



— LEGAL POLICY FOCUS —

Federalism in the Time of Pandemic

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EXECUTIVE SUMMARY

- Since the beginning of the novel coronavirus pandemic, many commentators have questioned the continued viability of federalism in the United States. They have argued that the American federalist system—where power is divided between national and state governments—is outdated and ill-equipped to handle national health emergencies.
- Critics of federalism mistakenly assume that it requires a weak national government and near total deference to local governments. But federalism permits each level of government to focus on its core competencies, while respecting individual constitutional rights.
- While federalism remains the best form of government for the United States, policymakers should evaluate our country's response to the pandemic to identify measures that would improve the ability of the federal and state governments to work together in response to a future pandemic or other crisis.

What You Should Know

In our federalist system, power is divided between state and national government. By constitutional design, the powers of the national (or federal) government are limited and enumerated, whereas the governments of the fifty states may exercise broad police powers, so long as they do not violate constitutional rights. Recently, a number of writers have begun to question the ability of our federalist system to handle the spread of a global pandemic.¹ In their view, the “patchwork” of state and local policies has weakened our country’s response to the pandemic, and we would benefit from a stronger national government and a more centralized response.² Decisions about mask mandates or school reopening, the argument follows, should be made not by state and local governments, but instead by federal officials in Washington, D.C.

A federalist system of government, however, provides many advantages in a pandemic, as it does during normal times. The United States is a large and diverse country, and the coronavirus pandemic hit different regions of the country differently and at different times. Moreover, conditions relevant to the pandemic—such as population density and hospital capacity—vary dramatically across the country. In light of these differences, it would be nonsensical to take a one-size-fits-all approach to the problem.

Federalism permits a flexible and nimble pandemic response. State governments are our front-line responders, responsible for making most decisions concerning locking down and reopening economic and social activities based on local conditions. The federal government supports states in their efforts and can intervene to prevent state officials from overstepping the bounds of their authority. This system ensures that most pandemic-related decisions are made by the officials who are more knowledgeable of, and accountable to, the people directly affected by those decisions.

Why You Should Care

- **States are better situated than the federal government to respond flexibly and efficiently to a pandemic.** State and local governments have superior knowledge of local circumstances and can tailor their pandemic responses accordingly. If the facts on the ground change, states receive immediate feedback and are well-positioned

1 Andrew Gawthorpe, *Federalism has become another casualty of Trump and the coronavirus*, The Guardian (Apr. 18, 2020), available at <https://www.theguardian.com/commentisfree/2020/apr/18/federalism-another-casualty-donald-trump-coronavirus>.

2 Richard Kreitner, *When Confronting the Coronavirus, Federalism Is Part of the Problem*, The Nation (Apr. 1, 2020), <https://www.thenation.com/article/politics/federalism-coronavirus-problem-government/>.

to adapt their strategies quickly as necessary. State governments are also more reflective of their local populations than the federal government, and thus states will have a better understanding as to what pandemic-mitigation measures will and won't be tolerated by the people. For example, a mask mandate might work in one state, but prompt a backlash in another. In light of the inherent advantages possessed by states, decisions about many pandemic mitigation measures are best made at the local level.

■ **The federal government still has an important role to play in a pandemic.** The federal government has more resources—including both money and manpower—than state governments. The federal government can and should use these resources in cooperation with states to respond to a pandemic. For example, federal agencies have played an important role with respect to researching the coronavirus and publishing guidance to which states can look in determining their policies. The federal government has also provided much-needed financial support to states, along with support to individuals and businesses, in response to the pandemic.

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■ **A federalist system will best protect individual rights in a pandemic.** Emergency situations can be breeding grounds for authoritarianism, as officials may attempt to overstep the bounds of their authority in order to address the crisis at hand. Our Constitution mitigates this risk by dividing power between the federal and state governments. Our federal courts provide an additional check against abuse by ensuring that government officials do not trample on our individual liberties in their zeal to combat a pandemic.

Background

The United States Constitution establishes a national government with **limited, enumerated powers**, such as the power to raise and support an army, regulate interstate commerce, and spend money for the general welfare of the nation.³ All powers “not delegated to the United States [federal government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁴

³ U.S. Const. art. I, § 8; Randy E. Barnett & Heather Gerken, *Federalism and the Overall Scope of Federal Power*, National Constitution Center (last visited Aug. 20, 2020), <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/section/8712>.

⁴ U.S. Const. amend. X.

