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The Distribution of Power Over Social Distancing Regulation in the UK: Constitutional Design Principles from Economic Theory

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The Distribution of Power over Social Distancing Regulation in the UK: Constitutional Design Principles from Economic Theory

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January 2021

Abstract:

Which groups of elected officials should be in charge of decisions about the imposition of lockdowns and other social distancing rules? People throughout the UK have debated this issue since the start of the pandemic. When central government, local governments, and devolved administrations all enjoy democratic legitimacy, disputes over who should have the power to impose social distancing rules are almost inevitable. The nature of the British constitution also means that the recent debates about parliamentary oversight and social distancing rules were predictable. This paper sheds light on these debates over who should have the power to impose social distancing rules by drawing on economic theory, particularly the work of Nobel Laureates Hayek (1945) and Ostrom (1990). We review UK policy since March 2020 using this lens and then present policymakers with actionable recommendations. We argue that local rather than national governments should be given authority over whether or not to impose lockdowns and similar measures. We argue that in areas in which local government powers are not unified into a single unit and instead dispersed to different levels (e.g. county and borough councils), power over social distancing rules should be vested in the most junior unit of government. We use economic theory to argue that the legislative branches within each level of government should exercise close and continuous parliamentary oversight of all social distancing rules. In light of this pandemic, the UK might also consider investing resources in acquiring a written constitution that would clearly specify who has power over public health measures such as social distancing rules.

Keywords: Coronavirus; social distancing; devolution; local government; constitutional economics; Bloomington School of Political Economy

Introduction

Covid-19 has created novel collective action problems (Johnson, Dawes, Fowler, and Smirnov, 2020; Foss, 2020). Social distancing regulations such as lockdowns involve painful trade-offs between negative epidemiological, economic, and psycho-social outcomes (Goodman, Coyne, and Devereaux, 2020; Bazzi, Fiszbein, and Gebresilas, 2020). As with past pandemics (Trosken, 2015; Geloso and Murtazashvili, 2020; Beach, Clay and Saavedra, 2020), Covid-19 has raised the issue of who should have the right to impose social distancing restrictions. Should such powers be distributed to decision-makers in local communities or should they be vested in national leaders (Kettl, 2020; Knauer, 2020; Benton, 2020; Downey and Myers, 2020)? President Trump's declaration in April 2020 that he had "total" authority to order governors to lift state lockdowns prompted Americans to discuss constitutional checks on presidential power (New York Times, 2020). Similar, albeit less vitriolic, debates about the respective advantages of centralisation and decentralisation have taken place in other federal countries (Rozell and Wilcox, 2020; Béland, Lecours, Paquet, and Tombe, 2020; Kumar, Nataraj, and Kundu, 2020) and in those democracies traditionally classified as unitary states. The United Kingdom witnessed debates whether Covid-19 lockdowns should be national or confined to just localities with high R rates. UK political actors objected when the central government imposed local lockdowns over the objections of elected mayors (British Medical Journal, 2020; Wise, 2020, Guardian, 2020). When central government, local government, and devolved administrations all enjoy democratic legitimacy, such disputes are almost inevitable.

This paper contributes to these debates about the advantages and disadvantages of decentralised responses to the pandemic by applying a theoretical lens taken from the work of Nobel Laureates Hayek (1945) and Ostrom (1990). Ostrom's insights into how communities avoid the tragedy of the commons have deepened our understanding of such common-pool resources as fisheries (Smith, 2016; Carlisle and Gruby, 2018), shale gas (Murtazashvili and Piano, 2019), and the atmosphere Ostrom (2009). As the curtailment of infectious diseases often involve restricting individuals' access to common spaces, the same theory can be repurposed for thinking about where control over social distancing rules should be located. Although Hayek and Ostrom have been cited in the social-scientific research on the current pandemic (Perez and Ross, 2020; Tang and An, 2020; Hattke and Martin, 2020), their ideas remain an under-utilized tool for thinking about who should have the power to impose social distancing regulations. The paper by Hattke and Martin (2020), which was a robust defence of Germany's relatively decentralised approach to the Covid-19 pandemic, is informed by theoretical commitments broadly similar to our own. However, it differs from our own paper because it neither conceptualises public spaces as commons nor seeks to inform our thinking about the complex trade-offs involved in decisions about lockdowns and social distancing rules.

The next section discusses key features of the theoretical lens we use for viewing common resources. The subsequent section builds on this theory to formulate seven guidelines for thinking who within a country should have control over the making of social distancing regulations during pandemics. The paper then compares this ideal state of affairs with the actual distribution of power to impose lockdowns in the UK, a country's whose approach to the making of social distancing rules and guidance has been highly centralised. The paper suggest that a more decentralised approach to the making of social distancing rules likely would have produced superior outcomes in Britain. In this context, superior outcomes are defined as striking the right balance between limiting different types of harm, epidemiological, economic, and psycho-social that reflect the values and knowledge of local people. The paper argues that in future pandemics involving infectious diseases, local communities should be empowered to manage access to common spaces, with local rather than national governments being given authority over social distancing rules. Limitations and directions for future research are also discussed.

