

Covid-19, The Usa And The Generation Of Constitutional Conflict

Abstract

The United States has responded ineffectively to the COVID-19 pandemic, raising questions about the capacity of contemporary American federalism to deal with crises. This article examines the scope of power granted to the federal government by the U.S. Constitution and the legislative power available to states under state constitutions, concluding that these powers are adequate to deal with the pandemic and other emergencies. It then considers whether having multiple governments confronting the crisis has precluded a coordinated response. Although scholars have highlighted cooperative federalism in the United States, cooperation is not automatic, and in recent years American political parties have become more ideologically cohesive and more polarized. Federalism has multiplied the opportunities for these parties to advance their objectives or to frustrate those of their adversaries in the overlapping domains in which both states and the federal government operate. The result has been uncooperative federalism.

“Emergency does not create power. [But] while emergency does not create power, emergency may furnish the occasion for the exercise of power.” So wrote Chief Justice Charles Evans Hughes in *Home Building & Loan Assoc. v. Blaisdell*, a case decided in 1934, at the height of another national emergency, the Great Depression. What the Supreme Court recognized in *Blaisdell* was that the greater the threat, the greater the justification for vigorous governmental action. This might seem an argument for concentrating power, for ignoring the states, particularly in combatting threats like the pandemic, that are national in scope and that show no respect for state boundaries. Federalism, which divides power between nation and state, may according to this view be all right in normal times, but it impedes dealing with emergencies.

Happily, that view is wrong: federalism is not a synonym for ineffective government. In the *Blaisdell* case itself the division of power between nation and state mattered: the Supreme Court was upholding action by a state, preceding any action by the federal government, on behalf of homeowners faced with foreclosure. And in the current crisis individual states initially acted more decisively than did the federal government in confronting COVID. Looking beyond our borders, federal systems such as Germany, Canada, and Australia have responded swiftly and effectively to the coronavirus. Each of these federal countries quickly inaugurated extensive testing and contact tracing, and they developed a relatively uniform set of policies as to lockdowns and other restrictions across jurisdictions. This is not to say that federalism guarantees an effective response. The United States, in contrast, was slow to respond to the crisis, with limited testing and poor intergovernmental cooperation and with widely divergent policies from state to state and even within states. In this paper I will consider whether America’s system of constitutional federalism has contributed to the country’s inadequate and oftentimes chaotic response to the pandemic.

Conceivably the fault for this poor response could lie in our constitutional architecture—do our federal and state governments have the power to respond effectively to emergencies, and even if they do, is that power properly distributed between nation and state? To answer those questions, let us look first at the US Constitution. James Madison’s Virginia Plan, which provided the agenda for the Constitutional Convention, proposed giving Congress authority to legislate in all cases to which the states were incompetent. Some delegates objected that this might expand federal power too much. The Plan’s proponents agreed that Congress should not have unlimited powers but they claimed one could not enumerate congressional powers until one determined the ends that the federal government would pursue. Mollified perhaps, the delegates overwhelmingly endorsed the Virginia Plan’s broad grant of authority, while keeping open the possibility of an enumeration of powers at a later point. This occurred in the Committee on Detail, which was tasked with preparing a draft constitution based on the agreements reached by the delegates. The Committee proposed the Constitution’s current enumeration of Congress’s legislative powers, which was adopted by the convention with little debate. The fact that this enumeration occasioned so little debate suggests that the powers granted were considered sufficient to encompass all cases to which the states were incompetent without unduly expanding congressional power.

In my view this enumeration of powers has had some perverse effects. First, it has put the advocates of vigorous federal action on the defensive, forcing them to justify such action not as necessary to confront problems but as authorized under the Constitution’s specific grants of power. Beyond that, the enumeration of powers, when combined with the Tenth Amendment’s protection of state powers not delegated to the federal government, has encouraged a focus on safeguarding state prerogatives rather than on accomplishing the purposes for which the Constitution was established. As Chief Justice Roberts put it in *National Federation of Independent Business v. Sebelius*, the initial case challenging the constitutionality of the Affordable Care Act, “the Constitution’s express conferral of some powers makes clear that it does not grant others.” And in interpreting the powers conferred, Roberts continued, the Court must not do so in a way that “undermines the structure of government established by the Constitution.” Implicit in this formulation is the idea that federalism involves a zero-sum competition for power between nation and state, a turf war between autonomous governments, such that expanding the power of one level of government diminishes the power of the other level.

