

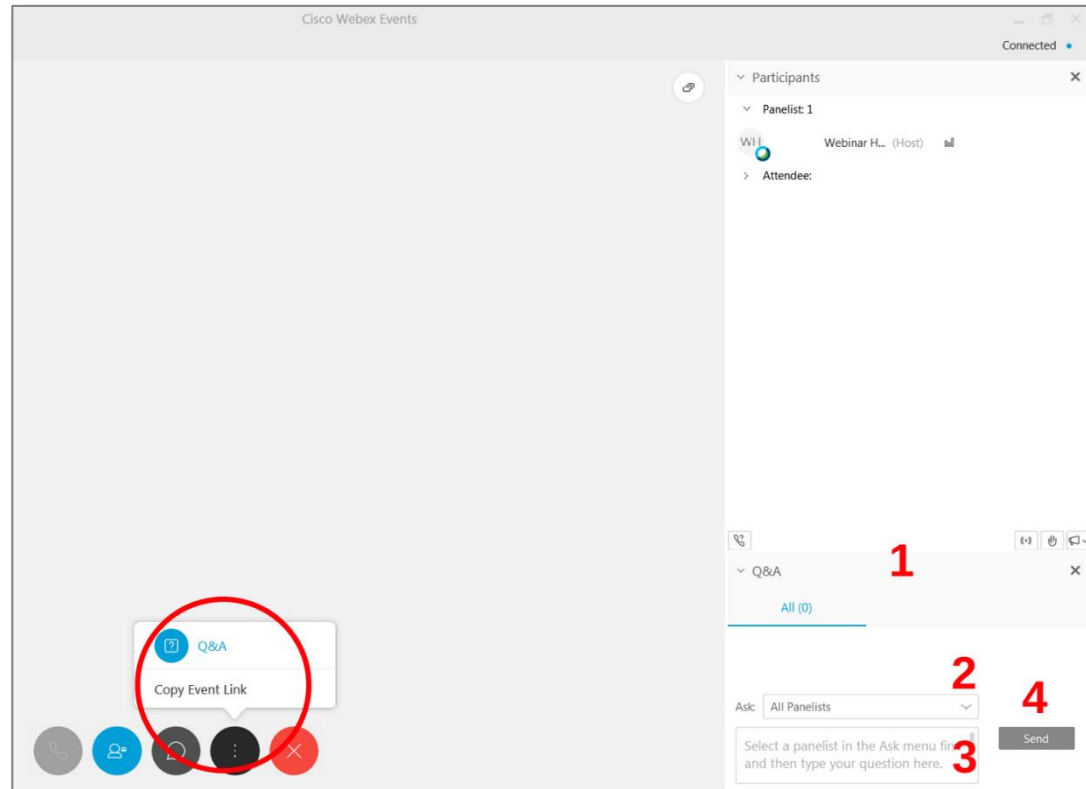
COVID-19: Focus on Emerging Constitutional Challenges

April 15, 2020

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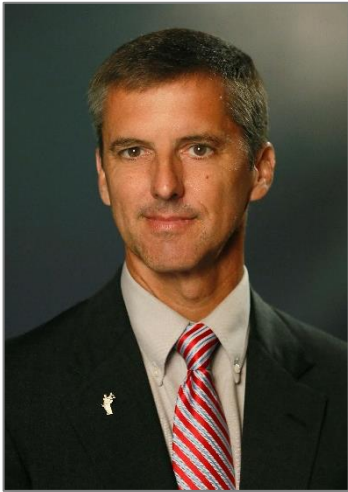
Moderator



Kayleen Klarich, Marketing and Membership Manager, the Network for Public Health Law – National Office

- Areas of expertise:
 - Development and execution of marketing strategies
 - Management of organizational membership programs

Presenter



James G. Hodge, Jr., Director, Network for Public Health Law - Western Region; the Peter Kiewit Foundation Professor of Law and Director, Center for Public Health Law and Policy, ASU Sandra Day O'Connor College of Law

- J.D., Salmon P. Chase College of Law (KY)
- LL.M., Georgetown University Law Center
- Research interests/areas of expertise:
 - Emergency Legal Preparedness & Response
 - Vaccinations
 - Preemption
 - Emerging Infectious Diseases
 - Constitutional Rights and Structural Principles

Emergency Legal Preparedness in Response to COVID-19: Focus on Constitutional Issues

April 14, 2020

James G. Hodge, Jr., J.D., L.L.M.

