



The Last Best Hope? Understanding America from the Outside In

## **The Federalism Episode**

Series I (Trinity term 2020)

Published 2 May 2020

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### **TRANSCRIPT**

*NB the text below was transcribed automatically by <https://otter.ai>.*

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#### **Audio of news conference**

Donald Trump: when somebody is the president of the United States, the authority is total, and that's the way it's gotta be.

Reporter: You said when someone is president of the United States, their authority is, total. That is not true.

Trump: Okay, you know what? We're going to write up papers on this. It's not gonna be necessary because the governors need us one way or the other, because ultimately it comes with the federal government.

#### **Adam Smith**

Hello, I'm Adam Smith. And welcome to the Last Best Hope, a podcast from Oxford's Rothermere American Institute in which we try to understand America from the outside in. In this episode, we're asking if the coronavirus pandemic has exposed not just the failings of the Trump administration, but the most fundamental structural feature of U.S. Government: federalism. Donald Trump says that when it comes to dealing with states, his authority is total.

#### **Audio from news conference**

Donald Trump: You could look at constitutionally, you could look at federalism. You could look at it any different way. Fact that I don't want to exert my power is much different. We have the power... Does the federal government have the power? The federal government has absolute power. It has the power, as to whether or not I'll use that power we'll see.

#### **Adam Smith**

Well, the trouble with this claim is that, like so much else that comes out of his mouth, it's simply not true. Governor Andrew Cuomo of New York and his own press conference the following day was asked about the president's claims. This is what he said.

### **Audio from news conference**

Andrew Cuomo: What are you gonna grant me, what the Constitution gave me before you were born? It's called the 10th Amendment, and I don't need the president of United States that tell me the powers of a state. People did that. Alexander Hamilton, Thomas Jefferson, James Madison. They are the ones who gave me the power. Maybe he should have read the Constitution before he said he had the power to open the states.

### **Adam Smith**

The 10th Amendment that Cuomo invokes says that power is not specifically delegated to the federal government remain with states. That would certainly include quarantines on lockdowns. But we've had 230 years of Supreme Court decisions, of political rhetoric about states' rights, a civil war, the rise of a powerful federal government in the 20th century. And yet the ambiguities and tensions around this federal-state relationship remain unresolved. A division of power between the federal and state governments may have seemed like a good idea in theory. But in practise it has been far from straightforward. To help me explore these issues in the light of the Coronavirus pandemic and this standoff between Trump and the governors, I'm joined by Grace Mallon from Oxford University, who is a specialist on how federalism worked in practise in the years after the Constitution came into effect. Grace, thank you so much for joining me on the Last Best Hope podcast.

### **Grace Mallon**

Thank you so much for having me.

### **Adam Smith**

So Grace, let's start by... I really want to understand what the framers of the Constitution thought they were trying to do in separating power between the federal government and the States in this way. What was the problem they were trying to solve?

### **Grace Mallon**

The problem, they were trying to solve was that the federal government, in about 1787 when the Constitution was framed, didn't really have any effective power, and that was the big problem that they were facing. So they try to create a document that would give the federal government some power. But at the same time, Americans were very used to most government happening at the state level. And so they were trying to find a way to give the federal government some effective power, but without taking away all of the states' powers. There was some talk at the Constitutional Convention – I think some of it was sarcastic – of just abolishing the states altogether. Abolish the state governments and just have a unitary state. They didn't end up doing that. That was not a popular view. And so they just decided to create this new government where –

### **Adam Smith**

Did... Alexander Hamilton's, was he one of the people supporting that idea?

### **Grace Mallon**

Hamilton was one of the people who would sort of be in favour of this highly centralised state. He thought that the British Constitution, the British system with a unitary state, was

really the best model you could possibly have, and so yeah, he was in favour of this. But where they end up doing is something which was sort of, I think, unknown in political science up to that point, which is, they said, we're going to divide sovereignty between the United States government and the individual state governments.

