

Civil Liberties in the Age of COVID-19

By John W. Whitehead and The Rutherford Institute

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“It takes a remarkable force to keep nearly a million people quietly indoors for an entire day, home from work and school, from neighborhood errands and out-of-town travel. It takes a remarkable force to keep businesses closed and cars off the road, to keep playgrounds empty and porches unused across a densely populated place 125 square miles in size. This happened ... not because armed officers went door-to-door, or imposed a curfew, or threatened martial law. All around the region, for 13 hours, people locked up their businesses and ‘sheltered in place’ out of a kind of collective will. The force that kept them there wasn’t external – there was virtually no active enforcement across the city of the governor’s plea that people stay indoors. Rather, the pressure was an internal one – expressed as concern, or helpfulness, or in some cases, fear – felt in thousands of individual homes.”—Journalist Emily Badger, “The Psychology of a Citywide Lockdown”

INTRODUCTION by John W. Whitehead

You can always count on the government to take advantage of a crisis, legitimate or manufactured. Emboldened by the citizenry’s inattention and willingness to tolerate its abuses, the government has weaponized one national crisis after another in order to expand its powers. The war on terror, the war on drugs, the war on illegal immigration, asset forfeiture schemes, road safety schemes, school safety schemes, eminent domain: all of these programs started out as legitimate responses to pressing concerns and have since become weapons of compliance and control in the police state’s hands.

It doesn’t even matter what the nature of the crisis might be—civil unrest, the national emergencies, “unforeseen economic collapse, loss of functioning political and legal order, purposeful domestic resistance or insurgency, pervasive public health emergencies, and catastrophic natural and human disasters”¹—as long as it allows the government to justify all manner of government tyranny in the name of so-called national security.

This coronavirus pandemic has been no exception. Not only are the federal and state governments unraveling the constitutional fabric of the nation with lockdown mandates that are sending the economy into a tailspin and wreaking havoc with our liberties, but they are also rendering the citizenry fully dependent on the government for financial handouts, medical intervention, protection and sustenance.

Every day brings a drastic new set of restrictions by government bodies (most have been delivered by way of executive orders) at the local, state and federal level that are eager to flex their muscles for the so-called “good” of the populace.² This is where we run the risk of this whole fly-by-night operation going completely off the rails. It’s one thing to attempt an

¹ “Military may have to quell domestic violence from economic collapse,” *Raw Story* (Dec 29, 2008), https://www.rawstory.com/news/2008/Report_Military_may_have_to_quell_1229.html.

² “State ‘Shelter-in-Place’ and ‘Stay-at-Home’ Orders,” *FINRA* (accessed on Mar. 31, 2020), <https://www.finra.org/rules-guidance/key-topics/covid-19/shelter-in-place>.

experiment in social distancing in order to flatten the curve of this virus because we can't afford to risk overwhelming the hospitals and exposing the most vulnerable in the nation to unavoidable loss of life scenarios. However, there's a fine line between strongly worded suggestions for citizens to voluntarily stay at home and strong-armed house arrest orders with penalties in place for non-compliance.³

Yes, COVID-19 is taking a significant toll on the nation emotionally, physically, and economically, but there are still greater dangers on the horizon. As long as “we the people” continue to allow the government to trample our rights in the name of so-called national security, things will get worse, not better. Now there's talk of [mass testing](#) for COVID-19 antibodies,⁴ screening checkpoints, mass surveillance in order to carry out contact tracing, [immunity passports](#)⁵ to allow those who have recovered from the virus to move around more freely, [snitch tip lines](#) for reporting “rule breakers” to the authorities,⁶ and heavy fines and jail time for those who dare to venture out without a mask, congregate in worship without the government's blessing, or re-open their businesses without the government's say-so.

These may seem like small, *necessary* steps in the war against the COVID-19 virus, but they're only necessary to the police state in its efforts to further undermine the Constitution, extend its control over the populace, and feed its insatiable appetite for ever-greater powers.

Whatever dangerous practices you allow the government to carry out now—whether it's in the name of national security or protecting America's borders or making America healthy again—rest assured, these same practices can and will be used against you when the government decides to set its sights on you. The war on drugs turned out to be a war on the American people, waged with SWAT teams and militarized police. The war on terror turned out to be a war on the American people, waged with warrantless surveillance and indefinite detention. The war on immigration turned out to be a war on the American people, waged with roving government agents demanding “papers, please.”

This war on COVID-19 will be yet another war on the American people, waged with all of the surveillance weaponry at the government's disposal: thermal imaging cameras, drones, contact tracing, biometric databases, etc. Unless we find some way to rein in the government's power grabs, the fall-out will be epic. Everything I have warned about for years—government overreach, invasive surveillance, martial law, abuse of powers, militarized police, weaponized technology used to track and control the citizenry, and so on—has coalesced into this present moment.

³ Jorge L. Ortiz, “Coronavirus in the US: How all 50 states are responding to this public health emergency,” *USA Today* (Mar. 30, 2020), <https://www.usatoday.com/story/news/nation/2020/03/30/coronavirus-stay-home-shelter-in-place-orders-by-state/5092413002/>.

⁴ Victor Tangermann, “US GOVERNMENT CONSIDERING COVID-19 “IMMUNITY CARDS,”” *Futurism* (Apr. 10, 2020), <https://futurism.com/neoscope/us-government-considering-covid-19-immunity-cards>.

⁵ Elizabeth Yuko, “Could COVID-19 Immunity Certificates Help Reopen America — Or Create More Class Divide?” *Rolling Stone* (Apr. 21, 2020), <https://www.rollingstone.com/culture/culture-features/covid-19-coronavirus-antibody-test-immunity-certificate-987061/>.

⁶ Associated Press, “Residents snitch on businesses, neighbors amid COVID-19 shutdowns,” *Times of Northwest Indiana* (Apr. 2, 2020), https://www.nwitimes.com/news/residents-snitch-on-businesses-neighbors-amid-covid-19-shutdowns/article_f313f435-3b0d-51db-8b28-2c824e550db9.html.

The government's shameless exploitation of past national emergencies for its own nefarious purposes pales in comparison to what is presently unfolding. It's downright Machiavellian. Deploying the same strategy it used with 9/11 to acquire greater powers under the USA Patriot Act, the police state—a.k.a. the shadow government, a.k.a. the Deep State—has been anticipating this moment for years, quietly assembling a wish list of lockdown powers that could be trotted out and approved at a moment's notice.

It should surprise no one, then, that the Trump Administration asked Congress to allow it to suspend parts of the Constitution whenever it deems it necessary during this coronavirus pandemic and "other" emergencies.⁷ It's that "other" emergencies part that should particularly give you pause, if not spur you to immediate action (by action, I mean a loud and vocal, apolitical, nonpartisan outcry and sustained, apolitical, nonpartisan resistance).⁸ In fact, the Department of Justice (DOJ) has been quietly trotting out and testing a long laundry list of terrifying powers that override the Constitution.

We're talking about lockdown powers (at both the federal and state level): the ability to suspend the Constitution, indefinitely detain American citizens, bypass the courts, quarantine whole communities or segments of the population, override the First Amendment by outlawing religious gatherings and assemblies of more than a few people, shut down entire industries and manipulate the economy, muzzle dissidents, "stop and seize any plane, train or automobile to stymie the spread of contagious disease,"⁹ reshape financial markets, create a digital currency (and thus further restrict the use of cash), determine who should live or die... These are powers the police state would desperately like to make permanent.

Bear in mind, however, that these powers the government, acting on orders from the police state, have *officially* asked Congress to recognize and authorize barely scratch the surface of the far-reaching powers the government has already unilaterally claimed for itself. *Unofficially*, the police state has been riding roughshod over the rule of law for years now without any pretense of being reined in or restricted in its power grabs by Congress, the courts or the citizenry.

As David C. Unger, observes in *The Emergency State: America's Pursuit of Absolute Security at All Costs*:

"For seven decades we have been yielding our most basic liberties to a secretive, unaccountable emergency state – a vast but increasingly misdirected complex of national security institutions, reflexes, and beliefs that so define our present world that we forget that there was ever a different America. ... Life, liberty, and the pursuit of happiness have given way to permanent crisis management: to policing the planet and fighting preventative wars of ideological containment, usually on

⁷ Peter Wade, "DOJ Wants to Suspend Certain Constitutional Rights During Coronavirus Emergency," *Rolling Stone* (Mar. 21, 2020), <https://www.rollingstone.com/politics/politics-news/doj-suspend-constitutional-rights-coronavirus-970935/>.

⁸ Betsy Woodruff Swan, "DOJ seeks new emergency powers amid coronavirus pandemic," *Politico* (Mar. 21, 2020), <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>.

⁹ Josh Gerstein, "What more could he do? A look at Trump's extreme powers," *Politico* (Mar. 13, 2020), <https://www.politico.com/news/2020/03/13/trump-extreme-powers-coronavirus-129176>.

terrain chosen by, and favorable to, our enemies. Limited government and constitutional accountability have been shouldered aside by the kind of imperial presidency our constitutional system was explicitly designed to prevent.”¹⁰

This rise of an “emergency state” that justifies all manner of government tyranny in the name of so-called national security is all happening according to schedule. The civil unrest, the national emergencies, “unforeseen economic collapse, loss of functioning political and legal order, purposeful domestic resistance or insurgency, pervasive public health emergencies, and catastrophic natural and human disasters,”¹¹ the government’s reliance on the armed forces to solve domestic political and social problems, the implicit declaration of martial law packaged as a well-meaning and overriding concern for the nation’s security: the powers-that-be have been planning and preparing for such a crisis for years now, not just with active shooter drills and lockdowns and checkpoints and heightened danger alerts, but with a sensory overload of militarized, battlefield images—in video games, in movies, on the news—that acclimate us to life in a police state.

