



Written by [Michael Tennant](#) on May 18, 2020

Governors on the Defensive as Court Challenges to Lockdown Orders Mount

Even as some states slowly begin loosening their coronavirus orders, legal challenges to the orders continue to be mounted.

“Already, more than a dozen states across the country have faced lawsuits over their lockdown mandates,” reports [Politico](#), and that number is likely to grow as long as the policies remain in place.

The most successful of these suits thus far has been the one brought by the Wisconsin legislature against Democratic Governor Tony Evers’ (shown) statewide shelter-in-place order. The state supreme court [overturned the order](#) last Wednesday on the grounds that it should have been promulgated as a “rule,” which would have given legislators a say in the process.



Michigan Governor Gretchen Whitmer (D) is also the target of a lawsuit brought by her state legislature. On April 30, just as her initial state-of-emergency proclamation was about to expire, Whitmer unilaterally [extended it](#) despite the fact that the legislature, as required by law, had not voted to do so.

“In California, [Democratic] Gov. Gavin Newsom is facing more than a dozen lawsuits challenging everything from beach to business closures,” wrote *Politico*. “And earlier in May a coalition of business owners sued Maine Gov. Janet Mills, also a Democrat, seeking to end that state’s shelter-in-place order.”

Maryland Governor Larry Hogan (R) is being sued over his shelter-in-place orders by a group of state legislators and business and religious leaders. “Though the state has asked a federal judge to dismiss the case, a scheduling hearing was held last week — days before Hogan announced the end of the statewide lockdown — indicating it will move forward,” noted *Politico*.

In Ohio, Governor Mike DeWine’s (R) current stay-at-home order is the subject of a [suit](#) on behalf of gym owners who claim that the order unfairly singles them out while allowing other businesses to reopen. The day after the lawsuit was filed, DeWine announced that gyms would be allowed to reopen May 26, which could render the case moot.

In fact, the disposition of many of these cases may be cast into doubt as states lift their restrictions. But in states such as Michigan and California, where governors have shown little sign of voluntarily giving up power, the legal jousting is likely to continue.

University of Michigan law professor Richard Primus told *Politico* that while “it’s not impossible” the courts will overturn Whitmer’s orders, “The thing about Hail Mary passes is sometimes they work, and



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sometimes crazy things happen in courts.”

Whatever the outcome of the case, it is unlikely to address the fundamental matter of whether any branch of government has the authority to abrogate constitutionally guaranteed rights such as freedom of assembly, freedom of religion, due process of law, and the inviolability of contracts.

“A lot of people are trying to make the Michigan case into a big constitutional case about the fundamentals of executive authority and freedoms — that’s rhetoric and hyperbole,” Primus said. “The case is really just about the right understanding of a statute passed by the Legislature.”

Harvard University law professor Noah Feldman told *Politico* that if courts continue overturning such edicts, “that will send a message to states that they need to engage’ in the political process of legislating or rule-making, with governors and their health officials not wanting state Supreme Courts to rule against them.”

In other words, court victories for liberty may well be short-lived as states find other ways of implementing the same policies. Evers is already trying to do that in Wisconsin by [reinstating his orders as a rule](#).

Don’t expect much help from Republican lawmakers, either. “Republicans who brought the lawsuit had asked the justices to side with them but to stay their ruling for about a week so legislators and Evers could work out a new plan to deal with the pandemic,” reported the [Milwaukee Journal Sentinel](#). Likewise, Michigan GOP legislators don’t seem to have a problem with unconstitutional lockdowns — they have their own complicated [reopening plan](#) that may never fully end — but simply dislike being frozen out of the process of crafting them.

None of this is to say that lawsuits are a waste of time. In the battle for liberty, keeping government officials on the defensive is always worthwhile. But when it comes to whether courts will side with tyranny or the Constitution, the jury is still out.



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