

Mass Movement, Business and Property Control Measures

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SUMMARY. Government powers support the use of physical distancing measures as a strategy to mitigate the spread of COVID-19. This Chapter examines the efforts of governments to limit mass movement and large gatherings, close businesses and schools, and restrict non-essential personal, recreational, and commercial activities. Government legal authority to impose these restrictions to stop the transmission of an infectious disease such as COVID-19 is quite broad, and these measures are essential tools to reduce the community spread of COVID-19. However, government orders that restrict movement or activity must consider the effects on constitutional rights; the economic, social, and health impacts that restrictions impose; and the potential for inequitable burdens on marginalized communities if supportive policies are not implemented along with restrictions. Movement and activity restrictions in the form of stay-at-home orders, gathering size limitations, and business and school closures have been instituted widely during the initial COVID-19 response, primarily by state governments, although local governments have also imposed these measures. Often politically controversial, numerous legal challenges have been brought against government orders restricting movement, imposing gathering limits, and closing businesses. The government has prevailed in most of these legal challenges, and this deference to government-imposed restrictions demonstrates an appropriate balancing of public health and other considerations under circumstances of scientific uncertainty. However, government officials must take affirmative steps to set up systems that render widespread restrictions on movement and activity less necessary to contain COVID-19 and to ensure that when restrictions and closures are in place that supportive policies mitigate disparate burdens on marginalized communities.

Introduction

This Chapter explores the many actions taken by federal, state, and local governments to contain the spread of COVID-19 through restrictions on mass movement; control of personal interactions and property uses; and limitations on personal, recreational, educational, and commercial activities. Most pandemic plans consider physical separation of people an essential strategy to stop the spread of an infectious disease—like COVID-19—for which there is no effective vaccine or treatment. Among the available options for reducing disease transmission are bans on gatherings; stay-at-home orders, travel restrictions, and other restrictions on mass movements; and closures of businesses, schools, and other institutions.

Federal powers to control interstate commerce are broad enough to restrict travel between states or into the country to stop the spread of an infectious disease. Federal officials may also issue travel advisories as guidance and may place incoming international travelers under quarantine or isolation (see Chapter 3).

State government powers—and local government powers by extension—provide significant authority to restrict movement of individuals, limit activities, and impose property controls (Gostin & Wiley, 2020). These powers are grounded in the states' police powers, which grant the states the authority to take steps to protect the health and well-being of the population. Consequently, state powers are considerably broader in scope than federal powers in these areas. Past interpretations of state police powers by courts recognize that states can force businesses to shut down or relocate to protect health (*New York City v. New St. Marks Baths*, 1986; *The Slaughter House Cases*, 1873) and can impose restrictions or requirements on individuals to stop the spread of contagious diseases (*Jacobson v. Massachusetts*, 1905). State executives possess statutory authority under emergency response laws to impose restrictions on movement, bans on gatherings, and closure of commercial and recreational activities. These statutes grant state governors or other designated officials the authority to declare emergencies and issue executive orders tailored to reduce the spread of a contagious outbreak of a respiratory disease like COVID-19.

While these government powers are extensive, constitutional constraints—including protections for due process and equal protection, and freedom of speech, religion, and assembly—apply to government actions to respond to infectious disease outbreaks and can give rise to legal challenges to these powers. Courts typically defer to government judgment on the use of police powers during outbreaks of contagious diseases, even when there is scientific uncertainty about whether the threat posed by a new disease merits extra precaution. However, courts may invalidate government restrictions on movement, interaction, or activity that are overbroad, unsupported by scientific evidence, or applied in a discriminatory manner (*Jew Ho v. Williamson*, 1900).