Whether or not this particular crisis is of the government’s own making is not the point: to those for whom power and profit are everything, the end always justifies the means. The seeds of this present madness were sown several decades ago when George W. Bush stealthily issued two presidential directives that granted the president the power to unilaterally declare a national emergency, which is loosely defined as “any incident, regardless of location, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the U.S. population, infrastructure, environment, economy, or government functions.”¹²

Comprising the country’s Continuity of Government (COG) plan, these directives, which do not need congressional approval, provide a skeletal outline of the actions the president will take in the event of a “national emergency.”¹³ Mind you, that national emergency can take any form, can be manipulated for any purpose, and can be used to justify any end goal—all on the say so of the president. Just what sort of actions the president will take once he declares a national emergency can barely be discerned from the barebones directives. However, one thing is clear: in the event of a national emergency, the COG directives give unchecked executive, legislative and judicial power to the executive branch and its unelected minions. The country would then be subjected to martial law by default, and the Constitution and the Bill of Rights would be suspended.

The emergency state is now out in the open for all to see.

¹⁰ David C. Unger, *The Emergency State - America’s Pursuit Of Absolute Security At All Costs* (Penguin Books, 2012), pp. 1-3, https://www.rutherford.org/publications_resources/oldspcak/book_review_the_emergency_state.

¹¹ “Report: Military may have to quell domestic violence from economic collapse,” *Raw Story* (Dec. 29, 2008), https://www.rawstory.com/news/2008/Report_Military_may_have_to_quell_1229.html.

¹² “National Security Presidential Directive 51 and Homeland Security Presidential Directive 20: National Continuity Policy,” Center for Homeland Security and Defense (May 4, 2007), <https://www.hsdl.org/?abstract&did=776382>.

¹³ “National Security Presidential Directive 51 and Homeland Security Presidential Directive 20: National Continuity Policy,” Center for Homeland Security and Defense (May 4, 2007), <https://www.hsdl.org/?abstract&did=776382>.

Unfortunately, “we the people” refuse to see what’s before us. This is how freedom dies. We erect our own prison walls, and as our rights dwindle away, we forge our own chains of servitude to the police state. Be warned, however: once you surrender your freedoms to the government—no matter how compelling the reason might be for doing so—you can never get them back. No government willingly relinquishes power. If we continue down this road, there can be no surprise about what awaits us at the end.

That said, we still have choices. Just because we’re fighting an unseen enemy in the form of a virus doesn’t mean we have to relinquish every shred of our humanity, our common sense, or our freedoms to a nanny state that thinks it can do a better job of keeping us safe.

Despite all appearances to the contrary, martial law has not been declared in America. We still have rights. Technically, at least. The government may act as if its police state powers suppress individual liberties during this COVID-19 pandemic, but for all intents and purposes, the Constitution—especially the battered, besieged Bill of Rights—still stands in theory, if not in practice. Indeed, while federal and state governments have adopted specific restrictive measures in an effort to lockdown the nation and decelerate the spread of the COVID-19 virus, the current public health situation has not resulted in the suspension of fundamental constitutional rights such as freedom of speech and the right of assembly.

Mind you, that’s not to say that the government has not tried its best to weaponize this crisis as it has weaponized so many other crises in order to expand its powers and silence its critics. Yet here’s the thing: we don’t have to be muzzled and remain silent about government corruption, violence and misconduct just because we’re wearing masks and social distancing. While there is a moral responsibility to not endanger other lives with our actions, that does not mean relinquishing all of our freedoms. Be responsible in how you exercise your freedoms, but don’t allow yourselves to be muzzled or your individual freedoms to be undermined. The decisions we make right now—about freedom, commerce, free will, how we care for the least of these in our communities, what it means to provide individuals and businesses with a safety net, how far we allow the government to go in “protecting” us against this virus, etc.—will haunt us for a long time to come.

At times like these, when emotions are heightened, fear dominates, common sense is in short supply, liberty takes a backseat to public safety, and democratic societies approach the tipping point towards mob rule, there is a tendency to cast those who exercise their individual freedoms (to freely speak, associate, assemble, protest, pursue a living, engage in commerce, etc.) as foolishly reckless, criminally selfish, or outright villains.

Sometimes that is true, but not always. There is always a balancing test between individual freedoms and the communal good. What we must figure out is how to strike a balance that allows us to protect those who need protecting without leaving us chained and in bondage to the police state. We must find ways to mitigate against this contagion needlessly claiming any more lives and crippling any more communities, but let’s not lose our heads: *blindly* following the path of least resistance—acquiescing *without question* to whatever the government dictates—can only lead to more misery, suffering and the erection of a totalitarian regime in which there is no balance.

Whatever we give up willingly now—whether it’s basic human decency, the ability to manage our private affairs, the right to have a say in how the government navigates this crisis, or

the few rights still left to us that haven't been disemboweled in recent years by a power-hungry police state—we won't get back so easily once this crisis is past.

The government never cedes power willingly. Neither should we. As I've warned, this is a test to see whether the Constitution—and our commitment to the principles enshrined in the Bill of Rights—can survive a national crisis and true state of emergency. James Madison, the “father” of the U.S. Constitution and the Bill of Rights and the fourth president of the United States, once advised that we should “take alarm at the first experiment upon our liberties.”¹⁴ Whether or not you consider these COVID-19 restrictions to be cause for alarm, they are far from the first experiment on our liberties. Indeed, whether or not you concede that the pandemic itself is cause for alarm, we should all be alarmed by the government's response to this pandemic.

COVID-19: A Threat to Public Health or Civil Liberties?

The outbreak of the novel coronavirus and COVID-19, which the World Health Organization has declared a pandemic,¹⁵ has resulted in the most widespread and disruptive public health emergency in our lifetime.

Not since the Spanish Flu pandemic of 1918, which resulted in about 675,000 deaths in the United States,¹⁶ has the nation faced a similar disease-based threat to its safety, economy, and way of life. As has been reported, almost 524,000 U.S. residents have died from COVID-19,¹⁷ and more than 2.5 million deaths worldwide.¹⁸

Political leaders from the president to governors to mayors have subscribed to a broad range of actions aimed at limiting the spread of COVID-19, some of which have been draconian and unprecedented. On March 20, 2020, for example, New York's governor issued an executive order banning all non-essential public gatherings, required all employees of non-essential businesses to work from home, and limited non-essential public travel.¹⁹

A similar “lockdown” was imposed in California the previous day, barring persons from leaving their homes except for essential purposes, such as buying groceries or seeking medical attention, and allowing persons to be charged with criminal offenses for violating the

¹⁴ James Madison, “Memorial and Remonstrance against Religious Assessments,” 20 June 1785, *The Papers of James Madison*. 8:298-304, https://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

¹⁵ “WHO Director-General opening remarks at the media briefing on COVID-19 – 11 March 2020,” World Health Organization (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

¹⁶ <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>.

¹⁷ Centers for Disease Control, COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Mar. 9, 2021).

¹⁸ World Health Organization, WHO Coronavirus (COVID-19) Dashboard, <https://covid19.who.int/> (last visited Mar. 9, 2021).

¹⁹ Tess Owen, “Governor Andrew Cuomo Is Shutting Down New York on Sunday to Stop Coronavirus,” *Vice* (March 20, 2020), https://www.vice.com/en_us/article/4agpz9/governor-andrew-cuomo-is-shutting-down-new-york-to-stop-coronavirus.

lockdown.²⁰ And before that, many localities had ordered restaurants to close and forbade persons gathering in public.²¹ While these restrictions were eased when the spread of the disease appeared to be abating, they are quickly reimposed on reports of cases increasing.²²

As a result, the country is now facing not only a public health crisis but a civil liberties crisis that threatens to undermine our rights to worship, assemble, or travel freely without being tracked by the government. Citizens must remain vigilant in assuring that the restrictions on gatherings, travel, and commerce are necessary and strictly temporary measures to address a real and present threat to the public health.

If we do not stand guard to defend these liberties, they will most assuredly become casualties in the government's continuing war on freedom.

The danger that the government will use the current so-called crisis as a justification to erode our civil liberties is all too real. As noted, one need only look to the government's response to the 9/11 attacks, which gave rise to the Patriot Act and a host of intrusions on our constitutional rights that have served to expand the government's powers at our expense.

COVID-19 Restriction's Impact on Constitutional Rights

The measures accompanying the COVID-19 pandemic unquestionably restrict fundamental constitutional rights. For example, the First Amendment guarantees "the right of the people peaceably to assemble[.]"²³ "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs[.]"²⁴ Public parks and streets "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."²⁵

While the freedom to travel has been specifically recognized only in the context of interstate or international travel,²⁶ the freedom of movement is an implicit liberty that prohibits government agents from stopping and questioning or searching persons unless they have some justification.²⁷ As Justice William Douglas wrote:

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a

²⁰ <https://www.politico.com/states/california/story/2020/03/19/newsom-orders-all-40m-californians-to-stay-home-in-nations-strictest-state-lockdown-1268248>.

²¹ <https://www.memphisflyer.com/NewsBlog/archives/2020/03/19/mayor-strickland-orders-closure-of-restaurant-dining-rooms-bars-gyms>.

²² USA Today, "Covid-19 Restrictions: Map of COVID-19 case trends, restrictions and mobility," <https://www.usatoday.com/storytelling/coronavirus-reopening-america-map/>.

²³ U.S. Const. amend. I.