Theoretical Considerations

Why is a type of economic theory first developed to help understand issues such as access to water in arid regions of the United States (Ostrom, 1965), relevant to thinking about responses to Covid-19? Individuals who venture into public spaces such as streets, parks, shops, and restaurants during a pandemic are choosing to consume a shared resource, namely *common space*.¹ Their decisions to consume common space may have negative consequences for unseen others (Johnson, Dawes, Fowler, and Smirnov, 2020). For instance, an asymptomatic carrier may inadvertently transmit the virus to a vulnerable individual or to someone who will then meet a vulnerable person. The analogies between access to common space in a communicable disease pandemic and the use of other common-pool resources (henceforth “commons”) are close enough for us to profitably apply the ideas of Ostrom (1990) in thinking about how to manage these externalities in an optimum fashion.

The so-called “Bloomington School of Political Economy” associated with the foundational work of V. Ostrom and E. Ostrom can viewed as a response the hubristic faith in the role of state bureaucracies and benevolent experts that peaked in many countries, including democracies but also the Soviet Union, in the middle of the twentieth century (Wagner, 2005; Aligica and Boettke, 2009; Herzberg, 2015; Cole and McGinnis, 2017). The ideas of the Ostroms about the distributed nature of knowledge in society are similar to those presented by Hayek (1945) in his trenchant critique of those who wished to replace the spontaneous order of the market with central planning by government experts. Ostromian ideas now have social-scientist adherents around the world (Baldwin, Chen, and Cole, 2019; Sarker and Blomquist, 2019). Bloomington School, or Ostromian, theory is informed by

¹ In this paper, the term *common space* includes both privately-owned spaces in which people from different householders meet as well as publicly-owned spaces such as parks.

the Tocquevillian ideal of a self-governing society of free citizens (V. Ostrom, 1997). A key concept within their paradigm is polycentricity. V. Ostrom (1991) defined polycentric systems as being characterised by autonomous units of governance that formally independent of one another that have the right to make decisions. Such systems include federal constitutions and other political systems, such as democracy, that force policymakers to take the opinions of a wide range of different stakeholders into account.

Scholars who use the theoretical tools provided by Ostrom's work on the commons (1990) have recently made important contributions to our understanding a range of policy issues such as intellectual property rights (Dourado and Tabarrok, 2013), banking regulation (Salter and Tarko, 2019) and blockchain systems (Allen, 2019). For the purposes of thinking about the distribution of power over social distancing rules, it is useful to focus on the Ostromian research on commons access. The Ostromian perspective contrasts with what was once the conventional academic wisdom about how to manage the destructive dynamic that Hardin (1968) labelled "the tragedy of the commons." Hardin suggested that all common resources will be overconsumed in the absence of coercive mechanisms to prevent antisocial behaviour. In seminal publications that challenged this view, E. Ostrom preferred to speak of the "Drama of Commons" rather than the "Tragedy of Commons," as she sought to challenge the assumption that individual self-interest will inevitably result in the destructive overconsumption of common resources (Ostrom, 1990). Armed with Ostrom's ideas, researchers have explored how local communities develop effective systems for preventing the tragedy of these commons (see Dietz, Dolsak, Ostrom, and Stern, 2002; Cai, Murtazashvili, Murtazashvili, and Salahodjaev, 2019; Peredo, Haugh, Hudon, and Meyer, 2020) that correspond neither to the category of state solutions nor market-based ones.

E. Ostrom (2005, 259-281) outlined a series of principles for evaluating the merits of different institutional arrangements for governing access to commons. First, the boundaries for the common to be governed must be clearly defined. Second, those who create the rules governing access to a given commons (e.g. fish stocks or an aquifer) must have an intimate knowledge of the common resource in question so that appropriation rules closely reflect local conditions. Her theory suggests that uniform rules for heterogeneous and large territories are unlikely to produce satisfactory results. The third design principle is that "the individuals affected by the system should have a say in the creation and modification of rules" governing access to the commons and even the meta-rules that determine who gets to make commons access rules. The agents tasked with monitoring the behaviour of commons users should be members of the local community rather than outsiders and the penalties for violating the rules governing commons access should be finely graduated to take into account the seriousness and context of a violation. Ostrom also argued that there must also be a low-cost and local forum for the resolution of disputes between competing groups of commons users and for resolving disputes between commons users and enforcement agents and that commons users must retain the right to self-organise politically.

Ostrom also endorse “nested” governance and polycentric regulation. This principle means that governance of a given common should, generally, be decentralised to the lowest possible level of government, a principle other authors sometimes denote *subsidiarity*.

One of the most important threats to the successful governance of commons identified by Ostrom is “blueprint thinking.” According to Ostrom, “blueprint thinking occurs whenever policymakers, donors, citizens or scholars propose uniform solutions to a wide variety of problems that are clustered under a single name” (Ostrom, 1999, 7). Ostrom, who sometimes referred to blueprint thinking as “institutional monocropping” (i.e. the belief that the same institutions should be used everywhere regardless of local conditions), associated blueprint thinking with the habit of many modern policymakers of drawing analogies between complex social and ecological systems with the relatively simple structures designed by trained engineers. By using engineering metaphors in discussion complex social and ecological systems, advocates of master plans trade on the prestige rightly accorded to engineering.

Guidelines for the Making of Social Distancing Regulations in Pandemics Derived from Economic Theory

From the branch of economic theory described above, we can derive seven guidelines that can guide our thinking about how the power to make and enforce social distancing rules in pandemics should be distributed. First, as we have noted above, the shared resource to which access must be limited during a pandemic such as Covid-19 is common space, which includes pedestrianised streets, footpaths, parks, retail establishments, and restaurants. Ostrom’s paradigm suggests that the boundaries of the territory covered a given set of social distancing regulations must be clearly delimited and recognizable to all parties. Second, the individuals who create the rules for a given territory must have a deep local knowledge and the rules must be tailored to reflect local conditions. Research on commons informed by Ostromian ideas strongly indicates that uniform, “cookie-cutter” rules for large and diverse territories will rarely result in the common resource being utilised in the optimum fashion. Third, the individuals affected by the rules for gaining access to a common should have a say in the creation and modification of those rules as well as in the constitutional question of who gets to make commons access rules.

