy measures related to independent contracting helped during the pandemic, as people who had been laid off could do gig work, though that rule change predated the virus outbreak. The Biden DOL's withdrawal of the Trump-era independent contractor status rule[109] and pressure for the extension of federal unemployment insurance to contract workers would have made work for delivery services and the like more difficult had it been in place in 2020.[110]

On the other hand, some changes were not truly deregulatory. Access to government-backed small business loans is an example of red-tape loosening that consists not of removal of regulations, but of lessening of constraints that prevent government from intervening more readily in markets. There were many obscure actions, such as the Department of the Treasury's Interim Final Rule on Revisions to the Third and Sixth Interim Final Rules, which clarified and made retroactive provisions related to maturity, payment deferral, and loan forgiveness.[111]

Unless monitored, a mild rollback of agency internal red tape or increases in operational efficiencies can become the benchmark for "deregulatory" success rather than actual market liberalization and privatization. Expansion of telemedicine or telehealth was welcome, but expansion of related Medicaid coverage accompanied it.[112] For example, in an April 2020 press conference discussing COVID testing and diagnosis, then-Secretary of Health and Human Services Alex Azar affirmed CARES Act provisions regarding payments for providers and the uninsured, billing, and Medicare rate reimbursement.[113] These expansions occurred in a policy environment in which some regarded the CARES Act as a step toward Medicaid for all.[114] Other examples of this phenomenon included modifications of the U.S. Department of Agriculture food assistance and nutrition programs regarding requirements for school meal programs, relaxation of work requirements for the Supplemental Nutrition Assistance Program, and provision of emergency SNAP benefits.[115]

Perversely, streamlining of the "good government" variety can reaffirm administrative state authority in a way that can make it more difficult for future generations to unwind. While the "deregulatory" classification for rules that was operational in the era of Trump streamlining was removed by Biden, rules assigned to that category

Expansion of the surveillance state is an ongoing concern in normal times, let alone in any crisis response.

when they are not necessarily so perpetuate government dominance in areas where private solutions might work better, thereby undermining resilience and readiness for tomorrow's inevitable crises.[116]

3. *Crisis-induced legislation tends to expand regulation and overwhelm regulatory reductions*. Trillions in new federal spending and the injection of government it entails can represent regulation of the most invasive sort.

Escalation of social and financial regulation and erosion of property rights. COVID crisis-driven expansion of financial regulation will be difficult to unravel. Already noted was the pre-CARES move by the Federal Housing Finance Administration to suspend foreclosures on federally backed mortgages.[117] There is no question that the crisis and the political reaction to it put some renters and homeowners at great risk, but the eviction moratorium unfairly forced landlords to bear the burden of the crisis, undermining their property rights and discouraging the development of rental property in the future.[118] The brunt has been borne by small property owners, many from minority groups,[119] whose plight is made worse by the inability of state bureaucracies to get rent relief funds distributed.[120]

Surveillance. Expansion of the surveillance state is an ongoing concern in normal times, let alone in any crisis response. As it stands, surveillance cameras capture each American some 200 times per week,[121] and the horse long left the barn with respect to biometric databases.[122] "I'm worried we don't have the systems in place to carefully reopen the economy," then-FDA Commissioner Dr. Scott Gottlieb remarked in April 2020. "You need to be able to identify people who are sick and have the tools to enforce their isolation and [tracing of people they contact]. You have to have it at a scale we've never done before."[123] Nudges become shoves.[124] Without strict protections in place, a government test-and-trace program, regardless of its perceived necessity during a pandemic, becomes a tool governments can use to monitor other kinds of behavior.[125] Numerous federal agencies are expanding use of facial recognition applications.[126] Overreactions to the pandemic and the power grabs they entail will be propagated elsewhere in other contexts if the cycle is not broken now. As *Wall Street Journal* columnist Daniel Henninger put it in April 2020:

> [J]ust as no one doubts post-virus structural changes will happen everywhere, so too in the political system. Democrats and progressive

> writers will argue that if the virus-management model of Washington-directed "guidance" worked, that is the model we should use for other areas of national concern such as health care, education and, as [House Speaker Nancy] Pelosi is suggesting, underfunded union pension obligations.[127]

Has the term "climate lockdown" entered the lexicon?[128] The journal *Nature* even allowed writers on its pages to call for submission to "personal carbon allowances" to "achieve a safer climate" seeing COVID as a test case:

