

In response to the COVID-19 pandemic, governments have been issuing “stay-at-home” orders. Some countries have gone on national lockdowns, including the UK, India, Mexico, South Africa, and New Zealand, while in other countries, like the U.S., orders are happening more piece-meal, led by the States’ Governors utilizing state emergency authorities.

Today, all but a handful of states in the U.S. are under some form of shelter-in-place directive. These orders generally require that “non-essential” workers remain at home to mitigate the spread of COVID-19.

Some have argued the remaining states with no stay-at-home orders in place endanger the health of their residents and those in the neighboring states. But President Trump has resisted the calls for a national order that would harmonize essential services across the union. He noted the outlier states are “doing very well,” and their governors are “doing a magnificent job in running their states.” He also signaled a “constitutional problem” in ordering a national lockdown, hinting at the notion of federalism and states primacy to control health, safety and the general welfare.

Whether President Trump embraces this same respect for states in the future is not clear; but it is reasonable to assume there will be a conflict between the President’s interest in kick starting the economy as soon as he determines it is possible and the Governors’ seemingly unwavering commitment to flattening the epidemic curve for COVID-19. The burgeoning conflict can be seen in statements from the President that he sees “light at the end of the tunnel,” and the country will re-open “sooner than people think” and from certain advisors, like top economic advisor, Larry Kudlow, who [indicated](#) the President is hopeful “in the next four to eight weeks, we will be able to open the economy.”

When this happens, states will need to be prepared to answer some hard questions. Will states be required to open non-essential businesses even if they are not ready? By refusing to reopen, would states be in violation of federal law? What are the political consequences for Governors and monetary impact to states that choose to rebuff a President who wants a return to normalcy ASAP?

## States and Federal Government Authorities During Health Emergencies

The regulation of public health has historically been the prerogative of state and local governments. The states’ public health authority [derives](#) from the police powers granted by their constitutions and reserved to them by the Tenth Amendment to the U.S. Constitution. States also have the ability to use their police powers to enforce any declarations during emergencies. For example, state police powers allow them to put in place isolation and quarantine laws to prevent or stop the spread of disease, even over the objections of those affected and despite the inherent loss of liberty by those impacted. Such orders must be temporary and well justified but they are very powerful when used.

In accordance with these powers, states’ “shelter-in-place” orders have forced the closure of an untold number of non-essential businesses and restricted the freedom of movement of their citizens except for essential needs such as limited visits to grocery stores or the doctor’s office. As of April 7, 2020, over 40 states had some variation of a “shelter-in-place” order, covering 97% of Americans. It is now a crime to leave your home unless the government has decreed it is okay.

The federal government also has surprisingly powerful tools at its disposal during extraordinary health-related emergencies. For example, the basis for the federal government’s [authority](#) to prescribe a quarantine and other health measures is based on the Commerce Clause, which gives Congress exclusive authority to regulate interstate and foreign commerce. The Public Health Service Act, 42 U.S.C. § 264 (“PHS Act”), gives the Department of Health and Human Services (HHS) the authority to impose quarantines to prevent the spread of communicable diseases “from foreign countries into the United States and within the United States and its territories/possessions.” The [authority](#) for carrying out these measures has been delegated to the Centers for Disease Control and Prevention (CDC). Through the CDC, the federal government has the [authority](#) to “take measures to prevent the entry and spread of communicable diseases from foreign countries into the United States *and between states.*” (emphasis added). However, the HHS and CDC [rarely](#) use the quarantine powers and have traditionally deferred to state and local health authorities. So has, so far, the President.

## The Federal Government Is Not King

On March 16, 2020, President Trump published Coronavirus Guidelines for America—“[15 days to slow the spread](#),” recommending that Americans “[l]isten to and follow the directions of your state and local authorities.” On March 26, 2020, when many states had shelter-in-place orders extending into May and June, President Trump sent [a letter](#) to governors informing them that his administration was working on the new guidelines that would reopen parts of the stalled U.S. economy as soon as possible. Current federal social distancing guidelines expire April 30. So what would happen if President Trump were to relax the federal guidelines yet Governors determine stay-at-home orders remain indispensable to manage the health crisis in their states?

