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Making Rhyme or Reason out of Reopening

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Most states and U.S. territories have now begun reopening at least parts of their economies. The reopening efforts purport to follow a three-phase [White House plan](#), even though not many states have met the plan's benchmarks, including a “downward trajectory” in coronavirus cases. The White House guidelines are not mandatory. Rather, they advise governors to take a state-wide or county-by-county approach to analyzing the progress made in combating the coronavirus hotspots and permitting economic and social activity accordingly. Easier said than done. Reopening is proving challenging as leaders across the country are weighing health, economic, and political ramifications of opening too soon, too quickly, or not soon enough. At a congressional hearing last week, Dr. Anthony Fauci [warned](#) that reopening too quickly poses “a real risk that you will trigger an outbreak that you may not be able to control.”

One week into the reopening efforts, governors vs. county/city officials conflicts are brewing, with some states, like Wisconsin, disintegrating into “[massive confusion](#).” Some local officials have resisted reopening until health officials give the greenlight. Others have pushed hard against governors who seek to delay reopening. Most recently, Governor Hogan in Maryland [announced](#) phase one of the state's reopening. Wisconsin also reopened after a divided Wisconsin Supreme Court [held](#) the state state-at-home order invalid. So what happens if a governor wants the state to reopen but counties are not ready? What if it's the reverse? The short answer is, legally, the governors call the shots. Not the President and not local officials. But for political and health reasons, states and localities should work together.

The Two Emerging Scenarios

As we enter into the reopening phase, two scenarios have emerged: localities wanting to reopen before states' shelter-in-place orders are lifted, and the states making reopening decisions on state-wide data, when some counties have higher coronavirus cases than other counties within a state. One of the latest example of a city reopening ahead of a state is Ocean City, Maryland. On May 5, Ocean City Mayor Rick Meehan announced that Ocean City's beach and Boardwalk would open to the public on May 9. The announcement directly contravened Maryland's shelter-in-place order in place at the time, which allowed state residents to leave their homes only “for an essential job or for an essential reason.”

The reverse has taken place in Virginia. On May 10, Arlington, Alexandria, Fairfax, and Loudon and Prince William counties officials sent a [letter](#) to Governor Northam, urging him to delay Virginia's planned reopening on May 15 in their jurisdictions.

Legally, Governors Call the Shots

Historically, the relationship between state and local officials has followed one of two approaches: either the Dillon Rule or the home rule. Under the Dillon Rule, a local government may not act unless specifically authorized to do so by the state. In contrast, the home rule permits local governments to act unless explicitly prohibited or preempted by state law. But regardless of which rule a state follows, once the governor or other state authorities act, that state authority supersedes local authority. Thus, from a legal standpoint, the distinction between the Dillon and the home rule becomes irrelevant in states where governors have issued stay-at-home orders.

To illustrate, in Mississippi, Governor Tate Reeves's March 24 social distancing [order](#) explicitly superseded stricter restrictions imposed by local authorities in cities like Moss Point, Tupelo, Oxford, and Jackson. Restaurants, gun dealers, and churches re-opened, after having been closed for about a week. The governor finally bulged over mounting political pressure, reversing course on April 1, issuing a state-wide shelter-in-place [directive](#), and giving municipalities greater leeway. Restaurants, gun dealers, and churches closed again. By comparison, South Carolina state government left no place to doubt who calls the shots, as the state's attorney general issued an [opinion](#) that local governments were expressly prohibited from exercising emergency powers because the legislature had vested that power in the governor; thus, Columbia and Charleston—the state's two largest municipalities—could not issue stay-at-home orders.

Other, Equally Important Considerations

While legally the decision of when and how to reopen is up to the governors, reopening calls for a more delicate balancing act. The back-and-forth between governors and local officials is really the society's rebalancing of the measures it will accept to fight the coronavirus as the economic devastation deepens. With Ocean City's economy entirely dependent on tourism revenues, and few remote working opportunities, locals are desperate to go back to work. By comparison, other cities in Maryland with more diverse economies, like Chevy Chase and Baltimore, may have had more patience for a slower, later reopening.

Some governors, like Governor Logan of Maryland and Governor Northam of Virginia appear to recognize this. Two days after Ocean City Mayor Meehan's [announcement](#) of the reopening of the beach and Broadwalk, Governor Logan lifted some of state-wide restrictions, permitting some outdoor activities such as golf, tennis, boating, and fishing. State beaches also opened. Governor Northam has [extended](#) mandated closures and restrictions in Northern Virginia by two additional weeks, while the rest of the state is reopening at the end of this week.

These governors' coordination with local officials shows cities and counties do carry considerable political authority. First, in situations where governors were to insist on state-wide shelter-in-place orders despite localities' calling for reopening, the governors may face the reality that local law enforcement simply would not enforce the orders. Indeed, in announcing the reopening Ocean City beaches, Mayor Meehan [made clear](#) local law enforcement would not be restricting access to

the beach and Broadwalk. And two days later, in easing state-wide restrictions, Governor Logan [acknowledged](#) that the Ocean City Broadwalk was within the exclusive authority of local officials.

Second, in states where the opposite theme is developing, such as Virginia, for example, governors need to grapple with the possibility that state-wide reopening may have devastating health effects on counties and cities that have a higher population density and a higher number of cases and hospitalizations than other parts of the state. In their letter to Governor Northam, Northern Virginia leaders reasoned that, while it is “useful to examine statewide metrics” in making reopening decisions, these jurisdictions represent half of the state’s population, coronavirus cases, hospitalizations, and deaths.

All of this is to say, the White House guidelines correctly presuppose that the state wields absolute authority to determine the pace and approach at which it will open up. Legally, at least, that is true. But as the case of Ocean City, Maryland shows, local governments will play a critical role, and at times may be directly at odds with state authorities. The practicalities of enforcing state mandates dictate that state and local officials must work together.

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