> In particular, during the COVID-19 pandemic, restrictions on individuals for the sake of public health, and forms of individual accountability and responsibility that were unthinkable only one year before, have been adopted by millions of people. People may be more prepared to accept the tracking and limitations related to [personal carbon allowances] to achieve a safer climate and the many other benefits (for example, reduced air pollution and improved public health) associated with addressing the climate crisis. Other lessons that could be drawn relate to the public acceptance in some countries of additional surveillance and control in exchange for greater safety.[129]

While crisis response is necessary, flash policy actions weaken society's resilience for weathering subsequent crises without expanding government still further. The next section offers some resilience-oriented considerations involving policy changes at the individual, business, state, local, and federal levels to inform the crafting of an Abuse of Crisis Prevention Act.

Abuse of Crisis Prevention Act Title I: Fostering Individual and Household Resilience to Prevent Flash Policy

One version of the social contract seeks to foster individual and business self-reliance. Another seeks to foster dependency, corporate rent-seeking, and bigger government all around. If there are too little savings and self-reliance among the general population, and if public policy enshrines the social regulatory agenda defined by custodial care of able-bodied middle-class adults, there is no prospect for limited government at all, especially as the fruits of flash policy crisis responses mount. As economists Richard V. Burkhauser of Cornell, Kevin Corinth of the University of Chicago, Douglas Holtz-Eakin of the American Action

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Forum stress in a 2021 working paper:

> The key lesson from the Great Recession is that strong economic growth and a hot labor market do more to improve the economic wellbeing of the working class and historically disadvantaged groups than a slow recovery that relies on safety net policies to help replace lost earnings. Thus, the best way to prevent a "K-shaped" recovery is to ensure that safety net policies do not interfere with a return to the strong pre-pandemic economy once the health risk subsides, and that pro-growth policies that incentivize business investment and hiring are maintained.[130]

It is vital for policy makers to go beyond that and preemptively armor-plate society before the next shock happens. Following are some reform proposals to counter the mounting supervisory regulatory state with a classical liberal paradigm that can reset the foundation for a more resilient America.

Health self-reliance. Along with the collective responses that rightly dominate in a pandemic, individual-responsibility means taking those individual actions no one can do for us to manage exposure, including a duty of self-isolation and self-quarantining—which have been made easier thanks to the Internet. No bully pulpit can compel people to do what they do not want to.[131]

Policy makers could pursue many aspects of targeted resilience that involve better attention to tradeoffs and personal responsibility in future crises. Fortunately, most crises are not biological contagions. In the case of COVID, the option of asking those most at risk to self-isolate for their own good, rather than to shut everything down, got short shrift from policy makers. Many people in the over 65, the group most at risk, are already retired; others telework, and can more readily avoid public exposure. The Internet and online grocery delivery made it easier to self-quarantine. A significant percentage of elderly are not online, but that very fact alerts policy makers to a particularly vulnerable population that most needs help.

The most vulnerable can be helped without either shutdowns or trillions in new spending. As a good faith first move on the part of government, these most vulnerable or helpless could be provided promptly with medical-grade masks. Another sensible move was to lift or suspend regulations that were impeding appropriate stockpiling and contributing to shortages in needed items like standard vaccines and medical supplies, including personal protective equipment and ventilators.

Fostering financial independence.

The state is the great fictitious entity by which everyone seeks to live at the expense of everyone else.

—Frédéric Bastiat, *The State*[132]

The alternative to reflexive taxpayer-funded fiscal stimulus is for policy makers to preemptively foster the creation and retention of personal wealth and find ways to prevent that wealth from being siphoned off by Washington. That is a decades-long undertaking that needs to commence immediately, despite politicians' short time horizons.

Sweeping changes can be aimed squarely at individual and household resilience. Resilience, for both individuals and households, requires increasing household and individual wealth, or at least creating the conditions for making that expansion possible. Stories predating the novel coronavirus found over 70 percent of the U.S. population having less than $1,000 in savings at hand.[133] We can be confident that after COVID winds down, a new crisis will emerge for which politicians will call for billions or even trillions in new federal spending in response. An alternative resilience approach would enable people to be "prepped" with cash on hand ahead of time.

