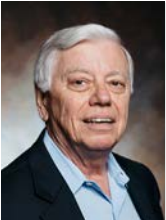


Federalism and the COVID-19 Crisis in the United States of America



Author: John Kincaid

John Kincaid is the Robert B. and Helen S. Meyner Professor of Government and Public Service at Lafayette College, Easton, Pennsylvania, USA, and President of the Center for the Study of Federalism.



Author: J. Wesley Leckrone

J. Wesley Leckrone is Associate Professor of Political Science at Widener University, Chester, Pennsylvania, USA, and a Fellow of the Center for the Study of Federalism.

Never have so many Americans said so much about federalism in so short a time as during the COVID-19 pandemic. But opinion is divided. Some see federalism as a lifesaver, others as a killer. The latter believe the states are laboratories of death because they did not act uniformly and the federal government did not order a national lockdown. Presumptive Democratic presidential nominee Joseph Biden called for this on March 28. The other camp says deaths would be higher if the states had awaited federal action. Thank goodness for governors, especially those who issued stay-at-home orders early on, starting with California on March 19, followed quickly by Illinois, New Jersey, and New York. A stay-at-home order closes non-essential businesses and requires citizens to remain home except for essential travel. Local officials in the six-county San Francisco area acted the earliest, issuing a stay at home order on March 16. Public approval ratings of responsive Democratic and Republican governors are higher than those of Republican President Donald Trump.

The United States' response to COVID-19 has been less than ideal. It has the world's highest number of reported cases and deaths. The first U.S. case was diagnosed on January 20 in Washington state in a man who had visited Wuhan, China. COVID-19 arrived in New York from Europe. It circulated in the New York City region for several weeks before the first case was diagnosed on March 1. The first federal government action in response was taken on January 31 when the president barred entry of most foreign nationals who had recently visited China.

The slow U.S. response was not due to constitutional infirmities of federalism but to party polarization and lack of preparation. Federal, state, and local Republican officeholders, as well as voters, discounted COVID-19's severity for longer than did Democrats. Of the first ten governors to issue stay-at-home orders, nine were Democrats, even though only 24 of the 50 governors are Democrats. Of the nine states that have issued no such order, eight have Republican governors, although, with the exception of Massachusetts, many of these states, such as North Dakota, are more rural than average.

The governors shut down the U.S. economy because the states, not the federal government, possess the police power. This is the power to legislate for the health, welfare, safety, and morals of citizens. The federal government has only limited, delegated powers. The police power is among the undelegated powers reserved to the states by the Tenth Amendment (1791) to the U.S. Constitution.

President Trump ignited a constitutional firestorm on April 13 when he declared he had "absolute" and "total" power to override the governors and reopen the economy. He called recalcitrant governors "mutineers." But Trump retreated the next day after a backlash from governors, members of Congress, and constitutional scholars. The president subsequently held a conference call with the governors and pledged to cooperate with them to reopen the economy.





About 45 states follow federal-government guidelines on business closures and will likely do so for reopenings. The Democratic governors of California, Oregon, and Washington have agreed to coordinate a regional reopening, as have six Northeast Democratic governors and five Democratic and two Republican governors in the Midwest.

The president lacks clear authority to issue a stay-at-home order. The president can bar foreign nationals from entering the United States, and can blockade states' borders to prevent interstate disease transmission, but he cannot reach into states to reopen schools, restaurants, and so on. There is an untested federal law allowing the U.S. Centers for Disease Control and Prevention (CDC) to take measures "in the event of inadequate local control," but the CDC has not cited any state or locality for inadequate action, and the law does not allow the CDC to terminate adequate state or local disease controls. The Defense Production Act (1950), which President Trump has invoked lightly, gives him broad economic authority to "allocate materials, services, and facilities in such a manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense." The president could use this act, plus grants-in-aid, to prod slow-moving states to reopen more quickly.

In late March, Congress overcame partisan gridlock to enact the largest stimulus package in U.S. history: \$2.2 trillion for public health, worker protection, and economic recovery. It includes \$256.1 billion for state, tribal, territorial, and local governments for medical and non-medical purposes. But there are equity concerns. One estimate indicates New York will receive about \$12,000 per COVID-19 patient while Nebraska will receive \$379,000.

The law also authorizes the Federal Reserve and U.S. Department of the Treasury to provide up to \$500 billion to keep the municipal bond market liquid. This will help state and local governments borrow to cover lost revenue from drops in sales and income taxes. However, polarization has blocked further legislation, and Congress recessed until May.

The principal barrier to economic reopening is lack of mass testing capacity. This is mainly a responsibility of the federal government, and it might not perform well enough to allow much reopening in May. It must also fund vaccine research. Otherwise, the federal government is providing medical equipment and personnel to states and localities with high infection rates. States with low rates also are sending personnel and equipment to states in need. Many states have relaxed their licensing rules to allow out-of-state medical personnel to work in their jurisdictions.

The coronavirus crisis is unlikely to induce significant change in the distribution of power in the American federal system. The governors' assertion of their states' police powers will ensure that the gradual centralization of the federal system, which has been occurring especially since the late 1960s, will not be pushed into high gear by COVID-19.