Fortunately, there is a significant gap between the Supreme Court’s theory and contemporary political practice. The expansion of federal power that began in the 1930s has not diminished the states; rather, it has encouraged an expansion of state activity, as nation and state sometimes collaborate and sometimes compete in addressing problems, ranging from the

environment to immigration to health care and, now, to the pandemic. For example, although testing for the virus and other mitigation measures were encouraged by the federal government, they were carried out by states. State officials thus are component parts of the national administrative apparatus, interpreting federal law and implementing federal programs, and often they have leeway to adjust those programs in light of the needs and circumstances in their states. As Professor Jessica Bulman-Pozen has put it, “State actors use their connections to federal politicians and administrators to safeguard state autonomy and to advance particularistic state interests.” When this shared involvement in problem-solving developed, scholars described it as cooperative federalism, though one may question whether contemporary American federalism altogether fits that description.

So if the federal government’s response to the pandemic has been inadequate, and it has, it is not because the Constitution denies it needed powers. When the crisis hit, Congress already had in place laws to facilitate an effective federal response to emergencies. For example, the Stafford Act authorized the President to declare a state of emergency, and when President Trump invoked the Act in March of this year, he freed up \$50 billion in disaster funds. And the Defense Production Act authorized the President to require the private sector to prioritize federal government contracts for medical supplies and equipment during the crisis. Neither of these laws, nor other laws enacted by Congress in the midst of the pandemic, have excited constitutional challenges. Indeed, the more frequent complaint has been that the federal government has not fully employed the powers available to it to combat the coronavirus and its effects.

Let me add a few words about state constitutions and state power. Constitutional scholars view the state legislative power as plenary: that is, the states inherently possess all legislative powers not granted to the federal government or denied to them by the US Constitution (think again of the 10th Amendment). State constitutions thus do not grant power—you won’t find an enumeration of powers in a state constitution—and state legislatures need not point to a specific grant of authority in order to legislate. State and federal judges regularly affirm that states possess the police power—that is, the power to protect the health, safety, welfare, and morals of their citizens. It is hard to imagine a more comprehensive authority. State citizens can circumscribe the plenary legislative power by inserting in their constitutions substantive limits on state legislatures (think of state bills of rights), or by imposing procedural limits on how the legislature operates, or by assigning some powers to local governments, a necessity as local governments themselves possess no inherent powers. One should also recognize that it is the state legislative power that is plenary—governors have only those powers granted to them by the state constitution or delegated to them by the state legislature, just as the President has only those powers granted by the Federal Constitution or delegated by Congress. There has been considerable litigation challenging state lockdown orders and other coronavirus regulations. For example, last May the Wisconsin Supreme Court struck down an executive attempt to extend a state stay-at-home order, and in October the Michigan Supreme Court rejected a gubernatorial attempt to continue a state of emergency without additional legislative authorization. But in neither these nor other state cases one could cite was there a challenge to the overall scope of state power. That power too is fully adequate for addressing emergencies.

Yet even if the state and federal governments possess sufficient power to confront emergencies, the existence of multiple governments in a single country does complicate the exercise of that power. The American federal system often relies on networks of policy experts at different levels of government to coordinate efforts, but coordination among the levels of government is hardly automatic. For example, in the absence of federal guidelines, various states developed their own distinctive policies for collecting and reporting data on COVID cases, which impeded planning and the distribution of resources at the federal level. Conflict may also replace cooperation—think of how the states competed for testing equipment and personal protective equipment (PPE) in the early months of the pandemic. Most importantly, political differences may impede cooperation and coordination between the states and the federal government.