Empowerment approaches like that of the late Rep. Jack Kemp (R-NY) emphasized household generational wealth.[134] The federal tax code could be changed to allow every American to amass up to five years of median income that could be accessed in future crises. The funds could be converted to retirement accounts when the time comes. Ideally, there should be no personal income taxes for households or individual taxpayers until they have several years of liquid-but-invested savings that they can certify—if Washington insists—on tax returns each year and use during emergencies, and then put toward retirement. If no crisis occurs before a holder turns 67 and it converts to a retirement package, resilience policy has thereby helped solve another big government-aggravated problem—the lack of preparedness for retirement.[135] Surprisingly, elements of this were contained in CARES Act provisions that allowed tapping into retirement funds without tax penalty via "special distribution options and rollover rules for retirement plans and IRAs and [expanded] permissible loans."[136] A broader step toward this category of reform would entail the replacement of Social Security for newborns with a down payment and family contributions that start compounding immediately, out of the reach of government, which over time, gets out of the retirement business.[137] Even a simple a step such as allowing individuals to contribute tax-free to both an employer-provided

Resilience, for both individuals and households, requires increasing household and individual wealth.

A government relied upon for most basic needs is, by definition, not a limited one.

retirement plan and their own IRA would help to relieve pressure on households.

In the long run, household resilience can replace the government programs that make the transition seem impossible now. If parents find it easier to establish savings accounts for newborns, the time value of money means those personal resources can go a long way toward replacing government retirement programs. In addition, the wealthy could be allowed to set up custodial accounts for the needy, privatizing poverty alleviation and stimulus programs. Many people in 2020 offered aid to families, friends, neighbors, and the needy. Businesses helped too, such as Airbnb hosts offering lodging to doctors, nurses, and other front line personnel.[138]

The new resilience regime will take years to materialize as part of a genuine "reset" entailing deliberate substitution of government with the primacy of the free individual and household.

Public policy should respect individuals' autonomy, allowing for the maximization of household and community efforts to prepare and to care—to be not only as secure as possible without massive new government emergency action, but also able to help others. A government relied upon for most basic needs is, by definition, not a limited one. The economist Robert Higgs, who warned of the upward ratchet phenomenon of government growth, observed that "Without government to defend us from external aggression, preserve domestic order, and define and enforce private property rights, few of us could achieve much. Unfortunately a government strong enough to protect us may be strong enough to crush us."[139]

Title II: Fostering Business and Corporate Preparation to Prevent Flash Policy

We have to protect Boeing and help Boeing.

—President Donald Trump[140]

When the government is called upon to protect you on the downside, they have every right to regulate you on the upside. ... So capitalism is changed.

—Billionaire investor Leon Cooperman[141]

Does a few weeks of business disruption really destroy major corporations? If any entities should have been resilient with months, even years, of reserve funds, it should be some the richest companies on the planet. Corporations need to prepare for crises, too, yet many are far from that today. Eight financial crises have occurred since the National Bank Act established federal banking oversight in 1863, and each policy response ended up expanding government.[142] What gets called "volatility suppression" sends the signal that government will step in to bail out private parties when they take excessive risks.[143] It happened again in 2020, as even companies with questionable accounting practices, and which the Fed had warned banks to avoid, received bailouts.[144]

Companies primed for crisis situations should be able to survive short disruptions without need for government relief. Public policy should strive toward that goal. Without bailouts, bankruptcies will occur in a crisis of significant scale, but the problems are worsened when government prolongs or aggravates a disruption. In bankruptcy, underlying assets do not disappear, and some enterprises may even survive reorganization. Planes still fly with new owners. As economist John Cochrane put it: "Bankruptcy of a large corporation does not leave a crater behind."[145] Economic intervention to stop bankruptcy can aggravate both market distortions and social inequalities, benefiting the haves rather than the have-nots. As described by investors Sam Long and Alexander Synkov in *The Wall Street Journal*:

> [B]ankruptcies among highly leveraged businesses often pose surprisingly little risk to employment. More often than not, creditors choose to keep businesses staffed even when restructuring to retain value for the long-term. By preventing these bankruptcies, the Fed is doing more for equity holders and junior creditors than for employees.[146]