²⁴ *Hague v. C.I.O.*, 307 U.S. 496 (1939).

²⁵ *Id.*

²⁶ *Sáenz v. Roe*, 526 U.S. 489, 500 (1999).

²⁷ *Terry v. Ohio*, 391 U.S. 1 (1968).

part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.²⁸

As a rule, people are free to roam and loiter in public places and are not required to provide police with their identity or give an account of their purpose for exercising their freedom.²⁹

However, as with all constitutional rights, these freedoms are not unqualified. The right to assemble is not absolute and may be regulated in the interest of the general public. As Justice Oliver Wendell Holmes wrote more than a century ago: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”³⁰ Even content-based restrictions on speech are allowed under the First Amendment if the restriction is needed to serve a compelling government interest.³¹

The Power to Impose Restrictions

The Supreme Court long ago “distinctly recognized the authority of a state to enact quarantine laws and health laws of every description[.]”³² Such laws are an exercise of the state’s police power, and if there is a rational basis for believing they are needed to protect the public health, they will be deemed to serve a compelling government interest.³³ That quarantine or other health laws restrict persons in the exercise of their rights does not mean they are unconstitutional or invalid if the circumstances present a compelling interest for their enactment.

The point was made over 100 years ago in circumstances similar to today’s COVID-19 outbreak when a smallpox outbreak occurred in Cambridge, Massachusetts, and a local health department invoked a state law allowing localities to make vaccinations mandatory and enforceable by criminal penalties. In upholding the law and local order against a claim that it violated the constitutional liberty to control one’s own body and health, the Supreme Court wrote as follows:

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be

²⁸ *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

²⁹ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

³⁰ *Schenck v. United State*, 249 U.S. 47, 52 (1919).

³¹ *Williams-Yulee v. The Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

³² *Jacobson v. Commonwealth*, 197 U.S. 11, 25 (1905).

³³ Elizabeth Joh, “Yes, States and Local Governments Can Close Private Businesses and Restrict Your Movement,” *Politico* (March 18, 2020), <https://www.politico.com/news/magazine/2020/03/18/states-police-power-coronavirus-135826>.

confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.” . . . The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will.³⁴

The Court went on to write that “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”³⁵ This principle was reaffirmed recently by the current Chief Justice in a decision denying a request that California be prevented from enforcing COVID-19-related restrictions.³⁶

Most states have enacted laws that recognize the need for prompt action in times of emergency, including epidemics, and have delegated the authority to an executive officer to take action to address that emergency. For example, Tennessee law provides that the governor is given the power to issue orders that have the force and effect of law to address emergencies, which include disease outbreaks and epidemics.³⁷ That state’s law similarly grants mayors or other local chief executive officers the power to issue orders and directives deemed necessary, including closing public facilities, in order to address civil emergencies.³⁸

Courts have ruled that they will defer to the decisions of an executive authority on the decision as to whether an emergency exists and whether the means employed to address the emergency are reasonable and legal, although there could be situations where a court would declare that the executive decision is arbitrary and unreasonable.³⁹

Legality of Restrictions Impacting Constitutional Rights

When governments act under their police power to control plagues and epidemics, those acts are valid and enforceable even though they may restrict individuals in the exercise of constitutional

³⁴ *Jacobson v. Commonwealth*, 197 U.S. 11, 26 (1905).

³⁵ *Jacobson v. Commonwealth*, 197 U.S. 11, 26 (1905).

³⁶ *South Bay United Pentecostal Church v. Newsom*, No.19A1044 (Sup. Ct. May 29, 2020) (Roberts, Ch. J., concurring).

³⁷ Tenn. Code §§ 58-2-101, 58-2-107.

³⁸ Tenn. Code §§ 38-9-101 et seq.

³⁹ *Jacobson v. Commonwealth*, 197 U.S. 11, 28 (1905); *South Bay United Pentecostal Church v. Newsom*, No.19A1044 (Sup. Ct. May 29, 2020) (Roberts, Ch. J., concurring).

rights. As one legal scholar has noted, the balance between individual rights and protection of the public “assumes that there will be times when there are truly compelling emergencies justifying severe measures. A global pandemic that spreads even among those who are asymptomatic and could exceed the capacity of the American health care system would appear to be just such a compelling situation.”⁴⁰

Right to Assembly and Freedom of Movement: Under the principle that the government may act in its police power to address civil emergencies, if the proper authority determines that the assembly of persons poses a threat to public safety, it may limit such gatherings without violating the First Amendment’s protection on freedom of assembly. Thus, most states have laws banning “unlawful assemblies,” which are gatherings of persons that pose a danger to public safety and order because of a risk of violence or disruption of traffic.⁴¹

Such laws do not offend the First Amendment because of the government’s compelling interest in maintaining peace and good order. Similarly, the right to freely move and be out in public is sometimes restricted by curfews in emergency situations. For example, the City of Baltimore imposed a curfew allowing travel in public for essential purposes in response to rioting that occurred in 2015.⁴² While such a restriction on travel is presumed unconstitutional, it is legal if imposed for a compelling reason.⁴³

Under the scientific consensus, the current COVID-19 outbreak is the kind of emergency circumstance that would support the restrictions on gatherings, assemblies, and movement in public. Evidence indicates the coronavirus is highly contagious and presents a risk of mortality significantly greater than the seasonal flu, particularly for certain at-risk groups such as the elderly and those with diabetes.⁴⁴

Despite heightened public awareness and the distribution of vaccines, concerns about transmission remain as variants of the virus have emerged that could be more communicable, more lethal and less controllable through vaccination.⁴⁵ Additionally, there is a risk that spread of the disease will result in swamping hospitals with COVID-19 patients, placing everyone in need of medical assistance at risk.⁴⁶ This public health emergency would provide the kind of compelling interest justifying the restrictions on the right of assembly and freedom of movement.

⁴⁰ Elizabeth Joh, “Yes, States and Local Governments Can Close Private Businesses and Restrict Your Movement,” *Politico* (March 18, 2020), <https://www.politico.com/news/magazine/2020/03/18/states-police-power-coronavirus-135826>.

⁴¹ <https://law.jrank.org/pages/11014/Unlawful-Assembly.html>.

⁴² <https://www.baltimorecity.gov/emergency-curfew-20150427>.

⁴³ *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir.2003).

⁴⁴ Rachel Rettner, “How does the new coronavirus compare to the flu?,” *LiveScience* (March 25, 2020), <https://www.livescience.com/new-coronavirus-compare-with-flu.html>; Brian Resnick and Christina Animashaun, “Why Covid-19 is worse than the flu, in one chart,” *Vox* (March 18, 2020), <https://www.vox.com/science-and-health/2020/3/18/21184992/coronavirus-covid-19-flu-comparison-chart>.

⁴⁵ Molly Walker, Shannon Firth, “COVID-19 Response Team Warns of Rise in Variants,” *MedPage Today* (Feb. 17, 2021), <https://www.medpagetoday.com/infectiousdisease/covid19/91245>.

⁴⁶ Brandon Spektor, “What is flattening the curve and will it work?” *LiveScience* (March 16, 2020), <https://www.livescience.com/coronavirus-flatten-the-curve.html>.

However, even with this power, some states and localities have gone too far in restricting travel and movement of people. Some states set up roadblocks and checkpoints at borders seeking to intercept and bar out-of-state travelers who might be carrying the coronavirus from entering the state. Such restrictions on interstate travel raise a host of constitutional concerns, not the least of which is the Fourth Amendment’s prohibition on unreasonable searches and seizures, which require that police have “reasonable suspicion” that a driver has violated a law in order to stop a vehicle. Additionally, interstate travel and commerce are almost exclusively a matter within the authority of the federal government under the U.S. Constitution, which has yet to impose restrictions on interstate travel because of the COVID-19 outbreak.

Any state attempt to stop interstate travel is likely beyond its authority and unconstitutional.⁴⁷

Free Exercise of Religion: Another kind of gathering impacted by the recent emergency restrictions are gatherings for religious purposes, including church services. Restrictions on religious activity impacts another clause of the First Amendment—the right to free exercise of religion.⁴⁸ Although some executive orders to stop the spread of COVID-19 have exempted religious gatherings,⁴⁹ the terms of most current orders do not contain an explicit exception for church services or other religious gatherings, nonetheless some churches have avowed to conduct services despite the restrictions.⁵⁰

As a rule, religious organizations and individuals must abide by the law or a government order pursuant to the law even though it imposes a restriction on their ability to exercise their religious beliefs. Under a 1990 Supreme Court decision, a person or church is not exempted from complying with “neutral and generally applicable” laws and regulations even if the law burdens their ability to practice their religious beliefs.⁵¹ However, recent orders responding to the COVID-19 outbreak may not be “generally applicable” because they contain exemptions for certain gatherings, activities, and travel that are deemed “essential.” Additionally, many states have laws that provide more protection for religious activities than provided by the First Amendment. These laws forbid the government from imposing a substantial burden on the

⁴⁷ Luz Lazo and Katherine Shaver, “Covid-19 checkpoints targeting out-of-state residents draw complaints and legal scrutiny,” *The Washington Post* (Apr. 14, 2020), https://www.washingtonpost.com/local/trafficandcommuting/covid-19-checkpoints-targeting-out-of-state-residents-draw-complaints-and-legal-scrutiny/2020/04/14/3fc0ed42-774e-11ea-b6ff-597f170df8f8_story.html.

⁴⁸ U.S. Const. amend. I.

⁴⁹ Zack Budryk, “Michigan governor says state doesn’t ‘have the ability to directly enforce and control’ religious gatherings amid coronavirus outbreak,” *The Hill* (March 22, 2020), <https://thehill.com/homenews/sunday-talk-shows/488860-michigan-governor-on-gathering-exemption-for-religious-services>.