Our nation has operated under this federalist system of government for nearly 250 years. Not only that, but, as one scholar has noted, “[i]n a country whose business is business, the Constitution has served as the best export article ever.”⁵ It is unsurprising, then, that “the notion of federalism has come to characterize an ever greater number of systems of government,” including India, Germany, Canada, Brazil, Switzerland, and Nigeria.⁶ The European Union has also been characterized as a federalist model of government.⁷ While every country’s implementation of federalism is unique, federalism overall has provided an “architecture for freedom” for numerous countries, including our own.⁸

There are **three primary benefits** of federalism. *First*, the division of power between two levels of government is thought to “lessen[] the chance of federal tyranny.”⁹ For example, our federalist system of government means that “most policing [is] done at the local level,” thereby avoiding the dangers of a “national police force” that could undermine “civil liberties if there is a capture by autocratic rulers at the national level.”¹⁰

Second, state government is “closer to the people and thus more likely to be responsive to public needs and concerns.”¹¹ Another more recent variant of this argument is that our federalist system allows people to “foot vote” by moving to a state with laws that better align with their preferences.¹² Progressives, for example, can move to California, and conservatives can move to Arizona.

Third, states “can serve as laboratories for experimentation.”¹³ It is easier for state governments to experiment with new policies, and to make course corrections as necessary. By contrast, once the federal government enacts a program, it is exceedingly difficult to prevent that program from growing, let alone repeal it.¹⁴

State authority, however, is not always preferable to federal authority. Federal authority **is important** where there is a need to, among other things, “provide public goods, eliminate negative externalities from state regulation, avoid races to the bottom, or provide a national floor on fundamental rights.”¹⁵ For example, “a state may

5 Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 New Eur. L. Rev. 129 (1993).

6 *Id.* at 129-30.

7 *Id.*

8 *Id.* at 141.

9 Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499, 525 (1995).

10 *Id.* at 536-27.

11 *Id.* at 527.

12 Ilya Somin, *Free to Move: Foot Voting, Migration, and Political Freedom* (2020).

13 Chemerinsky, 47 Fla. L. Rev. at 578.

14 John F. Cogan, *The High Cost of Good Intentions: A History of U.S. Federal Entitlement Programs* (2017).

15 Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317, 319 (1997).

regulate a factory in a manner that protects its citizens, but causes pollution to be thrown off to people in bordering states.”¹⁶ In such a situation, the exercise of federal authority might be appropriate to prevent the state from imposing that “externality” on its neighbors. Notably, the enumerated powers of the federal government, such as the power to raise and support an army (*i.e.*, to provide for a public good) or to regulate interstate commerce (*i.e.*, to prevent negative externalities and races to the bottom) generally track, albeit imperfectly, these core federal competencies.

Federalism In A Pandemic

Our federalist system of government enables a better response to a pandemic.

The United States is a populous and diverse country, making it “ill-suited to one-size-fits-all approaches to public problems,” including public health crises such as pandemics.¹⁷ Instead, as in normal times, a pandemic calls for a nuanced, multi-level approach to government, with the federal and state governments each taking primary responsibility for actions within their core competencies.

Strengths of the state governments

States have **several advantages** over the federal government with respect to responding to a pandemic. These include superior knowledge of available local resources (*e.g.*, hospital capacity) and potential local hazards (*e.g.*, tourist hotspots) and local response priorities (*e.g.*, whether the locality more urgently needs testing or treatment), and an ability to more quickly adapt their strategies to changing conditions and to correct mistakes.¹⁸ Centralizing a response to a pandemic in the federal government, by contrast, would foist upon our large and diverse country a “one-size-fits-all” approach and preclude “state experimentation with different approaches” that can improve our “knowledge of which policies are the most effective.”¹⁹

In particular, different circumstances between states require different approaches both as to locking down activity during a pandemic and reopening after it has abated. The pandemic hit certain states, like Washington and New York, early and hard, whereas other states, like Florida and Arizona, suffered more later. And the citizens of these states may have different tolerances for potential virus-mitigation measures or for reopening, such as government-mandated mask wearing or in-person school,

¹⁶ *Id.* at 407.

¹⁷ Jennifer C. Bracer, *COVID-19 and the limits of government power*, IWF.org (April 3, 2020), available at <https://www.iwf.org/2020/04/03/covid-19-and-the-limits-of-government-power/>.