Ethical best practices support imposing closures and restrictive measures on activity when such measures are reasonable, informed by scientific understandings of risk, and implemented in the least restrictive way possible to achieve the goal of mitigating the spread of infection (Gostin & Wiley, 2020). Pandemics can exacerbate already problematic racial and ethnic health disparities (CDC, 2020). When closures and movement restrictions are necessary to contain infectious disease outbreaks, it is vital that government provide legal protections and supportive resources to the people most vulnerable to negative consequences that coincide with closures and movement restrictions—often poor people of color, who disproportionately suffer from losing access to public services, paychecks, childcare, and mobility (Yearby & Mohapatra, 2020). Government-provided support—including access to food, health services, income support, and employment, utility, and housing protections—allows people to comply with stay-at-home orders. These programs promote equity and protect people—especially those living in poor and marginalized communities—from the negative economic, social, and health consequences that occur during a pandemic.

Mass Movement, Business and Property Control Measures during COVID-19

Government Actions to Control Movement and Limit In-Person Interactions

Despite large outbreaks of COVID-19 in China and Europe in early 2020, federal and state government officials in the United States acted slowly to respond to the risks posed by the disease. It wasn't until early March 2020 that government officials began to implement steps to contain the spread of the disease, through limiting in-person interactions. Government officials imposed stay-at-home orders and travel restrictions; limited the size of, or prohibited altogether, non-essential gatherings; and closed schools and non-essential businesses.

Federal officials attempted to limit travel into the United States, imposing partial travel restrictions on travelers from a variety of countries including China, European Union members, Brazil, Canada and Mexico, while simultaneously attempting to ban most immigration (see Chapter 33). Federal agencies have limited legal power related to closures and movement restrictions within the country, but considerable influence on policies adopted by states, localities, and private actors. Agencies including the Centers for Disease Control and Prevention (CDC), Department of

Labor, and Department of Education offered voluntary COVID-19 guidance regarding decisions to limit gatherings and close—or reopen—businesses and schools. Contradictory messages from federal officials and the widespread perception that the Trump administration has altered expert agency guidance on closures to conform to political preferences has limited the widespread acceptance of this guidance, politicized closure decisions, and undermined trust in government scientific experts. In addition, President Trump issued an executive order that invoked the Defense Production Act to potentially require meatpacking facilities to remain open in lieu of state-level closures (see Chapter 23 for more information on the Defense Production Act).

As community spread of COVID-19 became evident, state and local governments acted to forestall the growing outbreak by limiting movement and in-person interactions. By mid-March 2020, every state had declared an emergency related to COVID-19, expanding the authority of state officials to act rapidly to intervene. Drawing on existing emergency powers, most states imposed a set of movement, gathering, and activity restrictions designed to require significant physical distancing to reduce the spread of the SARS-CoV-2 virus that causes COVID-19. These provisions applied an extensive and varied array of strategies, including bans on gatherings, stay-at-home orders for non-essential activities, closures of schools and businesses, and mask-wearing mandates among many other provisions (including the imposition of quarantine on travelers from other states with high case numbers – see Chapter 3). Some local governments also enacted similar restrictions, in some cases with more stringent limitations than state-level requirements, provided that states permitted local variation. Indeed, some of the most contested legal and political disputes during the initial months of the pandemic involved disagreements over the ability of local governments to impose movement restrictions and mask mandates that were stricter, or more lenient, than state requirements (see Chapter 9).

Gathering bans were among the first restrictive actions taken by many state and local governments in response to the initial COVID-19 outbreaks. Throughout March, many state and local officials imposed increasingly strict limitations on the size of non-essential group gatherings, while others merely issued guidance discouraging such gatherings. In many states, orders limiting gathering size were revised rapidly to reduce in-person interactions as the scale and dangerousness of the outbreak became more obvious. New York, for instance, imposed a ban on gatherings larger than 500 people on March 12, 2020, limited social and recreational gatherings to 50 people on March 18, 2020, and banned non-essential gatherings of any size on March 22, 2020. State gathering bans exhibited great deal of variety in terms of size limitations with many states maintaining a limit of 10 people. The definition of “essential” gatherings varied across states as well. While indoor recreational gatherings exceeding size limits—such as concerts or sporting events—were universally proscribed, states were divided over whether gatherings for religious worship constituted an essential activity, with a few states explicitly exempting religious worship services from gathering size caps.

