COVID-19 and the Constitution:
State Police Powers and Judicial Scrutiny

By Dylan Cain

Executive Summary

Since the COVID-19 pandemic was announced on March 11, 2020, states and localities have faced some public scrutiny concerning the constitutionality of government response. This is particularly the case for **police powers** invoked during the pandemic, including stay-at-home orders, limits on travel and non-essential gatherings. This policy brief reviews COVID-19 policy responses at the federal, state, and local levels, and focuses particularly on the variation in state responses. Though state police powers are likely to face **strict scrutiny** under ordinary circumstances, a review of existing caselaw suggests that most courts suspend traditional levels of judicial scrutiny during natural disasters and public health emergencies. However, it remains to be seen if strict scrutiny will universally be suspended during pandemic conditions, if so, which lower standards will be utilized to evaluate the constitutionality of state and local orders?

Institute of Public Policy
University of Missouri

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Introduction

The World Health Organization officially classified severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), otherwise known as COVID-19, as a pandemic on March 11, 2020, citing its thirteen-fold increase in cases and its spread to 114 countries.[1] Before this declaration, the United States was already experiencing the economic consequences of the virus, with trading freezing and market confidence collapsing.[2] One week after the declaration was made, the number of confirmed positive cases in the US rose nearly seven-fold.[3] As the virus began its spread regionally and nationally, policy responses varied at the state, city, and county-levels. This is particularly true for the exercise of state police powers to mitigate the spread, including social distancing orders, the closure of schools and non-essential businesses, and the issuance of stay-at-home orders and advisories, which limit residential mobility to only essential activities.[4] However, each of these orders is likely to invoke different levels of judicial scrutiny based on the type of order issued, scope, and level of enforcement.

This policy brief analyzes the many isolation and quarantine policies adopted by federal, state and local governments and will discuss their legal and political implications as discussed in constitutional law literature. Policy options will be connected to state-level responses to the COVID-19 pandemic, and the variation in state responses will discussed. Given the constitutional questions that arise from the state usage of police powers, this brief also outlines how Supreme Court jurisprudence may limit state policy-making even during pandemics and emergency response.

Federal COVID-19 Responses

Federally, the President has constitutional authority for isolation and quarantine, though it is constitutionally limited. The Public Health Service Act (1944), in conjunction with the Commerce Clause of the Constitution, allows for the chief executive to place limits on or prevent interstate and international travel.[5] Formally, this is issued through a presidential directive to the Secretary of Health and Human Services to declare a public health state of emergency.[6] President Trump exercised his executive authority in a public address on March 11, 2020, announcing restrictions on some forms of international travel from COVID-19 outbreak clusters in European Union countries, establishing returning traveler healthcare screening stations, and the redirecting of some flights to allow for healthcare screenings to occur at high-traffic airports.[7] Prior to European travel restrictions, President Trump also restricted travel by foreign nationals travelling from China (issued January 31) and Iran (issued February 29). On April 20, the President announced a temporary suspension on all immigration to the United States through executive order.[8]

On March 13, the President announced an emergency declaration for all states, territories, tribal territories, and the District of Columbia through powers enumerated in the *Stafford Act* (1988), which opened the door for state, local, and even nonprofit agencies to apply for emergency-related public assistance.[9] Through invocations of the *Defense Production Act of 1950* by both the President and the Federal Emergency Management Agency (FEMA), the executive branch has also compelled domestic industries to produce resources critical to response by prioritizing of government contracts (i.e. "rated orders," which move public requirements to the front of the line), and issuing loans to private firms in order to have sufficient supplies to fill government orders.[10, 11, 12] The President first invoked this act through Executive Order 13909, and has directed identified manufacturers to procure supplies for ventilators and compel the domestic production of ventilators and nasal swabs.[13, 14] The Department of Health and Human Services (DHHS) also has the authority to provision resources to states and localities from its Strategic National Stockpile, which is managed by the Office of the Assistant Secretary for Preparedness and Response and consists of roughly 12 million N95 masks and approximately 4,000

ventilators according to some sources as of April 3.[15, 16, 17]

