Chapter 4 • Distancing, Movement and Gathering Restrictions, and Business and Activity Control Measures

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Summary
Community mitigation measures that limit contacts between people can be an effective strategy to reduce the spread of COVID-19. Government powers can be used to require or encourage these measures through an array of social distancing strategies such as movement and gathering restrictions, closure of in-person operations of non-essential personal, recreational, and commercial activities, and physical separation and facemask-wearing requirements. Such strategies have been integral to the COVID-19 pandemic response in the United States. This Chapter examines the legal, ethical, and political issues raised by the government’s use of these social distancing strategies, highlighting how state governments in particular have used these tools and how they have been adapted over time as successive waves of COVID-19 cases have emerged. Often politically controversial, numerous legal challenges have been brought against government orders that restrict movement, impose gathering limits, and close businesses. The government has prevailed in most of these legal challenges, due to the deference typically given by courts to government-imposed restrictions that seek to balance public health and other considerations under circumstances of scientific uncertainty. However, recent Supreme Court rulings portend changes to the legal landscape that may render government public health powers more vulnerable to challenge when religious exercise rights are implicated. Government officials have an obligation to take affirmative steps to minimize the need for social distancing orders and to ensure that when restrictions and closures are in place that supportive policies mitigate disparate burdens on vulnerable and marginalized communities.

Introduction
This Chapter explores some of the fundamental, most impactful, and controversial actions taken by federal, state, and local governments to contain the spread of COVID-19. Government officials have implemented widespread, but quite varied, actions to achieve better community mitigation of COVID-19. These efforts have taken the form of layered interventions that aim to reduce COVID-19 spread using some combination of measures that reduce interpersonal contact, expand physical distance when people do come into contact, reduce the intensity of exposure, and introduce physical barriers like masks, screens, and ventilation (see Chapter 2). Government orders imposed restrictions on mass movement; control of personal interactions and property uses through requirements to wear masks and maintain physical separation; and limitations on personal, recreational, educational, and commercial activities to limit the extent of personal interactions that can facilitate transmission of a contagious disease like COVID-19. While many of these social distancing strategies have long been recognized as effective interventions for mitigating the spread of airborne infectious diseases, these measures have not been widely used in the United States. The implementation of these countermeasures has raised numerous legal and political questions and challenges.

Social distancing strategies to mitigate infectious disease spread run along a continuum of restrictiveness, from extensive limitations on interactions (stay-at-home orders; business closures; activity bans; movement restrictions) to less restrictive measures (density or time limitations on in-person gatherings; physical separation; mask-wearing requirements). As the COVID-19 pandemic has continued, the insights of virologists and epidemiologists have allowed for a better understanding of...
the risks of this disease and its methods of infection and spread. Despite these insights, decisions about whether and when to use government powers to achieve social distancing have been wildly inconsistent, with some states vacillating between strict restrictions and minimal COVID-19 mitigation measures, and others refusing to take any significant compulsory measures to forestall the spread of the disease. This variation likely stems at least in part from the fact that there are so many options for intervention measures, but no national plan or clear evidence base for determining which combination of measures to apply (see Chapter 2).

The erratic application of community mitigation strategies also has intensified racial and ethnic health disparities. Increased levels of community-based COVID-19 infections have had greater impact on communities of color and indigenous communities (CDC, 2020), who are more likely to live in multi-generation households, work in jobs that require in-person contact, and have underlying health conditions that can increase the likelihood of serious COVID-19 infection and death. Members of these communities also are affected disproportionately by disruptions in public services, paychecks, child care, and mobility (Yearby & Mohapatra, 2020). Protecting the health of these communities requires a more equitable response than has been implemented so far. Robust and consistent government support that provides food, housing, and health services access as well as income, employment, utility, and housing protections can promote equity in the pandemic response and simultaneously allow people to comply with community mitigation strategies to further reduce the spread of COVID-19.

Volume I of this report addressed many of the fundamental legal powers that justify orders implementing distancing measures, movement and gathering restrictions, and closures of or limitations on businesses and other activities, and noted the historical development and application of these powers, including the widespread use of these strategies by states during the first wave of COVID-19 cases in the United States (Gable, 2020). In the second half of 2020, as COVID-19 cases ebbed and then resurged, many states again turned to these strategies, often using less-restrictive and more targeted approaches. The failure of the federal government throughout 2020 to provide leadership or sufficient support to state and local governments, while often actively opposing community mitigation efforts, further complicated efforts to bring rates of COVID-19 infection under control.

