

PORTADA

SUMARIO

PRESENTACIÓN

ÁREAS DE ESTUDIO

**NOVEDADES DEL  
FEDERALISMO COMPARADO**NOVEDADES DEL  
ESTADO AUTONÓMICONOVEDADES  
PARLAMENTARIASACTUALIDAD  
IBEROAMÉRICANA

CALIDAD DEMOCRÁTICA

AGENDA

ACTIVIDADES REALIZADAS  
JUNIO A NOVIEMBRE 2020ACTIVIDADES PREVISTAS  
DICIEMBRE 2020 A JUNIO 2021

CRÉDITOS

INSTRUCCIONES PARA  
LOS AUTORES

LISTA DE EVALUADORES

NOTA

**COVID-19 AND THE AMERICAN FEDERAL SYSTEM<sup>1</sup>****por John Kincaid**

Robert B. y Helen S. Meyner Profesor de Gobierno y Servicio Público en el Lafayette College, Easton, Pennsylvania, Presidente del Centro para el Estudio del Federalismo

COVID-19 has posed a major challenge to the American federal system. The system has responded comparatively poorly if measured by cases and deaths, not because of structural flaws, but because of partisan polarization and a president not amenable to cooperative federalism and a coherent pandemic response. Among federal and quasi-federal countries, only Argentina, Belgium, Spain, and Mexico have performed worse than the United States as measured by COVID deaths per capita.

The principle problem is partisanship. The political parties are not functioning to integrate the system as they often did in the past but rather to fragment the federal system.

The system demonstrated resilience, however, because the states' constitutionally protected police power enabled them to compensate in a dual federalist manner. The states also functioned as laboratories of democracy, reflecting diverse policy preferences and pandemic experiments. Although dual federalism was a second-best solution in principle, it was the best politically available solution.

Many critics argue that a key failure was the lack of a single, federally managed, presidentially led, national response. However, given the emergency uncertainty that accompanied the novel coronavirus, the best course of national action was not readily evident at first.

Nevertheless, it seems to be largely forgotten that, initially, the federal government responded vigorously. President Trump restricted travel from China on January 31. On March 13, Trump issued 57 simultaneous disaster declarations for all states, D.C., and U.S. territories—the first all-state declaration in U.S. history. The Families First Coronavirus Response Act, passed by 90-8 Senate votes and 363-40 House votes, was signed on March 18, providing \$95 billion in new outlays. The Coronavirus Aid, Relief, and Economic Security Act (CARES) of March 27, which passed by a 96-0 Senate vote and House voice vote, provided \$2.2 trillion. The April 23 \$484 billion Paycheck Protection Program and Health Care Enhancement Act passed the House by 388-5 and the Senate by voice vote. On June 5, Trump signed the Paycheck Protection Program Flexibility Act, which passed the House by 417-1 and the Senate by voice vote. The Federal Reserve initiated many stimulus programs, including \$2.3 trillion in lending to support households, employers, financial markets, and state and local governments, including a Municipal Liquidity Facility for the state and local bond market.

**PORTADA****SUMARIO****PRESENTACIÓN****ÁREAS DE ESTUDIO****NOVEDADES DEL  
FEDERALISMO COMPARADO****NOVEDADES DEL  
ESTADO AUTONÓMICO****NOVEDADES  
PARLAMENTARIAS****ACTUALIDAD  
IBEROAMERICANA****CALIDAD DEMOCRÁTICA****AGENDA****ACTIVIDADES REALIZADAS  
JUNIO A NOVIEMBRE 2020****ACTIVIDADES PREVISTAS  
DICIEMBRE 2020 A JUNIO 2021****CRÉDITOS****INSTRUCCIONES PARA  
LOS AUTORES****LISTA DE EVALUADORES**

The principal act, CARES, offered an array of aid programs, including about \$150 billion in direct aid to state and local governments. Taken altogether, Congress provided state and local governments with about \$360 billion.

After this burst of bipartisan activity from mid-March to early June, however, things fell apart as partisan fissures opened between the parties in Congress, between Congress and the White House, between the White House and governors, and among groups of governors as well. One consequence, of course, is that Congress has not passed a second stimulus. Whether this is desirable or undesirable depends on your point of view. The major stumbling blocks are different philosophies of fiscal responsibility and the age-old federalism conflict over how to distribute federal aid among the states in a way that does not unfairly benefit certain states at the expense of other states.

Meanwhile, the federal government lacks constitutional authority to command a national response. When Trump claimed “total” power to reopen states’ economies on April 13, he retreated the next day under heavy criticism. Former Vice President Joe Biden, citing “a constitutional issue,” similarly retreated from his mid-August call for a national mask-wearing mandate. Now he’s apparently limiting his mask mandate to federal property. Further, the Trump administration’s pandemic performance lends little confidence that a presidentially led federal response would have been desirable. Moreover, if Trump has authoritarian inclinations, a national response might have exacerbated those proclivities. Crises often precipitate centralization and executive overreach. There is little evidence of this, although some executive actions such as Trump’s directing the Centers for Disease Control and Prevention (CDC) in September to issue a nationwide moratorium on tenant evictions to reduce infection transmissions triggered alarms in some quarters.