As in previous responses to international and domestic crises, the executive branch has outsized authority when compared to the authorities of Congress. However, in the case of the response to COVID-19, the legislative branch played a critical role in provisioning emergency funds to executive departments, and providing economic relief for businesses and individuals. This included passing legislation for vaccine development, medical supplies, and public health grants (H.R. 6074), and the extension of tax credits to provide for wide scale paid sick, medical, and family leave (H.R. 6201).[18, 19] However, perhaps most substantially, Congress passed a large-scale relief bill in the Coronavirus Aid, Relief, and Economic Security Act (i.e. the *CARES* Act, or *H.R. 748*), which provided a historically unprecedented $2 trillion worth of economic stimulus. Half of the mandatory spending in the bill (totaling $454 billion) was directed to the Federal Reserve System to be distributed through stimulus checks to most individuals making less than $75,000 a year and couples making less than $150,000. The remainder of the bill was dedicated to loans, investments, and grants for businesses and state and local governments, as well as large scale expansion of unemployment benefits.[20]

State and Local COVID-19 Responses

Some congressional leaders called for a temporary, nationwide stay-at-home order, citing the strong probability for the virus to spread with interstate travel.[21] The executive branch, largely through DHHS and the Centers for Disease Control and Prevention (CDC), issued early guidance to engage in social distancing, limiting travel to only necessary trips, and issuing other isolation and quarantine guidelines for those who are sick or come into contact with someone who has been infected with the virus.[22]

However, the imposition of a formal stay-at-home order at the federal level invoked constitutional questions according to many constitutional law scholars. During the Ebola outbreak in 2014, concerns over constitutional authority for public health measures led to a commissioned Congressional Research Service (CRS) report on the issue.[23] This report concluded that most authority for public health response, including isolation and quarantine powers, lies with state governments whose constitutions guarantee police powers.[24] While the federal government also has powers for isolation and quarantine, these are thought to be limited to federal districts and territories and travel across borders.[25] This is because state powers and liberties recognized in the Constitution were incorporated, or recognized by the Supreme Court as applying to the internal affairs of the states, after the ratification of the Tenth Amendment.[26] Others have argued that the "general welfare" clause may also allow for national quarantine or isolation orders. However, this is also likely to face legal challenges.[27]

State governments have much more authority when it comes to quarantine and isolation, though the extent of action varies based on statutory law. Governors took a wide variety of actions to mitigate the spread of COVID-19. All states temporarily closed schools, mobilized the National Guard for pandemic response, and declared emergency and public health emergency orders.[28] Emergency declarations were required at the state-level to activate the maximum funding provided by the *CARES* Act, including a share of the $45 billion Disaster Relief Fund.[29] All states requested a 1135 Waiver from the Centers for Medicare & Medicaid Services (CMS) to forgive a vast number of the Medicare, Medicare, and Children's Health Insurance Program (CHIP) requirements to ensure quick and widespread care in each state.[30] According to the National Governors Association (NGA), all 50 states received approved waivers for at least one provision.[31]

However, state governments largely diverge in their exercise of police powers. Some governors used their isolation and quarantine authority to place travel restrictions on those entering and leaving the

state. Initially, many states acted by imposing social distancing orders and guidance, canceling or recommending the cancellation of events over a certain capacity.[32] While in mid-March, state orders varied on the upper-limit of gatherings (anywhere between 10 and 50 maximum), most upper-limits on gatherings diminished after the issuance of stay-at-home orders and advisories, which mandate staying at home with the exception of essential activities.[33] Stay-at-home orders vary in the following respects.