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Acknowledgements

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- **Michelle Notrica**, PharmD, JD, MPH
- **Claudia Reeves**, JD Candidate, ASU
- **Katherine Farrell Ginsbach**, MS, JD



- **COVID-19 Epi and Emergency Assessments**
- **Constitutional Balancing**
 - Structural facets
 - Rights-based issues
- **Assessment of Constitutional Challenges**
- **Questions/comments**

COVID-19 Global Distribution

Total Confirmed Deaths >: 120,450 = Mortality
Total Confirmed Cases >: 1,930,780 Rate 6.2%

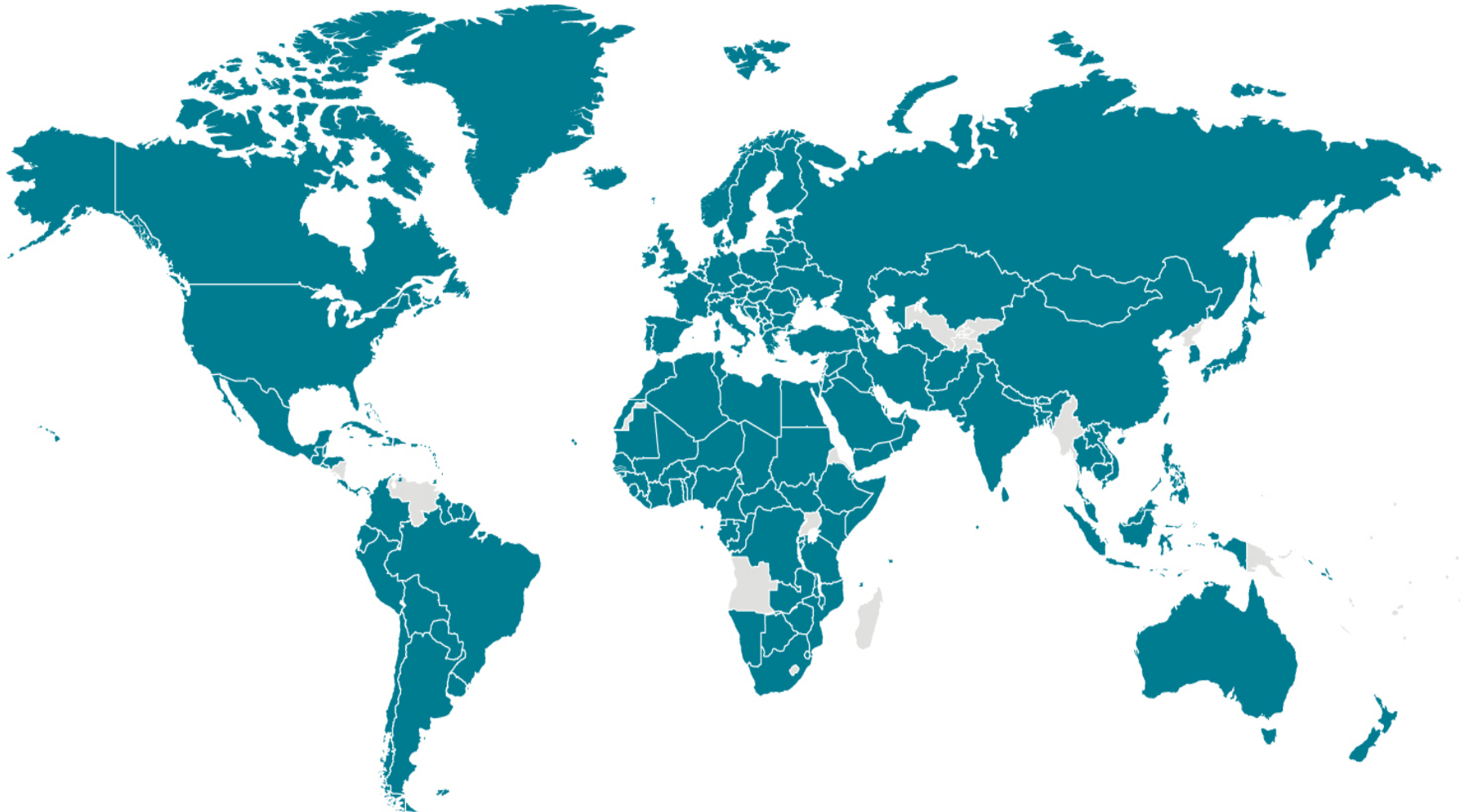


Image Source: <https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html>

Source: <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

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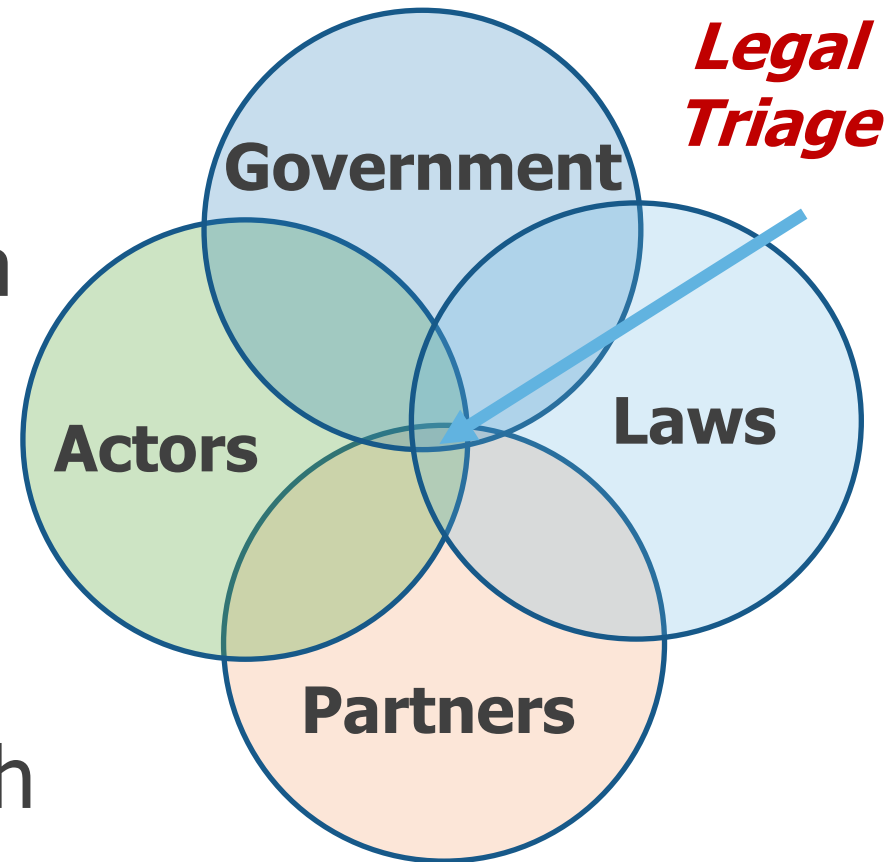
Multi-level Emergencies

Public health authorities, powers, liabilities & immunities vary depending on the type of emergency declared at each level of government