Worse, when government embeds itself in some economic function, its role often stops being recognized as a form of regulation. While regulation can have costs, benefits, and tradeoffs, bailouts and their ripple effects fall off the regulatory cost screen. Vulnerable restaurants and bars are one thing, but the businesses being propped up by the Federal Reserve and the Treasury are usually the likes of airlines and other large firms that repeatedly request bailouts in times of crisis. The Fed bought corporate bonds during the pandemic from companies that did not need support, including Microsoft, Apple and Home Depot.[147]

The CARES Act's discretionary deployment of public funds to support individual private businesses was unprecedented. Republicans adopted unbounded spending, loan guarantees, and industrial policy as sustainable principles—a concession from which there is no turning back without a

Companies primed for crisis situations should be able to survive short disruptions without need for government relief.

major course correction in advance of the next crisis, not just in the U.S. but worldwide.[148]

While companies and entities regarded as critical infrastructure have been bailed out before, then-Treasury Secretary Stephen Mnuchin assumed awesome powers—the negotiations of which he participated in—over the disbursement of hundreds of billions of dollars of public funds in collateralized loans and loans to private businesses, some ultimately to be forgiven.[149] These were powers Mnuchin was equally empowered to unilaterally take away.[150]

Vital functions of the market were taken over by government, as the Fed began allocating capital not just in the traditional form of its loans to banks, but also loans to individual businesses, thereby extending credit and picking winners and losers.[151] Two business school professors—Amit Seru of Stanford and Luigi Zingales of the University of Chicago—in a March 2020 *Wall Street Journal* op-ed, referred to the swamping of private lending as "the largest step toward a centrally planned economy the U.S. has ever taken."[152]

In a crisis, the government assumed great power in deciding who is supported and who survives.[153] It would take the elimination of a great deal of never-needed regulations to ever come close to offsetting such moves like this radical top-down replacement of market mechanisms in society.

Some larger businesses that were not in financial distress were able to tap funds and run them dry. Examples that came to light during 2020's bailout drama included Trump donors, billionaires and country clubs,[154] wealth management firms,[155] and the otherwise well-connected cashing in as beneficiaries of pandemic relief.[156] There were alleged overpayments, questionable companies receiving aid, bank windfalls,[157] and fraud.[158] Topping it all off, over half of small business emergency funds went to larger firms.[159] Early on, Sen. Ron Johnson had called for some basic controls:

> Loan forgiveness shouldn't be granted to organizations that have the ability to repay. A simple fix would require repayment of PPP loans to the extent a taxpaying entity has taxable income for 2020, or a tax-exempt organization has increased net assets.[160]

A fear at the time, as *The Wall Street Journal* described, was that potentially "a huge chunk of aid money is destined for the trial bar," which as early as April 2020 was "actively soliciting plaintiffs for cases against hand-sanitizer manufacturers, hospitals, vaccine makers [and] nursing-home operators."[161] While the lawsuit wave never materialized, as over half the states issued their own liability protections,[162] vulnerability remained.[163]

To prevent a bonanza for trial lawyers, indemnification and retroactive liability protections for reopening businesses and schools can make some sense in extraordinary circumstances, such as during a pandemic, but the concept can easily go too far. Overly broad indemnification can also harm resilience, such as a Lloyd's of London's call for government-backed "black swan" business insurance in the event of a shock.[164] Such a scheme would be irresistible to many business stakeholders and could easily be misused.

Contractually driven approaches to liberalize the insurance sector by treating liability as an evolving relationship are resilient. Insurance, like the myriad business sectors it covers, is itself a form of wealth, best governed by the ongoing competitive processes that expand the quantity and availability of it. Private risk management and business insurance market evolution is important, especially in emergent economic sectors that will be the wealth-creating engines of the future; their integration into society requires normal evolution of contractual, immunity, and risk sharing standards. That incorporation into economic life will be distorted by the expectation of future bailouts. By contrast, a resilience approach would emphasize deregulation and liberalization of insurance markets to expand healthy private contractual coverage alongside enhanced individual savings or self-insurance cushions. That, in turn, can allow policy makers to claw back indemnification approaches that can aggravate risk or put taxpayers on the hook.