Type of Order – Some states chose to issue executive orders that were framed in terms of advisories and recommendations. For example, the state of Massachusetts closed all non-essential businesses and encouraged limiting unnecessary travel, and encouraged citizens to stay-at-home when possible, much in line with other states.[34] However, Governor Charlie Baker (R-MA) stopped short of issuing an order for residents to limit their activities, and critics worried about the strength of an advisory measure over an order. This order is better classified as a "safer-at-home" policy, which encourages residents to make every effort possible to stay at home.[35] Non-essential businesses may or may not be required to close in these circumstances, though they must abide by social distancing orders. Other states that had similar policies include Kentucky, Nebraska, Tennessee, and Utah.[36] Alternatively, stay-at-home orders are considered more restrictive and are the most common policies issued during the pandemic.[37] Essential businesses and activities, as defined by both state and federal guidance, were permitted, were usually limited to basic shopping needs, outdoor exercise, medical needs, and work for those are employed in essential industries. Finally, shelter-in-place orders mandate staying in place until further instructions are given, though the exercise of this order was limited to only some cities and states, including the state of California.[38, 39]

Enforcement – States like Colorado, Minnesota, and Maryland, whose Governors issued an executive order, allowed local law enforcement to pursue criminal misdemeanor charges against those who violate the order, carrying anywhere from one to five thousand dollars in fines or up to one year in jail.[40, 41, 42] Regardless of the whether the state had punitive mechanisms built into their policy responses, policymakers and law-enforcement alike have signaled broader support for education efforts over enforcement. As expressed by Art Acevedo, president of the Major Cities Chiefs Association, the issuance of fines and citations was considered a "last resort" for most large police departments in the country.[43]

Scope – Lastly, some states limited the scope of their isolation orders in some respect. Some state orders and advisories were limited to select residents, including those most vulnerable to the disease, including Massachusetts, Oklahoma, and South Dakota.[44] Governors also geographically restricted the range of their response measures to specified counties. For example, before Pennsylvania's statewide order took effect on April 1, Governor Tom Wolf (D-PA) took an incremental approach, limiting stay-at-home orders to 33 counties in Eastern and Western Pennsylvania.[45] South Dakota only has imposed stay-at-home orders for residents over the age of 65 in two counties to stay home, as Governor Kristi Roem (R-SD) cited a more targeted approach for the Sioux Falls area, which as of April 15, had more cases per capita than Chicago, Illinois.[46]

Local governments, including mayors, city councils, and county commissions share similar authority with the states. For example, cities and counties are also the recipients of *CARES* Act funding, and they actively compete for medical resources with other jurisdictions.[47, 48]

Cities have also been able to provide their own forms of economic relief, including the cancellation of water disconnects through guaranteed and interest-free loans (e.g. Detroit, Michigan and Washington D.C.), as well as freezes on rent and evictions (e.g. Los Angeles, California and Miami-Dade County).[49, 50, 51] However, since many private housing and utility companies are guaranteed back-payments on missed rent and utilities, these forms of assistance may create less overall security than large-scale federal assistance.[52, 53] Finally, cities have also formed public-private partnerships with the business and non-profit communities to directly deliver support for vulnerable populations, including the elderly and the homeless. For example, the cities of Austin, Texas, Portland, Oregon, and Cambridge, Massachusetts utilized their public transit infrastructure to team up with non-profits and assist with food delivery for seniors.[54] However, it should be underscored that both municipalities and counties share police powers with state governments, meaning that restrictions on gatherings and travel and stay-at-home orders can be issued at the local-level insofar as they do not contradict superseding state orders.[55, 56]

> ***"Under ordinary circumstances, the challenge to restrictive government action is the test of strict scrutiny, which is applied to all laws that restrict liberties that the Supreme Court deems fundamental, or "most preferred."[58]"***

Legal Challenges and Constitutional Tests

The above survey of policy options, though not comprehensive, provides sufficient evidence that governments at various levels have a variety of policy options meant to provide economic relief and to mitigate the spread of the novel coronavirus. The most contentious policies, including stay-at-home orders and restrictions on religious gatherings, were met with protest in many state capitols.[57] After all, these orders were restrictive of liberties most Americans would normally enjoy, including the freedom to publicly assemble, the freedom to associate and exercise religion with undue burden, and the freedom of mobility. What types of constitutional challenges could police powers meet during this pandemic, and will the current emergency be enough for courts to give deference to state and local governments?

