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Political Science 401D

7 May 2020

Disease and Division: Federalism in the Time of the Coronavirus

The ongoing COVID-19 pandemic has exposed to many the strengths and weaknesses of America's system of federalism. As states make the decision to back the Trump administration's plans whole-heartedly, make plans of their own with regional pacts, or even go in entirely alone, observers will have the chance to see American federalism put to its greatest test in quite some time. Regulatory oversight on what power states have for themselves will probably not be the federal government's first priority as they try to stop public health from declining and the economy from hemorrhaging any further. It seems likely that states will use this opportunity to push the limits of what they are allowed to do without federal approval. With that in mind, some have begun to wonder whether this pandemic response has brought the country into a new era of federal-state relations or whether this is merely a natural extension of where those relations already were.

For now, the actions of states as they fight coronavirus fall comfortably into the existing era of ad hoc federalism; whether a state is prostrating before the Trump administration right now is largely a partisan question. If anything has changed, it would be the rhetoric around this decision, as the intense circumstances states have found themselves in give them reign to be more openly antagonistic. A review of the previous eras of federalism, from ad hoc all the way back to the dual federalism of the nascent United States, will help clarify how it reached this

current mindset. COVID-19 may provide the spark to move the US into a new, even more uncooperative era of federalism, but for now, it is too early to call.

America is rather unusual in its strong dedication to federalism, often seen as a symptom of its visceral reaction to a strong central government like it faced as an English colony. Simply put, federalism refers to a governmental system in which power is shared in approximately equal part by both national and regional authorities (Smith and Greenblatt 23). This sharing of power was a goal firmly held by the architects of the American state. The Constitution allocates much time to laying out the respective powers of the federal and state governments, what their limits are, and how they interact. Most notable with respect to federalism among these provisions is the Tenth Amendment, which specifies that powers not explicitly defined as being held by the federal government or explicitly forbidden to the states are to be left to the states and their people. Theoretically, this guarantees the states a nearly-unlimited right to exercise any power not mentioned in the Constitution's short text, and in practice, has often allowed them to take precedent in drafting laws that affect the everyday health and safety of their citizens (Smith and Greenblatt 32). While the supremacy clause ensures that the federal government will always win when its laws and state laws come into direct conflict, the early years of the federal system were structured to try and avoid this as much as possible through what is known as dual federalism. Also called layer-cake federalism, this ideology held that states and the federal government should have almost entirely separate spheres of influence, cutting down on areas where conflict between the two could arise (Smith and Greenblatt 34). However, as the country aged past its infancy, new, more complicated challenges would cause this perception to evolve.

As has often been the case throughout American history, the first major changes to the federalist system came during a time of crisis. The Great Depression and the New Deal programs

meant to assuage its impact represented a shift from dual federalism to cooperative federalism, a new conception of state-federal relations which tossed out the idea of separate spheres in favor of all levels of government working together. The basic format for governance under this doctrine was for the federal government to identify a problem, outline a solution, and turn the responsibility of implementation over to the states (Smith and Greenblatt 36). Cooperative federalism began a trend of greater federal influence in specific policy areas that would continue with the centralized federalism of the 1960's and 70's. Established under the Johnson administration, centralized federalism further increased the federal government's role as a leader in policy-craft (Smith and Greenblatt 38). Particularly relevant to a discussion of pandemic response is the fact that Medicaid was established during this period, setting a precedent for states having leeway in implementing federal healthcare policy (Smith and Greenblatt 427). States' rights advocates summarily rejected this trend, and they would eventually have their day under the Reagan administration with the advent of New Federalism, a doctrine which increased the authority of states over policy at the expense of cutting their federal funding for its implementation (Smith and Greenblatt 39). Although Reagan did not necessarily frame it as such, many considered this shift to be one towards the return of pre-New Deal federalism (Kincaid 88). Devolution, the transfer of powers from federal to state authorities, continued apace throughout Reagan's time in office and that of his two immediate successors, despite the change in ruling party brought by President Clinton. These movements over the course of the 20<sup>th</sup> century all represent shifts centered on the ideological value of federalism itself; the 21<sup>st</sup> century would see a movement based instead on more pragmatic concerns, one which has clear implications for fighting the coronavirus.

Moving into the new millennium, America saw a shift in federalist ideology unlike any of those that came before it. The new conception, known as ad hoc federalism, saw actors basing their support for states' rights not on any inherent support for the concept but instead on whether their political goals were better served by state or federal control (Smith and Greenblatt 41). Support for federalism has become a strictly-partisan question, one whose answer changes at the party of the sitting president and the convenience of a specific policy goal. Consequently, the Obama years saw many Republican governors asserting their right to ignore his directives on healthcare and immigration, while the Trump administration has had to deal with Democratic governors doing the same (Smith and Greenblatt 41). Such behavior has been permitted by the states' position as laboratories of democracy giving them freedom to implement federal policy as they see fit (Gluck 2005). While George W. Bush was the first president to start this new trend in federal-state relations, he was certainly not the last. The most significant healthcare legislation in modern American history, the Affordable Care Act, became a poster child for this antagonistic style of governance. At all levels of government, Republicans displayed an intense opposition to the law, primarily centered on its insurance mandate, which quickly manifested itself as states were asked to handle its implementation. Thompson and Gusmano suggest that the partisanship of their opposition ran so deep as to totally outweigh pragmatic considerations (429). Partisanship of such a high degree is clearly deeply ingrained and unlikely to fade anytime soon; with this in mind, it should not be surprising to see ad hoc federalism exerting its influence over the response to the COVID-19 outbreak.