In many states, gathering bans coincided with the imposition of widespread stay-at-home orders. Following the lead of some early-acting local jurisdictions such as Seattle/King County and San Francisco, the state of California issued the first statewide stay-at-home order on March 19, 2020. Nearly every state imposed some version of a stay-at-home order or advisory in late March or early April as COVID-19 case numbers continued to increase. Most of the stay-at-home orders required all individuals to stay home unless working in essential jobs or accessing necessities such as food, prescriptions, or emergency health care. Many states exempted outdoor activities with physical distancing from these restrictions. States exhibited variation in the language of the stay-at-home orders along a continuum of clarity. For instance, Michigan's order included clear prohibitive language ("all individuals...are ordered to stay at home or at their place of residence") while Texas's order adopted a somewhat less pointed statement ("every person...shall...minimize social gatherings and minimize in-person contact").

Most states ordered businesses and schools to be closed contemporaneously with the stay-at-home orders and gathering bans. Non-essential businesses—including most office, factory, and service sector workplaces—were forced to cease in-person operations temporarily. Essential businesses and their workers were permitted to continue operations as exceptions to these orders, allowing health care institutions (although in many states not elective or preventive health care procedures), food producers and sellers, and critical infrastructure workers including some government and delivery workers to continue to work in-person and on-site. Again, these state orders demonstrated some variety in content. Most states explicitly closed workplaces that could not operate and maintain the limits on gathering size and businesses where people have close contact for extended periods, such as dine-in restaurants, gyms, bars, salons, and theaters. State and local governments also closed schools to prevent the spread of COVID-19, although childcare for essential workers was permitted in most jurisdictions. State and local officials are currently weighing the risks of opening schools for fall 2020.

The combination of stay-at-home orders, widespread business and school closures, and limitations on in-person gathering seems to have effectively flattened the rising curve of COVID-19 infections between March and May 2020, although it's unclear from the evidence precisely which measures were effective, and if some were not (Castillo et al., 2020; Chapter 2). Nevertheless, many state and local officials that had imposed restrictions removed them, at least in part, beginning in May and June 2020. The quick removal of restrictions in many jurisdictions was prompted not by public health guidance, but rather by political pressure from President Trump and his supporters, protests organized by conservative groups, and a large number of lawsuits challenging stay-at-home orders and business closures.

Lifting restrictions on in-person interactions too quickly has been disastrous. States that removed their restrictions quickly, such as Arizona, Florida, Georgia, and Texas, have seen their COVID-19 cases again begin to increase, and some of these states have had to re-impose additional restrictions on movement and business closures throughout June and July 2020. Similarly tragic is the

failure of federal and state government officials to use the time while most people were staying at home to implement programs with sufficient capacity to test, contact trace, and isolate COVID-19 cases. Had stay-at-home orders been extended and testing/tracing capacity developed, this country would likely have been controlling a much smaller COVID-19 epidemic with targeted restrictions rather than the fluctuating application of state (and increasingly local) governments' restrictions on mass movement and business and school closures that will need to occur intermittently until an effective treatment or vaccine for COVID-19 becomes available. The rapid rollback of restrictions in many U.S. states can be contrasted unfavorably with the more successful approaches taken by most European countries, which maintained their movement restrictions and closures for longer and implemented more robust social support programs, allowing rates of COVID-19 infection to remain low when restrictions were eased.

Many states have attached legal penalties to movement, interaction, and closure restrictions that authorize fines (and less frequently arrest or imprisonment) for people found in violation of these restrictions. While legal sanctions can be justifiable to incentivize compliance with the law, the effects and incentives of enforcing physical distancing restrictions are complex. Enforcement of public health regulations may occur differentially across populations, with people of color more likely to face aggressive enforcement than white people for noncompliance. Additionally, mandatory enforcement may entrench opposition to public health interventions by inflaming political divisions in a counterproductive way. These concerns suggest that voluntary compliance with public health restrictions is preferred when feasible.