**Adam Smith**

You say it was unknown in political science. Were there no models either from the contemporary world or from the ancient world that they could draw on?

**Grace Mallon**

Well, there were a lot of models of confederations. So James Madison, actually, the year before the Constitutional Convention, went about researching what kinds of models the United States might build a new government on, his notes on ancient and modern confederacies. And he found that there were lots of examples from the ancient world where you'd have a group of states coming together basically to pool their resource is for military purposes, mostly. And the same thing was happening in mediaeval and early one in Europe, with Holland and Switzerland particularly sort of famous examples of confederacies.

**Adam Smith**

Why were those confederacies then not regarded as a suitable model for what they were trying to put together in Philadelphia in 1787?

**Grace Mallon**

Well, they didn't really have central governments in the same way. Well, Switzerland didn't have a central government in the same way that the United States now does. So they essentially had independent states which were allied. They had a pact between them for the common defence, but there wasn't a legislature is such where they would all come together and make laws that all of them would then abide by. And in Holland, they did have a strong, stronger central state, but they didn't have a republic, a successful republic. They ended up having a monarchy, a hereditary monarchy, and obviously the United States was not in favour of this model.

**Adam Smith**

I wonder whether possibly they had another sort of model in front of them, which was the British Empire itself. I mean that Britain, as you, as you say was, was and to some extent, despite devolution to, Scotland, Wales and Northern Ireland still remains a relatively centralised state and certainly was then. But these people had the experience of living and in almost all cases, participating in government of colonies, of British colonies in North America, that had levels of self-government despite being within an imperial context. I wonder whether that served as a model either positively or negatively.

**Grace Mallon**

Well, it certainly served as a model for the construction of their central government, where they decided, we're going to do something a little, that looks a little bit like Britain, we're going to have a sort of quote unquote monarchical element, which is the president. We're going to have a legislature like parliament, about sort of a popular legislature, we're going to

have an almost aristocratic upper house, the Senate, where they have longer terms. So there was definitely a lot of influence there. But they also wanted to avoid the problem which had been, Parliament had been insisting, we alone are sovereign, were the only we are going to be the ultimate recourse for sort of the creation of, of laws. And they didn't want to pursue that model in America.

### **Adam Smith**

So in the run up to the American Revolution, the problem had been that they, the colonists, many of whom are now, post revolution, trying to create their own government, these colonies had I felt as if they were running their own colonies. They felt if they realistically had self-government, they were able to levy taxes. They were able to make their own local decisions. They were electing ah, people to serve in their colonial legislatures. But the problem that arose in the run up to the American Revolution was that from their point of view, it appeared all of a sudden, the British government was saying, oh actually, you know that parliament you've got there in Boston or Philadelphia? Actually, when it really comes to it we don't really regard that as significant. We can override it at will, in Westminster. So they were trying to construct an alternative relationship between a, an overarching government and state governments that was, gave much more significance and power to the, to the the lower level.

### **Grace Mallon**

Yes, exactly, and particularly to retain, you know, many of the powers that they had previously had. So after the revolution, they realised they had this problem, that they didn't have a central government that could make treaties effectively, that could raise taxes effectively, that could raise armies effectively. And so they wanted to give those particular powers to a central government, a sort of federal government. But they wanted the states to be able to do everything else that they had previously been doing and, as you say, to raise their own taxes, to make their own decisions in most areas

### **Adam Smith**

And to deal with public health and matters of quarantine and what we would now call lockdown.

### **Grace Mallon**

Yes, precisely. So under the Constitution, all those powers which are not explicitly delegated to Congress, are left with the states and among those powers of what American legal scholars would call the police power, which is what we would think of as most of the things that government does, and certainly most of things that government did in the early modern period. They would regulate public health, the public welfare sort of *Salus populi suprema lex*. And they would, you know, they would –

### **Adam Smith**

Just translate that Latin phrase, which I believe the prime minister allegedly used at a meeting on Friday. Translate that Latin phrase for us, Grace?