So, let’s look at COVID-19 from the perspective of some currently prominent models of federalism, one being nationalist cooperative federalism.

*Nationalist Cooperative Federalism*

The contemporary school of nationalist federalism defines cooperative federalism as states’ willingness to comply with national directives. The model treats states as though they were prisoners of war facing a jailer who says “if you cooperate, you will get extra rations; if you don’t cooperate, we’ll hammer you.” Advocates of this model contend that states actually enjoy their status as prefects of the federal government because they have wiggle room in implementing federal policies.

This model “situates uniformity and finality for first-order norms at the national level, while allowing dialogue and plurality at the level of state implementation of those norms.” But this model is ill-suited to the pandemic because it ignores James Madison’s warning that “[e]nlightened statesmen will not always be at the helm” and, thus, whether first-order norms emanating from the Trump administration would have been desirable norms. The pandemic also puts this school in the odd position of having to say that the governors who implemented the strictest and longest lockdowns were uncooperative, a position wholly endorsed by President Trump who called these so-called uncooperative governors “mutineers” and tweeted such messages as “Liberate Michigan.” I don’t think this is where the advocates of this model of federalism want to be, but it’s where they end up.

Part of the problem may be that in situating first-order norms at the national level, this model does not specify just what the legitimate source of first-order norms should be. Must these first-order norms emanate only from acts of Congress signed into law by a president or can they emanate from Supreme Court rulings, presidential executive

**PORTADA****SUMARIO****PRESENTACIÓN****ÁREAS DE ESTUDIO****NOVEDADES DEL  
FEDERALISMO COMPARADO****NOVEDADES DEL  
ESTADO AUTONÓMICO****NOVEDADES  
PARLAMENTARIAS****ACTUALIDAD  
IBEROAMÉRICANA****CALIDAD DEMOCRÁTICA****AGENDA****ACTIVIDADES REALIZADAS  
JUNIO A NOVIEMBRE 2020****ACTIVIDADES PREVISTAS  
DICIEMBRE 2020 A JUNIO 2021****CRÉDITOS****INSTRUCCIONES PARA  
LOS AUTORES****LISTA DE EVALUADORES**

orders, and agency regulations? The notion that anything coming out of Washington, DC, must be viewed as a first-order norm requiring state compliance leaves no room for what we have traditionally understood to be federalism as a system of non-centralized power rather than a decentralized unitary system.

This model does not seem to leave any room for a loyal opposition either, namely, states and groups of states that might have rational and legitimate reasons for opposing certain first-order norms emanating from the federal government. On what grounds can one label states that have opposing points of view “uncooperative”? Given partisan polarization, moreover, first-order norms emanating from the federal government would trigger resistance from many state and local governments controlled by the opposition party.

Although centralization has shrunk state autonomy, making states, in many respects, administrative arms of the federal government, COVID-19 showed that state sovereignty is far from dead.

*Non-Centralized Cooperative Federalism*

A national response can also rest on reciprocal federal-state-local coordination, which is the essence of cooperative federalism. This occurred in Germany where Chancellor Angela Merkel and the sixteen *Länder* heads negotiated common COVID guidelines and maintained good communications. Such cooperative federalism in the United States foundered on (1) partisan polarization, (2) President Trump’s “personal presidency,” and also (3) the coronavirus’s arrival during a presidential election year, an impeachment trial of a president running for reelection, and low public trust in the federal government and in fellow citizens.

Although Trump held more than 90 conference calls with state, local, and tribal leaders between January and the end of March, he did not forge a reciprocally cooperative relationship. He sought to shift blame for failures onto governors, and his public statements featured bilateral rather than multilateral relations with governors, especially feuds with some Democratic governors, which included name-calling and threats of federal funding cuts. He also battled with some Republican governors, such as Maryland’s Larry Hogan. Hence, many governors turned to Vice President Mike Pence for help.

The president’s intergovernmental behavior cohered with his “imagining the presidency as a platform for his personal expression. He did not conceptualize cooperative federalism as a partnership of shared powers aimed at achieving common objectives. Instead, the transgressive character of his presidency breached customary intergovernmental norms, although many agencies, such as the CDC and Army Corps of Engineers largely maintained those norms.

