

## COVID-19 AND THE US CONSTITUTION

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The COVID response in the United States has been extremely poor from a public health perspective. The country has the highest number of deaths in the world, and after Chile is the large country with the most cases per capita, as of this writing. The President has pointedly decided not to wear a mask in public, joining such luminaries as Jair Bolsonaro and Alexander Lukashenko who are coronavirus deniers. State and local governments have in many cases undermined mask-wearing, which is widely accepted as a prophylactic measure. And American citizens successfully pressured their governments to reopen quickly, leading to a major spiked in cases. Surely this is an enormous governmental failure on a scale rarely seen in democratic countries.

Yet from a constitutional and democratic perspective, the failure may not be so great. While we can say with confidence that early lockdowns would have prevented spread of the pandemic, once the virus arrived on a mass scale, it is not clear what the universally optimal policy is, in terms of the severity of a lockdown. Surely a complete and total lockdown such as occurred in Wuhan would be good for eliminating the virus, but it also had significant costs in terms of the associated economic shutdown and in restrictions on civil liberties. Quarantines also create their own risks and put pressure on mental health. A pandemic response has to balance public health, economic, and libertarian considerations, with lots of complicated tradeoffs. In a democracy, the balance should be determined by political processes, informed by technical information.

Despite all its messiness, and its poor policy outcome, the coronavirus response in the United States has been successful in responding to the preferences of the public. This public is highly misinformed and distrustful of expertise. It important to remember that the United States is in something of an epistemic crisis, in which large segment of the population believes in

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conspiracy theories and distrusts science as a matter of course. We also have a longstanding libertarian tradition distrustful of all government as a matter of principle. From a public health perspective these people should be ignored. But from a democratic perspective they should not. The United States has had an extended constitutional conversation, involving state governments, courts at both states and the federal level, legislatures, and the public itself, about the response, and it surely is not a very good advertisement.

From a comparative perspective, the United States Constitution, drafted in 1787, is one of a small number without any provision for a state of emergency. The drafters of the document were skeptical about such provisions, and thought law could do little to regulate crises. Indeed, they feared that executives might use the emergency provisions to consolidate power, a phenomenon that has come to pass in many other constitutional systems. The absence of clear provisions on emergency has meant that the ordinary rules of governance have remained in place during the COVID-19 pandemic.

In the federal system of the United States, the “police power” is primarily located at the states, giving them the authority and duty to protect and regulate health and safety. These powers are limited by federal constitutional rights, as well as acts of Congress within the sphere of its own authority. All states have emergency statutes that allow the Governor, the chief executive of the state, to call an emergency and to take extraordinary steps thereafter for a limited period of time. These actors were the primary determiners of policy response in the COVID-19 pandemic, and their solutions varied a good deal. In highly urban states like California, the response was early and strong. In some southern states, the response was anemic. These states have become the primary locus of the second wave of the virus.

Once governors began to impose lockdowns, a dialogue followed about the nature of the response. Owners of gun shops challenged the application of general lockdown orders to their businesses, claiming that the constitutional right to bear arms contained in the Second Amendment meant that they should have special protection in this regard. Faced with this argument, many cities and states reclassified gun shops as “essential businesses” that could remain open. Another challenge was to certain state laws that discriminated against out-of-state travelers, such as Rhode Island Governor’s order to stop all cars with New York license plates. The next major set of challenges came from religious groups, which claimed that bans on gatherings of more than ten people, for example, infringed on freedoms of worship. In

one case, a governor refused to allow an Easter service in which worshippers would remain in their cars, prompting a lawsuit. The Sixth Circuit Court of Appeals ruled that lockdowns that singled out religious services without comparable restrictions on secular activities violated the First Amendment rights to free exercise of religion.

The Federal government's role in pandemic response is most apparent when it comes to outward facing policies like immigration controls, as well as coordination with international organizations. The Trump administration instituted travel bans, fairly early on. Using several statutory authorities, the Department of Health and Human Services declared a state of emergency on January 31, allowing expanded telemedicine and the release of national stockpiles of masks and other personal protective equipment. President Trump invoked the Defense Production Act, which allows the government to order private firms to prioritize its own orders and to control distribution. In March he declared an emergency under a statute, allowing the Federal Emergency Management Agency to get involved.

As the lockdowns dragged on and the economic carnage became apparent, protestors began to chafe under the restrictions, and demonstrations emerged. Most came from the political right, especially in rural areas who faced little real risk of the virus, but some came from the so-called "anti-vaxxers" on the political left, who oppose the taking of vaccines. Some lawsuits were filed in April but courts were generally unwilling to question the decisions of the elected representatives. As time went on and the economic costs mounted, the President announced that the pandemic response had to end and the economy had to re-open. Of course, under the federal system this was not his decision. Governors seemed to ignore the President: Republicans like Georgia's Brian Kemp re-opened even before Trump gave the green light; Democrats like New York's Andrew Cuomo and California's Gavin Newsom kept restrictions in place, and as a second wave of the virus hit in June, ramped up some restrictions again.