Legal Challenges to Government Restrictions

The imposition of government restrictions on gatherings, business operations, and related activities have resulted in numerous legal challenges, many of them still ongoing at the time of this writing. Litigants sought to have courts overturn government orders based on a number of different legal theories, including alleged violations of fundamental constitutional rights, due process, and equal protection. Many of the judicial rulings have relied on *Jacobson v. Massachusetts*, the 1905 U.S. Supreme Court case that upheld compulsory vaccination requirements imposed during an infectious disease outbreak as valid within state police powers, but also recognized that state power to constrain individuals was not unlimited and subject to court review. Modern courts' interpretations of *Jacobson*, however, have varied, and created disparate standards of analysis applied to constitutional challenges to government COVID-19 restrictions (Parmet, 2020; Wiley & Vladeck, 2020).

One analytical approach courts have used to evaluate state powers has been to apply deference to government interventions to protect public health while still affording consideration of applicable constitutional rights that could be violated by the state. In *South Bay United Pentecostal Church v. Newsom*, Chief Justice John Roberts voted not to block a California order limiting the size of attendance at religious worship services to 25% capacity or 100 attendees, noting in his concurring opinion both deference to public health officials who are "politically accountable" and

the order's consistency with upholding religious free exercise rights. Roberts addressed the issue of comparative restrictions between religious gatherings and comparable secular gatherings that involve large groups in close proximity for extended periods of time, finding that the secular gatherings face "similar or more restrictions" than religious gatherings. This ruling—and the subsequent Supreme Court ruling in *Calvary Chapel v. Sisolak*—seems to support the position that courts should give the government wide latitude to enact limitations on gatherings, but that the Court may step in if fundamental rights including religious free expression are impacted without sufficient justification. However, since both *South Bay* and *Calvary Chapel* denied request preliminary injunctions, the Court may ultimately take a different position on the merits.

Religious organizations have been frequent litigants seeking to overturn government restrictions that place limitations on the number of people permitted to attend religious worship services. These claims, grounded on claims that religious institutions and worshippers face unconstitutional free exercise and equal protection violations when religious gatherings are not considered essential or are subject to greater limitations than other businesses, have mostly been resolved in favor of the government, just like *South Bay* and *Calvary Chapel* cases. In several cases, however, courts have invalidated state orders that placed restrictions on religious worship that did not allow for sufficient alternatives. For example, a church in Kentucky successfully argued to overturn a state order prohibiting mass gatherings, including drive-in gatherings, which the court ordered the state to allow (*Maryville Baptist Church v. Beshear*, 2020).

Another analytical approach courts have used to evaluate state powers was demonstrated by the Fifth Circuit in *In re Abbott*. The court, in allowing a state law that suspended abortion services as not essential during the declared emergency, applied a more lenient and deferential view toward state power during an emergency, upholding state restrictions imposed due to an epidemic unless they constitute "a plain, palpable invasion of rights."

Regardless of jurisprudential interpretation, the vast majority of COVID-19 legal challenges decided so far have upheld government authority to implement movement restrictions, activity limits, and closures. For example, lawsuits brought by individual plaintiffs have argued that stay-at-home orders infringed on peaceable assembly, interstate travel, and due process rights. Most courts dealt with these challenges either by finding that emergency powers justified deference to state actions, or by finding that no fundamental rights were violated or discriminated against and state actions clearly met the rational basis standard.

Businesses alleging the government limitation on business operations violated their due process or equal protection rights also challenged state restrictions, with some plaintiffs maintaining that business closures were enacted without adequate process or hearing, or that closure orders constituted an unconstitutional taking by depriving business owners of property without just compensation. Courts rejected both of these arguments. Due process challenges failed because operating a business is not a

fundamental right and that state actions to protect public health easily met the rational basis test. Likewise, courts concluded that, even if takings claims were valid, the remedy would be damages and not an injunction against the closure order.