International	WHO Public Health Emergency of Int'l Concern January 30, 2020	Emergency Declarations by Foreign Governments Ongoing
Federal	Stafford Act or National Emergencies Act March 13, 2020	HHS Public Health Emergency January 31, 2020
State/Tribal	Emergency or Disaster	Public Health Emergency
Local	Emergency or Disaster	Public Health Emergency

Legal Triage In Emergencies

Legal Triage: efforts of legal actors & others during declared emergencies to build a favorable legal environment by prioritizing issues & solutions facilitating legitimate public health responses





Social Distancing Measures



- **COVID-19 Epi and Emergency Assessments**
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U.S. Constitution

Divides gov't power

Federal

State &
Local

Separates government branches

Legislative

Executive

Judicial

**Protects individual rights from government
interference**

Freedom of
Expression &
Assembly:
1st Amdt.

Due
process
rights to life,
liberty, or
property:
5th and 14th
Amdts.

Rights
against cruel
and unusual
punishment:
8th Amdt.

Equal
Protection:
14th Amdt.

Rights to
travel

Right to
privacy:
5th, 9th, 14th
Amdts.

Takings:
5th Amdt.

Right to
bear arms:
2nd Amdt

Array of Constitutional Issues



Separation of Powers



Freedom of Expression



Equal Protection



Federalism



Freedom of Assembly



Right to Travel



Supremacy



Freedom of Religion



Right to Bear Arms



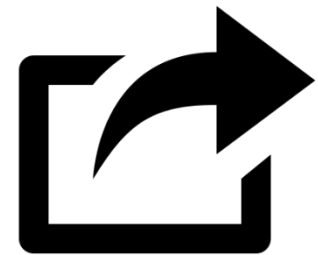
Preemption



Due Process



Cruel & Unusual Punishment



Judicial Deference



Right to Privacy



Takings

Constitutional Cohesion

Structural principles and individual rights intersect regularly in authorizing or limiting public health powers and duties across all levels of government.

Constitutional
Structural
Principles

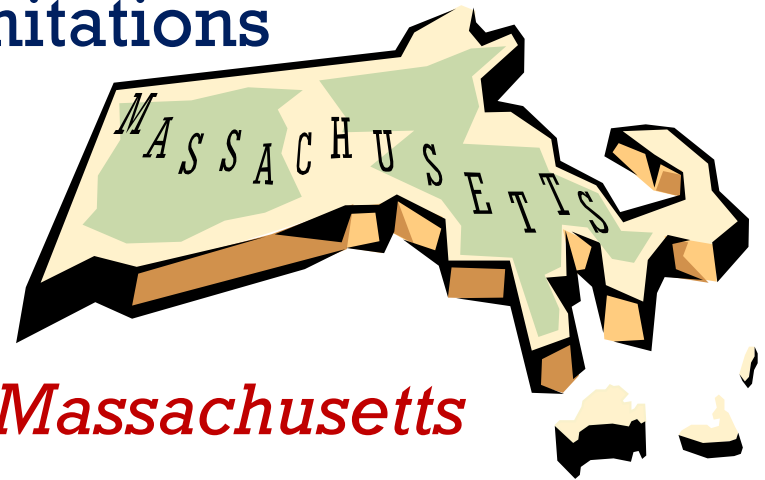


Cohesion



Constitutional
Individual
Rights

Use of individual-rights arguments to counter structural limitations



Jacobson v. Massachusetts (1905)

Judicial review is appropriate in emergencies “*if a statute purporting to have been enacted to protect the public health, . . . has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights . . .*”