As a practical matter, the lockdown restrictions on large assemblies became impossible to enforce after the emergence of mass demonstrations in May, prompted by the killing of a black man named George Floyd by police in Minneapolis. As these protests spread around the country, police found themselves unable to enforce restrictions on mass gatherings. Indeed, the presence of the lockdown demonstrators, only a month earlier, may have made the government less able to respond to the anti-policing protests. After all, the First Amendment prohibits the government from favoring one type of speech over another. Indeed, a Federal District Court in New York enjoined the state from enforcing prohibitions against religious services, point-

ing out the Mayor Bill de Blasio appeared without a mask at a demonstration that far exceeded the 25-person limit imposed by state law.<sup>1</sup>

Politically, many Americans seemed to have a strong aversion to the wearing of masks, a simple step that would do much to prevent the spread of the disease. The Governor of Nebraska threatened to withhold funds from any counties that *did* require masks. Judges began to get involved in calibrating the response: a federal judge in Michigan, for example, held that there was no rational basis for keeping gyms closed, and ordered the Governor to reopen them. But this order was stayed by the Sixth Circuit Court of Appeals.

Most of the state statutes allowing Governors to take emergency measures have temporal limitations, typically 30 days. After the initial period expired, most governors extended the lockdowns by unilateral order. Some lawsuits challenged these decisions but none to my knowledge has been successful. The standard of judicial review for all these matters was whether or not the government had a “rational basis” for its decision, which is a very easy standard for the government to meet.

A special issue arose with regard to elections, a challenge faced by many countries around the world. By my count, the majority of countries with elections scheduled during the pandemic decided to postpone them, but some went ahead. A major conflict arose in the State of Wisconsin, which has been ground zero for Republican efforts to lock in their power. Having drawn the lines for electoral districts, the Republicans hold 65% of the seats in the State Assembly despite obtaining a minority of the vote. They have also captured the State Supreme Court, which is elected on a partisan basis, as its true of many American states. The elections scheduled for May 2020 included a primary for the presidential election, and also a vacant state supreme court seat. With trouble find poll workers, the state’s Governor Tony Evers, a Democrat, sought to postpone the election. But the legislature, controlled by Republicans, disagreed. There were major technical problems with absentee ballots not being mailed in time. A federal district judge allowed the Governor to extend the period by which absentee ballots could be postmarked, but the Republican party challenged this decision. In an extraordinary intervention, the US Supreme Court by a vote of five to four overturned the District Court decision, saying the election had to go on just as scheduled. People stood in long lines to vote, and several dozen caught coronavirus as a result of the election, but it led to the defeat of the Republican candidate for the supreme court.

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<sup>1</sup> Soos v. Cuomo, 1:20-cv-651, (S.D.N.Y. 2020).

The pandemic has involved judges deeply in election law, leading them to engage in robust review. One major development is that they seem to be affirmatively requiring states to be more active in guaranteeing participation as if that is a positive right rather than a right to be free from government interferences. As Rick Pildes has noted, courts are thus saying that laws that would be constitutional in normal times are unconstitutional during the pandemic.<sup>2</sup> Federal and state courts, he documents, have ordered state election officials to change deadlines, to hold elections which they had decided to cancel, and to allow all voters to cast absentee voting in states in which those ballots were limited. This is a very unusual development because normally American courts do not consider government omissions to be a source of constitutional violations. For example, the Sixth Circuit held the rules requiring a certain number of signatures to appear on a state ballot were now a significant burden on the right to vote. Virginia's requirement that an absentee ballot be signed by a witness would not be a burden in normal times, but in light of the pandemic became a burden.<sup>3</sup> These are significant changes, and potentially important given the difficulties that will accompany the November 2020 presidential election. That election is likely to be extremely messy, and if it close, may end up turning on a court decision involving technical issues of election law in one or another state. This will be a moment of great risk for our constitutional democracy, which otherwise has survived the challenges of the Trump years fairly well.

The best way to characterize the American constitutional response to the coronavirus pandemic is as one of a dialogue among governmental institutions. The primary actors have been state governors, and they have generally been very popular during this period. Loud and vocal groups have challenged them, mainly about the duration and extent of lockdowns. Freedom of assembly was in great evidence throughout the period of the coronavirus pandemic, as was freedom of speech. Various coronavirus deniers were allowed to promulgate their views, which seem to be popular among a large portion of the electorate.

Courts have been active in monitoring governmental measures, and in some cases have stepped in to ensure the protection of constitutional rights. In some states, legislatures have pushed back against the governors, channeling popular discontent. This presumably informed the decisions to grad-

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<sup>2</sup> Richard H. Pildes, *The Constitutional Emergency Powers of Federal Courts* (manuscript).

<sup>3</sup> *League of Women Voters of Va. v. Va. State Bd. Of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at \*8 (W.D. Va. May 5, 2020).

ually lift the lockdowns, but the exact rules vary widely across the fifty states. This is of course appropriate in a large and diverse country.

The response has been very politicized, in keeping with the current state of the American polity. A large and powerful minority is deeply distrustful of science, experts and government. So while the constitution has shown its efficacy in allowing a response that reflects the popular views, that response has also led to massive number of needless deaths. For this, we cannot blame the Constitution, but rather ourselves in the current state of the polity.