

Legal “Tug-of-Wars” During the COVID-19 Pandemic: Public Health v. Economic Prosperity

Public Health and the Law

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Following a series of unprecedented public health legal responses to quell the spread of COVID-19 in the United States, politically-motivated calls to revive the national economy are rapidly emerging. All levels of governments are in various stages of re-opening following months-long stay-home and shelter-in-place orders that helped significantly lower infection rates and buy time for critical medical and public health interventions. “Essential” businesses (e.g., health care providers, groceries, manufacturers) are ramping up operations. “Non-essential” businesses (e.g., malls, casinos, cosmetologists) are opening their doors under limited capacity. Many schools are returning to in-person classes this Fall. Parishioners are streaming back to their religious entities within specific protections.¹

Still, the threat of COVID-19 pervades re-opening trends. Millions of Americans have been infected. Over 180,000 persons have died, including scores of front-line health care workers.² Tens of millions more Americans are vulnerable to a condition for which there is still no approved effective cure, vaccine, or cost-efficient treatment (for severe cases). Insufficient testing, surveillance, and contact tracing efforts compound the risks. Infections have risen in many states pursuing aggressive re-opening efforts. Conversely, economic impacts of the pandemic — including upwards of 50 million unemployed³ and thousands of businesses on the brink of failure — present their own crises despite substantial government bailouts.

The national quest to re-open America entails extensive “tug-of-war” battles within and between federal, state, tribal, and local governments asserting varying public health and economic positions. Private sector businesses claim rights to open while employees seek adequate protections. The public health repercussions of extensive re-opening efforts to normalize American society are unknown. Yet, as explained below, the legal consequences may change how public health laws and policies are interpreted, crafted, and balanced for years to come.

Federalism in Tailspin

From the onset of the pandemic, balancing federal and state powers has proven divisive. States’ re-opening strategies only intensify federalism debates. While states rely on emergency authorities underwritten by their constitutionally-vested police powers, federal leaders claim supreme authority, demanding cohesion despite strong state resistance. On April 27, 2020, for example, Attorney General William Barr warned states that the Department of Justice (DOJ) would legally intervene to advance federal re-opening efforts over conflicting state actions.⁴ Such gridlock muddies the boundaries of federalism to the detriment of Americans’ health.

Pandemic response efforts in Michigan are particularly illuminating. Reluctantly approving Michigan’s request for federal disaster relief, President Trump recommended the state be more proactive in its responses.⁵ He repeatedly criticized

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Governor Gretchen Whitmer's handling of emergency efforts, describing her as "clueless" and "inept."⁶ On May 1, the President implored her to end Michigan's stay-home order and give people "their lives back"⁷ as protesters assembled in Lansing. He then disregarded state law and company policy by partially touring a Ford Company plant on May 21 without a mask. Michigan Attorney General Dana Nessel, who previously insisted President Trump wear a mask during his tour, criticized his lack of respect

demic, states' extensive emergency powers and preemptive maneuvers present a "home court" advantage over local efforts, as exemplified in Pennsylvania.

Like other states, Governor Tom Wolf ordered a series of social distancing measures, including business closures and stay-home orders, in early March 2020. As substantial economic impacts of these measures surfaced, multiple local officials expressed concerns over continued business closures. In early May, sev-

with localities to assess preparedness innovations and effectively allocate resources.

Clash of the Sovereigns

As states struggle with localities to align re-opening activities, complexities also arise with tribes. Like states, tribal nations are working to protect the public's health while re-opening primary sources of revenue (e.g., community businesses, attractions, and casinos). States' health concerns related to tribal plans, however, implicate distinct legal issues given that tribes are sovereign, self-governing entities (often with federal backing).

On May 20, Connecticut Governor Ned Lamont criticized the Mohegan and Mashantucket Pequot decisions to re-open casinos as risky and premature.¹⁶ Though acknowledging tribal sovereignty, he threatened to retract the state-issued liquor licenses to the casinos and initiated a campaign warning visitors about COVID-19 exposure.¹⁷ Re-opening casinos presents increased risks of infection, especially among older customers, and the potential for regional spread through droves of patrons from surrounding jurisdictions.¹⁸ Although sovereign tribes may follow their own guidelines, leaders have agreed initially with Connecticut authorities to turn away buses of out-of-state visitors. Other states like California¹⁹ and Michigan²⁰ have also attempted to pressure tribes into cooperating with state directives.

Use of such tactics in the realm of COVID-19 may be treacherous for sovereigns. Resisting tribes face the loss of state support and diminution of inter-governmental relationships. States concentrating on sovereign tribes within their borders may later shift their focus to offending border states. Rare legal battles between states over essential public health responses could lead to precarious judicial decisions with lasting impacts.

Right to Open Doors

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for state public health protections.⁸ Days later, DOJ filed a statement of interest in a lawsuit against Governor Whitmer over her alleged arbitrary re-opening limitations affecting state businesses.⁹ Confrontational responses between federal and state authorities bely principles of cooperative federalism promoting the public's health through respective powers at each level of government.¹⁰

"Home Court" Advantage

Face-offs with federal authorities are not the states' only challenges. Across the country, local officials are raising "home rule" objections to complying with governors' emergency orders. Home rule refers to municipal self-governance on matters of mostly local concern, including some public health and safety concerns.¹¹ Routine debates arise over how extensively localities may act via home rule in contravention of state laws and policies. During the COVID-19 pan-

eral local district attorneys stated they would not prosecute violations of Governor Wolf's stay-home order.¹² His reaction was swift and powerful. On May 11, the governor threatened to (1) withhold distributions of federal recovery funds via the Coronavirus Aid, Relief, and Economic Security (CARES) Act¹³ to non-compliant municipalities; and (2) strip offending businesses of their health department and liquor licenses, as well as certificates of occupancy. He also intimated that offending businesses might risk loss of insurance for unlawful re-openings.¹⁴ Localities soon acquiesced.