Some businesses weathered the lockdown storm because of fortunate positioning, including big tech companies and big box stores. Others thrived as the beneficiaries of government munificence. Some businesses were deemed essential, while others were forcibly shut down. While neighborhood restaurants struggled, some chains boomed.[165] By December 2020, a stark contrast was apparent—45 of the country's 50 biggest companies posted profits while almost 8 million Americans had slipped into poverty since the summer.[166] While the Internet eased the pain for many, tech titans were enriched relative to other businesses,[167] and billionaire wealth set records.[168]

Still, the very success of some companies that became fortuitously richer points to the possibility that private actors—like Home Depot supplying chainsaws during a

Private risk management and business insurance market evolution is important, especially in emergent economic sectors that will be the wealth-creating engines of the future.

The very success of some companies that became fortuitously richer points to the possibility that private actors can provide relief better than some government can.

hurricane—can provide relief better than government can. When the *Guardian* reported early in the crisis, "It is calling up 100,000 troops, extending grants to small businesses, prioritizing essential goods, and cracking down on profiteers," it was talking about Amazon, not the government.[169] Every business should have the best chance possible to thrive, which means not unfairly disadvantaging them relative to others with inconsistency in regulation. As the National Association of Manufacturers pointed out in a November 2020 letter to House Oversight and Reform Committee Ranking Member Rep. James Comer (R-KY):

> The issues caused by piecemeal regulation across all levels of government have become acute in the COVID-19 era as manufacturers face a dizzying array of inconsistent and sometimes conflicting guidance while working to ensure Americans have everything they need to stay healthy and maintain their daily lives and protect their employees.[170]

The letter went on to urge policy makers to "take all available steps to preempt state efforts to create a patchwork of regulations that burden interstate commerce, particularly where those state regulations conflict with federal ones."[171]

There are several tasks that policy makers can undertake to improve resilience. Resisting the impulse to bail out struggling companies and liberalizing the insurance market are starting points. Policy makers should also address regulatory inconsistencies and assure conformity with sound principles of federalism as a part of the broader aims of allocating household, state, local, and federal roles in normal times, as well as when extraordinary circumstances occur.

At root, policy makers should look for ways to empower businesses to build wealth reserves. Many businesses that were able to survive during the COVID-19 crisis—like well-run airlines—have cash reserves to help them withstand shocks. This effort could entail Congress expanding retained earnings policy to allow companies, from mom-and-pop shops to global corporations, to expand accumulation of retained earnings beyond current Internal Revenue Service caps and limitations on bona fide "reasonable needs of the business." The tax regulations say:

> An accumulation of the earnings and profits (including the undistributed earnings and profits of prior years) is in excess of the reasonable needs of the business if it exceeds the amount that a prudent businessman would consider appropriate for the

> present business purposes and for the reasonably anticipated future needs of the business.[172]

We now know that reasonable needs include the ability to weather crises. That means Congress should explore allowances for set asides of six months or more of a firm's highest operating expenses as a fund to tap during an emergency or shock, or to use for investment, spending, or operations when necessary. Building such reserves could also improve companies' bargaining positions for negotiating with insurers over business interruptions. Insurance innovations could go hand in hand with these resilience-oriented changes.

Showing how little we have learned in this regard, in March 2022, the Securities and Exchange Commission announced a proposed rule to require public companies to disclose their exposure to supposed climate risks. This will surely divert corporate attention from planning for resilience against actual risks in favor of regulatory compliance related to imagined or overhyped risks.[173]

Washington's overly eager intervention into companies and sectors, during good times and bad, artificially reconfigures the economy into unsustainable non-market configurations, redistributes resources, and fundamentally changes the relationship of business to the state in a way that advances collectivist ends rather than voluntary competitive enterprise. Resilience legislation can set boundaries on that intervention, as well as help to better optimize the relationships between governmental units, an issue to which we turn next.

Reasonable needs include the ability to weather crises.

Title III: Rediscover Federalism to Prevent Flash Policy

The core role of government—at federal, state, and local levels—is the protection of individual rights, but the checks of federalism and the separation of powers that protect them have been eroded over decades.

Interestingly, the federal response to the 1918 Spanish flu pandemic was characterized by a largely hands-off approach. As the *Associated Press* described it in March 2020:

> A flu pandemic was ravaging the world, killing indiscriminately in almost every country, including more than 600,000 deaths in the United States. The states were in a panic, but there was almost no call for broad federal assistance—at least, not one heeded by the president.
>
> Woodrow Wilson did not address the nation on the subject of the pandemic of 1918-19 a single time. He did not call for Congress to act,

> and he did not summon the nation to unite. He had another battle to fight in trying to bring World War I to a close, even though the flu killed far more people.[174]

Expectations and capabilities are different now, but whatever the division of authorities, the goal should be to expand resilience. The erosion of federalism and rise of centralization in Washington has contributed to undermining the private sector's resilience in the face of crisis.