⁵⁰ Michelle Boorstein, “The church that won’t close its doors over the coronavirus,” *The Washington Post* (March 20, 2020), <https://www.washingtonpost.com/religion/2020/03/20/church-ony-spell-coronavirus-life-tabernacle/>; Tony Marrero, “Pastor of Tampa church that held two large Sunday services arrested, jailed,” *Tampa Bay Times* (March 30, 2020), <https://www.tampabay.com/news/health/2020/03/30/tampa-church-holds-packed-service-draws-warning-from-sheriffs-office/>.

⁵¹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

exercise of religion unless it has a compelling interest for doing so and the restriction is narrowly focused to serve that interest.⁵²

Thus, one court forbade the City of Louisville, Kentucky, from enforcing a pandemic-related restriction on gatherings that would have prevented the church from holding a “drive-in” Easter Sunday worship service.⁵³ Although the court accepted the significance of the COVID-19 health emergency, it pointed out that the church’s drive-in service, with congregants remaining in their cars, would comply with the social-distancing recommendations of health officials. But the court also stressed that the Louisville ban, which specifically mentioned church services, allowed numerous of other “drive-in” services, such a drive-thru liquor and food purchases, and did not prohibit persons from parking in parking lots. Therefore, the ban on church services was not “generally applicable” nor was it “narrowly tailored” to the goal of preventing the spread of COVID-19, and it violated both the First Amendment and Kentucky’s religious freedom law.⁵⁴

The Supreme Court thereafter confirmed in a series of decisions, striking down state and local regulations that limited religious gatherings more severely than similar secular gatherings. In November 2020, the Court struck down orders of New York’s governor that limited churches and synagogues from having more than 10 persons at church services, but allowed so-called “essential services,” which included acupuncture facilities, camp grounds, and big box stores, to gather. The restrictions were struck down as not neutral and generally applicable and because “even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment’s guarantee of religious liberty.”⁵⁵ And in February 2021, the Court reversed course from an earlier decision and held that California’s restrictions on the number of persons who could attend church services could not be enforced.⁵⁶ The Court made similar rulings in cases brought by churches in Colorado and New Jersey.⁵⁷

These decisions and others⁵⁸ show that states and localities must act rationally and in an even-handed manner when restricting the right of people of faith to come to together for religious worship. While each emergency order or decree is different and may not treat religious gatherings less favorably than other gatherings, if the order/decree does discriminate against church gatherings, it is vulnerable to a First Amendment challenge. Even COVID-19 measures that are not “generally applicable” or subject to state religious freedom laws could be valid and enforceable as applied to gatherings for religious purposes if the government can show the measure is needed to protect public health.

⁵² See, e.g., Ky. Rev. Stat. § 446.350.

⁵³ *On Fire Christian Center, Inc. v. Fischer*, Civ. Action No. 3:20-264-JRW (W.D. Ky. Apr. 11, 2020).

⁵⁴ *Id.*, slip op. at 12-13, 16.

⁵⁵ *Roman Catholic Diocese of New York v. Cuomo*, No. 20A87, slip op. at 5 (U.S. Sup. Ct. Nov. 25, 2020).

⁵⁶ *South Bay United Pentecostal Church v. Newsom*, No. 20A136, slip op. at 1-2 (U.S. Sup. Ct. Feb. 5, 2021).

⁵⁷ Richard Wolf, “Supreme Court continues to block state COVID-19 restrictions on religious gatherings,” *USA Today* (Dec. 15, 2020), <https://www.usatoday.com/story/news/politics/2020/12/15/churches-take-covid-19-supreme-court-sides-religious-freedom/3813310001/>.

⁵⁸ See *Roberts v. Neace*, No. 20-5465 (6th Cir. May 9, 2020) (church that was willing to enforce social distancing during worship gatherings entitled to order barring enforcement against it of governor’s restrictions on gatherings), and *Berean Baptist Church v. Cooper*, Civ. Action No. No. 4:20-CV-81-D (E.D.N.C. May 16, 2020) (church entitled to restraining order; governor’s order restricting indoor gatherings discriminated against worship services),

The ultimate test under either the First Amendment or a religious freedom statute is whether the regulation is supported by a compelling government interest.⁵⁹ As discussed above, the government's interest in protecting the public health and stopping epidemics is recognized to be a compelling one that would justify certain infringement on the free exercise of rights of churches or individuals.

Right to Engage in Business or Perform Contracts: The COVID-19 measures have imposed severe restrictions on commercial activities, requiring restaurants to shutter and businesses to attempt to operate with “work from home” employees. Many jurisdictions also adopted laws and regulations that limit the enforcement of residential lease obligations through eviction or home mortgage obligations through foreclosure.⁶⁰

This raises an issue of whether the restrictions violate the liberty or property interests protected by the Due Process Clause of the Fourteenth Amendment. Courts have at times recognized that the right to earn a living, and to engage in “common callings” is a right protected by the Constitution.⁶¹ Additionally, the Constitution forbids states from enacting laws “impairing the Obligation of Contracts[.]”⁶² But these rights are also subject to the state's exercise of its police power. It is the settled law that the prohibition on laws impairing the obligation of contracts does not prevent the state from exercising its authority to act for the general good of the public, though contracts previously entered into between individuals may thereby be affected.⁶³ And when state governments exercise their authority to regulate businesses, the regulation need only be supported by some “rational basis” in order to be constitutional.⁶⁴

Given the present pandemic, restrictions limiting economic rights have been upheld. Thus, a New York federal court upheld that state's moratorium on evictions against claims that it violated landlords' rights under the Contracts and Taking Clauses, ruling that the state had properly exercised its police powers.⁶⁵

Mask Requirements

One mandate that has become a particular point of contention concerns orders relating to the use of masks or face coverings. When the pandemic and health emergency was initially declared, the Centers for Disease Control (CDC) and federal government did not recommend that the general public wear face coverings, asserting they were not effective in protecting a person from becoming infected and might deplete the stock available for health care workers. However, in

⁵⁹ *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁶⁰ Perkins Coie, “COVID-19 Related Eviction and Foreclosure Orders/Guidance 50-State Tracker,” <https://www.perkinscoie.com/en/news-insights/covid-19-related-eviction-and-foreclosure-ordersguidance-50-state-tracker.html>.

⁶¹ *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 219 (1984).

⁶² U.S. Const., art. I, § 10.

⁶³ *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 241 (1978).

⁶⁴ *Williams v. Lee Optical*, 348 U.S. 343, 487-88 (1955).

⁶⁵ *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 160 (S.D.N.Y. 2020).

April 2020, the CDC reversed its position and issued a recommendation that persons wear cloth or fabric face coverings.⁶⁶

The current recommendation is that people wear cloth face coverings in public settings when physically in the presence of people outside of their household, especially when other social distancing measures are difficult to maintain. Additionally, the CDC has issued an order requiring face coverings on planes, buses, trains, and other forms of public transportation traveling into, within, or out of the United States and in U.S. transportation hubs such as airports and stations.⁶⁷

Numerous states and localities have issued orders or rules requiring the wearing of masks or face coverings under particular circumstances. In June 2020, California’s governor and Department of Public Health issued a statewide order requiring face coverings to be worn in indoor public spaces, including public transit, during work indoors, and outdoors when social distancing is not feasible.⁶⁸ West Virginia’s governor issued a similar executive order in July 2020 requiring all persons over the age of 9 to wear adequate face coverings while in any confined indoor space and when not able to maintain adequate social distancing.⁶⁹ Florida, on the other hand, does not have a statewide mask mandate, except for workers providing personal care services. However, many localities have adopted requirements that face coverings be worn while indoors in public places.⁷⁰

These orders have been met with significant backlash from citizens who see this as a threat to their liberty. As stated by Ohio’s governor in connection with his rescinding of a mask mandate he imposed, “People were not going to accept the government telling them what to do.”⁷¹ Objections also can be linked to the perceived uncertainty of the science supporting the benefits of masks.

Initially, the CDC specifically did not recommend that persons wear face coverings, but then changed its stance. At one point the CDC advised that wearing a mask does not protect the wearer from contracting COVID-19, only that doing so will prevent its spread, but now states that masks protect both the wearer and persons around them.⁷² There also have been reports that

⁶⁶ Colin Dwyer and Allison Aubrey, “CDC Now Recommends Americans Consider Wearing Cloth Face Coverings In Public,” *National Public Radio* (April 3, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public>.

⁶⁷ Centers for Disease Control, “Your Guide to Masks,” (Feb. 22, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>.

⁶⁸ California Department of Public Health, “Guidance for Wearing Face Coverings,” (June 18, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf.

⁶⁹ State of West Virginia Executive Dept., Exec. Order No. 50-20, July 6, 2020, <https://governor.wv.gov/Documents/2020%20Executive%20Orders/EO%2050-20.pdf>.

⁷⁰ Jacob Ogles, “Beyond the veil: What mask requirements are in place in Florida?,” *Florida Politics* (July 8, 2020), <https://floridapolitics.com/archives/342364-beyond-the-veil-what-face-mask-requirements-are-in-place-in-florida>.

⁷¹ Ritus Prasad, “Coronavirus: Why is there a US backlash to masks?,” *BBC News* (May 5, 2020), <https://www.bbc.com/news/world-us-canada-52540015>.

