



The Supreme Court Should Not Politicize Valid Public Health Orders

By Stephanie Wylie September 2, 2020

As COVID-19 cases began to overwhelm hospitals in the United States, state and local governments enacted public health orders in order to slow the rate of infection. These measures have ranged from stay-at-home orders and mask mandates to business closures and bans on large gatherings. All in all, 42 states issued stay-at-home orders for their residents.¹ Yet despite the broad public support for such public health orders, businesses and religious groups have brought multiple lawsuits in response.² Most of these challenges have either contended that the regulating body does not have authority to issue the order, that the order was discriminatory, or that the order constituted a regulatory taking. Moreover, these challenges largely have been partisan in nature rather than in the interest of public health. The legal validity of these orders is also supported by a long history of precedent showing that policing powers reside with the state, with courts consistently ruling that these powers include instituting protections during public health emergencies.

The COVID-19 pandemic is not over.³ In fact, as states have begun to lift public health orders, rates of coronavirus cases have started to rise.⁴ As a result, many local and state leaders have begun reinstituting some public health orders, likely increasing the number of legal challenges that will be filed in the courts.⁵ In order to ensure the safety of Americans, it is critical that courts follow the law and not succumb to partisan political arguments that are at odds with case law and scientific reality. However, it is also important for courts to be attentive to the potential for states to abuse their broad emergency authorities—especially with an election looming.

Supreme Court precedent regarding states' police powers

The U.S. Supreme Court has given states wide latitude in terms of their police powers, which provide state and local governments the authority to take action against impending threats to the safety of the public.⁶ Generally, the government must first declare an emergency.⁷ Once an emergency is declared, state and local governments have the ability to issue orders to protect public health and the power to restrain certain liberties.⁸

The 1824 Supreme Court case *Gibbons v. Ogden* distinguished between the authority given to the federal government and the authority of the state, holding that police powers largely belong to the state.⁹ Writing for the majority, Chief Justice John Marshall stated that these powers included the ability to impose isolation and quarantine orders.¹⁰ Almost a century later, in 1905, the court weighed in on the state's authority to impose public health orders in the case *Jacobson v. Commonwealth of Massachusetts*, which concerned a law mandating smallpox vaccinations.¹¹ The question for the court in this case was whether the state had the authority to issue such a mandate under the 14th Amendment.¹² The court stated that it did, finding that a “community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”¹³

Jacobson remains the principal case setting the legal standard for states' police powers and has been cited to uphold public health orders in many of the cases described later in this issue brief. However, the ruling does not give states carte blanche when enacting public health orders, as they are not allowed to exercise their power in an “arbitrary” or “unreasonable manner.”¹⁴

What constitutes a valid public health order?

The majority of the public health orders enacted during the pandemic have been valid orders necessary for ensuring public safety. Accordingly, most challenges are being brought to court on ideological grounds and not for legitimate legal reasons. That said, some public health orders have been issued for political ends that wrongfully abridged the public's civil rights; moving forward, it will be important to ensure that public health orders are not used in invalid ways.

Public health orders must have a “real and substantial” relation to protecting public health.¹⁵ While there is strong case law supporting states' ability to issue such orders generally, the courts have struck down orders that are not reasonably related to public health. For instance, a federal district court struck down a San Francisco public health order in 1900 that was issued primarily to discriminate against the city's Chinese population.¹⁶

In a more recent example, as the COVID-19 pandemic took hold, multiple states used the public health emergency as an excuse to curtail abortion care during the early months of the crisis.¹⁷ Notably, in Texas, people's ability to schedule an abortion changed almost daily as challenges to the overly broad order made their way through the courts.¹⁸ These public health orders wrongfully claimed that abortions were nonessential and a danger to public health.¹⁹ Many of the states that implemented public health orders banning abortion had previously passed laws to attempt to shut down abortion clinics or essentially make the procedure illegal altogether, suggesting that limiting care was the true motivation of these orders—not mitigating the effects of the pandemic.²⁰

In a concurrence finding Texas' abortion ban unconstitutional, Judge James L. Dennis wrote that Texas' "stated desire to enforce [the ban] against medication abortions despite the executive order's apparent inapplicability is a strong indication that the enforcement is pretextual and does not bear a 'real or substantial relation' to the public health crisis we are experiencing."²¹ However, in a later 2-1 decision that was split along ideological lines, the 5th Circuit Court of Appeals contorted itself, using *Jacobson* to hold that Texas could curb abortion access.²² Facing additional legal challenges, the governor eventually relented and allowed abortion care to proceed in the state.²³

While public health orders are widely held to be constitutional and are a necessary tool during pandemics, there is clearly the potential for states to abuse them for political purposes. Unfortunately, such attempts can be strengthened when partisan jurists act to further political goals that align with their own rather than issue decisions based on longstanding precedent and public health.

Elections are one major area of concern regarding the potential for bad actors to twist public health orders to serve personal or political aims. Targeted public health orders, for example, could be abused to suppress the vote or hinder attempts to make voting safer and more convenient during the pandemic. Moreover, public health orders could be used to close in-person voting locations or Department of Motor Vehicles offices, where many Americans register to vote or acquire the voter identification required in some jurisdictions.²⁴ Given accelerating efforts to suppress the vote in many areas of the country, this abuse of authority is a real possibility.²⁵ It is critical that courts ensure that public health powers are used to ensure public safety, not to undermine democracy.

