The pandemic exposes the need to fix the federalism debate

Overview

During the 2008 financial crisis, President-elect Obama's Chief of Staff, Rahm Emanuel, famously said, "You never want a serious crisis to go to waste."[1] The present pandemic is no exception. Examples of political and economic opportunities abound: the debates over the appropriate legislative response to the pandemic,[2] schemes to defraud frightened consumers and merchants,[3] the emergence of a "coronavirus economy,"[4] and even the mad dashes to hoard ordinary goods like toilet paper,[5] groceries,[6] and personal protective equipment.[7] And given the human propensity to forget our vulnerabilities between crises, the more negative of these examples will likely repeat themselves. Yet this crisis presents a rare opportunity to change the way we talk about federalism.

The misapplication of federalism doctrine to the COVID-19 crisis

Federalism describes the constitutional allocation of power between the federal and state governments. This and other structuralist doctrines have made a resurgence in recent years. Long before COVID-19 had a name, discussions of constitutional design principles like federalism and separation of powers had begun appearing in popular discourse.[8] For instance, the confirmation hearings of Justice Gorsuch thrust the doctrine of *Chevron* deference[9] — previously unalluring to all but a few seemingly self-loathing legal academics — into the political limelight.[10] The impeachments of presidents Clinton and Trump generated intense media discussions about separation of powers, as did the Bush administration's expansion of executive power in response to the terrorist attacks on September 11, 2001. Though each example came wrapped in the political squabbles of its day, all showed core constitutional doctrine in action.

The same applies to the ongoing federalism debate sparked by the coronavirus pandemic.[11] As state governments rush to contain outbreaks, questions have arisen about the federal government's role. To the president's detractors, the federal

government should be doing more, perhaps even leading the charge[12] in finding a cure for, preventing the spread of, and treating those afflicted by COVID-19.[13] Ask the president or his supporters, and the federal government is already doing enough, maybe even too much,[14] and states should be grateful for anything more than the promise of back-up.[15] On the surface, these events seem like the usual partisan politics, but they invoke a deeper debate about government roles.

Federalism's role in crisis management is more complex, and less partisan, than current news coverage might suggest. As we recently wrote, federalism acts as a check on federal power.[16] It corrals the "few and defined" powers of the larger, geographically expansive federal government by reserving "numerous and indefinite" powers to the smaller, more numerous state governments.[17] Indeed, the Tenth Amendment explicitly assigns to the states (which have the most direct influence over the actions of the individual and the greatest responsiveness to popular will) and the people those powers the federal constitution's first three articles did not grant the federal government.[18] From this arrangement emerges doctrines like anti-commandeering and judicial federalism, which together allow state governments to resist federal encroachment and, at times, even to enlist federal courts to police that boundary.[19]

The present debate's superficiality largely obscures this intricate arrangement. It casts federalism as a constitutionally-established blame game that reverses usual governmental tendencies: rather than the states defending against federal government overreach, here a federal government restrains itself as state governments lobby for its intervention. Setting this political narrative aside, assessing federalism's true role in pandemic management reveals two things. First, it uncovers federalism's limitations in forcing federal intervention. Second, it exposes a coming conflict in which federalism promises to be on full display.

Federalism's limited use in forcing federal action

Federalism is a shield, not a sword: it is a doctrine for states to prevent federal action, not to compel federal acts. Because it checks federal overreach, not dormancy, federalism is ill-suited to spurring a self-constrained federal government into action. Hence the calls by some critics for exasperated governors to get

together and “raise hell.”[20] Because that’s their only recourse.

The past initially appears instructive. During World War II, a particularly popular example at the moment, the federal government acted aggressively not only in shifting much of the domestic economy to war armament production, but also in addressing economic disincentives that kept pharmaceutical companies from producing the penicillin that could have prevented tens of thousands of American soldiers from succumbing to infected, but otherwise nonfatal war wounds.[21] Meanwhile, state governments enlisted hotels, parks, and private clubs for use as lodging for deploying and returning soldiers, as makeshift hospitals, and shamefully, even as internment camps for Japanese Americans.[22] These and other examples[23] show how federal and state governments can and have successfully worked well in tandem to confront a crisis. Yet they say nothing about what federalism *requires* of each level of government.

Appeals to prior instances of governmental symbiosis, though politically poignant, offer scant instruction about the duties owed by federal and state governments. No constitutional imperative compelled President Roosevelt to conscript American manufacturers, or the states to reoutfit hospitality and recreational infrastructure. These examples merely point to an ideal, an example of what perhaps could be if present leaders adopted a similar approach today. The tendency to invoke federalism as a measure of governmental performance, on the other hand, overstates its influence.