**Grace Mallon**

It means the public welfare is the supreme is the highest law, the welfare of the people. So yes, so that was definitely a responsibility that remained with the states under the Constitution, the Constitution does not explicitly delegate to Congress that power.

**Adam Smith**

That's actually within the Constitution itself I think in Article II, isn't it? But then, in addition, and almost to really ram home the point, the 10th Amendment, which Governor Cuomo referred to there in that clip kind of really reinforces this, doesn't it? By explicitly stating that any powers not enumerated as federal responsibilities were reserved to the states. So that seems on the face of it, then, pretty straightforward. So why are we even having this discussion, then, Grace? I'm guessing that it didn't really work out as straightforwardly as that in practise?

**Grace Mallon**

Well, no. I think this is a really important point. Yes, the Constitution sort of purports to create a division between a fairly sort of straightforward division between what the federal government can do, what the states can do. And there shouldn't really, under the Constitution, be overlap between those two groups. They shouldn't necessarily need to work, together. At least this has not explicitly stated in the Constitution to achieve sort of their particular policy goals. But in fact, as soon as the Constitution went into effect in 1789 when the first Congress met, it quickly became clear that actually a lot of important policy goals couldn't be met without the states and the federal government working together. And public health was one of those areas.

**Adam Smith**

And so in 1793 there was a major epidemic of yellow fever that affected the United States and that threw up, didn't it, a lot of these federal-state tensions, which we're seeing in the current crisis.

**Grace Mallon**

Yes, exactly. So part of the creation of the new federal government was that the federal government, which was then based in Philadelphia, sent out tax officials all over the Union to settle in the ports where they would check the cargoes of ships and they would levy a tax on the cargoes of those ships. So they would create these Customs Houses. You had federal officials living in ports all over the Union. And a particular state governor, Henry Lee of Virginia – at least this is the example I've found – really had a big question about whether the federal government or the state government should be responsible for quarantine, in 1793, because there were now both state officials and federal officials living together in the ports of the United States, where the quarantine would need to be imposed. So he wrote to Thomas Jefferson, who was the secretary of state mentioned by Governor Cuomo there, and said to Thomas Jefferson, would it be better if the federal government and particularly the customs officials, organise quarantine during this time. We've got yellow fever coming in from the Caribbean. And Thomas Jefferson said no, he didn't want the federal government to take responsibility.

**Adam Smith**

And was that just on, as it were, ideological grounds?

**Grace Mallon**

Well, that would certainly be an answer, because Jefferson was generally in favour of limiting the power of the federal government, at least until he himself became president. But it was also because Congress hadn't made a law that allowed for federal officials to take part in these quarantine processes. And, as we've just discussed, public health was understood to be under the umbrella of state responsibilities more broadly.

**Adam Smith**

So Jefferson was taking a very kind of straight down the line position there, and you're speculating this may, may have been because he just genuinely didn't think that he had as Secretary of State the power to do any more. But it may also have been because that fitted his view of the appropriate relationship between the states and the federal government in the first place. But this guy, Henry Lee from Virginia, which was Thomas Jefferson's home state, what was motivating him there? Was it a much more pragmatic desire to just to try to work out how to solve this problem? Or was, was Henry Lee also ideologically driven? Did he want the federal government to play a more central role?

**Grace Mallon**

That's a really interesting question. There's not a huge amount of evidence in the letters that I've read, but I sort of speculate. First of all, Henry Lee does say in his letters to Jefferson, my state law, which creates quarantine regulations, gives the customs officials the power to impose quarantine. Now I, the state of Virginia, no longer have customs officials in the ports because that's all being given over to the federal government. So, yeah, from a practical sort of perspective, it just seemed logical to him that this power would be handed over to the federal government. But there's also, I mean, and this is me speculating, there's also the fact that this is sort of a national area of responsibility in a sense. It's a commercial regulation which is delegated to Congress by the Constitution. It's affecting the entire eastern seaboard of the United States, which is pretty much all of the United States at that point. So, yeah, you can really see why it would have made sense to him to ask the Federal government to take responsibility.