¹⁸ Walter Olson, *Federalism and the Coronavirus Lockdown*, Wall Street Journal (March 30, 2020), available at <https://www.wsj.com/articles/federalism-and-the-coronavirus-lockdown-11585609012>.

¹⁹ Ilya Somin, *Federalism and the Coronavirus Crisis*, Reason.com (March 31, 2020), available at <https://reason.com/2020/03/31/federalism-and-the-coronavirus-crisis/>.

respectively. An effective pandemic response must take into account all of these differences, which is exceedingly difficult, if not impossible, to do from Washington, D.C.

It is true, of course, that a decentralized response to a pandemic will lead to varying approaches among the fifty states. But, as discussed below, federalism does *not* require complete decentralization, and the federal government has various authorities it can exercise to provide a certain amount of uniformity. Moreover, variance between states can be a feature, not a bug, of federalism: “The states have better information, can shape policies to local conditions, and can experiment on best practices. Some states may initially suffer while others succeed. But state diversity also introduces a resiliency in our system that makes it less likely that the nation will suffer from a failure by any single leader, such as the president.”²⁰

Strengths of the federal government

The federal government also has various strengths with respect to responding to a pandemic, and a federalist system permits it to focus on these strengths while leaving other issues up to the states. Perhaps most significantly, the federal government can use its authority to **spend for the general welfare** to, among other things, “provide medical equipment and drugs,” “transfer money to states and cities or private entities, such as hospitals, to help with costs,” and “[i]t can help disseminate information on the disease, fund research on a vaccine and cure, and coordinate the efforts of public and private institutions with guidance for best practices.”²¹

Exercise of such federal authority in a pandemic is readily reconcilable with the principles of federalism. Pandemics have serious national, and international, consequences and require a substantial amount of resources to fight—resources that state governments would find difficult to marshal on their own. Pandemics also raise various “externality” concerns, as, for example, an outbreak in one state can easily spread to another.²² Similarly, during a pandemic, states might attempt to obtain more scarce and critical supplies than they actually need, leaving other states with a shortage of such supplies. For example, earlier in this pandemic, some states attempted to obtain more ventilators than they actually needed, just to be “safe”—an entirely rational approach from the perspective of a state official.²³ The

²⁰ John Yoo, *Pandemic Federalism*, National Review (March 20, 2020), available at <https://www.nationalreview.com/2020/03/pandemic-federalism/>.

²¹ John Yoo & Harmeet K. Dhillon, *Federalism vs. coronavirus—who has the power to fight pandemic?*, FoxNews.com (March 25, 2020), available at <https://www.foxnews.com/opinion/yoo-and-dhillon-federalism-vs-coronavirus-who-has-the-power-to-fight-pandemic>.

²² See Somin, *Federalism and the Coronavirus Crisis*, *supra* note 19.

²³ Rich Lowry, *How the media completely blew the Trump ventilator story*, National Review (April 19, 2020), available at <https://www.nationalreview.com/2020/04/coronavirus-response-ventilators-trump-administration-handled-potential-shortage-deftly/>.

federal government, with its national perspective, was able to intervene to ensure an equitable distribution of supplies between the states.²⁴

Limits on the state governments

It is also important to recognize that, although states may exercise broad police powers in response to a pandemic, they may not exercise their powers in a manner that violates constitutional rights. Emergency situations create prime conditions for violations of constitutional rights, as government officials are understandably more concerned with addressing the crisis

at hand than with respecting constitutional bounds on their authority. An especially important role of the federal government, and particularly the federal courts, in such times will, therefore, be ensuring that state officials respect these limits.

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For example, several state lockdown orders have disrespected **religious liberty**, in violation of the First Amendment. Plaintiffs have called upon the protection of the federal courts with mixed success. A federal district court prohibited the City of Louisville from criminalizing drive-in church services on Easter Sunday,²⁵ whereas the Supreme Court declined to enjoin a directive of the Governor of Nevada that permitted casinos and other facilities to operate at 50% capacity but prohibited churches, synagogues, and mosques from admitting more than 50 persons regardless of capacity.²⁶ Ensuring that overzealous state officials do not trample such constitutional rights, especially in their haste to respond to a national emergency, is a core responsibility of the federal courts in our federalist system.

Myths about federalism

Criticisms of federalism in the wake of the pandemic, and more generally, often rest on mistaken assumptions about the system of government.

Myth #1: The Administration’s response to the pandemic proves that federalism is flawed.