Legal authority for these public health measures has historically been interpreted quite broadly at the state and local government levels, based on expansive understandings of the state police power and presumed deference to government officials pursuing urgent public health goals, particularly those designed to stop the spread of infectious diseases (Jacobson v. Massachusetts, 1905). While courts have occasionally invalidated government restrictions on movement, interaction, or activity that are overbroad or applied in a discriminatory manner (Jew Ho v. Williamson, 1900), government interventions of this sort have largely been upheld. This Chapter examines how social distancing, gathering limitations, mandated closures, and activity bans have been utilized during the COVID-19 pandemic, and how legal challenges to government orders implementing these restrictions have complicated the legal landscape regarding the scope of public health powers available to respond to infectious disease outbreaks. Recent judicial decisions interpreting public health powers (discussed in detail below) have introduced greater uncertainty about the amount of deference that governments will receive from courts when implementing orders that infringe on fundamental rights, particularly rights related to religious worship activities.

### Distancing and Control Measures during COVID-19
#### Government Actions to Control Movement and Limit In-Person Interactions

The use of social distancing strategies by government officials in the United States to respond to the COVID-19 pandemic during 2020 and early 2021 has varied considerably over time and across jurisdictions. State and local governments reacted to the first spike in COVID-19 cases in March 2020 by using emergency powers to implement widespread and wide-ranging stay-at-home orders and other steps to limit personal interaction to contain the spread of the disease. As the magnitude of the outbreak grew, government officials expanded and extended these restrictions to include travel restrictions, limits on the number of people permitted to congregate in non-essential gatherings, closures of in-person operations of schools and non-essential businesses, and requirements for mask-wearing and maintaining physical distance between people, especially indoors.

This initial round of closures, which lasted roughly from mid-March until May 2020 and imposed the most extensive set of layered interventions, seems to have had the intended epidemiological effect on containing the disease, as case rates that had been rising rapidly began to abate (Castillo et al., 2020; Anderson & Burris, 2020). Some states began removing restrictions on gatherings and business operations as early as April 2020, while cases were still rising. The rapid reversal of restrictions allowed for a resurgence in COVID-19 cases in states such as Arizona, Florida, Georgia, and Texas during summer 2020, prompting some of these states to reluctantly re-impose gathering and activity restrictions.

COVID-19 cases again began to rise nationwide in November 2020 to levels well beyond the spring 2020 outbreak. Yet despite this unprecedented surge in cases, most states reacted slowly and did not reenact the same extensive restrictions used the prior spring. Few states imposed full-scale stay-at-home orders, with most states opting instead to apply more limited, regional restrictions on movement and activity. States hit hard by new cases, such as California, implemented regional stay-at-home orders that could be adjusted to account for changes in COVID-19 case numbers, while other states such as Connecticut, Ohio, North Carolina, and Virginia imposed curfews for non-essential activities. Business closures and gathering restrictions reemerged as well—particularly indoor dining and recreational activities, which were curtailed in many states. However, some states refused to impose any restrictions to stop the spread of COVID-19 infections, such as North Dakota and South Dakota, where infection rates have been some of the highest per capita in the world. Other states, such as Iowa and Florida, have maintained relatively lax statewide COVID-19 restrictions and prohibited local governments from implementing stronger mitigation measures despite ongoing outbreaks.
Several reasons may explain why states were more reluctant to use social distancing orders in their responses to the winter 2020–21 surge. First, better scientific understanding of how COVID-19 is transmitted and the relative risks of different types of activities allowed for states to take more targeted interventions instead of the all-or-nothing approach employed at the outset of the pandemic. This approach is consistent with ethical best practices that state orders should seek less restrictive alternatives that will still achieve mitigation.