Fourth, the Ostromian perspective also suggests that the individuals tasked with enforcing access to the commons at “street level” should be drawn from the local communities in question. Fifth, the penalties for violating the rules governing access to the common resource during the pandemic should be finely graduated and there should be a low-cost system in each locality for the resolution of disputes between competing groups of would-be commons users and between commons users and the individuals who enforce the rules. Sixth, governance of the commons should be “nested” governance,

which means that power over access to commons should be decentralised to the lowest possible level of government. Seventh, what Ostrom called blueprint thinking should be avoided.

The Management of the Covid-19 Pandemic in the United Kingdom Seen In Light of Economy Theory

This section of the paper uses a brief analytic narrative (Gill, Gill, and Roulet, 2018) to sketch how UK policymakers responded to the Covid-19 pandemic in the first nine months of 2020. The management of coronavirus in the UK is thus used as a revelatory case (Yin, 2017) to illustrate the utility of an Ostromian perspective on Covid-19. Several considerations informed the decision to use the experience of the UK for this purpose. Britain is among the most centralised of the western European democracies (Booth, 2015). It is also significantly more centralised than other countries in the developed Commonwealth such as Australia and, especially, Canada, nations that are similar to the United Kingdom in political culture and whose written constitutions were originally UK statutes (Sayers and Andrew, 2013). “The UK is one of the most centralised countries of its size in the developed world” (Norris and Adam, 2017, p.11). The highly centralised nature of Britain’s response to Covid-19 means that focusing on its experience is useful for the purposes of illustrating the utility of an Ostromian approach.

The process of administrative and legislative devolution since 1997, which has witnessed the creation of separate elected governments with democratic legitimacy in Scotland, Wales, and Northern Ireland (for background, see Bogdanor, 2001; Laforest and Keating, 2018; Matthews, 2018), has meant that the British response to the Covid-19 pandemic has been somewhat less centralised than would have been the case in the absence of devolution. Each of the four nations of the United Kingdom have designed and implemented social distancing rules that differ somewhat from each other in details. However, within each of the four nations of the United Kingdom, the making of Covid-19 policy has been centralised in each national capital. As we will see below, individuals from across the political spectrum have argued that the British response to the pandemic is excessively centralised, particularly in England, the most populous of the four nations of the United Kingdom, has ignored the wishes of local elected officials and communities, and could be improved by transferring power over the management of the pandemic downwards to local government.

While support for public support for the lockdown measures introduced in March was initially high, subsequent months witnessed growing opposition to parts of these measures from groups that included elected politicians of all political parties (Hansard, 2020), leaders of the racial and ethnic populations that had been disproportionately sanctioned for violating social distancing rules (National Police Chiefs Council, 2020), and communities in the North of England, where there was a growing belief that Covid-19 policies designed in London were unsuited to local needs (Nurse, 2019). These concerns about the constitutional issues associated with Covid-19 were documented in publications

produced by the Institute for Government, the House of Commons Public Administration and Constitutional Affairs Committee (PACAC), and the national media. Documents produced by these sources were the basis of the analytic narrative presented below.

Two documents that stand out as particularly important in the preparation of the narrative are the study published by the Institute for Government in September 2020, “Decision making in a crisis: First responses to the coronavirus pandemic”, which examined the making of key decisions by ministers and their scientific advisers in the period leading up to the imposition of the national lockdown on 23 March. The Institute for Government is a think-tank whose rigorous research findings are widely respected by actors from across the political spectrum. Their report, which was compiled by three researchers who interviewed key individuals in government, concluded that the ministers’ response to the pandemic was hindered by short-term thinking, uncertainty about the distribution of decision-making authority, and the poor use of evidence. These problems were, according to the authors, evident in decision-making in three policy areas: the design of the packages of support for private companies, the design of the Covid-19 testing system, and the design of the lockdown and social distancing rules (Institute for Government, 2020a). The last area of policy is the sole focus of this paper. Another important source of information were the reports produced by the e Public Administration and Constitutional Affairs Select Committee is a select committee of House of Commons that has existed since 2015 and which has members from different political parties. A report published by this Committee in September 2020 that was highly critical of the government’s handling of the crisis (PACAC, 2020) was another important source of information.

Analytic Narrative: Response of Policymakers to Covid-19 in England, February to October 2020

In January 2020, UK government ministers began to hold regular meetings with Sage (Scientific Advisory Group for Emergencies) to discuss the virus. The first meeting of COBR (the crisis response co-ordination meeting held in the Cabinet Office Briefing Rooms) occurred on 24 January. The UK government then imposed quarantine restrictions on some international arrivals but did not introduce any restrictions aimed at preventing community infection within the United Kingdom (Institute for Government, 2020a; Health Foundation, 2020).