Governors also played a role in failing to formulate a cooperative nationwide response because of their party divisions. Partisanship is such a fundamental cleavage today that it affects how people view COVID-19 and make health-care choices. A prominent feature of the U.S. response has been sharp partisan divisions among both political leaders and citizens in their perceptions of the pandemic’s severity and beliefs about appropriate policies and personal behaviors. Most Democratic governors and mayors imposed earlier, longer, and more draconian stay-at-home orders (SAHOs) than did Republican executives. Democrats prioritized virus suppression. Republicans generally saw the economy as an equally or more important priority, namely, a need to balance COVID-19 responses with economic sustainability and minimizing other collateral damages of lockdowns. This partisanship has generated conflicts not

## PORTADA

## SUMARIO

## PRESENTACIÓN

## ÁREAS DE ESTUDIO

NOVEDADES DEL  
FEDERALISMO COMPARADONOVEDADES DEL  
ESTADO AUTONÓMICONOVEDADES  
PARLAMENTARIASACTUALIDAD  
IBEROAMÉRICANA

## CALIDAD DEMOCRÁTICA

## AGENDA

ACTIVIDADES REALIZADAS  
JUNIO A NOVIEMBRE 2020ACTIVIDADES PREVISTAS  
DICIEMBRE 2020 A JUNIO 2021

## CRÉDITOS

INSTRUCCIONES PARA  
LOS AUTORES

## LISTA DE EVALUADORES

only between the president and Democratic governors but also between governors of one party and county and municipal executives of the other party. Over time, among citizens too, Democrats reduced social activities and practiced social distancing more than independents, while Republicans engaged in more social activities and less social distancing than either group.

A president more amenable to intergovernmental cooperation might have tempered partisan conflict and provided political cover for Republican governors but would still have had difficulty replicating Germany's cooperative federalism because more cross-party cooperation is present in Germany.

*Dual Federalism and States as Laboratories*

Consequently, the dualism of American federalism, which is a barrier to unilateral federal-government action, enabled the states to respond to COVID-19. Although dual federalism has long been declared dead, path dependency, as well as the system's constitutional structure, have ensured the endurance of important elements of dual federalism, which the U.S. Supreme Court reaffirmed in *Gamble v. United States* in 2019. The vast lockdowns instituted by so many governors have no precedent in U.S. history. The unprecedented exercises of power over citizens and the national economy mandated by most governors, and by many mayors and county executives, have been extraordinary manifestations of dual federalism, demonstrating that the police power, which was not delegated to the United States, remains potent. The Tenth Amendment appears to be alive and well in this respect, and, to date, the U.S. Supreme Court has not curtailed these state powers, although on September 14, a U.S. district court judge ruled that Pennsylvania governor's March lockdown violated various rights provisions of the U.S. Constitution. That ruling is on appeal.

Under radical uncertainty, such as the novel coronavirus, it may be desirable for the states to be laboratories of democracy, at least until sufficient knowledge is available to formulate and negotiate a sensible nationwide policy. The outlines of possible consensus did not emerge until several months into the pandemic when many policymakers concluded that widespread testing, mask wearing, social distancing, and contact tracing are pre-vaccine keys to mitigation.

The laboratories-of-democracy concept presupposes that some experiments will be adopted by other states and/or the federal government. State and local officials nationwide have shared many policy ideas and used their national associations to disseminate information; however, innovation diffusion has been hampered by partisan barriers as it has been in other fields. Not all U.S. states adopted a SAHO, and those adopting them exhibited considerable variation in length, severity, and reopening metrics. In turn, neither the White House nor the Congress seems to have tried to use the results of state experiments to foster cooperative collaboration.

A potential liability of a laboratories-of-democracy response is that infections can cross state lines. However, this was mitigated after many lockdowns by (1) a 95 percent drop in domestic air travel by April 2, (2) steep declines in ground interstate public transportation, (3) self-quarantines of out-of-state arrivals ordered by many states, and (4) many individuals curtailing their own mobility.

The states' responses have not been ideal or as efficacious as might have been a cooperative-federalism response, but absent the states' constitutional authority to act, the pandemic would have been worse. In this respect, dual federalism came to the rescue. The constitutional design allowed states to respond according to their diverse preferences and also largely confined the consequences of each state's choices to that state.

**PORTADA****SUMARIO****PRESENTACIÓN**

System failures were not due mainly to structural flaws but to partisan polarization, which, itself, is largely the result of the centralization that has occurred since the late 1960s and the nationalization of so many issues once decided by the states. Absent the polarization generated by nationalization's weakening of federalism, the system might have responded to the crisis in a more effective spirit of cooperative federalism.

**ÁREAS DE ESTUDIO****NOVEDADES DEL  
FEDERALISMO COMPARADO**

A more centralized response may arrive next year, though. Biden says he will institute a more centralized response to COVID-19. Also, the federal court case coming out of Pennsylvania could ultimately curtail states' powers on individual-rights grounds. The district court judge opined that since the deferential *Jacobson v. Massachusetts* case in 1905, "there has been substantial development of federal civil liberties law. This development has seen a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers."

**NOVEDADES DEL  
ESTADO AUTONÓMICO**

These two potential developments could substantially re-shape the way states will be able to respond to future public health crises. ■

**NOVEDADES  
PARLAMENTARIAS****ACTUALIDAD  
IBEROAMÉRICANA****CALIDAD DEMOCRÁTICA****AGENDA****ACTIVIDADES REALIZADAS  
JUNIO A NOVIEMBRE 2020****ACTIVIDADES PREVISTAS  
DICIEMBRE 2020 A JUNIO 2021****CRÉDITOS****INSTRUCCIONES PARA  
LOS AUTORES****LISTA DE EVALUADORES**