Despite these concerns, the majority of challenges raised have been in response to valid public health orders.

Recent challenges to valid public health orders in response to COVID-19 pandemic

Many states that instituted public health orders in response to the pandemic faced lawsuits challenging these orders' constitutionality. These lawsuits raised various issues, including whether the government body instituting the order had the authority to do so, whether the orders were discriminatory, and whether the orders constituted a regulatory taking.

Suits challenging authority to issue orders

In Wisconsin, Republican lawmakers challenged a statewide stay-at-home order, arguing that the secretary of state did not have the authority to issue the order.²⁶ In a controversial decision, the Wisconsin Supreme Court struck down the public health order, finding that the secretary of state did not follow proper procedure when issuing the order.²⁷ Many jurists and experts have argued, however, that this case was decided incorrectly, stating that the public health order should have been upheld because the ruling did not recognize the broad emergency powers available to states and left Wisconsin without any statewide public health guidelines.²⁸ Even so, the case was not appealed to the federal Supreme Court.

Suits challenging orders as discriminatory

In June, the Illinois Republican Party appealed to the Supreme Court requesting an emergency injunction against the governor's order restricting gatherings to 50 or fewer people, as it disrupted their plans for a July 4 picnic.²⁹ Represented by the conservative law firm Liberty Justice Center, the Illinois Republican Party argued that the restrictions violated their First Amendment rights and that gatherings of religious groups and the Black Lives Matter protests were treated differently than their picnic.³⁰ In response, the governor's office stated that the lawsuit was merely an attempt to "scor[e] political points and criticiz[e] civil rights protests supporting the Black Lives Matter movement."³¹ The district court had previously denied the motion for an injunction, noting that the Illinois Republican Party had not provided evidence of discrimination; however, a unanimous panel at the 7th Circuit refused to stay the district court's ruling.³² Ultimately, Justice Brett Kavanaugh rejected the application.³³

There have also been multiple occasions in which religious groups raised challenges against public health orders, with three notable cases out of Illinois, California, and Nevada making their way to the Supreme Court.

In the case from Illinois, several churches argued that public health orders issued by the governor were discriminatory.³⁴ These churches were represented by the conservative litigation group Liberty Counsel.³⁵ When lower courts upheld the orders, finding them to be reasonable, the churches appealed to the Supreme Court.³⁶ Yet before the court issued a decision, the governor removed the mandatory public health order as applied to the church, rendering the issue moot.³⁷

In California, a church appealed to the Supreme Court to issue an injunction against the government's public health orders.³⁸ The church argued that the public health orders were discriminatory since different restrictions were placed on businesses.³⁹ The court upheld the restrictions, finding that they were not discriminatory and treated similarly situated institutions, such as concert venues and movie

theaters, the same as churches.⁴⁰ However, the decision was narrowly decided, with President Donald Trump’s appointees to the bench siding with conservative Justices Clarence Thomas and Samuel Alito to oppose the decision.⁴¹

The Supreme Court also rejected a challenge by a Nevada church against the governor’s public health orders.⁴² The church, represented by the conservative legal organization Alliance Defending Freedom, argued that the restrictions on attendance size were discriminatory and violated their First Amendment rights.⁴³ The 9th Circuit Court of Appeals had denied the church’s request for an emergency injunction, citing the Supreme Court’s decision against the California church.⁴⁴ Additionally, the Nevada District Court previously upheld the state’s policies, finding that church attendance was more analogous to that of venues such as movie theaters, which have similar restrictions.⁴⁵ Ultimately, the Supreme Court’s decision was decided along the same lines as the California case, with Chief Justice John Roberts joining Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan to follow long-standing precedent and uphold the public health order.

Suits alleging a regulatory taking

Challenges to public health orders based on a regulatory taking claim that the government is depriving the litigants of their economic property rights. Typically, government deprivation of economic property rights without compensation is considered a regulatory taking under the Fifth Amendment’s takings clause.⁴⁶ However, the Supreme Court grants governments leeway for temporary restrictions. In the 2002 case *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, for example, the court held that a 32-month delay on land development was a temporary restriction and therefore did not constitute a taking.⁴⁷

More recently, a lawsuit challenged Pennsylvania’s stay-at-home order, which the plaintiffs argued was a regulatory taking.⁴⁸ After the Pennsylvania Supreme Court found the order to be “reasonably necessary” due to the public health emergency, the litigants appealed to the U.S. Supreme Court.⁴⁹ The court ordered Pennsylvania to respond to the suit, but ultimately declined to take up the case and left the order intact.⁵⁰

Conclusion

The ability of state officials to issue public health orders is supported by Supreme Court precedent regarding police powers given to state authorities during emergencies. Moreover, the vast majority of public health orders enacted during the coronavirus pandemic have been necessary and have even saved hundreds of thousands of lives, while lawsuits attempting to overturn the orders have largely been driven by ideological organizations.⁵¹

Still, while public health orders remain an effective and important tool to combat public health emergencies, in the months to come, any future challenges should be carefully examined. There remains the potential for political actors to use these orders for their own aims, as was the case in Texas. Courts must safeguard against these types of abuses of authority—particularly with elections looming on the horizon—while also ensuring public safety.

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Endnotes

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