



P E R S P E C T I V E S

by Rinaldo S. Brutoco



Rinaldo S. Brutoco is the Founding President and CEO of the Santa Barbara-based World Business Academy and co-founder of JUST Capital. He's a serial entrepreneur, executive, author, radio host, and futurist who's published on the role of business in relation to pressing moral, environmental, and social concerns for over 35 years.

A New Federalism in a Post-COVID World, Part 4 of 4

We began by examining the growing power of the Federal government, and particularly the executive Branch (the President). We traced the rise of Federal power, for better or worse, from the Articles of Confederation, through the US Constitution, and through World War I up until today with the respective actions of states and the Federal government to the Covid-19 pandemic. We then examined those times when Federalism performed at its best (e.g. Roosevelt's handling of the Great Depression and world War II), and how badly it has failed us with the Coronavirus that has now claimed over 80,000 lives and rises daily. Last week we rounded out our observations by tracing the Civil War's long-term impacts and the failure of the Federal government to obtain the Confederacy's surrender, through the "States Rights" controversies in the 20th Century and the resultant reverberations of the current "culture war" over time to the present. So here we are in 2020 living in a badly divided "nation" of "red" states and "blue" states," rather than the *United States*. Where does this end and how?

The Trump Administration has taken the position that it was not "responsible" for preventing the Coronavirus pandemic, nor for bringing the pandemic to an end (either domestically or abroad as was done so successfully with the Ebola virus and SARS) more quickly or with fewer dead Americans. They told the Governors that they were "on their own." The states have responded aggressively to protect the very lives of their people and the integrity of their local medical institutions. Like **Governor Cuomo** in New York (the original epicenter that has now flattened its pandemic curves), many governors have scrambled effectively to marshal their scarce resources to keep medical facilities from being overrun, and to keep their medical workers safe in the absence of adequate testing and personal protective gear with considerable success-- Washington, California, Oregon, New Hampshire, Virginia, and Ohio to name a few. They also formed "compacts" amongst themselves as separate states achieving coordinated regional responses.

Compacts are multistate agreements between two or more states, which most often in US history were organized around a common challenge. In the present moment the challenge is to bring about a quicker, safer end to the pandemic in the absence of federal support for procuring and distributing Personal Protective Equipment & test kits;¹ the absence of binding national standards on "sheltering in place;" the absence of FDA coordination of multiple suppliers of potential serum antibody tests; and the failure to properly and aggressively use the Defense Production Act of 1950 to mobilize

American industrial capacity to remedy all the supply chain disruptions. Currently three major regional state consortiums (informal compacts)² comprising over 170 million Americans have already been formed to jointly address these pandemic related issues: 1) The Western Compact unites California, Colorado, Nevada, Oregon, and Washington; 2) The Eastern Compact unites New York, New Jersey, Delaware, Rhode Island, Connecticut, Pennsylvania, and Massachusetts; 3) The Central Region unites Illinois, Wisconsin, Ohio, Minnesota, Michigan, Indiana, and Kentucky.

Compacts were widely used for many purposes by the original 13 Colonies prior to the Revolutionary War. The Articles of Confederation restricted such associations but the attempt to do so was partially watered down in the US Constitution as Article 1, Section 10, Clause III which read "No state shall, without the consent of Congress enter into any agreement or compact with another state." Even such an apparently definitive statement was not the final word as the Founding Fathers were primarily concerned with individual states setting up their own armies or "state departments," but most matters were believed to be best dealt with at the state level. A series of cases broadened the states authority making it easier to create domestic Compacts for a wide variety of regional solutions until the supreme Court in 1893 decided *Virginia v. Tennessee*. That case held that the "consent" of Congress could be express *or implied*, and that the failure of Congress to object was deemed consent.

There are many matters upon which different states may agree that would concern the United States. In fact, the passage of time itself would suffice as "consent" if Congress failed to reject the Compact (which raises the legitimate question: Is one House of Congress sufficient for consent, and the equally obvious, if both Houses don't agree to reject is it implied consent?).

The Coronavirus has catalyzed powerful regional Consortiums/Compacts into existence that collectively represent almost 60 percent of US GDP. What others will arise in the post Coronavirus world where arrangements will be sought between states to accomplish objectives an emasculated Federal government will not tackle? Short of setting up a "State Department" or creating an army for foreign deployment (as opposed to a National Guard which is totally permissible), it appears that the states could, and probably should, begin managing *far more* of their daily affairs amongst themselves. Almost certainly the Federal government, particularly the Executive branch, will be reduced in scope and power. Equally certain, a new balance of Federal and state power will emerge from the post Covid-19 world. What will *that* look like? Stay tuned...

¹ To the contrary, the Federal government has pitted one state against each other and against FEMA itself in the procurement of test kits creating price gouging by suppliers and radical responses by governors who have seen their supplies delivered to FEMA even after contracts are signed in a "Wild West" bidding contest. **Governor Hogan** of Maryland arranged through his Korean wife to purchase a plane load of tests and chartered a jet to have it secretly land at Baltimore International, protected by Maryland

National Guard soldiers, rather than Dulles so he could avoid having the Federal government seize the tests when they arrived. The remainder of that shipment is hidden and guarded from the national government to this day.

² Informal consortiums become formal compacts when the states participating in them formalize them by adopting mutually binding legislative action.