CONSTITUTIONAL COHESION AND THE RIGHT TO PUBLIC HEALTH*

James G. Hodge, Jr., J.D., LL.M.**

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Haley R. Augur****

Ashley Cheff*****

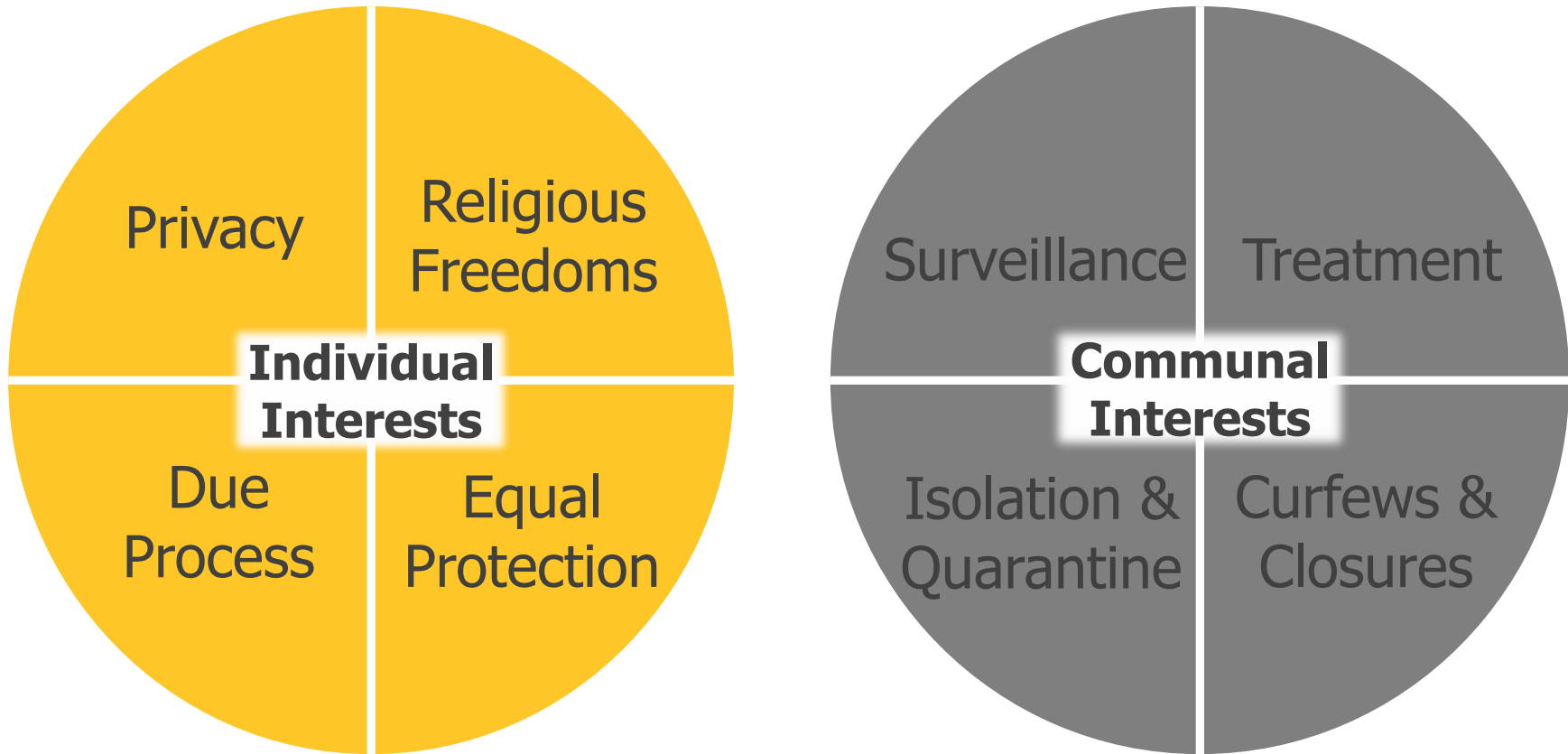
Joseph Daval*****

Drew Hensley*****

UNIVERSITY OF MICHIGAN
JOURNAL of LAW REFORM

Despite years of significant legal improvements stemming from a renaissance in public health law, Americans still face major challenges and barriers in assuring their communal health. Reversals of legal reforms coupled with maligned policies and chronic underfunding contribute to diminished public health outcomes. Underlying preventable morbidity and mortality nationally are realities of our existing constitutional infrastructure. In essence, there is no general obligation of government to protect or promote the public's health. Under principles of "constitutional cohesion," structural facets and rights-based principles interwoven within the Constitution protect individuals and groups from governmental vices (i.e., oppression, overreaching, tyranny, and malfeasance). Structural impediments and rights infringements provide viable options to challenge governmental efforts inapposite to protecting the public's health. Through corollary applications framed as auxiliary, creative, and ghost righting, courts are also

Constitutional Recalibration



Emergency Preparedness and Response

Constitutional Levels of Scrutiny

LEVEL	EQUAL PROTECTION	SUBSTANTIVE DUE PROCESS	REQUIRES
STRICT	Race, national origin/ethnicity, Suspect classes	Fundamental rights: procreation, travel, marriage	Compelling government interest + narrow tailoring
HEIGHT-ENED	Gender, illegitimate children; quasi-suspect classes	Quasi-fundamental rights (bodily integrity)	Substantial relationship to important gov't objective
MINIMAL (RATIONAL BASIS)	Any other infringement	All other classifications	Rational relationship to legitimate state interest

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Suit challenges ban on large crowd events in NH