Second, political and economic pressures made more extensive restrictions harder to impose and may have dissuaded officials from taking necessary steps to mitigate COVID-19 spread. The extensive restrictions in the first wave caused substantial economic and social disruption, even as they effectively “flattened the curve.” While federal and state support helped many individuals, businesses, and institutions get through the initial round of closures and restrictions, Congress never sufficiently funded programs that would provide adequate support for people to stay home and businesses and institutions to persist for longer-term shutdowns. Nor did funding or support materialize for a robust test-trace-isolate infrastructure that could allow for targeted COVID-19 interventions to break transmission chains as they are discovered. President Trump and conservative activists amplified voices opposed to further COVID-19 restrictions and inveighed against additional social support measures to help struggling individuals and businesses.

Third, the length of the pandemic and the accrual of loss, exhaustion, and strife made stricter interventions less palatable and less feasible. The initial round of community mitigation strategies were supported by impressive and unprecedented sacrifice and altruism by millions of Americans. As pandemic fatigue set in, accompanied by continued political gaslighting and heightened economic concerns, many decision-makers and members of the public alike became more frustrated and resigned to accept high rates COVID-19 infection and death as the “new normal,” and the reimposition of distancing measures as politically and economically infeasible. The disconnect — and in some cases outright denial — of many relatively well-off decision-makers from their constituents who were struggling to stay economically afloat exacerbated the resistance to both renewed community mitigation efforts and being open to provide sufficient economic and social support for those most impacted by COVID-19, particularly those in poor and marginalized communities.

During the second half of 2020, mask-wearing mandates became the most visible and contested community mitigation strategy at the state and local levels. Despite ongoing mixed messages on the importance of masks in stopping the spread of COVID-19, mandatory mask-wearing requirements increasingly have been adopted. At the time of this writing (February 2021) 33 states, the District of Columbia, and Puerto Rico have mask mandates in place for non-household indoor settings and six additional states require masks in some settings. Mask mandates have withstood legal challenges, including claims that mask mandates violate due process and constitute compelled speech. The Biden administration has recently implemented a mask mandate on federal properties and for anyone engaged in interstate travel.

All levels of government were slow in responding to the rising pandemic threat in early 2020, but the federal government response was especially anemic and continued to lack urgency, organization, and competence throughout 2020. The Trump administration consistently failed to provide sufficient guidance or leadership to slow the spread of the pandemic, and actively undermined and criticized states that took the lead in targeting restrictions on activities to slow transmission (Parmet et al., 2021).

The federal government’s role in effectuating distancing and control measures for infectious disease outbreaks can include coordination, direct action, and the provision of funding and support. The Trump administration largely eschewed this coordinating role. While guidance from the Centers for Disease Control and Prevention (CDC) was influential in helping states craft their policies on gathering sizes, distancing guidelines, and mask-wearing protocols, the president and other federal officials contradicted and questioned these public health efforts, blunting their influence.

Most legal scholars agree that federal executive branch officials have limited powers to directly issue broad orders to restrict movement, mandate distancing precautions, and require masks outside of federal properties and interstate travel. Yet the Trump administration did not apply COVID-19 mitigation measure even in these more limited settings. The CDC’s September 2020 nationwide eviction moratorium represents the most expansive use of federal authority to protect public health to date. Using the language found in Section 361(a) of the Public Health Services Act (PHSA), 42 U.S.C. § 264 as modified by regulations, the CDC director found that the halt on evictions was necessary “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.” This unprecedented broad assertion of federal executive authority to pursue public health goals has already withstood initial court challenges and could potentially form the basis of more aggressive federal intervention to impose nationwide movement restrictions or masking and physical distancing requirements (see Chapter 10 on federalism for more details).

Finally, the federal government did not sufficiently provide funding and support to allow communities, institutions, businesses, and individuals to comply with movement and activity restrictions. Congress passed legislation in spring 2020 containing some of these supports (such as economic assistance, eviction and utility shutoff moratoria, expanded unemployment benefits), but additional necessary resources languished for most of the year, limiting the ability of states to successfully reenact precautions when they were needed in November and December 2020. Indeed, had supportive measures for small businesses and restaurants been more consistent, it may have engendered less opposition and better compliance with closure orders. Lack of sufficient economic and social support measures has particularly negative impacts on members of racial and ethnic minority groups and the poor, who have faced disproportionate economic, social, and health effects during the COVID-19 pandemic (Yearby & Mohapatra, 2020).
As the Biden administration takes over the reins of government, there is ample opportunity for the federal government to assert a more proactive role in guiding and supporting community mitigation measures. The Biden administration has already issued executive orders requiring physical distancing and masking requirements on federal properties and interstate and international conveyances. The CDC should provide essential guidance to states, localities, and institutions about how to best target and layer community mitigation strategies to achieve significant reductions in COVID-19 transmission. Most importantly, Congress should pass legislation that supports the ability of people, businesses, institutions, and government to comply with community mitigation strategies. Such legislation should provide additional funding for individuals, small business, schools, and state and local governments and extend legal protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to community mitigation measures.

