



Journal of Liberal Arts and Humanities (JLAH)
Issue: Vol. 1; No. 4; April 2020 pp. 160-162
ISSN 2690-070X (Print) 2690-0718 (Online)
Website: www.jlahnet.com
E-mail: editor@jlahnet.com

COVID-19 in the United States: The Necessity of Each States' Police Power in this Epic Battle for Public Health

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The Unique Challenge of Addressing COVID-19 in the US Legal System

The legal system of the United States presents unique challenges in addressing the novel coronavirus disease 2019 (COVID-19) pandemic. Specifically, under the nation's decentralized federalist system there are actually two distinct legal systems functioning at the same time.^{1,2,3} Thus the federal government—represented by President Trump, Congress, and the Supreme Court—can *only* exercise the legal authority expressly granted to the federal government by the US Constitution. In other words, if the federal government takes action that is beyond the scope of the express authority granted to it by the Constitution—then that action will be struck down as unconstitutional and thus illegal.^{4,5}

On the other hand, each individual state in the United States retains *all* legal authority that is not prohibited by Article I, Section 10 of the Constitution.⁶ Most relevant to flattening the epidemic curve of COVID-19 is each states' "police power"—granted by the 10th Amendment of the Constitution—which expressly provides each state with the legal authority to establish and enforce laws that protect public health.^{7,8}

States Have Taken the Lead in Responding to COVID-19

There has been much discussion on the leadership from the federal government in responding to the COVID-19 pandemic—but there is no legal requirement that a state await federal action before exercising its police power. The more relevant question for discussion is "What are states doing to protect public health?". In the context of the American legal system it is the states that have the Constitutional authority to establish and enforce laws that protect the public health of citizens within the state's jurisdiction. It is the states that can *and* must *and* have over the years utilized their Constitutionally-derived police power to protect the public health of their constituents.⁹ Therefore in the present pandemic it is once again the states that are best positioned to establish and maintain a flattening of the epidemic curve of COVID-19 by implementing the most current guidelines from the Centers for Disease Control and Prevention (CDC) regarding reducing the transmission of COVID-19 among their respective citizenry.

States are Best Positioned to Flatten the Epidemic Curve

States, through their elected representatives and in accordance with their individual state constitutions, can and have enforced social distancing through their police power. At the time of this writing a number of states have, among other things, already:

- Banned and or canceled large gatherings
- Closed public schools
- Closed businesses that do not provide essential services
- Closed restaurants or prohibited onsite dining
- Closed public spaces (i.e. bars, nightclubs, cinemas)
- Closed casinos and racetracks¹⁰

On March 19, 2020 Governor Gavin Newsom became the first governor in the United States to utilize his state's police power to require residents of California to stay-at-home. Governor Newsom's *Executive Order N-33-20* required "all individuals living in the State of California to stay home or at their place of residence..."¹¹ While the federal government can issue guidelines and recommendations, it is the states—and not the federal government—that are in the legal position to most effectively flatten the epidemic curve by enforcing those matters that impact the public health of their citizens.¹²

State Responses are Crucial to the United States' ability to Respond to COVID-19

Given the realities of the American legal system, the United States cannot respond effectively to COVID-19 without each state appropriately exercising its police power. While it is necessary to balance individual liberties with public health concerns, safeguards for those liberties are already guaranteed at the state level through each state's respective constitution. In addition, the citizenship rights guaranteed by the Fourteenth Amendment of the US Constitution must also be upheld and complied with by the states. For example, the individual right of Due Process of law—which requires government actors to guarantee the normal judicial process for all citizens—is still applicable to the states even when states are implementing their police power to address COVID-19.¹³

While the legal system of the United States presents unique challenges in addressing the COVID-19 pandemic, there are also significant strengths found therein. Each state is positioned to protect its citizenry by establishing and enforcing measures designed to flatten the epidemic curve of COVID-19. The use of this police power is being tailor made by each state to address the specific needs of its locale and citizens. Nebraska does not necessarily share the same challenges as California, nor Hawaii with Utah. But through each state's implementation of its police power, in a manner that best fits the public health needs of its citizenry, the states of the United States have arguably already flattened the epidemic curve of COVID-19.^{14,15}

States Alone Have the Authority to Remove Restrictions and Resume Normal Life

Clearly each state may utilize its police power to implement all reasonable public health restrictions addressing COVID-19. The question arises—what about removing these restrictions? In other words, can the federal government open up businesses closed by the state's police power? The short answer is no—because the legal authority to reduce police power is simply the proverbial opposite side of the same coin. Unless the police powers enacted by the state violate Due Process or in any way contravene the US Constitution—then the removal of public health and safety restrictions implemented under a state's police powers are solely within that state's discretion.¹⁶

Conclusion

While the United States' decentralized, federalist legal system presents unique challenges in addressing the COVID-19 pandemic, each state in the United States is fully equipped with the legal authority to establish and enforce directives that protect public health. Ideally in the face of this, and any future, pandemic the states' police powers are augmented by the federal authority of the president to declare public health and national emergencies. With decisive, stable, and coordinated leadership at the state and federal level, the people of the United States will be—as President George Washington once said—better "prepared to make sacrifices of both ease and property" and readily engage in the social distancing and other preventative measures outlined by their elected leaders.

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