By Kevin Landrigan New Hampshire Union Leader Mar 19, 2020

NEW HAMPSHIRE
UNION LEADER

ACLU files 1st coronavirus curfew lawsuit in Puerto Rico

The Washington Post
Democracy Dies in Darkness

Utah groups sue to force more prison and jail inmate releases due to coronavirus

By MARK SHENEFEELT Special to the Daily Herald Apr 3, 2020 0

Daily Herald

Coronavirus In Pennsylvania: Attorney Files Lawsuit Against Gov. Tom Wolf For Non-Essential Classification

KDKA
CBS Pittsburgh


Abortion protesters sue Gov. Whitmer for alleged violation of her stay-at-home order

Posted Apr 03, 2020

Kentucky woman wants to see family. She sues over Beshear COVID-19 travel restrictions

LEXINGTON
HERALD LEADER

COVID Constitutional Issues – Honorable Mentions

- 
- Home Rule Limitations in South Carolina
 - Questioning Stay Home Orders in Idaho
 - Ankling Recalcitrants in Kentucky
 - Revisiting Rights of the Accused in Texas
 - Church Receipt of COVID Funds in DC
 - Habeas Corpus for Juveniles in New York
 - Challenging Beach Closings in Florida
 - Rights to Assemble in New Hampshire

TOP 10

Gun Shop Closures

Airport Assessments

Reproductive Rights

Prisons

Takings

Crisis Standards of Care

Travel Limits

National v. State Powers

Religious Congregations



April 13: “[S]ome in the Fake News Media are saying that it is the Governors decision to open up the states, not that of the President . . . Let it be fully understood that this is incorrect . . . It is the decision of the President, and for many good reasons. . . . A decision by me, in conjunction with the Governors . . . will be made shortly!”





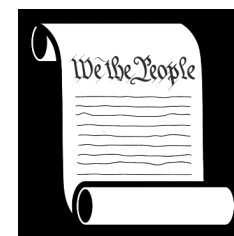
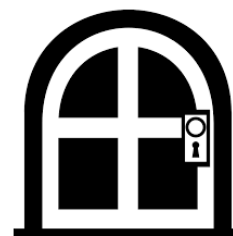
April 7: Governor Doug Ducey issues Executive Order 2020-24 authorizing immediate self-quarantine or self-isolation for travelers arriving at AZ airports from areas with substantial community transmission, including NY, CT, and NJ, in coordination with airport authorities.