⁷² Centers for Disease Control, “Masks Protect You and Me,” (Jan. 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/masks-protect-you-and-me.html>.

masks can cause health problems, such as depleting the body of oxygen, increasing the respiration of carbon dioxide, or subjecting the body to increased bacteria intake.⁷³

The resistance to mask mandates has resulted in heated, and in at least one case fatal, incidents at public places, particularly retail establishments. Because enforcement of the mask requirements is largely left to private businesses, retail employees without the training or equipment for enforcement have been thrust into confrontations that quickly get out of hand. A California Target employee ended up with a broken left arm after helping to remove two customers who refused to wear masks. And a convenience store cashier in Pennsylvania who told a man refusing to wear a mask that he could not buy a pack of cigars was punched three times in the face.⁷⁴ A security officer at a Michigan Dollar Store was shot and killed because he had told a woman she could not enter the store without a face covering.⁷⁵

While those objecting to mask requirements assert that the masks violate their rights, the results of lawsuits leave this claim unsettled. With regard to claims that mask requirements violate persons' rights, a retail store or other owner of private property is not subject to limitations imposed by the federal or state constitution even if the property is generally open to the public; a store or restaurant can enforce its own policy of requiring masks to enter regardless of any constitutional restrictions on mask mandates.

Some have suggested that the American with Disabilities Act (ADA), which requires privately-owned facilities to be accessible to persons with disabilities, might prevent places open to the public from requiring masks be worn by persons who have a medical condition that makes wearing a mask problematic. However, the Justice Department released a statement that the ADA does not provide a blanket exemption from mask requirements. And the process of obtaining an ADA exemption is a difficult and involved process requiring proof of a real medical disability and that the proposed exemption is a reasonable accommodation.⁷⁶

Employer mask mandates also have been challenged by employees asserting either that they have a medical condition that is aggravated by a face covering or that they have religious objections to wearing a mask.⁷⁷ As to medical conditions, the ADA is again implicated, but would require stringent proof of a medical condition affected by a mask *and* that some accommodation is possible that does not unduly disrupt the employer's business.

Religious objections are treated under Title VII of the Civil Rights Act, which requires employers to provide "reasonable accommodations" for the religious beliefs of employees.

⁷³ Staff Report, "Does Wearing a Face Mask Pose Health Risks?," *Spectrum News* (July 2, 2020),

<https://spectrumlocalnews.com/tx/san-antonio/news/2020/07/02/does-wearing-a-face-mask-pose-health-risks->

⁷⁴ Neil MacFarquhar, "Who's Enforcing Mask Rules? Often Retail Workers, and They're Getting Hurt," *New York Times* (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/coronavirus-masks-violence.html>.

⁷⁵ Meryl Cornfield, "Three people charged in killing of Family Dollar security guard over mask policy," *The Washington Post* (May 5, 2020), <https://www.washingtonpost.com/nation/2020/05/04/security-guards-death-might-have-been-because-he-wouldnt-let-woman-store-without-mask/>.

⁷⁶ Matthew Brown, "Fact check: ADA does not provide blanket exemption from face mask requirements," *USA Today* (July 16, 2020), <https://www.usatoday.com/story/news/factcheck/2020/07/15/fact-check-ada-disability-rights-and-face-mask-requirements/5391830002/>

⁷⁷ Colin H. Hargreaves, "Help! Help! Some of My Employees Say They Can't Wear a Face Mask," *Felhaber Larson* (Aug. 6, 2020), <https://www.felhaber.com/help-some-of-my-employees-say-they-cant-wear-a-face-mask/>.

However, an employer is not always required to provide an accommodation—it can avoid doing so if it shows the accommodation would impose even a minimal hardship on it.⁷⁸

While legal actions have been filed challenging state or local mask requirements, no case has yet upheld a constitutional claim. In a lawsuit filed in Maryland federal court, it was found that wearing a mask does not constitute speech, and so does not amount to forced expression in violation of the First Amendment.⁷⁹ Other cases have been filed alleging that mask requirements violate individuals' liberty interest in bodily autonomy and integrity,⁸⁰ but these claims have yet to be finally resolved.

The lawsuits may also challenge the authority of the issuing official to make the order under state law. The question in this kind of case is whether the official, usually the state governor, has the power to require masks or whether the order conflicts with some other law. Because the resolution depends on the intricacies of state law, it is not possible to generalize about such claims.

In one case from Virginia, a court upheld the governor's mask requirement against claims that the governor did not have the power to issue the order and that he had violated procedural rules in issuing it.⁸¹ But in another case from Louisiana, a court struck down a mayor's mask mandate ruling that state and local law did not give the mayor the authority to impose the mandate.⁸²

Surveillance, Contact Tracing and Immunity Cards

The onset of the COVID-19 epidemic raises an expanded surveillance threat to the government's existing arsenal of tactics and technologies for spying on citizens.⁸³ When the novel coronavirus first broke out in China, the Chinese government ratcheted up its already massive system for tracking its citizenry. In an attempt to identify where infected people were and to monitor quarantines using cameras, China employed facial recognition software, drones, and smart phone applications to track the movements of its people.⁸⁴

Based on China's now-suspect claims regarding success in containing the spread of the virus, other countries adopted similar tracking measures to stem the pandemic. South Korea, Singapore, Hong Kong, and Israel all implemented aggressive programs for tracing the location

⁷⁸ *Id.*

⁷⁹ *Antietam Battlefield KOA v. Hogan*, 2020 U.S. Dist. Lexis 88883 (D. Md. May 20, 2020)

⁸⁰ Associated Press, "Lawsuit Challenges Governor's Order for People to Wear Masks," *U.S. News* (April 18, 2020), <https://www.usnews.com/news/best-states/connecticut/articles/2020-04-18/lawsuit-challenges-governors-order-for-people-to-wear-masks>

⁸¹ *Phillip C. Strother v. Hon. Ralph Northam*, No. CL20-260, Fauquier County Circuit Court (June 20, 2020).

⁸² *Celcog LLC v. Perkins*, No. 624,744 La. First Judicial District Court (July 21, 2020).

⁸³ John Whitehead, "Government Eyes Are Watching You: We Are All Prisoners of the Surveillance State," *The Rutherford Institute* (June 18, 2018), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/government_eyes_are_watching_you_we_are_all_prisoners_of_the_surveillance_state.

⁸⁴ Arjun Kharpal, "Use of surveillance to fight coronavirus raises concerns about government power after pandemic ends," *CNBC* (March 30, 2020), <https://www.cnbc.com/2020/03/27/coronavirus-surveillance-used-by-governments-to-fight-pandemic-privacy-concerns.html>.

and movements of their citizens, which included smart phone applications that recorded and reported the alleged carrier's movements (including real-time tracking), tracking bracelets, and surveillance cameras.⁸⁵ More recently, China upped the ante by mandating a more sophisticated app that analyzes personal data to sort individuals into color-coded categories corresponding to their health status and level of risk for COVID-19 to determine where they can or cannot travel.⁸⁶

The United States has embraced similar tracking and surveillance measures in an attempt to contain the COVID-19 outbreak. Tech giants Apple and Google developed an app for their smart phone software that allows phones to keep track of other devices nearby in order to enable "contact tracing" of persons who have been infected with the virus.⁸⁷ Although the app is optional, these corporations build this tracing functionality into the underlying operating system for iOS and Android phones.⁸⁸ And while the plan was eventually scrapped, the U.S. government also created a task force to work with health technology companies to create a national coronavirus surveillance system meant to give the government real-time tracking and tracing capability of where patients are seeking treatment, for what, and whether hospitals can accommodate them.⁸⁹ This involved the collection of detailed information from multiple private-sector databases that allows the government to continuously monitor the movement and progress of patients across the country.

Another tracking possibility discussed by the government is the issuance of COVID-19 "immunity cards." The proposal suggests the widespread testing of persons for the coronavirus antibodies, which result from the immune systems response to a virus infection and help to immunize the person from future infections by that virus. Under this plan, persons who test positive for the coronavirus antibodies would be issued "immunity cards" to carry and allow them to travel and otherwise integrate into society.⁹⁰

With the advent and distribution of COVID-19 vaccines, a similar idea has been raised for person who have been vaccinated.⁹¹ As recognized by the head of the Center for Disease Control and Protection, such cards could be used to trace and track the movements and activities

⁸⁵ *Id.*

⁸⁶ Ali Dukakis, "China rolls out software surveillance for the COVID-19 pandemic, alarming human rights advocates," *ABC News* (Apr. 14, 2020), <https://abcnews.go.com/International/china-rolls-software-surveillance-covid-19-pandemic-alarming/story?id=70131355>.

⁸⁷ Google, "Exposure Notifications: Using technology to help public health authorities fight COVID-19," <https://www.google.com/covid19/exposurenotifications/>; Jack Nickas and Daisuke Wakabayashi, "Apple and Google Team Up to 'Contact Trace' the Coronavirus," *The New York Times* (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/technology/apple-google-coronavirus-contact-tracing.html>.

⁸⁸ Russell Brandom and Adi Robertson, "Apple and Google are building a coronavirus tracking system into iOS and Android," *The Verge* (Apr. 10, 2020), <https://www.theverge.com/2020/4/10/21216484/google-apple-coronavirus-contract-tracing-bluetooth-location-tracking-data-app>.

⁸⁹ Adam Cancryn, "Kushner's team seeks national coronavirus surveillance system," *Politico* (Apr. 7, 2020), <https://www.politico.com/news/2020/04/07/kushner-coronavirus-surveillance-174165>.

⁹⁰ Quint Forgy, "Fauci: Coronavirus immunity cards for Americans are 'being discussed'," *Politico* (Apr. 10, 2020), <https://www.politico.com/news/2020/04/10/fauci-coronavirus-immunity-cards-for-americans-are-being-discussed-178784>.