Under ordinary circumstances, the challenge to restrictive government action is the test of **strict scrutiny**, which is applied to all laws that restrict liberties that the Supreme Court deems fundamental, or "most preferred."[58] This can include restrictions on speech, assembly, mobility, press, and other individual liberties. The Supreme Court formalized their test in the mid-1960s, establishing that all such ordinances and statutes must (1) be necessary to fulfill a compelling state interest, (2) be narrowly-tailored to fulfill that interest, and (3) utilize the least restrictive means to achieve the purpose of the law (see Table 1).[59] This three-pronged test, which is suggested to have originated in the infamous Korematsu vs. United States (1944), suggests that all laws that severely hamper civil liberties must be for an incredibly important purpose in which the state has a legitimate interest.[60] Further, the measures must appear to have higher benefits relative to the costs, and must achieve its aims substantially better than less-restrictive means to achieving the same goal.

This standard, considered one of the most rigorous in constitutional law, could closely apply to isolation and quarantine orders, including stay-at-home and shelter-in-place orders, as well as any requirements for quarantine and isolation imposed by states after interstate and international travel. It can also apply to challenges about the free exercise of religion, particularly for religious groups

who believe that restrictions on gatherings place an undue burden on their congregations.[61] When applied, this standard of judicial review places a substantial burden on states and localities to demonstrate that their specific policies are not overly restrictive, which is a significant burden of proof given that research on the novel coronavirus is still relatively new.

Table 1: Sample of Constitutional Tests Relevant to COVID-19 Response

Standard	Definition	Application	Notable Cases
Strict scrutiny review[62]	**Government action must…** **1. be necessary to fulfill a compelling state interest** **2. be narrowly tailored to fulfill that interest, and** **3. use the least-restrictive means**	**Cases relating to the "most preferred" liberties** **Burdens on the free exercise of religion**	**Korematsu v. United States (1944)[63]** **Brown v. Board of Education (1954)[64]** **Griswold v. Connecticut (1965)[65]**
Time, manner, and place review[66]	**Government action must be…** **1. content-neutral and** **2. narrowly-tailored to** **3. serve a compelling state interest, and** **4. allow for alternative channels of speech and communication**	**Cases relating to speech and/or assembly that incidentally burden the time, manner, or place of said speech**	**McCullen v. Coakley (2014)[67]** **Binford v. Sununu (2020) [68]** **Friends of Danny DeVito, et al, v. Wolf (2020) [69]**
Good faith/ necessary basis standard[70]	**Government action must…** **1. be made in good faith, and** **2. have some evidence that it is necessary to maintain order**	**Can be applied during the suspension of strict scrutiny.** **Emergencies and natural disasters**	**Smith v. Avino (1996)[71]** **Binford v. Sununu (2020)[72]**
Jacobson v. Massachusetts (1905) standard[73]	**Government action must…** **1. have a substantive relation to a public health emergency, and** **2. not be a plain violation of fundamental rights**	**Public health emergencies**	**Jacobson v. Massachusetts (1905)[74]** **re Abbott (2020)[75]** **On Fire Christian Center v. Fischer et al. (2020) [76]** **Martinko et al. v. Whitmer et al. (2020) [77]**
Church of Lukumi Babalu Aye, Inc. v. City Council of Hialeah (1993) standard[78]	**Government action must…** **1. be content-neutral (both explicitly and de facto), and** **2. be generally applicable**	**Burdens on the free exercise of religion***	**Church of Lukumi Babalu Aye, Inc. v. City Council of Hialeah (1993)** **First Baptist Church v. Kelly (2020).[79]**

Underlined cases heard relating to police powers exercised in responses to COVID-19.
* = Most courts now recognize strict scrutiny review as the appropriate test for free exercise cases since the passage for Religious Freedom Restoration Act in many states. The ruling in *First Baptist Church v. Kelly* (2020) is a notable exception.

