



COVID-19 And The Limits Of Government Power

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The rapid advance of the novel coronavirus across borders, both international and domestic, has set off a vigorous debate about federalism and the separation of powers that promises to provide Americans with a long-overdue civics lesson.

President Trump has noted repeatedly that our nation's governors are on the front-lines of the crisis. Ironically, many of the same voices that often fret about Donald Trump's alleged authoritarian impulses now seem to long for a president with total authority to address the pandemic on his own.

An article in the Nation laments that, when it comes to confronting the coronavirus, "federalism is part of the problem." Harvard Law Professor Noah Feldman argues that, "[i]n times like these, it would be nice to have a stronger federal government."

Former Maryland Governor Martin O'Malley is not so polite. He describes federalism in the time of pandemic as "Darwinian," claiming that it is "states' rights taken to a deadly extreme."

Not surprisingly, former Florida Governor Jeb Bush has a different perspective. Bush sees the current crisis as highlighting the inefficiency of big government at the national level.

"The federal government's inability to respond quickly and effectively to the coronavirus is creating a newfound respect for local initiatives, private-sector creativity, personal responsibility and civic engagement," writes Bush in the Wall Street Journal.

In another Wall Street Journal piece, Walter Olson of the Cato institute argues that states should take the lead.

According to Olson, state and local governments are closer to the facts on the ground and, therefore, have more accurate information regarding the local hazards, available resources, and regional priorities. State and local authorities also are better able to respond quickly and to change course if an initial response fails to work.

It is not just efficiency that counsels in favor of a federalist approach to the pandemic. Our constitution requires it.

As Harmeet K. Dhillon and John Yoo explain at FOXNews.com, under our system of government,

States, not Washington, D.C., possess the “police power,” which gives them authority to . . . protect public health and safety. [O]nly the states may impose broad quarantines, close institutions and businesses and limit movement and travel.

By contrast, our constitution grants the national government limited, enumerated powers. By dividing power between the state and national governments, federalism protects us from tyranny by preventing power from accumulating at any one level. Our Founders believed that the government that is closest to the people is most responsive to the needs of the people. In turn, this gives the people greater ability to hold government officials accountable for their actions.

This makes sense not only in theory, but also in practice. America is a large, diverse nation that is ill-suited to one-size-fits-all approaches to public problems.

“If we’ve learned anything about the coronavirus so far,” writes John Daniel Davidson in the Federalist, “it’s that the disease spreads much more quickly in densely populated areas that rely on mass transit.” As a result:

dense megacities are going to need different responses to the virus than rural areas—and more resources from the federal government. . . .

By the same token, less densely populated areas of country [sic] will want to protect themselves from contagion emanating from large cities, hence the quarantine requirements you see governors imposing on travelers.

Of course, none of this means that the federal government lacks the power to act. Dhillon and Yoo note that the federal government, with better access to data about the virus and its trajectory than the states, can help disseminate that information to the public and to local governments. They argue that the feds also can bar potentially infected persons from entering the United States, provide funding for medical research, drugs, and supplies, and coordinate state action and the actions of private institutions.

But, they note, federal power is itself limited by the separation of powers between three co-equal branches of government. In many instances, then, the president lacks the power to take unilateral action. Here are Dhillon and Yoo again:

Trump can declare a national emergency . . . that allows him to disburse up to \$50 billion in federal funds, but only because Congress has appropriated money. Trump can send masks, equipment and even military hospitals, but only because Congress has bought and paid for them. Even if conditions significantly worsen, Congress has imposed procedures before a president can deploy the National Guard.

It is true that the states cannot solve this pandemic on their own. But federalism is not an either/or proposition. It involves cooperation between all levels of government that is, at times, messy. Together with the separation of powers built into our constitutional system, federalism provides maximum efficiency and flexibility, while simultaneously providing the checks and balances necessary to safeguard our liberty.