What prevailed during the COVID-19 crisis was neither a federal hands-off stance nor a state-level every-man-for-himself approach, but an intertwined situation that left ample room for sides to cast blame in all directions. White House Senior Adviser Kevin Hassett said of crisis response in April 2020, "Each state needs to make the call itself; it's a local decision."[175] Meanwhile, states were asking Washington for bailouts that would not go exclusively to COVID relief but also to bolster state budgets. Whether Trump, or any other president, imposed lockdown on citizens directly or deferred to governors or local leaders, it is the federal government footing the bill. States asked for compensation for lockdowns that they themselves imposed.

The more general rise in centralization at the federal level and erosion of federalism long predated Trump. Early on in the COVID crisis, Christopher DeMuth of the Hudson Institute—and former president of the American Enterprise Institute (AEI)—pointed out the then-restraint that characterized Trump's executive actions compared to his predecessors' reactions to societal shock:

> This time, the federal response rests largely on state and local government and private enterprise, with a wave of deregulation clearing the way. The Trump administration has seized no new powers, and Congress has stayed energetically in the game.[176]

Trump might have attempted to exercise authoritarian powers in some regards, but the limited emergency powers he did exercise to force corporations to produce hand sanitizer and ventilators by invoking the Defense Production Act long predated him.[177] Those same powers are potentially available to halt states' harmful regulatory interference. Unfortunately, the virtue of limited reliance on emergency powers was offset by the huge spending surge that rocketed the fiscal year budget to an all-time record \$6 trillion in outlays under Trump,[178] creating challenges for Republicans fretting about deficits being taken seriously, as happened in their balking at a federal debt limit increase in late 2021.[179]

The Brookings Institution's William Galston described the hyperspending predicament in which "Tea Party" Republicans found themselves:

> [T]he movement that began in opposition to a bailout is ending in an administration that finds itself forced to sponsor—and in many respects urge on—the largest expansion of government financial activity in our history.[180]

A few months after DeMuth wrote of Trump's forbearance, the former president, in a departure from his previous restraint, issued a set of four "pen and phone" executive actions unilaterally extending certain aspects of expiring CARES Act stimulus and recovery measures. Elements of this move concerned some on the right. Yuval Levin and Adam White of AEI described it as "constitutionally dangerous,"[181] while Sen. Ben Sasse (R-NE) called the act of "unilaterally" rewriting payroll tax law "unconstitutional slop."[182] These directives implemented a payroll tax holiday for households earning under $100,000, extended supplemental unemployment benefits by $400 per week, deferred student loan repayments through 2020, and (with CDC guidance) extended the eviction moratorium. The latter move drew legal challenge.[183]

The need for national action in genuine crises notwithstanding, the derailment of federalism via transfer of what should be state and local programs and responsibilities to federal authority, even during non-crisis times, has meant less preparedness and resilience across the United States. As discussed next, restoration of federalism, fiscal responsibility, and surplus can also lessen the blame game, as can taking steps that would make it less necessary to invoke emergency powers in the first place. Following are some options to incorporate into an Abuse of Crisis Prevention Act.

Leave Trillions in the States to Facilitate Rainy-Year Funds. Replacing federal first-resort largesse and resources with private and state resources by not having them taken out of the states in the first place is the cornerstone of a resilience approach. A restored federalism that would appropriately prohibit executive overreach would also entail the states picking up the bulk of financial responsibility rather than appealing to Washington for bailouts.

The derailment of federalism via transfer of what should be state and local programs and responsibilities to federal authority has meant less preparedness and resilience across the United States.

An obvious starting point toward ending states' dependence on the federal government during crises is to first end dependence in non-crisis times.