**Legal Challenges to Government Restrictions**

Numerous legal challenges to the use of government powers have emerged since the beginning of the COVID-19 pandemic. Litigants brought cases grounded in a variety of legal theories to challenge the authority of state and local governments to restrict gatherings, limit business operations, and impose other social distancing requirements. Courts have upheld the vast majority of government orders in the face of these challenges. But as the pandemic stretched on, courts — including the newly reconstituted and more conservative U.S. Supreme Court — have increasingly given less deference to state orders imposing social distancing and community mitigation measures, particularly when the legal challenges invoke religious free exercise. In addition, several state legislatures have successfully challenged in court the authority of executive branch officials to impose social distancing measures.

Courts evaluating challenges to state emergency orders have frequently relied on *Jacobson v. Massachusetts*, the famous 1905 U.S. Supreme Court case often considered the legal cornerstone of public health emergency powers. *Jacobson* recognized that the state’s interest in protecting public health can outweigh individual liberty interests in legitimate circumstances such as curtailing an infectious disease outbreak, while also noting that state power in these contexts is subject to judicial review. However, since *Jacobson* predates modern constitutional jurisprudence, modern courts have developed differing interpretations of how it applies to challenges to government-imposed COVID-19 restrictions (Parmet, 2020; Wiley & Vladeck, 2020).

At one end of the spectrum, some courts have interpreted *Jacobson* as establishing an extreme deference to state actions that suspends normal constitutional constraints during a public health emergency. The Fifth Circuit’s decision in *In re Abbott* is emblematic of this approach, upholding a state law that suspended abortion services as not essential during the declared emergency and finding that courts should defer to state restrictions imposed due to an epidemic unless they constitute “a plain, palpable invasion of rights.” Courts have dismissed virtually all challenges to stay-at-home or closure orders brought by individuals alleging violations of fundamental rights to assemble or travel using similar reasoning—that per *Jacobson*, pandemic exigencies rendered the restrictions constitutional without requiring further demonstration that strict scrutiny standards had been satisfied (Wiley, 2020). Likewise, most legal challenges by businesses claiming that government-imposed closures, customer limits, or operating restrictions violated due process and equal protection rights or constituted takings were resolved in the government’s favor, with courts finding in all but a few outlier decisions that these orders easily met rational basis standards (Wiley, 2020).

In evaluating challenges to social distancing orders, the Supreme Court initially adopted what seemed to be a cautiously deferential approach to evaluating state powers during a pandemic. In *South Bay United Pentecostal Church v. Newsom* (*South Bay I*), Chief Justice John Roberts explained in his concurrence that a California order limiting the size of attendance at religious worship services to 25% capacity or 100 attendees did not clearly violate religious free expression rights, recognizing deference to “politically accountable” public health officials.

The Supreme Court subsequently changed course, halting two similar government orders that restricted in-person religious worship services in two decisions issued after Justice Amy Coney Barrett joined the Court in October 2020. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court enjoined a New York order that placed limits on the size of indoor religious and other communal gatherings, finding that restrictions affecting religious worship activities that do not similarly restrict secular gatherings — even those that have less significant risks like shopping — were an unconstitutional violation of religious free expression. Justice Gorsuch’s concurring opinion harshly criticized the use of *Jacobson* to justify deference to state public health expertise that impinges on religious practice in *South Bay I*. The Court’s ruling in *South Bay United Pentecostal Church v. Newsom* (*South Bay II*) went even further to shield religious practice from public health orders, with six justices agreeing to grant an injunction against California’s order banning gatherings involving indoor communal activities. While the state order was generally applicable, placed restrictions on both religious and secular gatherings, and provided scientific support for limiting gatherings due to the high risk of COVID-19 infection in these settings, the Court’s plurality nevertheless found the measure to be too restrictive to religious worship.