Coronavirus has shined a light on American federalism just as it has with many other government functions and structures. An outbreak of this magnitude is something that requires national and global coordination to fight effectively, but any American talking to friends or

family outside of their own state knows that each state government is handling the crisis in different ways. Part of this is simply data-driven; for example, Nevada has seen the number of hospitalizations from the virus trend steadily downward since April 21<sup>st</sup>, allowing it to loosen restrictions even as more severely afflicted states like New York keep their shutdowns going (Rindels and Snyder). But the politics of each individual state also affect how the virus is handled. Federalism is the reason that blue states have been able to take action that the Trump administration and red-state leaders have found overly restrictive. Democrat-led states have been faster to issue stay-at-home orders and slower to retract them, even while those in Republican-led states have violated these orders more frequently (Rogers). Blue states have also been more proactive in forming interstate pacts to share data and coordinate public health measures, like those among the states of New England and the West Coast (Rogers).

My personal experience with the pandemic helps illustrate the patchwork quality of the country's response to it. As an employee of the College of Southern Nevada, my order to work from home until mid-June was a state directive. This return date was based on projections of when Nevada will be considered safe enough to work in person again, but it is impossible to truly know if that date will be safe unless the infection rates in nearby states are progressing similarly. A unitary United States would be able to order a return date based on the entire country's progress fighting the disease, as opposed to the current system where Nevada is making projections based on the hope that California, Utah, and its other neighbors are doing what they should. This system is the product of a country where the real labor of tracking and managing outbreaks is done not by a national organization like the Centers for Disease Control but by a disparate collection of over 2,600 state and local public health departments (Price). Unless the date is pushed back further, which seems unlikely given that Nevada has already

begun to tentatively reopen its doors, I will be returning to work as normal much earlier than my fellow community college employees in states like New York or Michigan that remain entirely closed (Washington Post staff). This may work out fine if the Nevada government is right in assuming that its rate of infection will continue to decrease, but there is no guarantee that a higher infection rate in a neighboring state will not bleed over into Nevada. No state exists in a vacuum; each one is reliant upon all the others to fight this pandemic.

Viruses do not observe state borders, but healthcare policy does. The ongoing era of ad hoc federalism means that regional leaders are deciding along partisan lines whether they would like to follow the Trump administration's regarding how seriously this threat is to be taken. In red states like Texas, for example, partisanship has even split states into smaller subsections; Democratic leaders in major cities like Houston have taken it upon themselves to order preventative restrictions that their governors have deemed unnecessary (Brownstein). The trend of Democrats taking the pandemic more seriously than Republicans is a national one, driven by the fact that Democrats control more of the most heavily-afflicted states in addition to simple partisanship. States are using the regulatory power given to them by the federal government to engage in "uncooperative federalism", a reality of the ad hoc era which has seen states dissent from federal directives at their own discretion when partisan concerns arise (Bulman-Pozen and Gerken 1259). Even though the interstate pacts they are forming show that states recognize the value of a coordinated response, they also show that states do not trust the federal government as a coordinator. If anything, COVID-19 might strengthen the hold of ad hoc, uncooperative federalism. It is not difficult to imagine blue states, frustrated by the lack of response from their red neighbors, cordoning themselves off even further as the outbreak continues. The potential, as described by Kreitner, for a fractured union where states place armed checkpoints at their

borders to prevent the infected from entering their territory is certainly there. For as long as the federal government enables them to, states will continue to respond to this pandemic in their own ways, and the extremely partisan atmosphere in which this crisis takes place will continue to ensure the health of ad hoc federalism.

Extreme challenges like COVID-19 often clarify how well a government is really running. Stripped of the ability to posture for the cameras as life-or-death choices excise any of its less pragmatic trappings, politics can become diluted into its purest form. For the US in 2020, this has meant a re-dedication to the principles of ad hoc federalism. States are having to make difficult decisions about how to balance public health with their economic futures, and they are doing it according to partisan leanings. Democrats have seized upon the country's federalist system to patch up what they see as holes in the Trump administration's plan of action. Interstate pacts formed by states to fight the virus represent both a recognition that coordination is necessary to effectively fight the pandemic and a recognition that they do not think the federal government has done this correctly. This may be the ultimate sign that ad hoc federalism is alive and well. Although the authors of the Constitution could not have predicted this for the country they founded, they laid the groundwork for the two centuries of trends in American federalism that led to this moment. Looking into the future, it is difficult to imagine states and the federal government seeing any value in reversing this process of division when the memory of how party loyalty affected who survived this crisis looms over their every interaction. A few decades from now, historians may look back on ad hoc federalism as the seed for a much greater schism in American politics, one which could conceivably even break the country up into multiple smaller states. If this does happen, coronavirus may very well be the axe that makes the first cut.

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