The government’s Scientific Pandemic Influenza Group on Modelling (SPI-M-O) published a paper on 11 February that recommended the government should not prohibit mass gatherings. On 26 February, the Sage committee advise to the government was that regulations restricting activities outside the household other than school and work might delay the peak of the coronavirus outbreak by three to five weeks, thus flattening the infection curve. On 2 March, the Prime Minister attended his first COBR meeting about the pandemic. A day later, he held his first televised press to discuss the virus: “I was at a hospital the other night where I think there were a few coronavirus patients and I

shook hands with everybody, you will be pleased to know, and I continue to shake hands.” The first death in the UK from Covid-19 occurred on 5 March. By early March, a growing number of domestic critics were calling for lockdowns similar to those that had been imposed in other European countries, such as Italy. UK ministers were denounced in the media for adopting a herd immunity strategy that would involve sacrificing the elderly and weak in the interests of the economy (e.g. Guardian 2020b). On 4 March, the government published the scientific advice it had received that had informed it that cancelling large-scale public events would be ineffective at containing the outbreak. The government controversially decided to allow the Cheltenham Festival, a three-day horseracing festival, to start on 10 March, which resulted in tens of thousands of travelling visiting the eponymous town (Vallance, 2020). In the face of growing criticism, particularly from the localities that hosted such mass gatherings, the government published the expert advice it had received from deputy chief medical officer who reported that “expert modellers” had concluded banning such large gathering would not “have a big effect.” She argued that if it banned large gatherings as other European countries had done, the UK would not be “following the science” (Shropshire Star).

On 12 and 13 March, modellers at Imperial College London and London School of Hygiene and Tropical Medicine (LSHTM) published forecasts about the Covid-19 death toll in the United Kingdom in the absence of a lockdown. These publications immediately attracted extensive media attention and which was later widely credited by observers (McDonald, 2020; Johns 2020; Institute for Government, 2020) with shifting the UK's Covid-19 policy away from the emerging Swedish model and towards the hard lockdown implemented in late March. The Imperial College report (Ferguson et al., 2020), which appears to have influenced decision-makers in American states (Pinker, 2020) as well as in the UK, predicted that critical care capacity in the UK will be overwhelmed by the coronavirus outbreak and that UK deaths would reach 250,000 without the immediate introduction of strict social distancing regulations. (The legitimacy of the Imperial College report model continues to be vigorously debated.) Speaking shortly after the release of the Imperial College report, the Prime Minister advised the public to avoid unnecessary contact and exposure in public places. “Now is the time for everyone to stop non-essential contact with others and to stop all unnecessary travel. We need people to start working from home where they possibly can. And you should avoid pubs, clubs, theatres and other such social venues” (Gov.uk, 2020). All pubs and restaurants were ordered to shut four days later. On 18 March, the government ordered the closure of all schools in England until further notice.

On 17 March, Government announced a new decision-making structure for handling the pandemic. “The new structure involved with daily Covid-19 meeting and four ministerial implementation committees” (Institute for Government, 2020, p.10). The social distancing regulations

were, therefore, made by a small number of “key figures” some of whom themselves incapacitated by Covid-19: “the prime minister, health secretary, cabinet secretary and the chief medical officer all contracted or had symptoms of Covid-19 around this time” (Institute for Government, 2020, p.31). These illnesses meant that the number of individuals in control of the UK’s social distancing rules was even smaller than the nominal committee membership would suggest.

At the start of the crisis, the government exercised the powers it possessed under the Public Health (Control of Disease) Act 1984 and the Civil Contingencies Act 2004. To give the government additional powers, ministers proposed the passage of a comprehensive emergency law. The media reported that there was general agreement across and within political parties about the measures contained in the proposed legislation, but some MPs, including those from the governing Conservative Party, critiqued the extended duration of the emergency powers. On 18 March, the leader of the Labour Party wrote to the Prime Minister to request that MPs be granted a vote to renew the bill every six months, while others in the Labour Party argued that the bill should be subject to renewal every 30 days. To accommodate such concerns, the legislation provided that the emergency powers would be reviewed by parliament every six months and would last for no longer than two years. The bill later called the Coronavirus Act 2020 was published on 19 March 2020. Despite objections from civil liberties groups such as Liberty and Big Brother Watch, the bill was passed by the House of Commons without a vote on 23 March and became law on 25 March 2020 (Law Gazette, 2020; Goddard, 2020; Moore, 2020; Institute for Government, 2020b).

The legislation granted the government emergency powers to handle the Covid-19 pandemic that included the right to detain individuals suspected to be infected by Covid-19, and to intervene or relax regulations in a range of sectors to limit transmission of the disease, ease the burden on public health services, and assist healthcare workers, alter a wide variety of regulations, and to suspend the operations of tenancy contracts. On 23 March, the previous advice on social distancing now becomes legally mandatory. The UK lockdown was announced by the Prime Minister in a television broadcast: “From this evening I must give the British people a very simple instruction - you must stay at home.”

During this national lockdown, which lasted until early May, all individuals not designated as “key workers” were obliged to remain at home except for shopping for “basic necessities”, obtaining “medical need or to help a vulnerable person,” and travelling to and from work where work could not be done from home. Additionally, individuals were permitted to leave home for outdoor exercise, which was limited to just one outdoor exercise session in a park or other public place per day (Institute for Government, 2020, 35). Schools remained open to take care of the children of designated key workers.

The government required all individuals who were over seventy or who had one of a designated number of pre-existing medical conditions to Shield, which meant they were required to remain at home and rely on others to bring them essential supplies. All individuals covered by the Shielding programme received a letter from the government informing them of their status.

