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How the U.S. Constitution Connects with COVID-19

Richard H. Seamon

Every semester, I tell the students in my course on constitutional law at the University of Idaho College of Law that it is a great time to be taking constitutional law. And every semester that proves to be true. Recent events during the COVID-19 pandemic have raised many issues of constitutional law useful for class discussion. In the following, I discuss one such event: the federal residential eviction moratorium. The moratorium arguably exceeds the federal government's statutory and constitutional powers. In the following discussion of the moratorium's legal vulnerability, you will encounter cases that you might remember from your own law school course in constitutional law. I hope the discussion shows the continuing vitality and central relevance of the U.S. Constitution to the challenges that confront our country today.

Introducing the CDC's eviction moratorium

In the pandemic-relief law known as the "CARES Act," Congress put a six-month moratorium on certain residential evictions.¹ After that moratorium expired in July 2020, Congress did not renew it. Instead, a new eviction moratorium was put in place by the Centers for Disease Control and Prevention (CDC), a federal agency within the U.S. Department of Health and Human Services.² The CDC's eviction moratorium expired on July 31, 2021, despite last minute pressure on the White House and Congress to extend it.³ In light of the looming expiration, the Idaho Judicial Branch started a pilot program in Ada County that invites landlords and tenants in eviction suits to negotiate settlement agreements through an online portal.⁴

The CDC eviction moratorium ap-

plied to all residential housing in the United States. To get protection under the moratorium, a tenant had to show that he or she had fallen behind in rent because of job loss, a cut in working hours, or extraordinary medical expenses. The tenant also had to show that he or she could not find alternative housing other than "congregate" housing like a homeless shelter. A landlord who evicted a tenant in violation of the moratorium faced up to one year in prison and a fine of up to \$250,000.⁵

The CDC issued the moratorium under the Public Health Service Act. That federal law authorizes the CDC to issue "such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State . . . into any other State."⁶ The CDC explained that the eviction moratorium could limit the spread of COVID-19 in three ways. It

could facilitate self-isolation by people who get COVID-19. It could help States and local governments implement stay-at-home orders. Finally, it could prevent people from ending up on the street or in homeless shelters, where COVID-19 is more easily spread.⁷

Thus, the CDC justified its eviction moratorium as a public health measure. That is important because the U.S. Constitution does not expressly authorize the federal government to issue public health measures. And so, a student of the U.S.

because the Constitution gives implied (as well as express) powers to Congress. The Court based this conclusion partly on the Constitution's Necessary and Proper Clause, which the Court interpreted to recognize Congress's power to enact all measures that are reasonably necessary to execute the enumerated powers.¹⁰

The *McCulloch* Court held that the creation of a national bank fell within Congress's implied powers, as reflected in the Necessary and Proper Clause. The Court reasoned that the bank was a reasonably

of implied powers combines with Congress's power to regulate interstate commerce and (2) how the Court's delegation doctrine allows Congress to transfer huge hunks of its Commerce power to federal executive-branch agencies.

Congress's commerce power

The implied powers of Congress recognized in *McCulloch* and reflected in the Necessary and Proper Clause can be exercised only in connection with Congress's execution of its expressly enumerated powers. The implied powers, in effect, enlarge the enumerated powers. This enlargement has been most significant as applied to Congress's power to "regulate Commerce . . . among the several States."¹²

As enlarged by implied powers, Congress's Commerce power was held in *United States v. Lopez* to authorize Congress to regulate three categories of activity:

"First, Congress may regulate the use of the channels of interstate commerce. Second, Congress [may] . . . regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce. [. . .] Finally, Congress [may] . . . regulate . . . those activities that substantially affect interstate commerce."¹³

The third category is reachable by Congress largely because of its implied powers. The classic case illustrating this is *Wickard v. Filburn*.¹⁴ There, the federal government fined Roscoe Filburn for growing more wheat than allowed under a federal statute. Mr. Filburn consumed all of this excess wheat on his own farm. The Court upheld Congress's power to regulate a farmer's growing his own wheat for his own on-farm consumption. The Court reasoned, in part, that regulation of this type of activity was necessary to protect Congress's ability to regulate interstate commerce in wheat. It was thus justified as a means that was reasonably necessary to executing the Commerce power over the commodity. To support this conclusion, the *Wickard* Court cited *McCulloch v. Maryland*.¹⁵

Today, we would say that Congress could regulate Farmer Filburn's growing of "excess wheat" for his own use because that activity—when considered in the aggregate—substantially affected interstate

“The implied powers, in effect, enlarge the enumerated powers. This enlargement has been most significant as applied to Congress's power to ‘regulate Commerce . . . among the several States.’”

Constitution naturally wonders whether it authorizes the CDC's eviction moratorium. This question of the federal government's power involves three issues that are covered in a law school course on constitutional law and are discussed as follows: the limited powers of the federal government; Congress's power over interstate commerce; and the delegation doctrine.

