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The constitutional immune system kicks in

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All 50 states have begun to return to normal life. Measures to curtail the spread of COVID-19 are gradually lifting as various milestones are met, and though ordinary economic and social activity is still weeks or months away, we're moving — however haltingly and with much bickering, hyperbole, and mutual recrimination — in that very welcome direction.

We're also going to court, with suits against lockdowns appearing on the docket in multiple states. This is good news, even if, like me, you've generally supported a robust public health response to this pandemic. We need this accountability, and we need it now, as fears rise about state overreach and the risk of permanent changes to our governance and society.

In the early days of COVID-19, legal experts predicted court challenges to stay-at-home orders and distancing mandates would generally fail. "The idea that you're going to walk into court and object vehemently and successfully against known, proven public health social distancing measures that are being employed currently is not a winner," Arizona State University law professor James Hodge told *Bloomberg Law* in March.

That view wasn't unwarranted, as police power, the authority under which states and municipalities have issued pandemic decrees, has historically permitted quarantines, travel restrictions, and the like to control epidemics. In New York City's 1916 polio epidemic, for example, families with infections were quarantined and publicly identified; movie theaters and other public gathering spaces were closed; and neighboring locales forbid travel from affected areas. Philadelphia took similar steps when afflicted with yellow fever in 1793 (tragically, quarantine was useless for a disease doctors did not yet realize was spread by mosquitoes). Cato Institute legal scholar Walter Olson reports he has been unable to find a single successful court challenge to "prohibition on public assemblies and closure of businesses" commonly used to fight the 1918 flu epidemic. And, in an extreme case, "Typhoid Mary" Mallon was essentially imprisoned for the final three decades of her life after she repeatedly refused to take steps to stop spreading her deadly infection.

But police power has never been unlimited in America. So, as Texas Supreme Court Justice James Blacklock wrote at the beginning of this month with the concurrence of several colleagues, the longer this pandemic lasts and the more we know about the virus, the less legal durability sweeping public health measures will have. "As more becomes known about the threat

and about the less restrictive, more targeted ways to respond to it, continued burdens on constitutional liberties may not survive judicial scrutiny," Blacklock said.

Some of those burdens have already succumbed. A state judge on Wednesday issued an injunction against Ohio's stay-at-home directive as it applies to gyms and health clubs, a group of which have brought suit. The ruling raised multiple objections to the order, which was found to exceed the "quarantine and isolation" authority of the Ohio Department of Health because it went well beyond the definitions of quarantine and isolation in Ohio law. The Health Department's director "has acted in an impermissibly arbitrary, unreasonable, and oppressive manner and without any procedural safeguards," the decision held.

Before the Ohio case, the Wisconsin Supreme Court struck down the state's lockdown order on procedural grounds. Because the restrictions imposed by acting Secretary of Health Services Andrea Palm include criminal penalties, the court said, they are a "rule," not an "order." That means they require implementation procedures (including "a preliminary public hearing and comment period") which Palm neglected to perform. The Oregon Supreme Court is considering an appeal from the governor after a lower court invalidated her pandemic orders, arguing citizens "can continue to utilize social distancing and safety protocols at larger gatherings involving spiritual worship, just as grocery stores and businesses deemed essential by the governor have been authorized to do."

Similar cases are underway in Illinois, Kentucky, Michigan, and elsewhere. California alone has more than a dozen cases active, four of them concerning churches and other religious gatherings. What makes California's prohibition on religious assemblies illegal, litigants contend, is it curtails constitutional rights and, crucially, isn't content-neutral. As the Justice Department's Civil Rights Division noted Tuesday in a letter to California Gov. Gavin Newsom (D), "government may not impose special restrictions on religious activity that do not also apply to nonreligious activity." But the second phase of Newsom's re-opening plan prohibits in-person church gatherings, even with social distancing, while permitting in-person gatherings at restaurants, movie studios, and other nonreligious businesses. The DOJ letter doesn't threaten legal action, but it may preview rulings to come in California's church-related cases.

The court challenges that stand a chance aren't those questioning state authority to take *any* pandemic action at all. Again, use of police power in public health crises is not novel, legally controversial, or inherently unconstitutional. (The Ohio ruling doesn't exempt the re-opening gyms from following hygiene and distancing regulations, and, along with the Wisconsin decision, it acknowledges statutory authority for public health emergency measures.) Rather, these cases tend to concern allegations of inconsistent or discriminatory applications of that power (as in Oregon and California), disregard for clear legal definitions and limits (as in Ohio), executive branch overreach (as in Michigan, Wisconsin, and Illinois), or undue prioritization of public health orders above constitutional rights (as in Kentucky).

These are needed correctives, a way to protect the health of our constitutional system while we protect the health of our people.