The UK's 45 territorial police forces were tasked with enforcing these regulations. A graduated systems of fines was introduced to sanction rule breakers and exemplary fines were given to some violators. Fines ranged from £200 for the first offence, lowered to £100 if paid within 14 days, £400 for the second offence, then doubling for each further offence up to a maximum of £6,400. Police forces instructed front-line officers to impose fines as a last resort as part of a 4Es strategy of "Engage, Explain, Encourage, and Enforce" (Metropolitan Police, 2020). At the same time, the government complemented the lockdown policy by providing extensive financial assistance to firms and to individuals whose revenues had been affected by the lockdown. The coronavirus job retention scheme, commonly called the furlough scheme, was pay the wages of employees whose workplaces had been shut. Similar measures were then introduced to support self-employed individuals (Institute for Fiscal Studies, 2020).

By early May the UK had surpassed Italy to become the European country with the highest number of recorded Covid-19 fatalities. By May, the infection rate in the UK had slowed to the point that the government decided to relax many of the lockdown regulations with a view to restarting the economy. On a televised address on 10 May, the Prime Minister unveiled a new "stay alert" slogan, which replaced the original "stay home" message and the government began encouraging workers in England in industries such as construction and manufacturing to return to work. The Prime Minister also announced that people would be able take "unlimited amounts of exercise" outdoors and would now authorised to "sit in the sun in their local park" (PACAC, 2020, p.22)

The governments of Scotland and Wales maintained their hard national lockdowns for somewhat longer than that of England, resulting the first significant divergence is national Covid-19 rules between England and rest of Great Britain. This divergence disturbed some domestic observers, who called for greater uniformity in how the UK exited lockdown, a so-called "four nations exit strategy" (Paun, Sargeant, and Nice, 2020). The leader of the Labour Party objected to divergence in social distancing regulations between localities on the equalitarian grounds that the United Kingdom's four nations had entered lockdown at the same time and should therefore exit it at the same pace

(Express and Star, 2020). On 13 May, the Prime Minister encouraged all individuals in England who were unable to work from home to go back to their jobs, while maintaining social distancing. The rules were relaxed to permit individuals out of their houses for unlimited daily exercise and to meet one other person outdoors, provided they remained two metres apart. Garden centres then reopened and the dates at which other non-essential retail establishments would be allowed to re-open were announced.

In early June, primary schools were re-opened for the children of non-key workers. Later that month, non-essential shops reopened in England, as did places of worship. Rules requiring passengers to wear face masks on public transport in England were . Exemplary fines continued to be given to individuals who broke social distancing regulations. In June, the government was plunged into crisis because of the behaviour of the Prime Minister's senior adviser. This individual, who had helped to guide the government's response to the pandemic, was revealed to have repeatedly breached social distancing rules. The Prime Minister's adviser neither lost his job nor paid a fine, leading to charges of hypocrisy and predictions that citizen compliance with the social distancing rules that had been developed by the Prime Minister's team would decline. Academics who studied public reactions to the episode found that there was widespread anger about the treatment of the adviser and that some survey respondents said they were more inclined to violate the rules as a result (Jackson, Bradford, Yesberg, Hobson, Kyprianides, Posch, and Solymosi, 2020).

In an effort to stimulate economic activity, the government then used social media and conventional advertising to encourage citizens to return to activities in common spaces they had enjoyed prior to the pandemic. The Chancellor of the Exchequer unveiled a £30bn spending package aimed at mitigating the economic impact of the pandemic that included a controversial scheme called Eat Out to Help Out, which subsidized restaurant meals with the goal of enticing consumers to return to restaurants. From the time it was first announced this scheme has generated debate about whether it was contributing to the spread of the virus (Fetzer, 2020). The short-lived Eat Out to Help Out scheme was described by a member of the central government's own scientific advisory group as part of a pattern of "flip-flopping" as the scheme encouraged "people to go to restaurants and bars" followed by "immediately closing them again" (Belfast Telegraph 2020).

As the national lockdown restrictions were lifted, local spikes in infection rates became visible to observers. On 4 July, the Secretary of State for Health and Social Care ordered the reintroduction of stricter lockdown measures in Leicester, a city with an unusually high infection rate. The postcode districts covered by these regulations were specified in a Schedule of the relevant statutory instrument (The Health Protection Coronavirus, Restrictions (Leicester) Regulations 2020). Similar measures

introduced later in the summer in Greater Manchester, metropolitan county in northern England whose ten boroughs are collective home to 2.8 million. Of the course of the summer, observers of the local government lockdowns became increasingly critical of the process by which they were imposed, which involved very limited parliamentary oversight, with parliamentary debate about a given regulation often scheduled long after the restrictions themselves were announced or came into force. There was also concern that in announced such local lockdowns, the government may have been exceeding its legal powers. On 30 July, the Secretary of State for Health and Social Care announced that a “local lockdown would be instituted in Greater Manchester, parts of West Yorkshire and East Lancashire” and that new restrictions of movement in those localities was legally binding. As a parliamentary committee later noted, “there was no legislation” authorising this lockdown and that the “Gatherings in gardens and people’s homes” that the Secretary of State declared has been prohibited in the named areas had not in fact been banned and remained legal until 5 August” when the relevant legislation was changed (PACAC, 2020, p.23). On 14 October 2020, all of the Statutory Instruments that imposed so-called local lockdowns on named localities and specified postcode districts were replaced by a national system for England with three tiers of restrictions. Under the new system, which had its legal basis in the Public Health (Control of Disease) Act 1984, the Secretary of State for Health and Social Care had the power to place local government areas into one of three tiers, with the most stringent social distancing rules being in force in Tier 3 areas.