Specific types of businesses also challenged the definitions of "essential" used in state and local orders, alleging that such categories were either too narrowly construed or defined in such a way to create equally situated businesses differently. Again, the government succeeded in virtually all of these challenges, as courts routinely deferred to government judgments in determining which businesses were essential, including closures of factories, gyms, firearms sellers, and elective and non-emergency health care procedures. However, courts have split on the issue of whether state limits on abortion services can be upheld, with the Fifth and Eighth Circuits allowing the restrictions to stand and the Sixth, Tenth, and Eleventh Circuits enjoining enforcement of these restrictions (see Chapter 15).

A final type of legal challenge advanced the argument that state stay-at-home orders and movement and business restrictions exceed the authority of or delegation to executive branch officials promulgating these orders. Claims of this sort—brought by individuals, businesses, and legislatures—have not had much success, but the Wisconsin Supreme Court overturned statewide stay-at-home and business closure orders, finding they exceeded the statutory authority of executive branch officials (*Wisconsin Legislature v. Palm*, 2020). States should consider clarifying the scope of emergency powers to avoid these disputes in the future.

In sum, government COVID-19 orders restricting movement, imposing gathering limits, and closing businesses have mostly withstood legal challenges. Given the underlying circumstances of the pandemic and the current options available to reduce the spread of COVID-19, deference to government-imposed restrictions is appropriate. 🌞

Recommendations for Action

Federal government:

- Congress should fund and CDC should take the lead in developing a unified national approach to rapid testing, contact tracing, and isolation of people infected with SARS-CoV-2 to allow for targeted interventions for COVID-19 rather than widespread closures and limitations on physical interaction.
- Congress should appropriate significant, expanded, ongoing funding to support people who lose jobs or income due to state and local stay-at-home orders, business and school closures, and gathering restrictions and to allow them to comply with these restrictions.
- Congress should enact legislation that strengthens and extends legal protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to stay-at-home orders, business and school closures, and gathering restrictions.
- Congress should appropriate significant, expanded, ongoing funding to support small businesses and school systems that were forced to close due to closure orders.
- CDC should develop rigorous, scientifically-grounded, apolitical guidance for safe operation of schools, for safe operation of schools, business, and indoor and other settings to assist government officials in making risk assessment decisions to prevent the spread of COVID-19.

State governments:

- States legislatures should enact legislation clarifying the scope and authority of state officials to limit person-to-person interaction and impose closures, movement restrictions, gathering bans, and physical distancing requirements.
- Governors or other designated officials should promote physical distancing to reduce the spread of COVID-19 through incentives, supportive programs, and legal protections that allow compliance with distancing guidance and reduce inequitable disparate impacts of gathering restrictions and closures. If mandatory restrictions and closures are implemented, state officials should base these measures on the best available epidemiological and scientific evidence.
- Governors, through executive orders, and/or legislatures, through amending legislation should empower local governments to implement targeted and scientifically-appropriate interventions to respond to COVID-19, including the ability of local jurisdictions to impose more stringent limitations than the state on movement of individuals, gathering sizes, mask requirements, and closure of businesses, schools, and other activities.
- Governors, through executive orders, and/or legislatures, through amending extant housing, utilities, and employment laws, should extend protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to stay-at-home orders, business and school closures, and gathering restrictions.

Local governments:

- Local ordinances should allow for the imposition of targeted and scientifically-appropriate closure, movement, and physical distancing restrictions consistent with stopping the spread of COVID-19 in local communities.
- Mayors through executive orders, and/or local councils through amending extant housing, utilities, and employment laws, should extend protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to stay-at-home orders, business and school closures, and gathering restrictions.

Courts:

- Courts should maintain the long-standing deference given to executive actions in the face of a public health emergency while protecting the public from measures based purely on fear, prejudice, or misinformation.



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