⁹¹ Kent German, "COVID-19 vaccine passport for travel: What it is, how it works, who is pushing for it," *CNet* (March 11, 2021), <https://www.cnet.com/health/covid-19-vaccine-passport-for-travel-what-it-is-how-it-works-and-who-is-pushing-for-them/>

of persons who have been infected, which some estimate could eventually be nearly 90 percent of people in the United States.⁹² As such, the “immunity cards” could become *de facto* national identity cards, which in turn lays the groundwork for a society in which you are required to identify yourself to any government worker who demands it.⁹³

The ramifications of such a “show me your papers” society in which government officials are empowered to stop individuals, demand they identify themselves, and subject them to pat downs, warrantless screenings, searches, and interrogations are beyond chilling. By allowing government agents to establish a litmus test for individuals to be able to exit a state of lockdown and engage in commerce, movement and any other right that corresponds to life in a supposedly free society, it lays the groundwork for a society in which you are required to identify yourself at any time to any government worker who demands it for any reason. Such tactics quickly lead one down a slippery slope that ends with government agents empowered to force anyone and everyone to prove they are in compliance with every statute and regulation on the books.

In the past, unless police had a reasonable suspicion that a person was guilty of wrongdoing, they had no legal authority to stop the person and require identification. In other words, “we the people” had the right to come and go as we please without the fear of being questioned by police or forced to identify ourselves.

Unfortunately, in this age of COVID-19, that unrestricted right to move about freely is being pitted against the government’s power to lock down communities at a moment’s notice. And in this tug-of-war between individual freedoms and government power, “we the people” are increasingly on the losing end of the deal.

Forced Vaccinations

With millions of dollars in stimulus funds directed towards policing agencies across the country, the federal government plans to fight this COVID-19 virus with lockdowns, SWAT team raids, mass surveillance, forced vaccinations, drones, and hi-tech surveillance technology.⁹⁴

There’s even talk of mobilizing the military to deliver forced vaccinations.⁹⁵

In many ways, this is just more of the same heavy-handed tactics we’ve been seeing in recent years but with one major difference: this COVID-19 state of emergency has invested government officials (and those who view their lives as more valuable than ours) with a

⁹² William Hanage and Helen Jenkins, “Virus models predict possible outcomes. We can fight to stop the worst ones..,” *The Washington Post* (Apr. 14, 2020), <https://www.washingtonpost.com/outlook/2020/04/14/coronavirus-models-ihme-ic/>.

⁹³ John W. Whitehead, “Things Are Getting Worse, Not Better: Round Ups, Checkpoints and National ID Cards,” *The Rutherford Institute* (Jan. 22, 2018), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/things_are_getting_worse_not_better_round_ups_checkpoints_and_national.

⁹⁴ Lee Fang, “Federal Government Buys Riot Gear, Increases Security Funding, Citing Coronavirus Pandemic,” *The Intercept* (May 17, 2020), <https://theintercept.com/2020/05/17/veterans-affairs-coronavirus-security-police/>.

⁹⁵ Raul Diego, “Trump Unveils Plan That Would See Big Pharma Reap Massive Profits from COVID-19 Vaccine,” *MintPress* (May 15, 2020), <https://www.mintpressnews.com/trump-plan-big-pharma-massive-profits-covid-19-vaccine/267617/>.

sanctimonious, self-righteous, arrogant, *Big Brother Knows Best* approach to top-down governing, and the fallout can be seen far and wide.

It's an ugly, self-serving mindset that views the needs, lives and rights of "we the people" as insignificant when compared to those in power.

That's how someone who should know better such as Alan Dershowitz, a former Harvard law professor, can suggest that a free people—born in freedom, endowed by their Creator with inalienable rights, and living in a country birthed out of a revolutionary struggle for individual liberty—have no rights to economic freedom, to bodily integrity, or to refuse to comply with a government order with which they disagree.⁹⁶

According to Dershowitz, "You have no right not to be vaccinated, you have no right not to wear a mask, you have no right to open up your business... And if you refuse to be vaccinated, the state has the power to literally take you to a doctor's office and plunge a needle into your arm."⁹⁷

Dershowitz is wrong: while the courts may increasingly defer to the government's brand of Nanny State authoritarianism, *we still have rights*. The government may try to abridge those rights, it may refuse to recognize them, it may even attempt to declare martial law and nullify them, but it cannot litigate, legislate or forcefully eradicate them out of existence.

That doesn't mean the government won't continue to try to undermine the citizenry's right to bodily integrity. Forced vaccinations will be the next major legal front in the COVID-19 battle between security and individual liberty.

There is precedence. For instance, in the 1905 case *Jacobson v. Massachusetts*, the United States Supreme Court addressed mandatory vaccinations in regard to smallpox.⁹⁸ The Court ruled that the police power of a state absolutely included reasonable regulations established by legislature to protect public health and safety. The Court reasoned that such regulations do not violate the Fourteenth Amendment right to liberty because they fall within the many restraints to which every person is necessarily subjected for the common good: real liberty for all cannot exist if each individual is allowed to act without regard to the injury that his or her actions might cause others; liberty is constrained by law. The Court went on to determine that a state may require vaccination if the board of health deems it necessary for public health or safety.⁹⁹

When determining the legality of a statute enacted to protect public health and safety, the Court found it immaterial that a portion of the medical community thought the vaccination worthless or even injurious. The state has the right to choose between opposing medical theories and to refer the matter to a board composed of persons residing in the affected location who are qualified to make a determination.

⁹⁶ Spencer Neale, "'Power' to 'plunge a needle into your arm': Dershowitz says forced vaccinations are constitutional," *Washington Examiner* (May 19, 2020), <https://www.washingtonexaminer.com/news/power-to-plunge-a-needle-into-your-arm-dershowitz-says-forced-vaccinations-are-constitutional>.

⁹⁷ Spencer Neale, "'Power' to 'plunge a needle into your arm': Dershowitz says forced vaccinations are constitutional," *Washington Examiner* (May 19, 2020), <https://www.washingtonexaminer.com/news/power-to-plunge-a-needle-into-your-arm-dershowitz-says-forced-vaccinations-are-constitutional>.

⁹⁸ *Jacobson v Massachusetts*, 197 U.S. 11 (1905).

⁹⁹ *Jacobson v Massachusetts*, 197 U.S. 11, 25-27 (1905).

The courts do not become involved in legislation formed under the state's police power as long as it relates substantially to public health, morals, or safety and is not a plain, palpable invasion of rights secured by fundamental law.¹⁰⁰ It is immaterial whether or not the vaccine is actually effective, so long as it is the belief of state authorities that the mandatory vaccine will promote common welfare and is a reasonable and proper exercise of the police power.¹⁰¹

The Court has not revisited or altered the *Jacobson* ruling in any meaningful way since it was issued over 100 years ago. If a court were to follow *stare decisis* in a situation of the government mandating vaccines, it is likely the mandate would be upheld. The Court reasoned it could not allow individuals to refuse vaccination while remaining within the general population because this would strip the legislative branch of its authority to care for the public health and safety when threatened by epidemic disease. The only exception to a mandatory vaccination is an offer of apparent or reasonably certain proof to the state's board of health that the vaccination would seriously impair an individual's health or probably cause death.¹⁰²

All 50 states and the District of Columbia now require children receive diphtheria, tetanus, pertussis, polio, measles, rubella, and varicella vaccinations before attending public school, and all also offer a variety of vaccine exemptions for medical, religious, and philosophical reasons. Only 11 states can override these exemptions in an outbreak.

The authority for these requirements has also been upheld by the Supreme Court in a case where officials excluded a student from a public school because she refused to submit to vaccinations.¹⁰³ She also was barred from attending private school under ordinances providing that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination. The trial court sustained the officials' demurrer and dismissed the bill. In upholding the officials' actions, the Supreme Court held that the ordinances conferred no arbitrary power to the administering officials, but only the broad discretion required for the protection of the public health.

Although the courts have upheld vaccine requirements and the imposition of sanctions for a refusal to receive, there is no indication that the courts have upheld the forced administration of vaccines upon a person. As one commentator has stated:

A free society demands adherence to the non-aggression principle. No person should initiate force against another, and should only use force in retaliation or self-defense. Forcibly injecting substances-attenuated microbes or otherwise-into someone else's body cannot be justified as an act of self-defense, because there is no way to determine with certainty that the person will ever be responsible for disease transmission.¹⁰⁴

¹⁰⁰ *McDaniel v. Paty*, 435 US 618, 698 (1978).

¹⁰¹ *Jacobson v Massachusetts*, 197 U.S. 1, 38 (1905).

¹⁰² *Jacobson v Massachusetts*, 197 U.S. 1, 38 (1905).

¹⁰³ *Zucht v. King*, 260 U.S. 174 (1922).

¹⁰⁴ Jeffrey A. Singer, "Vaccination and Free Will," *CATO Institute* (March 25, 2014), <https://www.cato.org/commentary/vaccination-free-will>.

The idea that persons have a right to bodily integrity that is protected by the U.S. Constitution has long been recognized by the Supreme Court. Thus, in *Rochin v. California*, a defendant in a criminal case claimed his conviction should be reversed because police officers forced him to the hospital to have his stomach pumped in order to retrieve two capsules (later found to contain morphine) he swallowed as he was being arrested. The Supreme Court held that the use of the capsules at his state criminal trial violated due process as conduct that “shocks the conscience.” “[T]o sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law.”¹⁰⁵

More relevant to the issue of forced vaccines is the recognition by courts that there is a constitutional right to bodily integrity that gives persons the right to refuse medical treatment.