**Adam Smith**

Jefferson said no. And so the federal government didn't play a role in trying to manage the epidemic. What were the consequences?

**Grace Mallon**

Well, things got pretty serious in the 1793 epidemic. I mean, most serious in Philadelphia itself...

**Adam Smith**

...which was the capital of the United States at the time wasn't it. So the federal government itself was actually situated there.

### **Grace Mallon**

Exactly. So, they were there in Philadelphia until they weren't because they knew the yellow fever was coming and said, well, we better get out of here. So, everybody got out, including Thomas Jefferson, Secretary of State. And they left the management of the yellow fever crisis essentially to a local board, a local committee of citizens. Most of them had day jobs, you know, as merchants or artisans and physicians. And they all came together to try and organise this response. There wasn't really any funding structure for this effort, so they ended up relying on charitable donations, the city of New York sent them some money. But yeah, I mean, and many of the people who were involved in this effort themselves died of yellow fever that year. And then the following year, the yellow fever returned to a number of other ports, including Norfolk, Virginia, which is, which is where Henry Lee was particularly worried about.

### **Adam Smith**

A moment ago, Grace, you mentioned commerce as being an area of activity that the federal government did take responsibility for. And there is a one of the things that the Constitution does do – it's referred to as the interstate commerce clause isn't it – is to give the federal government the, the right or the responsibility to manage commerce between the states, presumably because that had been one of the major problems they were trying to sort out when they came together in Philadelphia. To create a national government was the possibility, or the reality of former colonies, newly independent states, putting up tariff barriers and other kinds of trade barriers, which was regarded as and was extremely economically inefficient. So, the federal government did have that responsibility. Now, even something like an epidemic, because quarantining affects trade, could be construed as being responsibility of the federal government. So, in the coming years, over the decades that you study for your research, did this begin to shift? I mean, there's a notion of the implied powers isn't there. So okay, it doesn't explicitly say in the Constitution that the federal government could do this, this, and this, but maybe they need to have in order to properly regulate interstate commerce.

### **Grace Mallon**

Yeah, this is absolutely a question. This is certainly a question that I had. Why is quarantine the responsibility of the federal government under the Commerce Clause? Because quarantine is, you know and was recognised at the time to be, in many senses a commercial regulation. It mainly affects ships which are carrying goods from foreign nations or from other ports in the United States, and it actually could have a really serious economic impact in times like we're experiencing now where, you know, all of the ships would be stopped for a significant period of time. In fact, there was a concern, it was often a concern that ships just wouldn't want to travel to particular ports if they knew they were going to undergo stringent quarantine sort of regimes. So that was certainly a question that I had, and I think some merchants in the early United States also had, and they said, look, how can you do this to us, and in fact, doesn't the federal government have this responsibility? This question of federal powers over quarantine under the Commerce Clause did come before the Supreme Court of the United States in 1824 in a case called *Gibbons v Ogden*, which was about steam ships travelling between New York and New Jersey, and Chief Justice John Marshall gave a characteristically broad reading of the powers the United States under the

Commerce Clause, in his opinion, in this case. But he stopped short of giving the federal government the power to regulate quarantine. And this was very much in keeping with the general approach to state power over quarantine throughout this period. For example, 1796 and 1799, Congress did make laws pertaining to quarantine. But all they said was, federal officials, like customs officials, should help the state to enforce these laws as best they can. So it was all cooperative. The federal government never tried to seize power over quarantine regulations.

### **Adam Smith**

It's, the point you've made about *Gibbons v Ogden* may seem a little obscure, perhaps to some listeners, but it's really, really interesting because those of us who teach American history, when we talk about *Gibbons v Ogden*, we talk about it as a case which helped to consolidate federal power, and the chief justice, the long serving Chief Justice John Marshall that you referred to, was very much in favour of strengthening federal power, wasn't he? But what you're saying is that even in that case, which we largely remember as being a transfer of power, essentially, from state regulatory authority to federal regulatory authority, even then, almost as an aside or something I mean, how did he even bring it up? He just said, oh and by the way, what I'm saying here does not apply to quarantine laws...?