Other constitutional tests limit the prohibition of public assembly, including **the test on time, manner, and place restrictions** on public speech and assembly. Due to the issuance of stay-at-home orders and some shelter-in-place orders, the traditional avenues for demonstrations, gatherings, and other forms of public expression were limited. However, the Supreme Court has ruled that state action can limit these First Amendment liberties if the state meets a four-part test.[81] First, much like with the strict-scrutiny test, the state must (1) have a compelling state interest, and (2) the governmental action must be narrowly-tailored to meet said interest.[82] However, orders must also be (3) content-neutral, meaning they do not meaningfully impinge on one viewpoint over another, and (4) allow for other means of meaningful expression through "alternative forms of communication" (see Table 1). This test was most notably applied during the case of *McCullen v. Coakley* (2014) in which the Supreme Court ruled that Massachusetts' placement of thirty-five "buffer zones" around abortion and women's health clinics placed unreasonable limitations on protestors, as such restrictions were not considered to meet the test of content-neutrality.[84]

Both traditionally liberal and conservative groups publicly criticized the actions of state and local governments on constitutional grounds, each using the language of these tests. While the American Civil Liberties Union (ACLU) took issue with the disparate impact of enforcing stay-at-home orders, particularly for low-income and minority residents, some conservative columnists at *The National Review* directly challenged state and local orders, citing the highly-restrictive means utilized by the government.[85, 86] According to Anthony Kreis, assistant professor at Chicago-Kent College of Law, there is "near zero" likelihood that high levels of judicial scrutiny would be applied to reasonable legislation that restricts mobility within state boundaries during the COVID-19 outbreak.[87]

There is now legal precedent for this lack of concern. New Hampshire's ban on large gatherings has already been legally challenged in a case heard by the New Hampshire Supreme Court. In *Binford v. Sununu* (2020), the court ruled in favor of the state's restrictions on gatherings, finding that strict scrutiny need not apply during the public health crisis if action is taken in good faith and there is some evidence to believe that the restriction is necessary for the public (see Table 1).[88] After dispelling the need for strict scrutiny, the Court found that the state's limits on gatherings met all necessary conditions for time, manner, and place restrictions for public assembly.[89] In particular, the Court found that alternative forms of communication were protected by Governor Sununu's order, as at the time the state did not limit impromptu gatherings or scheduled gatherings of less than 50 people, and the state did not in any way inhibit virtual and telephone communication.[90] The state of Pennsylvania was also shown to have provided ample alternatives to communication for local campaign officials, who challenged the closure of businesses and campaign offices citing an undue burden in *Friends of Danny DeVito, et al. v. Wolf* (2020).[91] Upon appeal, the United States Supreme Court refused to hear the challenge to the Pennsylvania order without qualification on May 6.[92]

This does not mean that state and local decisions can go completely unchallenged, however. First, as is clear in the brief overview of state action, response to the COVID-19 outbreak varied by state. While some states were more narrowly-tailored in their approaches (e.g. orders for those over the age of 70 in Massachusetts), other states may use more restrictive means on targeted groups (e.g. Rhode Island's initial stops of New York City commuters by police, leading to threats of lawsuits from the ACLU and New York City Mayor Bill DeBlasio). [93] Existing case law suggests that deference to states is not universal, as the Supreme Court has found that states and cities may not impose isolation or quarantines in an unreasonable or discriminatory manner, or in a way that is not logical, even-handed, and/or scientifically founded.[94] The state of Kansas initially placed restrictions on religious gatherings of more than ten people (not including pastors or choir members), but the District Court of Kansas considered this