In early autumn, Members of Parliament from different political parties began to re-iterate their earlier calls for greater parliamentary scrutiny of the government’s response to the crisis doing so with greater force. Parallel criticisms were made by Lord Sumption, a retired Supreme Court judge (Financial Times, 2020). A critical report from the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) observed that the legal requirement to wear masks on public transport in England was announced in a televised press conference on 4 June and came into force eleven days later, but was not debated in the House of Commons until 6 July, when it was then approved retrospectively. The same report noted that the Prime Minister had announced a rule restricting gatherings of individuals to six people at a press conference. The actual text of the relevant regulation was published four days later, less than an hour before the regulation went into effect. The Committee declared that it was “concerned by both the scale of legislation and the inability of Parliamentarians to effectively amend Covid-19 legislation. The scale of legislation, covering a large number of statutory instruments made under multiple sources, makes it very difficult for even experts to follow what legislation is in effect” (PACAC, 2020, p. 17)

Concerns about the lack of parliamentary oversight and central government's lack of responsiveness to local elected officials in northern England intensified in the early autumn of 2020. Commentators spoke a growing "North-South divide" between northern England and the central government in London that was connected to the politics of social class and regional economic inequality (Independent, 2020). Lawmakers from all political parties also complained that they were not given the opportunity to discuss a regulation that mandated the closure of all restaurants at 10pm before it announced to the media. They also complained that neither they nor the public had been allowed to have sight of the advice from scientific experts that showed that such a regulation would be likely to have a significant effect on rate at which the virus was transmitted (PACAC, 2020). Others argued that parliament's lack of oversight over the government's handling of the pandemic was part of a trend towards the marginalization of parliament that was evident before the advent of the virus and which had been in evidence in 2019 during the process by which Britain prepared to leave the European Union in a fashion to which a majority of MPs, and the elected governments of Scotland and Wales, objected (Ward, 2020; Miller, 2020).

Covid-19 thus intensified discussion of the constitutional questions that British people had debated during the post-2016 Brexit process, the 2014 referendum on Scottish independence, and earlier debates about devolution within England (Nurse, 2020). As in these earlier discussions, actors invoked the competing theories of political legitimacy associated with different variants of democratic theory (Oliver, 2018; Keating, 2019). On 29 September, the House of Lords Constitution Committee launched an inquiry into the constitutional implications of Covid-19. The remit of this inquiry was to explore "the impact of the pandemic, and the Government's response to it, in relation to the operation of the courts and Parliament and the use of emergency powers." The Committee specified that it wanted to examine such issues as divergences in Covid-19 policy between the four nations of the UK, the "right balance between powers for the Executive and parliamentary oversight and approval?," the new criminal offences created to enforce social distancing rules and whether "criminalisation [is] a proportionate, justified and appropriate response?" to the pandemic, whether central government had clearly explained new legal requirements imposed on people during lockdown "to authorities (e.g. local government, police, border force, regulators), businesses and members of the public?"

In October, nation-wide lockdowns were reinstated in Wales and in continental European countries. The leader of the Labour Party then proposed an English national two-week "circuit breaker" lockdown to slow the spread of the virus (BBC, 2020). At first, the governing Conservative party rejected this proposal on the grounds that the regional lockdowns it has imposed on the worst-affected communities in the north of England and other areas were sufficient. In late October, as it became

increasingly clear that the government was considering the re-introduction of a national lockdown for all of England, the government faced increasing discontent from party members. At least one Conservative MP and self-described lockdown sceptic argued that government's mishandling of the crisis illustrated that the United Kingdom needed a "written constitution" to constrain the power of central government. This proposal to start work on writing a constitution was rejected by the Prime Minister who declared that "I think what the people of this country want rather than delectable disputations on a written constitution is to defeat the coronavirus" (Politico, 2020).

Summary of Analytic Narrative

As we have seen in the narrative above, the making of the UK's lockdown and social distancing regulations occurred in an extremely hierarchical fashion. The March 23 rules governing who could leave their homes, for how long, and for which purposes, were made by a small group of ministers, scientific experts, and civil servants in London. As we have seen, there was a sharp reversal in the thinking of this group of policymakers in the middle of March, following the publication of a highly influential, and subsequently controversial report by Imperial College epidemiologists. At that time, the UK government policy swung dramatically from permitting mass gatherings, such as the Cheltenham horseracing festival, to a highly restrictive national lockdown, a polar opposite stance. A report on the decision-making process associated with this shift in national policy indicated that only a small number of individuals were responsible for it (Institute for Government 2020a) and that some members of this small group were themselves unable to participate in the decision-making process because they had been temporarily incapacitated by Covid-19. Therefore, the number of individuals involved in making the social distancing rules was even smaller than the nominal membership of the designated committees.

We have also seen that during the first three months of the national lockdown (March, April, and May) there was very limited parliamentary oversight of the government's decisions. Thereafter, parliament began to re-assert its authority and there was intensified debate about the constitutional implications of the imposition of strict social distancing regulations by the executive. As the UK began to emerge from its first national lockdown in May, there was growing divergence in the social distancing regulations between the four nations of the union, which also prompted discussion of fundamental constitutional issues. The creation by the central government of a three-tier system into which all English local government areas are placed prompted debate about another set of constitutional issues, namely the relationship between national elected officials and their directly-elected counterparts in local government. The public's willingness to comply with the social distancing rules designed by a small group of ministers and their advisers appears to have been affected by the revelation that one of the architects of government policy, the Prime Minister's senior adviser repeatedly broke the regulations without punishment.

