



# Power resides with the states to institute lockdowns or not

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President Donald Trump provoked widespread criticism last week when he claimed he had “total” authority to reopen the economy, thereby overriding lockdown orders issued by numerous state governments. Democratic governors, such as Andrew Cuomo of New York, pushed back, arguing that such use of federal power would be “a total abrogation of the Constitution,” which leaves such decisions to the states.

The dispute is, perhaps, the latest example of liberal Democrats using constitutional federalism to combat Trump.

More recently, the White House issued guidelines for reopening that are merely advisory. But Trump has not repudiated previous assertions of total authority and could potentially resort to them again if states do not act as he wishes.

At the same time, however, others on the left contend that the coronavirus crisis justifies weakening constitutional constraints on federal power, so as to ensure a cohesive national policy. For example, University of Illinois law school Dean Vikram Amar argues that constraints on federal power to regulate interstate commerce unjustifiably prevent the federal government from ordering a nationwide lockdown, and could also block it from requiring mandatory vaccination of all Americans when and if a vaccine becomes available. Others also argue against constitutional barriers to a comprehensive nationwide lockdown enforced by the federal government and a federal vaccination mandate.

## Centralization isn't the only answer

If such arguments prevail, they will set a dangerous precedent. In a time of crisis, it is tempting to assume that we need to concentrate power as much as possible. But centralization can often make things worse rather than better. Moreover, consolidations of power that arise during crises often continue long afterwards.

The Founders regarded most public health issues as primarily a state responsibility beyond the scope of federal power. Modern Supreme Court decisions have greatly expanded federal authority. But some powers are still reserved to the states. For example, the federal government does not have a general power to impose mandates on private individuals, it cannot

“commandeer” state governments to enforce its laws, and its power to regulate interstate commerce does not extend to many types of “noneconomic” activity.

The federal government has an important role in combating a pandemic. For example, it can help fund research on treatments and vaccines, and try to compensate people for the enormous economic damage caused by the virus and associated shutdowns. But it would be a mistake to junk structural constraints on federal power.

Those who emphasize that Trump and the federal government generally have done a terrible job of addressing the coronavirus crisis should be particularly wary of giving them even more power than they already have. If Trump has the power to order a nationwide lockdown, he will also have the authority to override state lockdown policies.

Overcentralization has already done considerable damage in the current crisis. Among other things, federal agencies caused a deadly delay in the deployment of coronavirus testing by botching test development and blocking states and private labs from deploying their own tests.

Trump deserves blame for some of these errors. Undermining of constitutional constraints on federal power in times of crisis often generates harmful results even under more conventional presidents. In the 1942 case of Wickard v. Filburn, where the Supreme Court legitimized a vast expansion of federal authority by ruling that Congress’ power to regulate interstate commerce allowed it to restrict farmers’ production of wheat, even if it never crossed state lines. Few recall that the effect of the law the court upheld was to create an artificial shortage of wheat in the midst of the Great Depression, thereby raising the price of food at a time when millions of people were already unable to make ends meet.

### **Governors have taken steps to combat the virus**

State governments have done much to address the current crisis even without a federal lockdown. Forty-three states, covering 97% of the U.S. population — have adopted “stay at home” orders. Perhaps states should have acted sooner. But had the U.S. response to the virus been under complete federal control, it is highly likely the government would have taken longer to act. After all, Trump for a long time denied that the virus was a serious danger.

Some states have more severe restrictions than others. But it is unlikely that a one-size-fits-all lockdown is ideal for a large and diverse nation where conditions differ greatly between states. For example, densely populated areas like New York City may require a different approach than rural and suburban regions.

A federal mandate is also not needed to ensure widespread deployment of a vaccine. All 50 states already require mandatory vaccination for a variety of contagious diseases. Should an effective vaccine become available, state governments would have a strong incentive to make it compulsory; no state would want to be one of the few where the virus continues to be a menace. The federal government can further incentivize vaccination by using its spending power to fund it, which would be constitutional even under a relatively narrow interpretation of Congress’ power to spend to provide the “General Welfare.”

State-led coronavirus policy is not risk-free. The highly contagious nature of the virus creates a risk that a state with overly lax policies can potentially “infect” its neighbors. But this danger can be mitigated by cooperation between neighboring states, an approach that is already being pursued by groups of states on the East and West coasts, and in the Midwest. States can, of course, still make dangerous mistakes. But the same is true of the federal government, and a flawed federal policy that applies to the whole nation is likely to do much more harm than a similar error by a single state government.

If the current crisis enables the federal government to seize virtually unconstrained power to impose mandates and shutdowns at will, that power is unlikely to go away in the future. Democrats who distrust Republicans should think about how the latter might use such sweeping authority going forward. Republicans tempted to support Trump’s claims to “total” power should think about how that power might be used by a future Democratic president. In a highly diverse and ideologically divided nation, all sides can benefit from strong constitutional limits on federal power.

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