Travel Checkpoints in Rhode Island



March 26: Gov. Gina Raimondo issues E.O. 20-12 requiring self-quarantine for travelers solely coming from New York, authorizing enforcement checkpoints and going door-to-door. After NY Gov. Cuomo threatened to file suit 2 days later, Gov. Raimondo issued E.O. 20-14 applying to all travelers.





March 28: Seattle & King County Health Department issues Quarantine Directive and Isolation Order mandating that persons testing positive for COVID-19 self-isolate and persons with COVID-19 symptoms self-quarantine. Non-compliers could face involuntary detention.





March 29: Despite Hillsborough County's stay-at-home order, Rev. Rodney Howard-Browne held 2 large church services in Tampa and was arrested on "misdemeanor charges of unlawful assembly and violating quarantine orders." On April 1, Gov. Ron DeSantis issued E.O. 20-91 imposing a stay-at-home order but exempting religious services.



Gun Shop Closures in California



March 20: Governor Gavin Newsom issues E.O. 202.6 closing non-essential businesses. L.A. County Sheriff interprets the order to include retail gun shops (later rescinding this interpretation). On March 27, NRA and others challenge Gov. Newsom's closures. On April 6, U.S. district court denies request for temporary restraining order against the E.O.



Takings in Pennsylvania



March 23: After Governor Wolf issues E.O. closing non-essential business on March 19, manufacturer Schulmerich Bells files class-action lawsuit alleging that forced business closures implicating lost revenue and wages constitute a government “taking” of private property without compensation and violate substantive and procedural due process.





April 2: Class-action lawsuit filed against Gov. Pritzker and Dept. of Corrections allege failure to take necessary precautions to reduce spread of COVID-19 within prisons, where public health and medical care programs are incapable of controlling the virus among vulnerable populations.



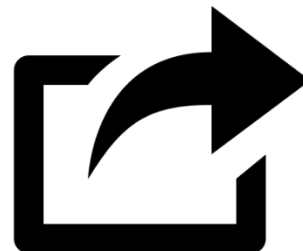
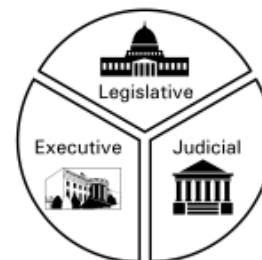
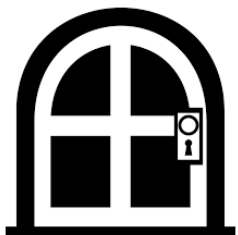


March 24: Alabama Disabilities Advocacy Program files complaint with HHS OCR challenging the state's EOP listing several health conditions (severe mental retardation, dementia, severe traumatic brain injury) for which providers should not issue ventilators based on 2010 CSC guidance. On April 8, Alabama formally rescinds its guidelines in response to OCR.





March 22: Gov. Greg Abbott issues E.O. GA-09 banning nonessential medical procedures including surgical abortions, leading to a lawsuit by reproductive rights advocates on March 25. On April 7, the 5th Circuit Court of Appeals rejects temporary restraining order, allowing the E.O. to remain in place. U.S. Supreme Court to consider the case.