The limited powers of the federal government

The U.S. Constitution creates a federal government of limited powers. But to grasp this point fully, law students must learn that the limited powers granted by the Constitution can include *implied* powers under the U.S. Supreme Court's decision in *McCulloch v. Maryland*.⁸

In *McCulloch*, the Court held that Congress had the power to create a national bank. The Court acknowledged that “[a]mong the enumerated powers, we do not find that of establishing a bank.”⁹ That was not fatal, the Court concluded,

necessary way for Congress to execute various enumerated powers. Those powers included the powers to lay and collect taxes (with the national bank serving as a depository of those taxes); to borrow money (with the bank serving as the federal government's lender); and to regulate commerce (with the bank's notes serving as a form of national currency). And so, after all, the national bank was a “necessary and proper” way of executing several enumerated powers.

The *McCulloch* Court's recognition of “implied powers” underlay the federal government's expansion in the twentieth century. As one website says, “Ultimately, *McCulloch v. Maryland* made possible the rise of . . . ‘the administrative state,’ in which the government employs officials to oversee many aspects of American life, from environmental issues to labor disputes.”¹¹ This conclusion is incomplete, though. To appreciate the connection between *McCulloch* and today's “administrative state,” the student of constitutional law must learn (1) how *McCulloch*'s concept

commerce in wheat and thus fell within Congress's Commerce power (as enlarged by the implied powers reflected in the Necessary and Proper Clause). The Commerce power, as amplified by the Necessary and Proper Clause, underlies most federal statutes on the books today, including federal anti-discrimination laws, environmental protection laws, and, most relevant here, public health laws.

So far, we've established Congress's power to regulate activity that substantially affects interstate commerce. We still must connect that power of Congress to federal executive-branch agencies like the CDC. The connection lies in the delegation doctrine.

The delegation doctrine

The delegation doctrine allows Congress to authorize federal agencies to make rules that have the "force and effect of law."¹⁶ These rules are called "legislative rules" to indicate that their legal effect is tantamount to that of federal statutes.

Early on, the U.S. Supreme Court rejected the argument that, by allowing federal agencies to make legislative rules, Congress was abdicating its duty to exercise "[a]ll legislative Powers" vested in it by the U.S. Constitution.¹⁷ The Court takes the position that federal agencies exercise only a "quasi-legislative," not a purely legislative power.¹⁸ The Court insists, however, that in granting this power, Congress must prescribe an "intelligible principle" for the agency to follow when making legislative rules. Thus, the federal statute that grants rulemaking power must put comprehensible ("intelligible") restrictions on that power.

In applying the "intelligible principle" standard, the Court has upheld exceptionally broad grants of rulemaking power to federal agencies. For example, the Court upheld the federal statute that allows the Occupational Safety and Health Administration (OSHA) to make workplace safety rules. The statute requires the rules to be "reasonably necessary or appropriate to provide safe or healthful employment [which] most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health."¹⁹

It does not matter that this statute is full of fuzzy wobble words like "reasonably necessary or appropriate," "adequately assure," "to the extent feasible," and "material impairment." Nor does it matter that the rules cover all businesses that are engaged in interstate commerce or whose activities substantially affect interstate commerce. Under the Court's delegation doctrine, OSHA can prescribe national workplace safety policy for almost the entire private sector.

Revisiting the CDC's eviction moratorium

At this point, we can fully analyze the CDC's power to issue the eviction moratorium. Analysis entails three questions:

1. Does the nationwide eviction moratorium fall within the CDC's power under the Public Health Service Act? If so, two further questions arise:

2. Does the Act violate the delegation doctrine?

3. Does the Act fall within Congress's power?

Only questions two and three are questions of constitutional law. Question one involves statutory interpretation, but it is influenced by constitutional concerns, as shown in a recent decision by the U.S. Court of Appeals for the Sixth Circuit, *Tiger Lily, LLC v. U.S. Dep't of Housing and Urban Development*.²⁰

The court in *Tiger Lily* held that the CDC's eviction moratorium was not authorized by the Public Health Service Act. The court relied partly on its belief that the Act "could raise a nondelegation problem" if it were interpreted to authorize the moratorium. The court explained that such an interpretation "would grant the CDC director near-dictatorial power for the duration of the pandemic."²¹ The apparently limitless scope of power entailed by the CDC's favored interpretation would mean that the statute necessarily lacks an "intelligible principle" restraining agency discretion. As such, the statute would violate the nondelegation doctrine if the CDC's interpretation were adopted.

The *Tiger Lily* court also believed that an expansive interpretation of the Act urged by the CDC would "push the limit of congressional authority" and for that

reason, too, must be avoided.²² The "congressional authority" that the court had in mind was Congress's authority under the Commerce Clause. Although the CDC argued that the moratorium regulated activity that substantially affects interstate commerce, the argument was a stretch in the court's view. That was so for three reasons.

First, the eviction moratorium did not regulate a commercial transaction like the rental of housing. Indeed, it didn't alter tenants' contractual obligation to pay rent. It just restricted a legal remedy—one that usually would be sought in a state court—for nonpayment. Nor was the moratorium a reasonably necessary part of a broader federal scheme for regulating the real estate market.

