

# How to do Constitutional Analysis of Government Restrictions in a Healthcare Crisis

## A Corona Virus Constitutional Law Discussion

**By Michael Farris, Esquire**

I see a lot of posts that question whether the government is violating our constitutional rights in the management of the current crisis.

I cannot tell you how a court would ultimately rule because it depends on the specific facts which are changing by the day.

But I can tell you the legal tests the courts would use and the kind of evidence it would take to win such a case.

The Supreme Court has generally divided our rights into two categories—fundamental and non-fundamental. (There is no historical or textual basis for these categories but that is an issue for another day.)

Fundamental rights include freedom of religion, freedom of speech, and freedom of assembly. Non-fundamental rights include business and economic rights. (I strongly disagree with treating these as non-fundamental but I am not on the Supreme Court.)

The protections for fundamental rights are much stronger than the protection for non-fundamental rights. So for our purposes, I will just discuss the fundamental rights to demonstrate what even the strongest claims would face.

The first step in a fundamental rights claim is to show that the right has been “substantially burdened.”

There is really no question about this. Shutting down church services and closing all gatherings of people burdens religious freedom and assembly.

The second step is the “compelling interest standard.” This is designed to assess how important the government objective is. In the *Wisconsin v. Yoder* case, the Supreme Court described this as “an interest of the highest order.”

There is little doubt that the Supreme Court would find that the goal of stopping a deadly pandemic would qualify as a compelling government interest.

The final test is the one that would be in serious dispute in the right kind of case. This requires the government to show that its compelling interest is being pursued in the “least restrictive means.”

In other words, is the government restriction more burdensome than need be to accomplish its objective.

The shorter the duration of any limitation, the harder it will be for anyone to beat the government in such a case. But if the facts unfold to show that the alarm was exaggerated or that the means of restriction are not effective or necessary, then the cases become much more winnable.

Don't expect any court victories on this soon (for the kind of restrictions we are now experiencing.) But if this drags on and the claims start to unravel, then it becomes far more likely that the government could lose.

It is possible that the government will overreach in a way that a court would condemn at any moment. I am virtually certain that some official will carry things too far sometime soon.

But no court is going to put a restraining order on the bulk of restrictions we see for the moment. But that could change.

We must remain vigilant not only for our health but for our liberties.

## Coronavirus Constitutional Law—Part 2

While there are significant difficulties with stopping the government from enforcing health quarantines and closures in the short run (as I pointed out in my first post on this subject), that's not the final word.

There well may be a serious constitutional claim that business owners can make against a government for closing their doors and the resulting economic losses.

The Fifth Amendment to the Constitution proclaims that private property cannot be taken for public purposes without just compensation. In two major zoning cases, the Supreme Court ruled that local government restrictions that take away the economic viability of property is a "taking" requiring just compensation.

That is exactly what has happened to many small businesses—especially restaurants.

A taking is always done for the public good. So saying it was necessary is not a sufficient answer to such a claim.

Claims of this scale have no history or precedent. But the Supreme Court has repeatedly said that the Constitution is intended to govern in good times and in bad.

Why should a few people bear the brunt of this crisis when the de facto seizure of their property was for the good of us all?

Moreover, workers have a legitimate property interest in their jobs. This would be a pretty novel extension of the principle but there is no textual reason that the seizure of their jobs should not also be compensated.

Both of these cases will require innovative lawyering, but justice will absolutely require the courts to look at these claims very seriously.

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