Other federal systems—such as Australia, Germany, and Canada—have managed to avoid partisan discord in responding to the pandemic. Indeed, Australia and Germany assembled crisis cabinets with representation from across the political spectrum precisely in order to forestall the response from becoming a partisan issue. As a result, they were able to act quickly with extensive testing and contact tracing, and they developed a relatively uniform set of policies across jurisdictions. The United States, in contrast, was slow to respond to the crisis, with limited testing and spotty

intergovernmental cooperation and with widely divergent policies from state to state and even within states. To some extent, this inadequate response may be traced to political leadership at the national level, and the American people will shortly be rendering its verdict on that leadership. But there is a constitutional dimension to this as well.

American constitutions not only distribute power; they also create the institutions that exercise that power. Those serving in government are responsive to the particular electorates that choose them, and so they tend to check each other. At the national level this involves the separation of powers and the checks and balances associated with it—Federalist 51’s famous “ambition must be made to counteract ambition.” The President, as well as the members of the House and Senate, serve different length terms and represent different constituencies, so divided party control, such as we have now, is always a possibility, and party differences lead the different branches to check one another. When one looks beyond Washington, DC, divided party control is inevitable—in a nation of 50 states, there are sure to be some states controlled by the party out of power nationally. Even should the Democrats gain control of the House, Senate, and Presidency in the upcoming election, Utah will remain a Republican stronghold, and so will several other states. The existence of such partisan enclaves affects the operation of American federalism. State and federal officials who share a common party affiliation may have an incentive to cooperate, but federalism ensures that there will be state officials who do not share the same party or outlook as federal officials, and these state officials will often seek to challenge federal initiatives or pursue their own paths. A textbook example is the lawsuit filed by Republican attorneys general in more than 20 states challenging the constitutionality of the Affordable Care Act (Obamacare) immediately after Congress enacted it without a single congressional Republican voting for the law. In that instance partisan conflict at the national level was rejoined at the state level, where the party that was in the minority nationally had an advantage. More generally, federalism multiplies the opportunities for political parties to advance their objectives or to frustrate those of their adversaries in the overlapping domains in which both states and the federal government operate. Not surprisingly, then, scholars today speak not only of cooperative federalism but also of uncooperative federalism and even partisan federalism.

Where does this take us? First, the diversity of approaches to policy issues that federalism allows often is an advantage, encouraging policy experimentation at the state level and allowing federal policies to be adapted to local conditions. But sometimes the absence of a uniform national policy can frustrate efforts to address urgent problems of national scope. Whether the policy diversity that federalism allows is an advantage or a disadvantage depends in each instance on the issue and on political circumstances.

In dealing with COVID-19 the federal government invited state experimentation and a diversity of state responses. Early in the pandemic the Center for Disease Control recommended that Americans stay at home and practice social distancing. But the federal government left to the states the decisions as to whether to impose restrictions and as to how long those restrictions should remain in place. This resulted in a patchwork of state responses. Some states imposed stringent restrictions, but others never imposed lockdowns, and still others adopted regulations only reluctantly and belatedly. Some states in that last group—most notably Florida and Georgia—have since prematurely reopened their states with only slight restrictions, despite spikes in infections in their states and in the face of opposition by their own health officials. I believe that the lack of clear and vigorous national leadership was, to say the least, unfortunate.

Second, the conflict between states and the federal government over the response to the pandemic illustrates that federalism disputes are primarily policy and partisan disagreements rather than disputes about protecting the autonomy of states or the powers of the federal government. This is reflected in the very different responses states made to the pandemic. New York, California, Michigan, and those other states that declared a health emergency early, even before the President did, tended to have Democratic governors, and those states were particularly cautious in lifting restrictions. In contrast, those states that were slow to impose lockdowns and eager to lift them tended to be Republican states that voted for Donald Trump in 2016.

Commentators have observed that American political parties have in recent years become more ideologically cohesive and more polarized, producing a country with states moving in different directions. Federalism has not produced this divergence, but it has created venues in which partisan differences can have political effect. As a result, American

constitutional federalism has exacerbated the partisan nature of our response to the pandemic.

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Further Reading

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