So-called blueprint thinking was very much in evidence in policymakers' discussions about the initial lockdown, its gradual easing, and then the planning for a second lockdown. Metaphors taken from engineering, such as "circuit breaker," were used extensively in policymakers' debates about the imposition of social distancing regulations. The use of such metaphors is a classic hallmark of blueprint thinking and suggests that policymakers did not conceptualise the systems they were attempting to manage as highly complex socio-economic-environmental entities. Similarly, policymakers displayed a strong preference for uniformity. When it became clear in May that there was going to be divergence in social distancing regulations between England and other nations of the UK, some policymakers objected to this divergence on grounds that individuals in parts of the country should be treated equally. When a system of local lockdowns was created in England, the central government placed all local government areas into one of three tiers it had designed and local government were not allowed to design their own social distancing regulations that differed from those of other localities in the same tier.

Considering the UK's Handling of Covid-19 in Light of Economic Theory

Above, we used the existing Ostromian research on the management of common resources to establish eight guidelines that can guide our thinking about how the power to make and enforce social distancing rules in pandemics should be distributed. We then presented an analytic narrative that described the policies put in place in the UK to limit access to the common resource of public space during this pandemic. In the table below, we compare the actual policies introduced in the UK with the eight guidelines.

Table 1 indicates that there was significant variance between the guidelines we derived from Ostromian theory and the system actually used in in the UK to make and enforce social distancing regulations during the first six months of the Covid-19 pandemic. The economic research informed by Ostrom's ideas strongly suggests that polycentric, nested governance and the involving of local communities in the design of commons access rules tends to result in superior outcomes than do centralised and hierarchical approach. To the extent to which one subscribes to the Ostromian approach, many, but certainly not all, aspects of the English system for limiting access to public spaces during the pandemic would seem to have been undesirable. The most undesirable features of the UK system were the fact it was highly centralised and designed by a small group of ministers and expert advisers who were, at least during the early phases of the pandemic, subject to very limited parliamentary oversight. From May 2020, the system became somewhat less centralised as the UK government ceded some control over lockdowns to policymakers in the UK nations that enjoyed devolved status (Scotland, Wales, and North Ireland). In all parts of the UK, Local governments had a limited role in the design of the policies and in the later parts of the period covered by this narrative, local elected mayors in England began to complain about their exclusion from the process of making the rules.

Thinking Counterfactually: Limitations of Current Research and Directions for Additional Research

The branch of economic theory on which this paper draws suggests that a more decentralised approach to the making of social-distancing rules during the early stages of the Covid-19 pandemic might have produced superior outcomes (i.e. policies that did a better job of reflecting the values of the population and balancing competing economics and health interests). The uniform national approach adopted by the UK in late March neither permitted local variation and experimentation in social distancing regulations nor allowed communities in different regions of UK to make their own trade-offs between controlling the spread of the virus and the avoidance of other harms. A more decentralised approach to the making of social distancing regulations, perhaps akin to that adopted in Germany, might have helped to strike the right balance while avoiding the massive swing in policy that took place following the publication of the influential Imperial College study in March. Moreover, the fact the social distancing regulations were made by a small group of individuals (ministers, scientists, and advisers) whose personal failings became common knowledge over the course of the summer is suggestive of the risks involved in such a centralised approach. Had the social distancing regulations governing the UK been made collectively by large numbers of local councillors rather than a handful of individuals in Downing Street, reports of rule-breaking by one of the rule makers would have had a less pronounced effect of the willingness of the public comply with the regulations.

Readers of the analytic narrative with very strong *a priori* commitments to the Ostromian approach would likely endorse the counterfactual statements made in the previous paragraph. Such readers would also likely accept, with enthusiasm, the claims of Hattke and Martin (2020) that the fragmented and decentralised public health system of the Federal Republic of Germany responded better to the pandemic than did the more centralised systems of other countries. In a paper on Germany's response to Covid-19 published in early September 2020, these authors celebrated the decentralist features of the 1949 German constitution. They observe that the German "chancellor holds fewer executive powers" than do leaders in comparator nations, German "states are independent from the federal government with regard to most matters, including healthcare and disaster management", and the German "constitution guarantees that municipalities have the right to local self-governance". These authors suggest that there was a causal linkage between these features of the German political system and the country's relative success in handling the crisis: "Germany was one of the hardest-hit countries in terms of the number of infections when the pandemic reached Europe" but country nevertheless responded well, which means that "Germany's federal political system and the decentralised organisation of its public health system provide a setting that promises to yield rich information about collective action during the Covid-19 crisis" (Hattke and Martin, 2020, 5).

In our view, the claims made by Hattke and Martin (2020) and other advocates of decentralised responses to pandemics, including us, must be regarded as somewhat provisional until we have sufficient data to engage in a robust statistical analysis of the various causal factors that can plausibly be advanced in explaining variations between countries in their success in balancing success on limiting the spread of the virus while also protecting economic activity. Some observers have attributed to the statistics showing that the overall death toll (Stafford, 2020) and GDP impact of Covid-19 (OECD, 2020) were somewhat lower in Germany than in the UK to range of factors unrelated decentralization.

