

Newsweek

Broad Lockdowns Are No Longer Constitutionally Justified

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Now into the third month of the coronavirus crisis, Americans are getting restless. Having for the most part accepted in March that fighting a pandemic with incomplete data required taking drastic steps, they now want the benefit of the lose-lose bargain that COVID-19 forced on them. We flattened the curve, the thinking goes, preventing our medical system from being overwhelmed—heck, health care workers are being laid off!—so now it's time to resume our lives and recoup as much as we can.

The constitutional analysis of the various shutdown orders tracks that popular sentiment: States have the "police power" to govern for the general health, welfare and safety of society, so long as they have sufficient justification for doing so. But that doesn't mean that there's no limit on the actions that state and local officials can take, or that actions that were justified at one point will continue to be justified forever, regardless of underlying developments.

In other words, it's prudent in a pandemic to restrict activities that would otherwise bring people together in a way that facilitates viral transmission, but it doesn't mean governors get to "shut down" anything and everything on a whim. Recall that viral video of the guy running along the beach in California, chased by a hapless cop. Or that dad who got arrested for playing catch with his kids in a public park. Or mayoral edicts that stop drive-in church but permit drive-thru liquor sales. Or the Michigan order banning motorboats but not sailboats; the sale of seeds but not weed.

State officials also have to follow their own constitutions. A pandemic is an emergency in a certain sense, at least initially, but it goes on for months, which allows for both legislative action and the observance of due process. I'm no expert in Wisconsin administrative law, but I was heartened to see that state's supreme court throw out the health secretary's shutdown order because it violated the separation of powers and didn't follow proper procedures. Ditto the Oregon court's injunction—now temporarily stayed—against the governor's extension of that

state's shutdown order without seeking legislative approval. We don't throw away the rule of law in a pandemic, even when we allow the government to do things it otherwise can't.

Just because certain expansive state actions are lawful at the outset of a pandemic doesn't mean they continue to be lawful for as long as the government wants to maintain them. A long-term shutdown of all productive activity, including most of what makes life sustainable and worth living, is unrealistic—and, as we're learning, unnecessary. It's particularly unnecessary for those whose jobs can't be done over the internet, or for whom telecommuting is unfeasible given childcare demands.

As the facts on the ground change, government actions that once were grudgingly accepted now simply don't pass the constitutional smell test. That's especially so given the fundamental error that was made in ordering shutdowns based on arbitrary definitions of "essentiality," as opposed to issuing rules according to the safety of various activities.

With unemployment going through the roof, why shut down landscaping businesses just as spring arrived? Why close outdoor recreational facilities? The benefit of sunlight and exercise outweighs the risk that a contagious stranger will sneeze in your face while you hike or apply mulch. My own city of Falls Church, Virginia, closed tennis courts *in week seven of quarantine*—not even because tennis is dangerous, but because a busybody complained about teenagers congregating. Yeah, chaining courts will definitely stop teens from hanging out.

Instead of such blunt and ineffective measures, if the goal is social distancing to prevent viral spread, why not regulate social distancing to prevent viral spread? For example, instead of roping off certain aisles at Walmart, why not limit the number of people per square foot and have them travel in a set direction through the store, as IKEA has always done? And have guidelines on mask-wearing that focus not on virtue-signaling, but on indoor spaces where avoiding shared HVAC systems is unavoidable. This might sound crazy, but hear me out: Let restaurants put tables outside, regardless of zoning rules.

Perhaps most emblematic of the coronavirus overreach is the jailing of Shelley Luther, who opened her Dallas, Texas hair salon before Dallas County lifted its stay-at-home order. Punishing someone for trying to make a living is outrageous, but this episode is an object lesson for why all government orders, emergency or otherwise, need to be well considered. Legislatures and executives alike need to think long and hard before creating mandates that carry punishments—because the ultimate enforcement of any law, including for the non-payment of a fine or a tax, involves a police officer with a gun and a jailer with a cage.

Some regulations are definitely worth that price—the prohibition on murder and other violent crime comes to mind—but that doesn't mean that we should presume every government edict to be legitimate. Just because there's a role for government in promoting public health doesn't mean that anything goes.

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