Pennsylvania's experience reveals the hard-line stances states may take to quell local resistance to public health emergency powers. Gubernatorial emergency authorities may legitimately nullify local responses deleterious to the public's health.¹⁵ Yet, as with principles of federalism, states should work in tandem

non-essential businesses (e.g., gyms, salons, bars, restaurants, amusement parks) to re-open despite continued state-based orders limiting private sector operations. Fortune 500 companies like General Electric, American Airlines, and Tesla face diminished profits.²¹ Thousands of shuttered small businesses are on the brink of bankruptcy.²²

Multiple businesses are opening their doors despite public health concerns, challenging the constitutionality of their respective states' stay-home orders. Multifarious lawsuits brought by businesses, civil liberties groups, and customers allege governmental violations of equal protection, due process, and takings (among other claims).²³ California-based "The Gym," for example, has prominently displayed the U.S. Constitution in its windows while defying Governor Newsom's orders to limit its operations. Its owners threatened to sue the Governor and San Bernardino County officials asserting their "freedom to work," premised on an amorphous constitutional argument of their right to return to pre-pandemic operations to prevent further economic harm.²⁴

At first glance, businesses' claims resounding similar themes appear specious. There is no definitive, constitutional "right to work."²⁵ Emerging COVID cases, however, evince renewed principles of economic due process underlying government denials of licenses, certifications, or other access to lawful occupations.²⁶ Innovative judicial arguments are unlikely to outweigh explicit governmental public health efforts to control COVID-19 infections.

Quest for Employee Protections

As businesses re-open, employees face a difficult choice between (1) returning to their workplaces and risking COVID-19 exposure, or (2) refusing to return and losing their jobs. Across the U.S., employees have filed thousands of workers' compensation claims for on-the-job COVID-19 exposures since re-opening efforts commenced in early May 2020.²⁷ Relief is typically limited to employees who can definitively prove they

contracted COVID-19 at work — a heavy burden.²⁸ Employees have sued employers on additional legal claims, including wrongful termination, workplace discrimination, negligence and intentional torts, and public nuisance.

On May 19, McDonald's workers filed a class action suit in Illinois state court, alleging the corporation breached its duties to (1) provide them with adequate hand sanitizers, masks, and gloves, and (2) notify them when coworkers test COVID-19 positive (despite health information privacy concerns). They also raised a public nuisance claim framed on extensive public health consequences of COVID-19 spreading from their restaurants absent further precautions. Employees demand McDonald's revise its re-opening policies, including requiring customers to wear masks. In a motion to dismiss, the company asserted the rising "flood" of litigation against businesses could carry economic setbacks.²⁹

Concerns over COVID-19 litigation led Utah lawmakers to immunize businesses from employees' related claims.³⁰ U.S. Senator Mitch McConnell (R-KY) has called for similar federal protections for businesses complying with CDC's re-opening guidelines.³¹ Legislation protecting economic interests may facilitate re-opening efforts, but dissuade employers from taking viable steps to mitigate COVID-19's spread to the detriment of employees and their families.

Aligning Church and State

The traditional premise that American constitutional law separates "church" and "state" is severely challenged by COVID-19 social distancing efforts. Religious enterprises present significant risks of COVID-19 infection through extended, large gatherings (>10 persons) in closed settings. Most states have applied rigid closure policies to religious enterprises, lending some objectors to claim violations of First Amendment and statutory rights to free exercise and assembly. Corresponding litigation is supported by President Trump, DOJ, and some state/local officials.³² They stress how

the Constitution carves out special protections for religious entities from strict social distancing measures.

In reality numerous Supreme Court cases affirm that (1) First Amendment rights to assemble may be temporarily restricted to protect public health and safety;³³ and (2) freedoms of religious expression do not allow persons to engage in publicly-harmful behaviors.³⁴ Content-neutral public health laws that do not target specific religious groups and leave alternative channels open for communication are constitutionally-sound. Still, on May 19, DOJ communicated to California Governor Newsom that the state's restrictive re-opening strategies affecting religious entities are an affront to First Amendment freedoms.³⁵ Ten days later, U.S. Supreme Court Chief Justice John Roberts opined in a split decision that California's approach comports with established First Amendment jurisprudence.³⁶ Framing the Court's holding within the limits of separation of powers principles, the Chief Justice noted that religious establishments are distinguishable from other entities due to the higher risks of infection among large gatherings.

Conclusion

Unprecedented efforts among states, tribes, and localities to implement social distancing to lower COVID-19 cases are giving way to ad hoc, inconsistent re-opening efforts to reboot the economy at the insistence of federal authorities. Emerging legal issues expose the need to craft sustainable plans for disease mitigation that also safely incorporate economic activities. Reaching this threshold presently requires ongoing public health surveillance, reporting, and testing, as well as adherence to re-opening guidance grounded in public health and safety. Achieving these goals long-term may require reassessments of the triggers, scope, and extent of social distancing powers.

Note

The authors have no conflicts to disclose.

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