The coming clash

Federalism instead answers a different, albeit related question: The one that concerns our eventual return to “normal.” As with any crisis, the longer this pandemic lasts, the greater its costs (both human and economic) will be. But by limiting its role to that of a back-up to state governments, the federal government has undertaken relatively few emergency measures (particularly relative to the president’s emergency powers)[24] that it might roll back in any future push to reopen the economy. Though the president has issued social distancing guidelines, governors and mayors are responsible for the stay-at-home orders that have shut down large segments of the American economy in an effort to “flatten the

curve."[25] Therefore, even were the president to discontinue federal guidelines, withdraw all emergency-related orders, and refuse to sign any further pandemic assistance passed by Congress, those state orders would remain.

And federalism prevents, at the very least, the President from countermanding a state governor's quarantine order.[26] Though well-positioned to influence both public opinion and state officeholders within his political party, the president cannot compel the state governments to rescind stay-at-home orders.[27] No statute grants him such authority. And controlling U.S. Supreme Court caselaw suggests any attempt to do so would be struck down, either as an unlawful usurpation of congressional power[28] or (if done by an act of Congress) as a violation of the anti-commandeering doctrine, which prohibits the federal government from forcing, or even overly pressuring,[29] state governments to implement its policies.[30] The federal constitution withholds "a plenary police power" from the federal government,[31] while according state governments "great latitude" to use their own police powers "to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."[32] Nothing short of a congressional act preempting the entire field of public health[33] (a politically unthinkable endeavor) could plausibly compel the states to reopen their economies. Even then, courts would be unlikely to uphold the wholesale displacement of "the historic primacy of state regulation of matters of health and safety."[34] This is one federalism battle that the states are uniquely positioned to win.

Conclusion

Federalism is a referee, not a rulebook. This distinction tends to be lost in repeated comparisons to the coordinated responses of federal and state governments during World War II and other past crises. Just as every crisis poses unique threats, every level of government possesses unique understandings of their proper role in America's federalist scheme. And to a considerable extent (perhaps more than we care to admit), federalism accommodates those ideological fluctuations. This does not mean federalism has nothing to say about the role that each actor plays in addressing the present pandemic. It does, but not as a playbook for governmental disaster responses. Instead, federalism tells us that the federal government, while free to let the states take the lead in containing the outbreak, cannot declare victory

and force states to leave the field.

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[1] Rahm Emanuel, Chief of Staff to President-Elect Barack Obama, address to attendees of the Wall Street Journal's 2008 CEO Council (2008).

[2] *See* McCormack, *Congressional Democrats Add Last-Minute Ideological Demands to Coronavirus Relief Package,* Nat. Review (Mar. 23, 2020), Solis, *Republicans Tried to Sneak Abortion Restrictions into the Coronavirus Bill,* Vice (Mar. 13, 2020), Bresnahan et al., *Senate GOP Crafting New Massive Coronavirus Package at 'Warp Speed'*, Politico (Mar. 17, 2020).

[3] SeeMcKee, *Fraud: An Inevitable Symptom of COVID–19,* Forbes (Apr. 10, 2020).

[4] Klebnikov, *Here Are 20 Stocks To Buy In The 'Coronavirus Economy,' According To Market Experts*, Forbes (Mar. 16, 2020).

[5] Smith, *This is Why Everyone is Hoarding Toilet Paper,* ARS Technica (Mar. 24, 2020).

[6] Knuckle and Ruane, *Coronavirus Triggers Run Grocery Stores, with Panic Buying, Hoarding and Some Panic Too*, Wash. Post (Mar. 13, 2020).

[7] Vigdor, *A Hoarder's Huge Stockpile of Masks and Gloves Will Now Go to Doctors and Nurses, F.B.I. Says*, N.Y. Times (Apr. 2, 2020).

[8] See, e.g., Root, *Kavanaugh Joins Gorsuch in Fight To Revive Nondelegation Doctrine*, Reason.com (Nov. 25, 2019); Barnes and Kim, *'Everything Conservatives Hoped for and Liberals Feared': Neil Gorsuch makes his Mark at the Supreme Court*, Wash. Post (Sept. 6, 2019), *Justice Neil Gorsuch Opens Up on His Judicial*

Philosophy on 'Fox & Friends', Yahoo News Videos (Dec. 17, 2019), Foley, Revisiting the Constitution: Restore Federalism, N.Y. Times (Oct. 1, 2013); Somin, *How Liberals Learned to Love Federalism*, Wash. Post (July 12, 2019). .