Today, there exist not just expectations but demands that the federal government reimburse states without conditions. Complicating matters, states can simultaneously argue that the federal government ties their hands. As New York University Law Professor Richard Epstein and Mario Loyola (now with the Competitive Enterprise Institute) have noted, citing George Mason University Law Professor's Michael Greve's book *The Upside-Down Constitution*:

> [T]he intermingling of state and federal finances has led to a disastrous and unsustainable fiscal dysfunction across the whole government. The money Washington sends to the states is not "assistance"; it is rent for the use of state agencies as field offices of the federal government, in transactions that contain a strong element of coercion.[184]

An obvious starting point toward ending states' dependence on the federal government during crises is to first end dependence in non-crisis times. As the late Paul Posner of George Mason University noted, states have long had to pay for a growing "taxonomy of federally induced costs" that is by no means unique to Democratic administrations. Under the administration of George W. Bush, for example, Posner wrote in 2007:

> The extension of federal goals and standards to such areas as education testing, sales tax collection, emergency management, infrastructure, and elections administration were among the areas of significant mandates and preemptions.[185]

As Mercatus Center Research Fellow Veronique de Rugy pointed out:

> With the federal government accounting for roughly a third of total state spending prior to the pandemic, it's fair to wonder what the future holds for the relationship between the federal government and the states. The Constitution gave the states sovereign powers and limited (or at least tried to limit) the propensity for federal domineering. Today, the federal government not only dominates the states, it often does so with the encouragement of state and local officials who are all too happy to cash Uncle Sam's "free" checks. The strings attached are a mere inconvenience. As a result, we're continuing to move even further down the road toward the states effectively becoming administrative units of the federal government.[186]

Federal grants to states and localities in categories like health, transportation, income payments, education, job training, social services, and environmental protection have grown from 100 under President Lyndon Johnson to over 1,200, with spending on them topping $750 billion in 2019.[188]

Tradeoffs among programs the federal government funds with block grants ought to be made at the local level with money that never left the state in the first place—which would amount to a larger state pot as a consequence. To keep resources localized and Congress out of the picture, the end game would be to end all block grants and let localities govern without the funds orbiting the Washington Beltway beforehand. Transferring all Department of Education funds to state education departments and phasing out the federal Department of Education would help wind down federal centralization and restore federalism and local decision making.

Clarify the Distinction between Federal and State Strategic Stockpiles. Problems with federal choices on what goes into stockpiles and shortages underscore a need for better policies regarding federal and state expectations and duties, as well as expectations for the private sector and households. For example, the distinction between state duties and what the FDA's National Strategic Stockpile inventory should contain remains muddled.[189] The federal FDA stockpile, scattered across the nation, was never intended to support every single state at once.[190] Still, despite the inevitability of pandemic today and of another later, the requisite stockpiles of tens of millions of masks and thousands of ventilators, mobile beds, and other gear that would have cost a relative pittance were not available or had been dismantled. The *Los Angeles Times* described a program under California Governor Arnold Schwarzenegger whereby about $200 million was spent to acquire mobile surge hospitals, N95 masks, ventilators, and other supplies that might be needed in a pandemic. The arsenal was later eliminated by Governor Jerry Brown, who took office facing a $26 billion budget deficit.[191] There are numerous matters to examine. What had other states done? Why was the federal National Strategic Stockpile not bursting at the seams? Does the stockpile contain the proper inventory?

Undertake Concerted Streamlining Now, before Allowing Post-COVID Use of Recovery and Emergency Funds. Where crisis funds are contemplated, Congress should impose strict conditions on their disbursement. With that in mind, there are numerous proposals to shrink the federal enterprise worthy of consideration.

Getting spending out of the federal government and back to states and localities is a critical step, but cannot

Tradeoffs among programs the federal government funds with block grants ought to be made at the local level with money that never left the state in the first place.

State budgets' growth continues as if on autopilot, much as occurs at the federal level.

be the end of the matter. At the state level, there should be elimination of regulation and cutting of programs and governmental duties, just as at the federal level. Such reforms could include streamlining of redundant government services, elimination of prevailing wage requirements in contracting, and shifting away from defined benefit pensions toward defined contribution retirement plans.