Second, the connection between the eviction moratorium and the interstate movement of people was highly attenuated. The Texas court found that, while about 15% of residential moves are interstate, only a small percentage of residential moves result from evictions. Marital breakups account for 10 times as many residential moves as do evictions, and yet it's doubtful that the federal government can regulate divorce, as family law is an area of traditional state concern.²³

Third, a federal eviction moratorium is unprecedented. In the past, eviction moratoria have been thought to fall within the States' police power.²⁴ The federal government's failure to exercise a power that would be so appealing in response to events like the Spanish Flu of 1919-1920 and the Great Depression tends to suggest that the power does not exist.

Thus, the Sixth Circuit's decision in *Tiger Lily* implies that the moratorium's constitutionality is dubious because of the nondelegation doctrine and the limits on Congress's Commerce power.

The D.C. Circuit, however, came to opposite conclusions in *Alabama Ass'n of Realtors v. U.S. Dep't of Health and Human Services*.²⁵ The D.C. Circuit's decision has limited precedential value, as it was a short per curiam opinion issued on appeal from a district court's grant of a stay pending appeal. Even so, the decision is significant because of its conclusions that the eviction moratorium (1) "falls within the plain text" of the Public Health Service

Act; (2) the Act, in turn, falls within Congress's "well-established authority to regulate rental housing transactions because they substantially affect interstate commerce;" and (3) the Act complies with the nondelegation doctrine because it "provides an intelligible principle that guides the [CDC's] authority."²⁶ These quotations from the D.C. Circuit's opinion make clear that it does not see eye-to-eye with the Sixth Circuit when it comes to the validity, including the constitutionality of the eviction moratorium.

This disagreement between the circuits is unlikely to be resolved by the U.S. Supreme Court in the near term. The expiration of the CDC eviction moratorium probably renders pending legal challenges to it moot. But the federal government's power under the U.S. Constitution to impose such a moratorium remains an important issue that could ultimately draw the Court's attention. And the issue could arise again if COVID-19 flares up or some other crisis causes the federal government to reinstate a moratorium.

Conclusion

Even if we consider only the federal government's power to issue the residential mortgage moratorium, we delve into topics that consume several weeks of the constitutional law course. And this article has not even addressed the question of whether that exercise of power violates individual constitutional rights, such as the right to just compensation for takings of private property.²⁷ I hope this article nonetheless suffices to show that the U.S. Constitution remains at the center of matters

of vital public interest, and that the law school course on constitutional law begins to equip students to analyze those matters.



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Endnotes

1. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 4024, 134 Stat. 281, 492-93 (2020).
2. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).
3. CDC, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 (updated June 29, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html>; Andrew Ackerman & Siobhan Hughes, *House Adjourns Without Extending Covid-19 Eviction Moratorium*, Wall St. J., July 30, 2021, https://www.wsj.com/articles/house-adjourns-without-extending-covid-19-eviction-moratorium-11627684248?mod=searchresults_pos1&page=1.
4. State of Idaho Judicial Branch, Press Release: *New Tool Allows Landlord, Tenants to Resolve Eviction Cases Online* (July 7, 2021), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjateXk_YyyAhVSqJ4KHQ80BgsQFjACegQIBxAD&url=https%3A%2F%2Fisc.idaho.gov%2Fsites%2Fdefault%2Ffiles%2Fpress-release-documents%2F20210707%2520New%2520Tool%2520Allows%2520Landlords%2520Tenants%2520to%2520Resolve%2520Eviction%2520Cases%2520Online.pdf&usq=AOvVaw3tclM8I5CVbyLQVqpvAOXc
5. *Id.* at 55,296-97.
6. 42 U.S.C. § 264(a). The statute grants rulemaking power to the Surgeon General, but that power has been transferred to the CDC. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., No. 21-5093, 2021 WL 2221646, at *1 n.1 (D.C. Cir. June 2, 2021).
7. 85 Fed. Reg. at 55,292.
8. 17 U.S. (4 Wheat.) 316 (1819).
9. *Id.* at 406.
10. U.S. Const. art. I, § 8, cl. 18.
11. History.com Editors, *McCulloch v. Maryland*, history.com (updated June 1, 2021), <https://www.history.com/topics/united-states-constitution/mcculloch-v-maryland>.
12. U.S. Const. art. I, § 8, cl. 3.
13. 514 U.S. 549, 558 (1995).
14. 317 U.S. 111 (1942).
15. *Wickard*, 317 U.S. at 129 n.29.
16. *E.g.*, PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2055 (2019).
17. U.S. Const. art. I, § 1.
18. *E.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).
19. Industrial Union v. American Petroleum Institute, 448 U.S. 607, 612 (1980) (quoting statute).
20. No. 21-5256, 2021 WL 3121373 (6th Cir. July 23, 2021).
21. *Id.* at *4.
22. *Id.*
23. *Terkel*, 2021 WL 742877, at *10.
24. *E.g.*, Home Bldg. Ass'n v. Blaisdell, 290 U.S. 398, 437 (1934).
25. No. 21-5093, 2021 WL 2221646 (June 2, 2021).
26. *Id.* at *3.
27. U.S. Const., amend. V.

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