a haphazard application of the law, considering that "airports, offices, and production facilities" have an equally high chance of promoting the spread of the virus.[95] By editing an existing order to include church-specific requirements that were not required for secular gatherings, the court ruled that this was *facially* content-neutral, but not *de facto* (or in effect) content-neutral.[96] Other state supreme courts, however, including the Texas Supreme Court, showed more deference to the state in *Re Abbott* (2020) when Governor Greg Abbott initially closed churches through executive order, using a far less restrictive standard for government action during public health emergencies.[97] In spite of the general deference to state and local governments during health crises, cases like *First Baptist Church v. Kelly* may embolden some litigation efforts by groups opposed to the usage of police powers during the pandemic.

"What remains to be seen is whether these sets of state restrictions will survive two judicial standards of constitutionality, including strict scrutiny and the test for time, manner, and place restrictions. Ultimately, not all laws will be equally narrowly -tailored, and not all laws limiting speech and assembly will not equally provide a wide variety of alternative avenues for speech and communication."

Conclusion and Looking Forward

All levels of government have taken widely different policy approaches to addressing the COVID-19 pandemic. Federally, the executive branch has used its constitutional authorities to place limits on international travel and immigration, and to declare both a national emergency and a public health emergency to open funding floodgates for states and localities. The legislative branch has exerted more control over economic relief, providing funding for health authorities, small businesses, large industries, and average Americans. However, lower levels of government have far more authority to isolate and quarantine its residents because of the police powers deferred to states and local governments by the Tenth Amendment.[98] Key police powers exerted during this crisis include the powers to limit public gatherings, close businesses deemed non-essential, and mandate that residents stay at home for all non-essential activities. What remains to be seen is whether these sets of state restrictions will survive two judicial standards of constitutionality, including strict scrutiny and the test for time, manner, and place restrictions. Ultimately, not all laws will be equally narrowly-tailored, and not all laws limiting speech and assembly will not equally provide a wide variety of alternative avenues for speech and communication. The following questions remain unanswered as response to the virus is still unfolding.

First, how many courts will ultimately choose to suspend strict scrutiny? In the event that a state-level or lower-level federal court does not see the current outbreak as a sufficient reason to suspend strict scrutiny, state and local authorities will have the tough task of definitely demonstrating that their policies are not more restrictive than necessary, and written in such a way that does not place an undue burden on any residents, including religious congregants. This is also a particularly high barrier given that the literature on the effectiveness of COVID-19 policy responses is in its relative infancy.

Second, will any courts strike down gathering laws as unconstitutional restrictions on the time, place, and manner of speech? As instantiated, states and localities have a substantial and compelling interest to save lives in their state, and by prohibiting all gatherings of a given size, state and local action has thus far passed the test of content-neutrality. However, the spread of nationwide protests

against stay-at-home orders, combined with the potential to issue citations to protestors and demonstrators creates fertile ground for lawsuits on the basis of undue time, manner, and place restrictions.

Finally, will stay-at-home orders face any legal challenges? While each of the major cases discussed since the outbreak, including *Binford v. Sununu* (2020), *DeVito v. Wolf* (2020), and *Kelly v. Legislative Coordinating Council* (2020) addressed these levels of judicial scrutiny, each case concerned only limitations and restrictions on gatherings as well as the designation of essential businesses. However, stay-at-home and shelter-in-place orders are just as liable to meet challenges if lower courts deem them insufficiently narrow or unnecessarily restrictive. For example, California chose to issue a shelter-in-place order as opposed to a stay-at-home or safer-at-home order. Will courts view this action as a net benefit when considering the risks involved, as well as the limitations placed on mobility?

While these questions remain unanswered at the time of this brief, litigation in these areas will certainly follow in the coming months, informing future government response during times of emergency and crisis.

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