



## President Trump Cannot 'Order the Nation Back to Work'

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Can the president “order the nation back to work”? On Wednesday, Real Clear Markets editor John Tamny—a friend, ski pal, and former Cato colleague—quoted me often in support of his argument that my current Cato colleague and friend, [Walter Olson](#), was mistaken when he wrote in Tuesday’s *Wall Street Journal* that the president doesn’t have the constitutional power to reverse the recent lockdown and economic closure orders that most state governors have enacted or the power to order the nation back to work.

With so many Americans suffering not only from the coronavirus contagion but from the closures governors have ordered, John’s frustration is understandable—and, to his credit, he wrote with due modesty that his argument is not “based on the presumption of constitutional expertise.” Rather, it’s based on my contention that under our system of government, freedom comes first, government second, to secure our freedom. I stand by that contention, but properly understood and implemented, it’s perfectly consistent with Wally’s argument. Here’s why, starting with a quick look at the basic theory of the matter.

The Constitution makes federal law supreme in its domain, to be sure, but it divides powers between the federal and state governments, leaving most powers with the states or, as the Tenth Amendment says, with the states or the people. Federal powers are thus limited. You’d never know that today, of course, not since the New Deal Supreme Court misread the Constitution after President Franklin Roosevelt threatened to pack the body with six new members, thus opening

the door to today's federal Leviathan. Still, at least in principle, Congress has only 18 legislative powers or ends, as enumerated in Article I, section 8. Everything else belongs to the states, including, especially here, the general "police power," which governors wield to protect the rights, health, and safety of their citizens. That's why most criminal law, for example, is enacted and enforced by the states and state executive agencies. Again, in principle, the federal government, including the president, has limited authority over such matters because there is no general federal police power—Wally's main point.

Responding to Wally's claim that the president doesn't have the power to reverse the governors, John cites me arguing that state powers are not absolute: The Founders did not enshrine "mob rule locally," he writes, for states cannot violate our constitutional rights. Thus, his argument "is about individual freedom and property rights," including "the right of Americans to get back to work." And he adds, with no little merit, that "free people fearful of contracting a virus should be free to not patronize businesses exercising their natural right to reopen." The economic closures so many governors have imposed under their police power have violated those rights, he concludes, citing the famous 1905 *Lochner* decision upholding the right to freedom of contract, which the New Deal Court effectively overturned.

Notice, however, that even if the courts were to strike down a state statute, as in *Lochner*, or a governor's order, as here, that would not empower the *president* to act in the way John envisions. It would simply lift the state restrictions. But notice too that the rights John has in mind are themselves not absolute. That is true of core constitutional rights: Look at the exceptions to free speech, for example, to say nothing of the right against unreasonable searches and seizures—though there the word "unreasonable" already qualifies the right. Here, however, we are dealing with risk and a great deal of uncertainty about the risk. This is an area where, quintessentially, state police power to regulate the health and safety of citizens comes to the fore. And it's an area where reasonable people can have reasonable differences. What is the "right" speed limit?

Extreme risk-takers and risk-averse people will rarely be satisfied with a given state's determination of our rights in such domains, which points to one of the virtues of our federal system, as Wally notes. That was evident initially in the present case as different states followed different paths to the onset of the coronavirus. And for sure, the tendency of government officials is to err on the side of safety, as we're seeing. That's why leaving more decisions about handling risk to individuals, as John suggests, has merit. After all, the "essential" businesses that have been left to run have generally adjusted to the risk at hand without the heavy hand of government coming down upon them. There's doubtless much more room for expanding that category of businesses than we see now.

But this regulation belongs to the states, for the practical reasons Wally goes on to cite. It is not for the remote federal government, nor for the courts, except in egregious cases, for they lack the expertise or the power to manage such matters. There will reach a point at which the costs of shutting down the economy will exceed those of trying to avoid the virus, at which point we'll see political pressure brought to bear on governors and we'll start to see them peel away the

draconian restrictions they've now imposed upon us. Our law sets the framework for this, but politics determines how it plays out.

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