Some critics of the the Trump administration’s coronavirus response claim that purported uneven assistance to states, funding and supply delays, inconsistent

²⁴ *Id.*

²⁵ See Ilya Shapiro, *Yes, The Government Has A Lot More Emergency Powers Than Libertarians Like, But It Still Can’t Control Everything*, *The Federalist* (April 15, 2020), available at <https://thefederalist.com/2020/04/15/the-government-has-a-lot-more-emergency-powers-than-libertarians-like-but-it-still-cant-control-everything/> (citing *On Fire Christian Center, Inc. v. Fischer*, __ F. Supp. 2d __, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020)).

²⁶ See *Calvary Chapel Dayton Valley v. Sisolak*, __ U.S. __, 2020 WL 4251360 (July 24, 2020) (Mem.).

messaging, and insufficient testing, have brought “the failures of federalism” into “sharp relief, forcing us to reconsider one of the most deeply held American beliefs: that decisions made closer to home are inherently better.”²⁷ Whether the Trump Administration has effectively responded to the pandemic is beyond the scope of this paper. Even if one believes, however, that the Trump Administration mishandled the pandemic, the purported deficiencies in the current Administration’s approach constitute an argument in *favor* of federalism, not against it.²⁸

Consider this: If the United States had a single, centralized government, then our nation’s response to the pandemic would fall upon the federal government alone. This would augur well for the United States if the president were competent, but bode horribly for the country if the president were not. Given that presidential approval ratings historically hover around 50%,²⁹ it appears that, at any given moment in any administration, approximately half of the population should be grateful that the fate of our nation does *not* depend upon the competence of one person. Put another way, those who believe that President Trump has mishandled the pandemic should celebrate that he’s not the only one with the authority to respond to the crisis, and that there are fifty states that can fill any leadership void.

Myth #2: Federalism requires a weak national government.

Federalism requires a division of power between at least two levels of government, but it does not require a weak national government. Indeed, the vast power exercised by our federal government today would leave the framers of our Constitution “rubbing their eyes.”³⁰ But today even federalism’s most ardent defenders would not suggest a return to an earlier time in our nation’s history, where the federal government was but a fraction of its current size. Instead, they simply contend that we should continue to recognize, respect, and take advantage of the varying competencies of the federal and state governments.

Specifically with respect to the pandemic, some individuals have criticized President Trump’s “laissez faire federalism” or “corona-federalism.”³¹ But such critiques relate

27 Sarah H. Gordon, *What Federalism Means for the US Response to Coronavirus Disease 2019*, JAMA Health Forum (May 8, 2020), available at <https://jamanetwork.com/channels/health-forum/fullarticle/2766033>.

28 See generally Yuval Levin, *Washington’s Response to the Virus*, National Review (March 18, 2020), available at <https://www.nationalreview.com/2020/03/coronavirus-federal-government-response-not-everything-must-be-coordinated-from-above/#slide-1>; Gary Gerstle, *The New Federalism*, The Atlantic (May 6, 2020), available at <https://www.theatlantic.com/ideas/archive/2020/05/new-federalism/611077/>.

29 Gallup.com, *Presidential Approval Ratings—Gallup Historical Statistics and Trends* (last visited Aug. 11, 2020), <https://news.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx>.

30 *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

31 Ross K. Baker, *Trump’s Laissez Faire Federalism is as Toxic as Covid-19*, USA Today (July 14, 2020), available at <https://www.usatoday.com/story/opinion/2020/07/14/donald-trump-federalism-coronavirus-covid-19-response-column/5424862002/>; Joshua A. Geltzer, *Trump’s ‘corona-federalism’ pits states against each other. It’s a disaster*, Washington Post (April 8, 2020), available at <https://www.washingtonpost.com/outlook/2020/04/08/trump-corona-federalism/>.

to President Trump’s exercise, or failure to exercise, existing federal authority in response to the pandemic. They do not suggest that the authorities already possessed by the federal government are inadequate, nor that we should revise our system of government to concentrate additional authority within the federal government.

Myth #3: Federalism means “states rights.”

Some commentators mistakenly associate federalism with the claims to “state’s rights” in the Reconstruction and Jim Crow eras that enabled unconstitutional and invidious discrimination against African Americans.³² As described above, however, federalism does not—and should not—mean total deference to state authority. One of the core competencies, and responsibilities, of the federal government is ensuring that states do not violate fundamental constitutional rights. The unconstitutional discrimination characteristic of the Reconstruction and Jim Crow eras was not the result of “the doctrine of enumerated powers” that is at the heart of our federalist system; it was the result of “judicial abdication” of that federal role, “thereby leaving the freed slaves in the South to the mercies of state legislatures.”³³

Myth #4: Federalism pits national and local governments against each other.