As it stands, state budgets' growth continues as if on autopilot, much as occurs at the federal level. The National Association of State Budget Officers projects state budgets to increase by five percent in fiscal year 2022, above fiscal year 2021 levels.[192] As Jonathan Williams and Lee Schalk of the American Legislative Exchange Council note, "State and local governments do not lack revenue. They lack spending restraint." As they put it:

> History suggests that federal bailouts are not a "free lunch" for states. They decrease state sovereignty, incentivize future fiscal irresponsibility, and create a moral hazard problem. Bailouts reward fiscally reckless states at the expense of fiscally responsible ones. … Rather than request a $500 billion bailout from Congress, adopting spending reforms like priority-based budgeting—which eliminates redundancy and increases accountability to taxpayers—is key.[193]

That means program-by-program walkthroughs with the proverbial axe. The likelihood of federal bailouts of costly state pensions will mean less money for basic government functions and increased burdens on taxpayers. Profligate states' self-inflicted financial problems should be disqualifications for federal aid, not justifications for it. Ensuring that funds remain in states in the first place where matters have been streamlined, and where households are more flush, will dampen the calls for more "reset" programs.

Limit the Use of Emergency Statutes. The wide scope of emergency powers and the potential for abuse long predated the COVID-19 pandemic. After the boost that the Trump administration gave to the Defense Production Act, and Biden's promises to invoke it still further, it is likely that the DPA will be invoked in future crises even more aggressively—a development that some companies supplying the products in question would likely welcome.

There also needs to be a thorough review by Congress of the appropriate and inappropriate scope of emergency powers. Some steps in this direction are already under way. For example, the ARTICLE ONE Act (for Assuring that Robust, Thorough, and Informed Congressional Leadership Is Exercised over National Emergencies), sponsored by Sen. Mike Lee (R-UT), would amend the National Emergency Act to require Congress to vote to extend emergency declarations after 30 days, as opposed to the current requirement for Congress to vote to cancel a declaration (subject to presidential veto).[194]

Despite politicians' rhetoric over cherishing principles of federalism, that concept is not applicable to a government that does as much as ours does now. Changing that is a prerequisite for resilience and a core title of any Abuse of Crisis Prevention Act.

Conclusion

We are told the COVID crisis is like nothing the nation has faced before. If taken seriously, that would have meant extreme caution and restraint. But few guardrails exist to make crisis response targeted and temporary.

A global pandemic was a foreseeable event. There are more crises yet to come, but they are not license for policy makers to exercise whatever powers they like. So, it is not enough to improve resiliency via steps like those covered in the foregoing pages. The exploitation of misfortune to grow government well beyond its constitutional bounds must have consequences.

This report has presented numerous changes in approach as a basis for an Abuse of Crisis Prevention Act. The flash policy approach is destabilizing and manipulative, yet there are no circumstances one can envision in which the policy makers responsible would admit failure. They need limits imposed before the next shock.

The expanded power of the executive branch under both parties is the crux of the problem. As George Mason University Law Professor Michael Greve expressed it:

> The major domestic policy debates of the past decade—over health care and insurance, climate change, energy policy, immigration, and labor relations, among other issues—all implicate two central constitutional themes of American politics: the separation of powers, and federalism. All illustrate the dominance of the Executive, rather than Congress or the courts, over federalism relations.[195]

The root of the problem is not only the noted over-delegation of power by Congress to the administrative state, but also the assumption that the public

The expanded power of the executive branch under both parties is the crux of the problem.

can delegate sweeping power over fellow citizens to Congress. There are things we cannot legitimately vote to do to our fellow citizens or prohibit them from doing if limited government has any meaning. These are limits even more fundamental than those to impose on government.

Being as readied, prepared, and stockpiled as possible in terms of immediate household and business needs in both normal times and during crisis—and in terms of the need to protect against abusive government encroachment—are essential for resilience and national security in a free society, as distinct from the militarized "homeland security" one. An economy as healthy as possible, unencumbered by never-needed regulation, legislation, and governmental bodies, will be more robust and buoyant in the face of future crises. To date, policy makers have offered few concrete proposals to either rein in the state or prepare it to do what it should in the name of crisis response—while preventing it from doing what it should not.

Progressivism thrives on crisis. Republicans' compromises with it, worsened by the preexisting administrative state's gravitational pull, will lend legitimacy to potentially limitless government growth without an Abuse of Crisis Prevention Act. The COVID-19 response is just the latest episode.

This report offers initial steps and ideas for consideration regarding the bolstering of resilience and protection of basic liberties to incorporate into an Abuse of Crisis Prevention Act and forestall the rise of new opportunistic "forever wars" against every societal ill imaginable. An actual reset would restore boundaries on lawmakers regarding what they can do in the name of crisis, and in terms of what disciplinary action can be taken against them when they abuse their authority. It is long past time for policy makers to let crises go to waste.

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