The preemption doctrine is legally [complex](#) and normally the [Supremacy Clause](#) of the U.S. Constitution would suggest federal law is “the supreme law of the land.” But the application of the following principles to the potential conflict between states and the federal government in the context of COVID-19 pandemic—where the states have adopted stricter measures than the federal government to preserve health and safety—most likely would result in state policies trumping Trump’s efforts to open the country for business before Governors agree.

First, when a federal statute contains an express preemption clause, as long as the statute is constitutional, it forecloses a potential state argument against preemption.<sup>1</sup> In other words, if a federal statute says it preempts state laws on the same subject, it mostly likely does. The PHS Act, however, does not contain an express preemption clause. In fact, it could be read as prohibiting the abrogation of a state or local quarantine as it states: “Nothing in this section ... may be construed as superseding any provision under State law ... except to the extent that such a provision conflicts with an exercise of Federal authority under this section ...”. The federal PHS power here would only work to create more restrictive policies, not eviscerate state orders in the name of the economy. The federal wrench, at least in this situation, only ratchets in the wrong direction of where the President seems to want to go.

Second, courts are likely to find against the federal preemption of state exercise of police powers by federal law in the areas traditionally reserved for the states, such as public health, safety, and welfare. In these cases, the presumption *against* preemption may apply.<sup>2</sup> Quarantines historically fall within the states’ police power. The Supreme Court recognized this as early as in 1824<sup>3</sup> and again in 1902: “from an early day the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants ... is beyond question.”<sup>4</sup> Indeed, the federal law encourages the federal government to cooperate with and assist states in carrying out their quarantines, not inhibit them. Under 42 U.S.C. § 243(a), General Grant of Authority for Cooperation, the HHS Secretary is required to “assist States and their political subdivisions in the prevention and suppression of communicable diseases” and to “cooperate with and aid State and local authorities in the enforcement of their quarantine and other health regulations.”

Third, the [control of diseases](#) *within* state borders would typically fall with state and local governments’ responsibility, while the control of disease *abroad and among* the states rests with the federal government. Again, this is so because the federal government’s authority to impose quarantines stems from the Commerce Clause’s grant of federal authority to regulate foreign and interstate commerce, while the Tenth Amendment reserves police powers to the states. Thus, the federal government may intervene and [impose](#) stricter directives if the state or local measures “are insufficient to prevent the spread of any of the communicable diseases *from* such State or possession *to any* other State or possession.” (Emphasis added.) But if the federal government were to relax social distancing guidelines, the states’ COVID-19 measures (at least in their current form) would be more restrictive, not “insufficient” vis-à-vis the federal government’s policy, to stopping the spread of the disease. The dire economic impact of the state restrictions are a consequence that will most likely get resolved politically, not legally.

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1 See *Engine Manufacturers v. South Coast Air Quality Management*, 541 U.S. 246 (2004).

2 *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663–64 (1993) (“In the interest of avoiding unintended encroachment on the authority of the States . . . , a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.”).

3 *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824).

4 *Compagnie Francaise De Navigation A Vapeur v. La. Bd. of Health*, 186 U.S. 380, 387 (1902).

## Other Considerations

For all these reasons, relaxed social distancing guidelines seem exceedingly difficult to achieve nationally. POTUS has the bully pulpit, it is an election year so politicians are already nervous and we may see strings tied to stimulus dollars in exchange for relaxation of health orders. But regardless, it appears companies and individuals are much more likely to suffer from confused messages and be subject to the continued patch work of stay-at-home orders for differing periods of time as Governor's stay-at-home orders will continue to be legally controlling. The political pressure states feel to relax these orders will build as economies continue to flounder and because states will need to rely on the federal government's support not only in dealing with the COVID-19 pandemic but also with rebuilding their economies in its aftermath.

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