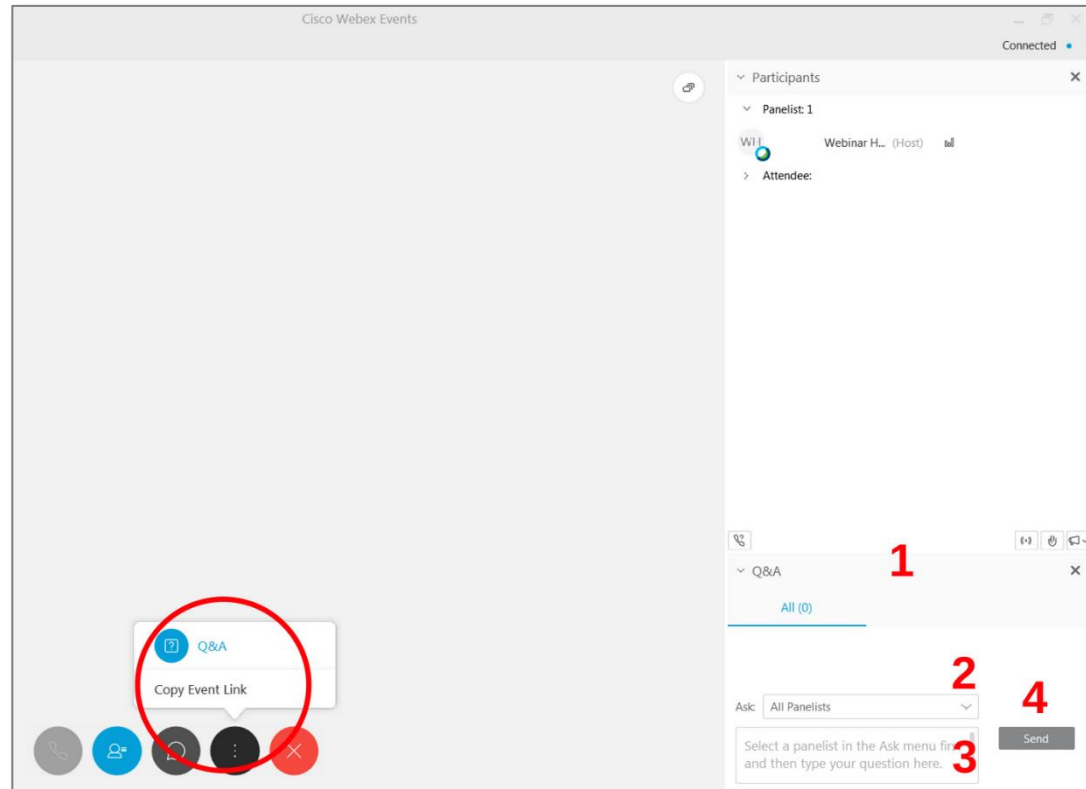


- **Ask the Network** for more information or ongoing COVID-19 legal response efforts
- **james.hodge.1@asu.edu** | @jghodgejr



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Thank you for attending

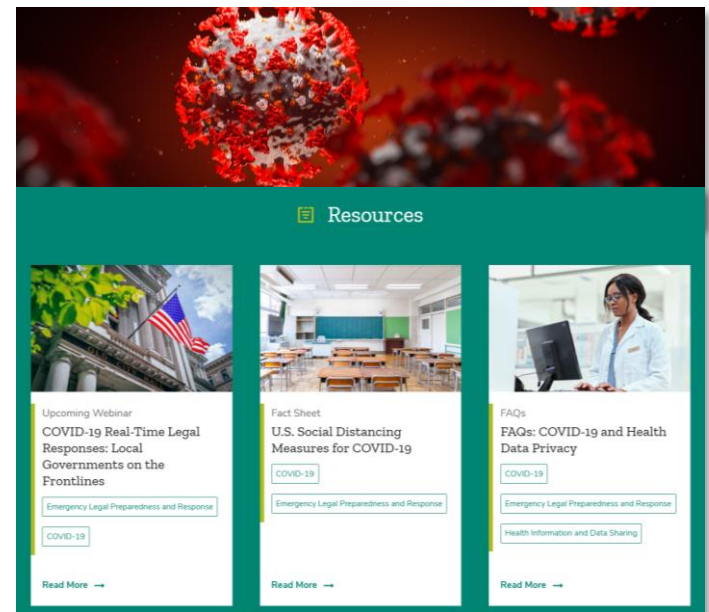
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Public Health Decision-Making During the COVID-19 Pandemic

1:00 – 2:00pm EST | April 23

COVID-19: Real-Time Guidance, Resources and Information

View resources & request assistance
at networkforphl.org/covid19



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