[9] The doctrine is named for the eponymous Supreme Court case, *Chevron U.S.A.. v. Nat. Resources Defense Council* (1984).

[10] See Berenson, *How Neil Gorsuch Could Dramatically Reshape Government*, Time (Mar. 19, 2017); Hamburger, *Gorsuch's Collision Course With the Administrative State*, N.Y. Times (Mar. 20, 2017); Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, N.Y. Times (Mar. 14, 2017); Robinson, *High Court Could Take First Step to Chevron Doctrine's Demise*, Bloomberg Law (Mar. 28, 2019).

[11] See, e.g., Tackett, *Analysis: Virus Pulls Federalism Debate into 21st Century*, AP News (Mar. 28, 2020).

[12] J. B. Pritzker, Governor of Illinois, tweet regarding U.S. President Donald Trump (Mar. 22, 2020).

[13] Yglesias, *America Has No Federal Response to This Crisis,* Vox (Apr. 3, 2020), Cook and Diamond, *'A Darwinian Approach to Federalism': States Confront New Reality Under Trump*, Politico (Mar. 31, 2020).

[14] Yoo, *Pandemic Federalism*, Nat. Review (Mar. 20, 2020); Levin, *Washington's Response to the Virus*, Nat. Review (Mar. 18, 2020).

[15] Mackey, *In Exchange for Aid, Trump Wants Praise From Governors He Can Use in Campaign Ads*, Nat. Review (Mar. 27, 2020); Smith, *Trump Tells Governors to Stop 'Blaming' Him After They Request More Help From Feds*, NBC News (Mar. 22, 2020); Donald Trump (@RealDonaldTrump), President of the United States, tweet regarding Illinois Governor J.B. Pritzker (Mar. 22, 2020).

[16] See Stanford & Carrillo, *Judicial Resistance to Mandatory Arbitration as Federal Commandeering* (2019),71 Fla. L. Rev. 1397, at 1417.

[17] *Id.* at 1417–18.

[18] *Id.*

[19] *Id.*

[20] Posner and Bazelon, *Trump Is Politicizing the Pandemic. Governors Can Fight Back.*, N.Y. Times (Apr. 2, 2020).

[21] Ubel, *US Government's WWII Mobilization on Penicillin is a Road Map to Fighting the Coronavirus*, USA Today (Mar. 30, 2020); Wilson, *The 5 WWII Lessons That Could Help the Government Fight Coronavirus*, Politico (Mar. 19, 2020).

[22] See, e.g., Meares, *SoCal Drafted Its Buildings To Help Win WWII — And We're Doing It Again To Fight Coronavirus,* LAist.com (Apr. 13, 2020).

[23] See DeSeve, *Agile Federalism in Times of Crisis*, NAPAWash.com (Mar. 23, 2020) (referencing examples of successful federal-state collaboration in combating homelessness and wildfires); *but see* Downs, *The Epidemics America Got Wrong*, The Atlantic (Mar. 22, 2020) (discussing poor responses to smallpox and HIV-AIDS).

[24] Goitein, *The Alarming Scope of the President's Emergency Powers*, The Atlantic (Jan./Feb. 2019 Issue).

[25] Mervosh, Lu, and Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times (Apr.7, 2020).

[26] Noted conservative and liberal scholars agree on this point. See, e.g., Yoo, *No, Trump Can't Force States to Reopen*, Nat. Review (Apr. 13, 2020) and Chemerinsky, *Op-Ed: Trump Doesn't Have the Authority to Order the Country Back to Work by Easter. Here's Why*, L.A. Times (Mar. 25, 2020).

[27] Chesney, *Can the Federal Government Override State Government Rules on Social Distancing to Promote the Economy?*, LawfareBlog.com (Mar. 24, 2020).

[28] See *Youngstown Sheet & Tube Company v. Sawyer* (1979).

[29] See *NFIB v. Sebelius* (2012) at 2601–07 (striking down Obamacare Medicaid expansion funding penalties as unduly coercive).

[30] See Stanford & Carrillo, *supra* note 16, at 1419–25.

[31] *United States v. Lopez* (1995) at 566.

[32] *Medtronic, Inc. v. Lohr* (1996) at 475.

[33] See *id.* at 484–86 (explaining test for federal preemption of state police power).

[34] See *id.* at 485; *Gibbons v. Ogden* (1824)at 203 (counting "[i]nspection laws, quarantine laws health laws of every description, as well as laws for regulating the internal commerce of a State" even those affecting interstate commerce, among police powers reserved to the states).