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# An Uphill Legal Battle Against Lockdowns

Adam Freedman

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The Wisconsin Supreme Court's recent decision overturning coronavirus-related restrictions has energized opponents of state lockdown measures. Legal challenges are piling up in other states, too—but most will face an uphill battle in the courts.

In response to the Covid-19 pandemic, most states imposed lockdown measures including stay-at-home orders, mandatory quarantine for visitors, and restrictions on travel, social gatherings, and nonessential businesses. All 50 states have started relaxing measures—possibly mooting future lawsuits—but existing challenges continue through the courts. Those cases generally fall into two categories: attacks on the procedural basis for the orders and claims that the orders violate federal constitutional rights.

The Wisconsin case was a procedural challenge. The state legislature filed the lawsuit, seeking to nullify the "Safer at Home" order issued by the state's top health official, Andrea Palm, on the grounds that she lacked the authority to impose such a sweeping measure unilaterally. The ruling turned on whether the Safer at Home policy constitutes a "rule" under state law, which requires the executive to follow certain procedures involving legislative consultation.

Wisconsin's decision isn't binding on courts in other states, but it points to the potential vulnerability of sweeping restrictions imposed by executive fiat. In the pandemic's early days, such orders may have been more easily justified by the need for swift action. As time passes, however, courts may become more sympathetic to arguments that legislation or formal rulemaking should replace the more ad hoc orders of March and April.

Constitutional challenges to state lockdown orders—including lawsuits in Pennsylvania and Michigan—have proved unsuccessful. This isn't surprising. Under America's federal system, the authority to protect public health is traditionally included among the states' inherent "police powers." In *Gibbons* v. *Ogden* (1824), Supreme Court Chief Justice John Marshall observed that such powers extend to quarantine measures and "health laws of every description." As legal scholar Walter Olson recently observed, the Constitution's Framers lived at a time when states and localities often ordered quarantines to combat yellow fever and other diseases. It's unlikely that those who ratified the Constitution would have understood the document as interfering with the ability to enact such measures.

Successful challenges to quarantine laws are rare. In 1900, a federal district court struck down a San Francisco ordinance that sealed off Chinatown—but not adjacent areas with non-Chinese residents—to protect against bubonic plague. The court held that the racially discriminatory

nature of the quarantine violated the Equal Protection Clause of the Fourteenth Amendment. Today, the much-publicized lawsuit by electric-car maker Tesla against California's Alameda County is mainly founded on a claim of unequal treatment—namely, that Tesla's plant in Fremont is subject to restrictions that don't apply in the state's other counties.

More often, courts have sustained quarantine laws. In 1902, in *Compagnie Francaise de Navigation a Vapeur* v. *Louisiana Board of Health*, the Supreme Court upheld a Louisiana law requiring passengers on incoming ships to be quarantined as a legitimate exercise of the state's police power. Subsequent federal cases have tended to side with state officials defending lockdown measures.

The current cases challenging state lockdown orders generally assert violations of one or more rights protected by the Fourteenth Amendment: liberty, property, speech, assembly, and free exercise of religion. Lockdown orders often do place a burden on such rights, but courts will likely uphold the restrictions if the state is acting in furtherance of a "compelling interest" and has enacted "narrowly tailored" restrictions. In a 2016 case, *Hickox* v. *Christie*—involving New Jersey's mandatory quarantine of incoming visitors who may have been exposed to Ebola—a federal district court rejected a Fourteenth Amendment challenge brought by an American nurse detained at Newark Airport for 80 hours upon her return from Africa.

Though such precedents remain persuasive, the wild card in the Covid-19 cases may be the requirement that state action be "narrowly tailored." Past cases dealt with quarantine orders targeted at those who were infected or likely to have been exposed, whereas recent state regulations include not only quarantine but also shelter-in-place and other restrictions. Still, courts tend to defer to state authorities under emergency circumstances. As the judge asserted in *Hickox*: "the State is entitled to some latitude in its prophylactic efforts to contain what is, at present, an incurable and often fatal disease." If states continue the gradual easing of restrictions, it's unlikely that courts will find that they violated constitutional rights during the pandemic's early months.