The Supreme Court’s recent decisions have upended conventional wisdom about deference to government actions taken to protect public health during epidemics. The Court’s willingness to subject social distancing orders that impact religious worship to rigorous strict scrutiny and to second-guess the government’s scientific risk assessments and conclusions creates significant uncertainty about when courts will uphold social distancing orders that impact fundamental individual rights. As Justice Elena Kagan noted in her dissent in *South Bay II*, these rulings inject “uncertainty into an area where uncertainty has human costs.” While most courts will continue to give the government wide latitude to enact limitations on gatherings, the judiciary may intervene if religious free expression (and perhaps other fundamental rights) are impacted without sufficient justification. State and local governments
should carefully draft social distancing orders to ensure that they are neutrally-worded and do not single out religious gatherings, and should include clear, scientifically-supported information justifying restrictions and explaining the scientific basis for differences in restrictions across categories of activities (Wiley, 2020; Parmet, 2020).

In several states, legislatures brought legal challenges asserting that executive branch officials exceeded their statutory authority in issuing social distancing and community mitigation orders. While most such challenges failed, at least two state supreme court rulings limited executive branch powers. The Wisconsin Supreme Court invalidated statewide stay-at-home and business closure orders in Wisconsin Legislature v. Palm, finding they exceeded the statutory authority of health department officials. In In re Certified Questions, the Michigan Supreme Court similarly concluded on nondelegation doctrine grounds that the Emergency Powers of the Governor Act — a broad emergency statute enacted in 1945 — did not authorize the governor to exercise emergency powers to respond to COVID-19, invalidating dozens of state orders. Michigan’s state health department subsequently reinstated many of these orders under different statutory authority. Inter-branch disputes at the state level over the extent of executive branch powers are likely to continue as at least 24 states have introduced legislation that would explicitly curtail public health powers (Barry-Jester et al., 2020), some drawing on model legislation from the libertarian-leaning American Legislative Exchange Council. States would benefit from creating substantive standards for how public health powers and emergency powers may be used to impose social distancing orders, but should not restrict the ability of executive branch officials from acting decisively to intervene when infectious disease pandemics require rapid intervention (Wiley, 2020).
Recommendations for Action

Federal government:

- Congress should appropriate significant, expanded, ongoing funding to support people who lose jobs or income due to state and local stay-at-home orders, business and school closures, and gathering restrictions so as to enable them to comply with these restrictions.
- Congress should enact legislation that strengthens and extends legal protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to stay-at-home orders, business and school closures, and gathering restrictions.
- Congress should appropriate significant, expanded, ongoing funding to support small businesses and school systems that were forced to close or reduce services due to COVID-19 mitigation orders.
- CDC should provide essential guidance to states, localities, and institutions about how to target and layer community mitigation strategies to best achieve significant reductions in COVID-19 transmission.

State governments:

- State legislatures should enact legislation creating substantive standards to guide the scope and authority of state officials to limit person-to-person interaction and impose closures, movement restrictions, gathering bans, and physical distancing requirements.
- Governors or other designated officials should promote social distancing to reduce the spread of COVID-19 through incentives, supportive programs, and legal protections that allow compliance with distancing guidance and reduce inequitable disparate impact of gathering restrictions and closures. If mandatory restrictions and closures are implemented, state officials should base these measures on the best available epidemiological and scientific evidence.
- Governors, through executive orders, and/or legislatures, through amending extant housing, utilities, and employment laws, should extend protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to stay-at-home orders, business and school closures, and gathering restrictions.
- State and local governments should carefully draft social distancing orders to ensure that they are neutrally-worded and do not single out religious gatherings, and should include clear, scientifically-supported information justifying restrictions and explaining the scientific basis for differences in restrictions across categories of activities.

Local governments:

- Local ordinances should allow for the imposition of targeted and scientifically-appropriate closure, movement, and physical distancing restrictions consistent with stopping the spread of COVID-19 in local communities.
- Mayors, through executive orders, and/or local councils, through amending extant housing, utilities, and employment laws, should extend protections against eviction, mortgage foreclosure, utility shut off, discrimination, and employment loss due to stay-at-home orders, business and school closures, and gathering restrictions.
About the Author

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