The “notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment,” and “[t]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.”¹⁰⁶ In a concurring opinion, Justice O’Connor wrote that “the liberty interest in refusing medical treatment flows from decisions involving the State’s invasions into the body. . . . Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”¹⁰⁷

The right to bodily integrity has been regularly recognized by the Court.

In a case involving abortion regulations, the Court pointed out that the right to obtain an abortion previously established is based not only on the right of privacy, but also the right “of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”¹⁰⁸

More recently, the Court referred to the right of bodily integrity as grounds for refusing to allow the police to require drunk driving arrestees to submit to blood extractions. In so deciding, the Court wrote that such conduct “involve[s] a compelled physical intrusion beneath [the arrestee]’s skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual’s ‘most personal and deep-rooted expectations of privacy.’”¹⁰⁹

The idea of bodily integrity could be the basis for persons objecting to being physically forced to receive a Covid-19 vaccination once available. Although *Jacobson* seems to foreclose the argument that one can’t be sanctioned in an appropriate way for refusing, it does not foreclose a claim that the liberty interest of a person to refuse to receive intrusive medical procedures precludes the state from forcing vaccinations.

¹⁰⁵ *Rochin v. California*, 342 U.S. 165, 173 (1952)

¹⁰⁶ *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269-70 (1990).

¹⁰⁷ *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring) (citing *Rochin*).

¹⁰⁸ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹⁰⁹ *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). See also *Winston v. Lee*, 470 U.S. 753 (1985) (recognizing right to bodily integrity, but holding that state interest allowed requiring person to submit to surgery to retrieve evidence of crime) and *Sell v. United States*, 539 U.S. 166 (2003) (recognizing liberty interest to refuse to receive anti-psychotic drugs, but finding sufficient state interest to override that interest).

Whether such a claim would ultimately prevail (even assuming a state resorts to forced vaccinations) would depend on the courts' balancing of the individual interest versus the state interest. For example, the Court has held that the forced blood draw from a drunk driving suspect was not unreasonable, because blood draws "are commonplace in these days of periodic physical examination, and experience with them teaches that the quantity of blood extracted is minimal, and that, for most people, the procedure involves virtually no risk, trauma, or pain."¹¹⁰

Courts may similarly find that the intrusion on bodily integrity from a vaccination is minimal when compared with the public interest in its administration.

Short of using brute force, those in power will also seek to leverage that power to coerce persons to receive COVID-19 vaccinations. There already are reports of public and private employers requiring employees (particularly health care workers and first responders) to receive a vaccine if it available and using the threat of termination to force acceptance of the vaccine.¹¹¹ One lawsuit has been filed challenging this practice; a New Mexico corrections officer alleged her was threatened with termination if he refused.¹¹²

However, legal protections in this area are limited. Again, the ADA protects those who can prove they have medical conditions that make receiving a vaccination dangerous, but employees must be able to prove they have a sensitivity to vaccines.

The Title VII requirement that employers provide religious accommodations may be invoked by employees who have sincere religious beliefs against receiving vaccinations. But an employer's duty of accommodation is not absolute, and if it can show that accommodating the worker's objections to vaccinations will interfere with its operations or workplace safety, the employee may face the choice between keeping her job or violating her religious beliefs.¹¹³

Censorship and Technofascism

As is often the case when faced with an emergency, the government's attempted efforts at controlling the pandemic have included efforts to control the information people can communicate and receive. For example, in March 2020, the White House summoned the leaders of the world's largest tech companies and providers of information, including Facebook and Google, for a meeting at which the White House's chief technology officer asked for the

¹¹⁰ *Schmerber v. California*, 384 U.S. 757, 771 (1966).

¹¹¹ Robin Young and Serena McMahon, Can Employers Require Workers To Get The COVID-19 Vaccine? One Expert Says It's Complicated," *WBUR* (Jan. 19, 2021), <https://www.wbur.org/hereandnow/2021/01/19/employees-vaccine-requirements>.

¹¹² "Preview of Things to Come? Lawsuit Challenges Employer COVID-19 Vaccine Mandate," *Faegre Drinker* (March 5, 2021), <https://www.faegredrinker.com/en/insights/publications/2021/3/preview-of-things-to-come-lawsuit-challenges-employer-covid19-vaccine-mandate>.

¹¹³ "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," U.S. Equal Employment Opportunity Commission (Dec. 15, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

companies' help in spreading information approved by the government and stopping what the government considers misinformation about the coronavirus outbreak.¹¹⁴

The White House issued a statement that “[c]utting edge technology companies and major online platforms will play a critical role in this all-hands-on-deck effort” to control information.¹¹⁵ Soon thereafter, the tech giants issued a joint statement pledging to “jointly combat[] fraud and misinformation about the virus, elevating authoritative content on our platforms, and sharing critical updates in coordination with government healthcare agencies around the world.”¹¹⁶

Under the guise of protecting the public during the pandemic, the government and giant corporations have acted in concert to silence those who dare to challenge government orthodoxy regarding the pandemic. For example, David Icke,¹¹⁷ who heads a British media company that serves as an independent and uncensored platform for news and information, was banned from Facebook, YouTube, and other social media outlets in May 2020 soon after he challenged the authoritarian nature of the international community’s governmental response to managing the pandemic. Icke also questioned whether COVID-19 was actually as cataclysmic a public health threat as portrayed by governments worldwide and their international corporate partners.¹¹⁸ This coordinated de-platforming has essentially muzzled Icke and stymied his ability to speak to and be heard on matters of public importance by the millions of individuals who follow him across these social media platforms.

The current pandemic has fueled the rise of “technofascism,” the modern-day equivalent of book burning which involves doing away with controversial ideas—legitimate or not—and the people who espouse them. Censorship of the kind Icke and his organization have been subjected to is increasing at a rate that poses a serious threat to the freedoms of all people, regardless of their views. Clothed in public health and safety justifications, this form of technofascism sets us on a slippery slope that begins with censoring so-called illegitimate ideas and ends by silencing truth.¹¹⁹

¹¹⁴ See, e.g., Taylor Hatmaker, “White House asks tech leaders for help with coronavirus response,” *TechCrunch.com* (March 11, 2020), <https://techcrunch.com/2020/03/11/white-house-cto-kratsios-tech-facebook-google-meeting/>.

¹¹⁵ Tony Romm, “White House asks Silicon Valley for help to combat coronavirus, track its spread and stop misinformation,” *The Washington Post* (March 11, 2020), <https://www.washingtonpost.com/technology/2020/03/11/white-house-tech-meeting-coronavirus/>.

¹¹⁶ Catherine Shu, Jonathan Shieber, “Facebook, Reddit, Google, LinkedIn, Microsoft, Twitter and YouTube issue joint statement on misinformation,” *TechCrunch.com* (March 16, 2020), <https://techcrunch.com/2020/03/16/facebook-reddit-google-linkedin-microsoft-twitter-and-youtube-issue-joint-statement-on-misinformation/>.

¹¹⁷ David Icke is an internationally renowned author, lecturer and vocal critic of Orwellian tendencies in society, government and among corporations to manipulate information to reinforce its own positions, while suppressing any views that run counter to or challenge those embraced or approved of by the Establishment.

¹¹⁸ “Coronavirus: David Icke kicked off Facebook,” *BBC News* (May 1, 2020), <https://www.bbc.com/news/technology-52501453>.

¹¹⁹ John Whitehead, “Technofascism: Digital Book Burning in a Totalitarian Age,” *The Rutherford Institute* (May 5, 2020), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/technofascism_digital_book_burning_in_a_totalitarian_age.

Declaration of Martial Law

Although the pandemic has not yet caused general community conditions to deteriorate significantly, disruptions in the supply of goods, services, and necessities of life are not wholly beyond the realm of possibility. The possibility of significant civil disruption increases in particular areas that are hard hit by the spread of the disease. As a result, it may lead to more severe circumstances that interfere with the ability of citizens to obtain or receive basic necessities or receive assistance from government entities responsible for public safety. Should conditions worsen to such a degree, there is the possibility of a declaration of martial law.

While “martial law” is a term that connotes military rule over a population, it is difficult to obtain a clear meaning of the term. “Martial law” appears almost nowhere in the statutes of the United States or in the U.S. Constitution.¹²⁰ The closest the Constitution comes to referring to the idea of “martial law” is in Article I, § 9, which generally deals with the limits on the power of Congress, and provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The term “martial law” does appear in some Acts of Congress establishing as territories areas controlled by the United States, such as Guam and the Virgin Islands, allowing the governor of the territory to place it under “martial law” “in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it[.]”¹²¹

The Supreme Court had the opportunity to address martial law several years after it was declared in the territory of Hawaii by its governor (and with the subsequent approval of President Franklin Roosevelt) after the attack on Pearl Harbor. In the course of deciding whether non-jury trials in criminal cases held under martial law were valid, the Court pointed out that

[T]he term “martial law” carries no precise meaning. The Constitution does not refer to “martial law” at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times. By some it has been identified as “military law” limited to members of, and those connected with, the armed forces. Others have said that the term does not imply a system of established rules but denotes simply some kind of day to day expression of a General’s will dictated by what he considers the imperious necessity of the moment.¹²²

One concurring justice in the case wrote that “martial law is the exercise of the power which resides in the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety. . . . It is a law of necessity to be

¹²⁰ There are some references to the term in statutes dealing with sanctions against the People’s Republic of China, allowing the lifting of sanctions only when “martial law” is lifted in Tibet. See, e.g. 22 U.S.C. § 2151.