Some people also mistakenly assume that federalism is an either-or proposition: either the national government has a certain authority, or the local governments, but not both. In fact, there is substantial overlap. Take spending, for example. As noted above, the federal government has the authority to spend for the general welfare. But states, too, have broad power to spend in exercise of their general police powers. This means that both the federal and state governments can spend in response to the pandemic—this authority is in that respect shared by both levels of government.

At its best, federalism creates opportunities for collaboration and cooperation between the federal and state governments, with each level of government drawing upon its core competencies.³⁴ The Centers for Disease Control and Prevention, for example, has used its superior resources and national knowledge to study the coronavirus and develop guidance as to suggested policies and procedures for controlling the transmission of the disease.³⁵ The states have then been able to use that guidance in forming local policies, adjusting their policies as necessary based upon their superior local knowledge and understanding as to what citizens in their state would be likely to accept.

³² See generally Roger Pilon, *On the First Principles of Federalism*, Cato Policy Report (Nov./Dec. 1995), available at <https://www.cato.org/policy-report/novemberdecember-1995/first-principles-federalism>.

³³ *Id.*

³⁴ See generally Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243 (2005).

³⁵ See Centers for Disease Control and Prevention, Coronavirus (COVID-19) (last visited Aug. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/index.html>.

Recommendations

Although our present federalist system of government is well-suited to respond to a pandemic, this does not mean that there is no room for improvement. Given that the United States has not been called upon to address a pandemic of this magnitude in over a century, it is understandable that our current response to the pandemic has been somewhat chaotic. But we should use this experience to plan for the future. Thus, policymakers should:

■ ***Identify policies or practices that require uniformity, and thus federal action, and those that do not.*** Identifying policies or practices that require uniformity, and those that do not, will assist policymakers in determining the areas that the federal and state governments, respectively, should focus on as they plan for the next pandemic. For example, it is likely that “epidemic data collection should be standardized.”³⁶ Information is one of our most potent weapons in responding to a pandemic, and the reliability of that information will depend in part upon its consistency across states. If what counts as a “coronavirus death” in one state is different from what counts in another, then it will be difficult for policymakers to draw accurate conclusions based on the data. Thus, one area of federal focus should likely be improving coordination with respect to data collection.

■ ***Improve cooperation between the federal and state governments.*** “A healthy vision of federalism needs to involve cooperation between state and federal actors, not the supremacy of either of them.”³⁷ With this point in mind, policymakers need to put in place policies and procedures that would facilitate better, and more organized, cooperation and coordination between the federal and state governments during a pandemic. It is important that such policies and procedures be put in place *before* a crisis develops, so that the crisis response can be as organized as possible. For example, the federal government should consider ways in which it could use its superior leverage and buying power to assist states in purchasing needed emergency supplies, and have in place clear policies and procedures with respect to such assistance so that states know what support they can expect going into the next pandemic.

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³⁶ Gordon, *supra* note 27.

³⁷ Mikael Tessema, *To Fight Coronavirus, Fix Federalism*, Harvard Political Review (May 30, 2020), available at <https://harvardpolitics.com/united-states/to-fight-coronavirus-fix-federalism/>.

- ***Empower states to exercise emergency authorities.*** There are approximately 136 federal statutory provisions that authorize various extraordinary actions in a national emergency. These statutes do a decent job of empowering the president to respond to an emergency, but practically nothing to empower a state response.³⁸ Congress should consider amending federal emergency statutes to permit states, in addition to the president, to waive burdensome federal regulations that hinder an emergency response. In our federalist system, states are key partners of the federal government in responding to a pandemic and other emergencies, and our federal emergencies statutes should reflect this fact.

Conclusion

Federalism is the best system of government to meet the needs of our large and diverse nation, and this fact is as true during a pandemic as it is under normal conditions. To improve our future response to another pandemic or other crisis, policymakers should focus on measures that would work *within* our federalist system of government, rather than abandoning the system that has served our country well for nearly 250 years.

³⁸ Kristin A. Shapiro, *Congress must make states equal partners in responding to emergencies*, Washington Examiner (April 16, 2020), <https://www.washingtonexaminer.com/opinion/congress-must-make-states-equal-partners-in-responding-to-emergencies>.