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Perspective

Thinking Globally, Acting Locally — The U.S. Response to Covid-19

Rebecca L. Haffajee, J.D., Ph.D., M.P.H., and Michelle M. Mello, J.D., Ph.D.

Covid-19 has exposed major weaknesses in the United States' federalist system of public health governance, which divides powers among the federal, state, and local governments.

SARS-CoV-2 is exactly the type of infectious disease for which federal public health powers and emergencies were conceived: it is highly transmissible, crosses borders efficiently, and threatens our national infrastructure and economy. Its prevalence varies around the country, with states such as Washington, California, and New York hit particularly hard, but cases are mounting nationwide with appalling velocity. Strong, decisive national action is therefore imperative.

Yet the federal response has been alarmingly slow to develop, fostering confusion about the nature of the virus and necessary steps to address it. States and localities have been at the leading edge of the response but have exercised their public health powers unevenly. Because science-based social distancing and targeted quarantine measures can succeed only if implemented wherever the virus is spreading, the lack of interjurisdictional coordination has and will cost lives.

Our constitutional structure rests primary responsibility for public health with the states and, through delegated authority, cities and counties. In ordinary times, states can exercise broad "police power" to protect citizens' health, subject to constitutionally protected individual rights such as due process, equal protection, and freedom of travel and association. The federal government's ordinary public health legal authority is more limited and focuses on measures necessary to prevent the interstate or international spread of disease.

In extraordinary times, however, states and the federal government can activate emergency powers to expand their ability to act swiftly to protect human life and health.[1] As of March 27, 2020, all 50 states, dozens of localities, and the federal government had declared emergencies for Covid-19.[2] The resulting executive powers are sweeping; they can range from halting business operations, to restricting freedom of movement, to limiting civil rights and liberties, to commandeering property.[1]

The primary concern regarding this emergency legal framework has long been that it affords officials too much discretion, with too few checks on poor decisions. Usually, the fear is that officials will implement unduly coercive

State and Local Covid-19 Emergency Stay-at-Home Orders, April 1, 2020.*

Statewide stay-at-home orders (effective date)
Alaska (3/28)
Arizona (3/31)
California (3/19)
Colorado (3/26)
Delaware (3/24)
Florida (4/3)
Georgia (4/3)
Hawaii (3/25)
Idaho (3/25)
Illinois (3/21)
Indiana (3/24)
Kansas (3/30)
Louisiana (3/23)
Maine (4/2)
Maryland (3/30)
Michigan (3/24)
Minnesota (3/27)
Mississippi (4/3)
Montana (3/28)
Nevada (4/1)
New Hampshire (3/27)
New Jersey (3/21)
New Mexico (3/24)
New York (3/22)
North Carolina (3/30)
Ohio (3/23)
Oregon (3/23)
Rhode Island (3/28)
Vermont (3/25)
Virginia (3/30)
Washington (3/23)
West Virginia (3/24)
Wisconsin (3/24)

Stay-at-home order in parts of state
Alabama
Florida
Georgia
Maine
Mississippi
Missouri
Oklahoma
Pennsylvania
South Carolina
Tennessee
Texas
Utah
Wyoming

* Specific policies for stay-at-home orders vary by state. All orders have exceptions for critical activities, but they vary in how they define such activities. Kentucky, Connecticut, Massachusetts, and Tennessee also have advised residents to stay at home but have not ordered them to do so. From Mervosh et al.[4]

measures in response to public demands to act. For example, during the 2014 Ebola outbreak, New Jersey's governor ordered a nurse returning from Sierra Leone into quarantine although her case did not merit it under Centers for Disease Control and Prevention (CDC) guidelines.

Today, we find ourselves in the opposite situation: the federal government has done too little. Perhaps because of misleading early statements from federal officials about the gravity of the threat, public sentiment has weighed against taking steps that would impose hardship on families and businesses. The tumbling stock market has created further pressure to project a sense of calm and avoid adverse effects on businesses. The resulting laconic federal response has meant that a precious opportunity to contain Covid-19 through swift, unified national action has been lost — a scenario that mirrors what occurred in Italy.[3]

U.S. law provides few viable mechanisms for holding officials accountable for anemic action in response to a health emergency. Federalism is the mainstay — states and localities can step in to fill a vacuum in national leadership, and many have done so with vigor. For instance, six counties in the San Francisco Bay Area led the issuance of orders requiring residents to remain home and businesses to close except for essential activities.