¹²¹ See, e.g., 48 U.S.C. § 1422. A governor’s proclamation of martial law may be revoked by a vote of two thirds of the territory’s legislature.

¹²² *Duncan v. Kahanamoku*, 327 U.S. 304, 315 (1946).

prescribed and administered by the executive power. Its object, the preservation of the public safety and good order, defines its scope, which will vary with the circumstances and necessities of the case.”¹²³

Thus, martial law is a raw exercise of executive power that can override the other branches of government and assume control over the functioning of a nation, state, or smaller area within a state. The power has been exercised by the president, as President Abraham Lincoln did soon after the start of the Civil War,¹²⁴ and by governors, as was done in Idaho to quell a miner’s strike that broke out there in 1892.¹²⁵

In areas under martial law, all power rests with the military authority in charge. As British General Wellington wrote, “martial law” is not law at all, but martial rule; it abolishes all law and substitutes for it the will of the military commander.¹²⁶ Military personnel are not bound by constitutional restrictions requiring a warrant, and may enter and search homes without judicial authorization or oversight.¹²⁷ Indeed, civil courts would no longer be functioning to hear citizen complaints or to enforce their constitutional rights.¹²⁸

The Supreme Court has in several instances overruled actions taken under martial law. For example, it threw out convictions imposed by military tribunals in Hawaii because they were entered at a time when the emergency justifying the martial law proclamation had ceased to exist and when civil courts could have been convened.¹²⁹ Moreover, the Supreme Court dismissed a military tribunal conviction during Lincoln’s martial law declaration because there was no imminent invasion or threat of rebellion and the civil courts were capable of functioning.¹³⁰ However, these cases were brought long after the martial law declaration and the infringement of civil rights that were challenged.

If martial law is imposed and the authority of the courts is suspended by the executive’s use of military force, claims that rights have been illegally infringed will have no tribunal in which to be heard and persons aggrieved will have no immediate recourse to vindicate their rights.

Supreme Court decisions do make clear that martial law or emergency restrictions may last only so long as necessary. “The exercise of the power may not extend beyond what is required by the exigency which calls it forth.”¹³¹ The government cannot use an emergency that no longer exists as a pretext to impose a permanent limitation on constitutional rights. However, history shows that emergency measures, even if warranted and effective, sometimes remain in place long past the time the actual emergency exists.¹³²

¹²³ *Id.*, 327 U.S. at 335 (Stone, J., concurring)

¹²⁴ *Ex parte Milligan*, 71 U.S. 2 (1866).

¹²⁵ <https://www.loc.gov/rr/news/topics/cour.html>.

¹²⁶ *Ex parte Milligan*, 71 U.S. 2, 36 (1866).

¹²⁷ *Luther v. Borden*, 48 U.S. 1, 45 (1849).

¹²⁸ *Ex parte Milligan*, 71 U.S. 2, 127 (1866).

¹²⁹ *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946).

¹³⁰ *Ex parte Milligan*, 71 U.S. 2, 127 (1866).

¹³¹ *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, J., concurring).

¹³² Matthew Feeney, “How Should Civil Libertarians Respond to Pandemics?,” *CATO at Liberty* (March 27, 2020), <https://www.cato.org/blog/civil-libertarians-time-pandemic-surveillance>.

Authority to Lift Restrictions

As vaccines have been administered and measures imposed to hinder the spread of COVID-19 have taken hold, some governments have moved to lift restrictions on gatherings, travel, and business operations, thus beginning to restore the country to normal operation.¹³³ Initially, there had been a controversy over the transition to normalcy and who has the authority to lift the current restrictions and “open up” the country.

This exposed a tension between the federal government and state governments when it comes to opening up the country and lifting the restrictions put in place to limit the pandemic.¹³⁴ While then-President Trump insisted that he had “total authority” when it came to opening up the country and lifting the restrictions put in place to limit the pandemic,¹³⁵ governors of major states asserted that they would decide how and when the restrictions are lifted.¹³⁶ The consensus among legal experts is that governors and local officials have primary control over the lifting of COVID-19 restrictions. Moreover, while the president and his executive agencies issued guidance on social distancing and other health related response, it was the governors and local officials who actually imposed the restrictions on gatherings and businesses. As one former Justice Department official stated, “Only the states can impose quarantines, close institutions and businesses, and limit intrastate travel. . . . governors . . . imposed their states’ lockdowns, and only they will decide when the draconian policies will end.”¹³⁷

This is supported by the text and structure of the United States Constitution. Under the Constitution, the powers of the three branches of the federal government are limited to those delegated in the Constitution.¹³⁸ Unless the power is expressly delegated to the federal government or necessarily implied from a delegated power, it does not have that power. Moreover, there is nothing in the Constitution that plainly gives the president the power to override emergency orders of state governors.¹³⁹

By contrast, the Tenth Amendment to the Constitution provides that “[t]he powers not delegated to the United States by the Constitution, or prohibited by it to the States, are reserved to the States respectively, or to the people.” As mentioned above, a reserved power of the State is

¹³³ Tim Fitssimons, “Texas and Mississippi to lift mask mandates and roll back Covid restrictions,” *NBC News* (March 2, 2021), <https://www.nbcnews.com/news/us-news/gov-greg-abbott-lift-texas-mask-mandate-open-state-100-n1259329>.

¹³⁴ Khadim Shuber and Peter Wells, “Trump claims ‘total’ authority as he considers easing lockdown,” *Financial Times* (Apr. 14, 2020), <https://www.ft.com/content/02deff26-0c84-4658-b17a-1c6e81d5cecd>.

¹³⁵ Khadim Shuber and Peter Wells, “Trump claims ‘total’ authority as he considers easing lockdown,” *Financial Times* (Apr. 14, 2020), <https://www.ft.com/content/02deff26-0c84-4658-b17a-1c6e81d5cecd>.

¹³⁶ Jill Colvin, Zeke Miller and Geoff Mulvihill, “Governors Refute Trump’s Claim He Has ‘Total’ Authority on Easing COVID-19 Restrictions,” *Time* (Apr. 13, 2020), <https://time.com/5820342/trump-authority-states-coronavirus/>.

¹³⁷ Charlie Savage, “Trump’s Claim of Total Authority in Crisis Is Rejected Across Ideological Lines,” *New York Times* (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/trump-total-authority-claim.html>.

¹³⁸ Roger Pilon, “The Powers Delegated to the Federal Government Are Few and Defined,” *Roots of Liberty*, <https://rootsofliberty.org/the-powers-delegated-to-the-federal-government-are-few-and-defined/>.

¹³⁹ Salvador Rizzo, “Four Pinocchios for Trump’s claim that he has ‘total authority’ over the states,” *The Washington Post* (Apr. 14, 2020), <https://www.washingtonpost.com/politics/2020/04/14/four-pinocchios-trumps-claim-that-he-has-total-authority-over-states/>.

its general police power to act for the health and safety of the public. Thus, the Constitution appears to plainly give States and their officials the power to decide what restrictions should be put in place to protect the public health and general welfare.¹⁴⁰

That said, there are a number of ways citizens can limit the duration of the COVID-19 restrictions and assure that they are only temporary limits on the constitutional right to travel, assemble, and worship together. As such, restrictions on gatherings and travel are not limits on the First Amendment right of free speech or the right to petition government. With the internet, social media and other technologies, citizens are still able to communicate with each other and form communities that can influence public opinion. These “virtual assemblies” can demand that those in power, including their legislative representatives who retain power and influence, provide information and explanations about why restrictions on liberties are necessary and what criteria will be used to determine when the restrictions will be lifted.

Additionally, the courts remain available—so long as martial law is not imposed—to hear complaints and petitions of citizens that their civil liberties are being unnecessarily infringed. As noted above, the authority of governors and local officials to declare emergencies and take actions in response are delegated by state law, but are also limited by state law to actual emergencies or public health threats. Courts, on the petition of any citizen whose civil liberties are infringed, may reverse the declaration of an emergency if it finds that current conditions no longer satisfy the legal definition of that term. Federal courts are also empowered to declare that a restriction on constitutional rights is not justified by a compelling interest and that the government must allow persons to exercise those freedoms guaranteed to them by law.

The Ultimate Authority Rests with “We the People”

As the Declaration of Independence states, we are endowed by our Creator with certain inalienable rights—to life, liberty, property and the pursuit of happiness—that no government can take away from us. Unfortunately, that hasn’t stopped the government from constantly trying to usurp our freedoms at every turn. Indeed, the nature of government is such that it invariably oversteps its limits, abuses its authority, and flexes its totalitarian muscles.

Take this COVID-19 crisis, for example. What started out as an apparent effort to prevent a novel coronavirus from sickening the nation (and the world) has become yet another means by which world governments (including our own) can expand their powers, abuse their authority, and further oppress their constituents. Until now, the police state has been more circumspect in its power grabs, but this latest state of emergency has brought the beast out of the shadows.

We are on a slippery slope to outright despotism. This road we are traveling is littered with the debris of our First and Fourth Amendment freedoms. Yet pandemic or not, “We the People” are still the final authority over how to manage our personal lives, but it is a distinction that is hanging by a thread. At the point that we lose that distinction or relinquish that final authority, we will no longer be citizens of a constitutional republic but inmates in a police state. The burden and responsibility rest with us to make the government play by the rules of the Constitution. Together, we *will* make America free again. We must.

¹⁴⁰ *Id.*

Defending your rights

The Rutherford Institute stands ready to defend your rights if they are violated by the government. For over a quarter century, we have assisted, without charge, persons deprived of their liberty by government officials.

Should you have further questions or need legal assistance in exercising your constitutional rights, please contact the Legal Department at legal@rutherford.org.

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