

The states have been out in front in dealing with the coronavirus. Apart from Trump's tardy response to the crisis, there are reasons for this, involving limits on Trump's authority, practicalities, and constitutional rulings.

### **Statutory limits.**

As I discussed in a [previous post](#), the President's power to deal with an epidemic is mostly derived from statutes. The available statutory powers include deploying federal resources and funding to support the states; controlling the movement of infected individuals across state line and the U.S. border; and dealing with infections within the government's workforce. [*Addendum*: the way this was originally stated, it was a bit too narrow. The Feds can also quarantine those who are likely to infect people who will cross state lines.] States have broader powers. Governors, and often mayors, have the power to impose quarantines, close down businesses, and take over needed private resources. State governments also have ultimate control over public hospitals, and they regulate medical practice and activities of private hospitals. In short, while they don't have the same resources as the federal government, their powers are significantly stronger.

### **Practical limits.**

There are also practical reasons for a major state role. They can provide more granular responses since they're closer to the ground. They're also the ones with local police forces who can enforce rules. If necessary, they can use the national guard to enforce lockdowns or quarantines, whereas the federal government is forbidden by law from using the army or national guard for law enforcement.

### **Constitutional limits.**

That brings us to the constitutional limits on the federal government. There's a strong argument that Congress lacks the power to impose quarantines or other restrictions on people except in narrow circumstances. The Supreme Court has ruled that Congress's power over interstate commerce only extends to non-commercial transactions under limited circumstances — if a situation involves a channel of interstate commerce like the airlines, or if the transaction itself crosses state lines like someone driving from one state to another. Getting sick from a virus is not a commercial transaction. So Congress arguably has the power to regulate the conduct of sick people only if they're crossing state lines or using a train, an airplane, or the like. According to the Supreme Court's conservative majority, regulating everyday, noncommercial problems like guns in schools or domestic violence is entirely reserved to the states. It would appear that the same is true of an illness.

Don't complain to me, I didn't make these constitutional rules. I think they're wrong, but the majority of the Supreme Court thinks otherwise. Of course, maybe under the press of current circumstances, they would find a loophole. But based on current law, there seem to be real doubt about whether Congress could take control of lockdowns or quarantines, or mandate testing, with the exceptions discussed above.

There's another constitutional limitation. Even if Congress did have power to impose quarantines or mandate tests, it couldn't require the states to enforce those rules. Under a Supreme Court doctrine called the anti-commandeering rule, Congress can't force the states to implement federal programs. The dissenters warned that this rule needed an escape hatch for exceptional circumstances, but the majority said no. According to the majority, the federal government has two choices: it can either offer states financial incentives to implement a program, or it can implement a program itself. This is why the Court held that states had to have a free choice over whether to expand Medicaid under Obamacare.

In the current situation, financial incentives might work to get state cooperation, or they might not. And short of having a military occupation of every American city, it's hard to see how the federal government could do its own enforcement even if it wanted to.

These constitutional rules reinforce the statutory and practical reasons why states have been doing so much of the heavy lifting during this viral outbreak. The federal government could do a lot more than it has so far, but its powers are not unbounded. Don't get me wrong, the role of the federal government in addressing the pandemic is vitally important. The Feds have resources and funding the states can't match. But the way our system of government is designed, states and cities are inevitably going to be on the front lines.