As of April 1, 2020, a total of 72 days after the first reported U.S. case of Covid-19, 33 states and dozens of localities had issued stay-at-home orders, and a handful more had simply instructed nonessential businesses to close, but some orders lack strong enforcement mechanisms (see box). Many jurisdictions continue to permit widespread noncompliance with CDC-issued social-distancing recommendations (e.g., no gatherings of more than 10 people), as evidenced by crowded spring-break beaches, discretionary travel, open schools and day care centers, busy stores selling nonessential goods, contact sports among young adults, and children congregating in public parks.

This is the dark side of federalism: it encourages a patchwork response to epidemics. States and localities may decide to implement aggressive disease-mitigation measures, but need not do so. The defining feature of the U.S. response to Covid-19 therefore continues to be localized action against a threat that lost its local character weeks ago. The U.S. approach contrasts strikingly with those of South Korea and Taiwan, which have prevented widespread community transmission by rapidly implementing a centralized national strategy. Lacking strong federal leadership to guide a uniform response, the United States quickly fulfilled the World Health Organization's prediction that it would become the new epicenter of Covid-19.

What more can the federal government do to promote a unified response, particularly as regards community mitigation approaches such as social distancing? There is a clear need to go beyond merely issuing White House and CDC guidelines, because voluntary compliance is not working. A fed-

eral takeover of all public health orders would be out of step with our federalist structure, but there are other options.

First, we believe that the White House must reverse its trajectory toward prematurely weakening existing federal measures and instead strengthen the resolve of governors to do all they can to mitigate the impact and spread of the disease, including enforcing stay-at-home orders and school closures and securing adequate medical supplies and tests for their populations (see box).[4] At a time when Covid-19 case counts are growing exponentially, the White House has suggested that it may soon relax federal guidelines for social distancing and encourage businesses to reopen in order to stimulate the economy.[5] The recent extension of social distancing guidelines from Easter to April 30 falls short of what epidemiologists project will be needed. The executive branch should convene governors and state directors of public health and exhort them to reach consensus on a coordinated set of community mitigation interventions and a timeline. Unified decision making would ensure that all governors have access to the best available evidence, provide political cover for those under pressure to minimize disruptions to their local economy, and replace competition among states for scarce medical resources with a sensible allocation framework.

Second, Congress could use its spending power to further encourage states to follow a uniform playbook for community mitigation that includes measures for effective enforcement of public health orders. It could create incentives for action by conditioning a portion of funds going to states in any future relief packages on states' adherence to the measures — a defensible step, from a constitutional standpoint, because the programmatic purpose of such funds is to make it feasible for states to shutter schools and businesses. It could also threaten to withhold some federal funds (e.g., for schools and highways) from states that do not comply, again on the basis that compliance is related to the federal goals of school safety and safe interstate travel.

Third, Congress could leverage its interstate-commerce powers to regulate economic activities that affect the interstate spread of SARS-CoV-2. For example, it could restrict large businesses from having employees travel and from operating across state lines in ways that expose workers to risk (e.g., a shipping and delivery business that does not implement specified measures to provide employees with adequate personal protective equipment and paid sick leave could be declared a threat to public health).

Federal emergency declarations also provide useful powers that can help unify a national response. In addition to the helpful steps already taken to approve state major-disaster declarations, waive health care regulatory requirements to facilitate timely care, and ease the path for laboratory-developed tests to be put to use, the government could further use the Defense Production Act to direct private companies to produce needed supplies, devote additional federal resources to purchasing and equitably distributing test kits, and take stronger steps to prevent the virus's spread in federal facilities, including immigration-detention centers and correctional facilities. Finally, the CDC can implement interstate travel restrictions for persons with known exposure to or symptoms of Covid-19.

Learning is difficult in the midst of an emergency, but one lesson from the Covid-19 epidemic is already clear: when epidemiologists warn that a pathogen has pandemic potential, the time to fly the flag of local freedom is over. Yet national leadership in epidemic response works only if it is evidence-based. It is critical that the U.S. response to Covid-19 going forward be not only national, but also rational.

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From RAND, Boston (R.L.H.); the Department of Health Management and Policy, University of Michigan School of Public Health, Ann Arbor (R.L.H); and Stanford Law School and the Center for Health Policy/Primary Care and Outcomes Research, Department of Medicine, Stanford University School of Medicine, Stanford, CA (M.M.M.).

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