### **Grace Mallon**

If you read the syllabus of the case, it's just one of the outcomes of the case. None of, no the commercial regulation of the United States shall be construed to, to extend to quarantine regulations. So there was a real sense that this is absolutely something which belongs to state and particular local authorities, to municipal authorities like the city of New York itself.

### **Adam Smith**

And so does this come back again to a phrase you used earlier? The "police power"?

### **Grace Mallon**

Yes, exactly. I think one of the interesting things about looking at American government in the 19th century is, there's this sort of myth that Americans hate government and that they try to push government as far away as possible. And they go out on the frontier and they pull themselves up by their bootstraps and they avoid regulation at all costs on. You know, if you look at the federal government, you know, that could almost be a supportable view. Look, they don't really do very much today. But when you look at...

### **Adam Smith**

...although the federal government was distributing land and sending armies west in order to protect settlers. And they were doing quite a lot of the West, but yes...

### **Grace Mallon**

They were doing, they were in fact doing a lot more than, you know, the myth would allow us to think. But the states were certainly, you know, creating these coercive laws which really impacted the lives of the citizen at every level, not just in terms of health care and education and labour laws and social welfare, but also in terms of morality and things like



that. If you didn't go to church on Sunday, you could get in trouble, you know, your divorce will be regulated by the state legislature. All of those things. Gambling could be regulated by the legislature, and alcohol consumption would be regulated by the state legislature. So, yeah, they really did have this quite coercive hold over the lives of citizens.

### **Adam Smith**

Fast forward into the 20th century, Grace. And some of those things that you just mentioned very much did seem to become federal responsibility. So control of alcohol, we had the prohibition amendment, and then it was repealed. Much more recently, we've had the Supreme Court decision on, on equal marriage, which was a nationalising measure in that it, there were already of course plenty of states that had authorised marriage for same sex couples. But this was this was this was a federal measure. So how did that come about? I mean, it's a very big question, but how did it come about that the federal government in the 20th century was able to assume those powers? And where does that leave the situation now with regard to lockdowns?

### **Grace Mallon**

This expansion of power I think is traditionally associated with the administration of Franklin D. Roosevelt and the New Deal. When government does start in sort of this incredible period of crisis with the Great Depression followed by the Second World War, government does start to take, or the federal government does start to take a much bigger role in managing a lot of these questions of social welfare. And that's where the Centers for Disease Control then sort of comes out in about 1946 with a centre, for I think it's the Communicable Diseases Centre was its original name, which begins to handle infectious diseases. So it's this period of crisis, which really generates this shift. But the states continue to retain a lot of these coercive powers that I've just mentioned and they might not be as sort of overt as some of those sort of very puritan, almost, regulations that I've just been talking about, so that sort of police power, still remains a state responsibility.

### **Adam Smith**

So what you're telling us Grace, is that although Governor Cuomo may say, look, let's read the 10th Amendment, let's look at the writings of these framers of the Constitution, and this will tell me what my responsibility is and what the responsibility of the president is, in fact, it's always been much, much more complicated than that and although the Supreme Court has weighed in on this and political writers and politicians have weighted in on this over the centuries, in fact, nobody really knows how to resolve it.

