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Do Ohio officials have the authority to order closures and other coronavirus measures? Mark R. Brown

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Gov. Mike DeWine speaks during a daily coronavirus briefing on Thursday, April 2, 2020. (Photo provided by Office of the Governor)

By

- Guest Columnist, [cleveland.com](https://www.cleveland.com)

COLUMBUS, Ohio -- Gov. Mike DeWine deserves a collective pat on the back. His timely response to the pandemic saved lives and in hindsight proved quite wise for Ohio's future.

Wisdom, however, does not equate with legality (let alone constitutionality), a fact I have repeatedly tried to convey to my

constitutional law students over the years. “Bad” does not equate with “illegal,” nor does “good” mean constitutional. Consequently, whether Gov. DeWine’s orders prove normatively good presents only half the question. The other, more important, half in a constitutional republic is whether they are legal.

Take the [stay-at-home](#) and shelter orders imposed on so-called nonessential persons and businesses. It is not at all clear that Gov. DeWine’s Department of Health had the authority to issue them.

Unlike many states, including Wisconsin, Ohio has not chosen to delegate to the governor or Department of Health explicit emergency powers. And even if Ohio had done so, legitimate questions would emerge over the exercise of those powers. The Wisconsin Supreme Court, for example, [ruled on April 6](#) that, notwithstanding an explicit and broad grant of emergency power, Wisconsin’s governor exceeded his emergency powers when he suspended that state’s April 7, 2020 in-person election.

All that supports Gov. DeWine’s orders, meanwhile, is section 3701.13 of the Ohio Revised Code, which, per [an Ohio Supreme Court interpretation](#) of the language, authorizes the Department of Health to quarantine “infected persons” and those directly exposed to contagious disease.

In the past, Ohio courts have relied on this to justify isolating infected and exposed individuals. The law has never been used to isolate healthy people in uninfected environments. The Ohio Supreme Court, for its part, has ruled that the authority of health officials to protect the public health -- which is what Gov. DeWine claims is at the heart of his actions -- is not a blank check to override existing laws.

What about federal law? Does it supplement the governor's powers during emergencies? Nope. Quite the opposite. The federal Constitution -- in particular the First and 14th Amendments -- restrict what states and their governors can do during emergencies. Of particular relevance to Gov. DeWine's emergency orders is the First Amendment, which protects speech and religion. Gov. DeWine, of course, exempted religious gatherings from his prohibition on mass gatherings, ostensibly to avoid violating religious freedoms. By doing so, however, he likely violated the Speech Clause in the First Amendment, which prohibits discrimination against -- and in favor of -- religious speech. A neutral approach toward religious gatherings, in contrast, would not have violated either the Speech Clause or the Free Exercise Clause of the First Amendment.



Mark R. Brown is the Newton D. Baker/Baker & Hostetler Chair at Capital University Law School.

The Constitution also protects the rights of citizens to travel between states, both for travel's own sake and to purchase goods. Gov. DeWine's recent orders [banning people](#) from West Virginia and Pennsylvania from purchasing liquor in Ohio appears in direct conflict with the Constitution's fundamental right of interstate movement. Fans of John Steinbeck will recall from "The Grapes of Wrath" California's restrictions on so-called "Okies" during the Dust

Bowl crisis of the Great Depression. Not reported in that famous novel was the fact that the Supreme Court ruled that California's laws [were unconstitutional](#).

Just last week the first of what promises to be a number of legal challenges to Gov. DeWine's emergency orders [was filed in federal court in Columbus](#) by a bridal shop deemed "nonessential." The shop owner claims that Gov. DeWine's orders, issued through his Department of Health, violate the federal Due Process Clause.

So what is to be done with Ohio's legal loose ends? For starters, the legality of Gov. DeWine's and Ohio's past and present actions must be questioned. Japanese-American Internment during World War II presents a cruel testament to what can happen when established law is blindly ignored under exigent circumstances.

The best way to avoid repeating a doomed history is for government and governed to be curious and transparent.

Next, and toward this end, Ohio's General Assembly -- the representatives of the people -- must step up and fix the proper path for Ohio to emerge from this crisis. That is not the governor's job. The legislature must ratify or disavow the governor's past actions, bring its and the people's collective wisdom together to plan for future outbreaks, and insure that Ohio follows the rule of law. That is not something that can be trusted to any single individual, even if he is doing yeoman's work.

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