### **Grace Mallon**

I mean, my answer, and the reason I've had such difficulty periodizing this project and sort of setting an end date on it is because they haven't really been resolved. We had last year, we had this constitutional controversy in the UK concerning the prorogation of Parliament, which was taken to the Supreme Court and it was resolved, but a lot of people started saying, well, wouldn't it be better if we had a codified constitution a bit like the United States, like other nations, where it's all just set down what the relationship is between these different parts of government, who's allowed to do what? And what I want to say to all those people is well, America does have that, and it still hasn't solved many of these

fundamental problems because ultimately the Founding Fathers, and there are actually some nice quotes from the Constitutional Convention where they make this point, Gouverneur Morris particularly, that you know, we can't predict what's going to happen in the future and a lot of these massive constitutional questions end up being resolved only as and when they actually arise. And one of those, I think, you know, is the powers of the state and federal government. And they can be re-litigated and they can come before the courts again and again, and people can have different answers to them at different periods of time. So, I mean, my comforting answer is, none of this really has been resolved.

### **Adam Smith**

One thing we can say for sure is that when Trump says that he is in total control, the federal government has total authority – that's clearly wrong, isn't it? I mean, there's nobody has never been anyone in American history who would have agreed with that assertion, is there, and no previous president?

### **Grace Mallon**

Well, I think you know, we have to remember that the origins of the United States, all of the complaints against Great Britain when it came to you know the Declaration of Independence were against the King. Monarchy has not traditionally been a popular form of government in the United States. And I think to say that the president has or was intended to have complete power would be massively to overstretch the case. And you know, some conservative or some Trumpian legal scholars will make the case for the executive power being this very expansive power but I think most constitutional scholars would fundamentally disagree with that.

### **Adam Smith**

There's a funny – there's something we should perhaps note here, which is that broadly speaking, people on the right in American politics, and you think of the Federalist Society – tend to, or historically have tended to emphasise states' rights as opposed to the federal government. But at the federal level, within the federal government, they've also tended to emphasise executive authority. So the presidential powers in relation to Congress and indeed the judiciary as well. What do you think, Grace? How much of this is just positional? I mean, we're now in a situation where, you know, the Republicans are in control, obviously on the executive level of federal government and rapidly gaining control of the judicial level. Now we might see a switch between the two parties, and it might be now in the interests of the Democrats, people on the left in American politics, to start talking about states' rights and start talking about political solutions rather than judicial solutions in order to advance a progressive agenda.

### **Grace Mallon**

Absolutely. I think we see this throughout American history, that commitment to state's rights tends to vary with your particular policy agenda, where you can most effectively sort of execute the policies that you want to execute. So, you know, way back in 1798. I mean, Governor Cuomo is talking about Jefferson and Madison because they were the fathers of the states' rights doctrine, in a sense, with the Virginia and Kentucky Resolutions when they were saying, look, federal government, you can't do that with reference to these coercive,

these very concerning laws that John Adams was trying to pass – in fact, did pass. But then Jefferson turns round when he's president and says, actually, I want to accrue as much power as I can to myself, and the New England states, which were traditionally very federalist were saying, we're going to secede from the Union, we have states' rights and you see this switch going back and forth. But I absolutely agree. I think too little attention has been paid by progressives to state politics recently. And I think we are going to see a shift because the states still control voting rights. They still control congressional districting, which is obviously going to be a big concern. And they control a lot of these other policy areas. And if they're sort of, if the Democrats fund state legislative races, I think they could see a really big shift at the state level.

**Adam Smith**

Grace, thank you very, very much indeed, that's being a really illuminating conversation. Thank you very much for joining me,

**Grace Mallon**

Thank you.

**Adam Smith**

And you can read a fantastic op-ed piece by Grace Mallon on that subject in The Washington Post. So if you want to find out what authority the President of the United States has in relation to state governors, don't ask the president.

**Audio of new conference**

Donald Trump: the president of the United States has the authority to do ... what the president has the authority to do.

**Adam Smith**

Not very illuminating. But don't rely either on the theoretical writings of the framers or even the document of the Constitution itself. The relationship between the federal government and the states has been forged and is continuing to be forged in the reality of politics. And that's it for this episode of Last Best Hope, the podcast from Oxford's Rothermere American Institute, in which we try to understand whether or not the United States is now or has ever been the last, the best hope of Earth – studying it from the outside in. My name's Adam Smith. Goodbye.