Throughout the pandemic, observers have argued about why Germany's Covid-19 fatality rate is relatively low. For instance, April 2020 one academic, who conceded that "the German response has been a good example of how countries can combat the spread and severity of Covid-19" suggested that part of the explanation might relate the younger average of those infected (Rossman, 2020). The competing explanations for Germany's relative success, at least during the early phases of the pandemic, continue to be discussed (Huggler, 2020). Similarly, the reason why the economic and medical impact of the virus in East Asian democracies such as Japan, South Korea, and Taiwan (An and Tang, 2020), continue to be debated. We concede that a critic who is predisposed to dislike the normative claims associated with Ostromian and to favour highly centralised approaches to collective action problems might argue that China's apparent success in limiting the humanitarian and economic impact of Covid-19 proves that neither the polycentric governance endorsed by Ostrom (1990) nor Western-style democracy more generally are suitable during pandemics. Indeed, a few Western observers have indeed praised China's authoritarian response of the pandemic (Trofimov, 2020).

We would counter this argument by noting that a considerable number of cultural, geographic, and institutional variables have influenced the degree to which countries have suffered medical, economic, and psycho-social harms from the pandemic. As data from different countries about the effectiveness of different non-pharmaceutical interventions continues to accumulate, we must all be cautious about expressing overly confidence opinions about the merits of different institutional arrangements in combating the disease. We have relatively strong aprioristic commitments to Ostrom's theory but are also aware of the dangers of confirmation bias in academic research must be extremely cautious in attributing differences between countries the impact of Covid-19 to institutional variation. Given that multicollinearity often complicates statistical analysis, it is possible we will never be able to use such statistical analysis to conclusively determine whether relatively decentralised approaches to pandemics similar to Covid-19 are everywhere and always superior to more centralised ones.

However, there is a long tradition in social science that argues when the empirical data about a particular set of phenomena, in this case the relationship between national constitutions and the effectiveness of responses to Covid-19, is unclear, it is legitimate to rely more heavily on theory in

charting a course forward (Knight, 1952; Tonsberg & Henderson, 2016). Economic theory informed by Ostrom (1990) strongly suggests that polycentric and democratic governance systems tend, in general, to produce superior socio-economic outcomes (i.e. greater human welfare or happiness) in the long term than do centralised or authoritarian, command and control systems. The perspective on commons of Ostrom (1990) is, therefore, broadly consistent the literature in economics that stresses the superiority of markets over central planning of the economy (Hayek, 1945) and with the literature that argues that the “inclusive” and “chained Leviathan” political institutions” that correspond with the terms “democracy” and “constitutional government” generally produce superior socio-economic outcomes than either authoritarianism or the anarchic absence of any government (North and Weingast, 1989; Acemoglu and Robinson, 2019).

Policy Recommendations

For these theoretical reasons, we argue that policymakers and citizens in the UK and other democratic jurisdictions whose responses to the pandemic have been more centralised than in other democracies should consider how the eight principles described in Table 1 can inform how their nations respond to future pandemics involving infectious diseases. We therefore present policymakers with five key take-home lessons. First, local communities (e.g. elected councils) should be empowered to make social distancing rules that govern access to public spaces. Local rather than national governments should be given authority over whether or not to impose lockdowns and similar measures. Second, if and when national lockdowns are deemed to be necessary, there should be close and continuous parliamentary oversight of all proposed restrictions on individual liberty prior to such impositions being implemented. Third, when local governments’ social distancing regulations must be discussed and approved by elected officials (e.g. local council) rather than simply by municipal civil servants working with a few members of the executive. Fourth, in areas in which local government powers are not unified into a single unit and instead dispersed to different levels (e.g. county and borough councils), power over social distancing and lockdown rules should be vested in the smaller unit of government.

Fifth, national written constitutions should specify where the powers to impose lockdowns and social distancing regulations should be vested and the procedure for implementing them. If implementing this suggestions requires amending an existing national constitution, the amendment process should itself be inclusive and polycentric so that a wide range of citizens of different backgrounds should be involved in drafting and ratifying the changes. Citizens’ assemblies of individual drawn at random from the electorate (Rose, 2007; LeDuc, 2011) and ratifying referenda might, therefore, be employed. It would be a mistake to entrust the writing of the meta-rules governing the power to impose lockdowns to a small group of professional politicians. Similarly, in jurisdictions in which specifying the distribution of powers to make lockdowns would require the creation of a written constitution *de novo*, the composition of this document and ratification should not be entrusted to a

constitutional convention of political insiders who are members of the national parliament and should instead involve a wide range of actors, perhaps through the use of a citizens' assembly.

To conclude, the paper argues that *a more decentralised* approach to the making of lockdown and social distancing rules of the Covid-19 pandemic would have produced superior outcomes for the United Kingdom. In future pandemics involving infectious diseases, local communities should be empowered to manage access to public spaces, with local rather than national governments being given authority over whether or not to impose lockdowns and similar measures. Ostromian theory may also be useful in thinking about how policymakers think about the management of the next phases of the current pandemic. Future research rooted in Ostromian theory should be undertaken.

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Table 1: Comparing Ostromian Derived Guidelines to Actual UK Covid-19 Policy

Guideline Derived from the Work of Ostrom (1990)	Extent to which UK Covid-19 Policy was consistent with this guideline
Clear boundaries of the territory covered a given set of social distancing regulations	UK Covid-19 policy was generally consistent with this guideline. The territories to which rules apply are relatively clear to citizens because the boundaries of the three tiers correspond to familiar local government boundaries and to postcode districts.
Individuals who create the social-distancing rules for each territory must have a deep knowledge of area and local conditions.	UK Covid-19 policy was generally inconsistent with this guideline. Rules, including the three-tier system of classifying local areas, were designed in London by central government officials
The individuals affected by the rules should have a say in their making and in the constitutional question of who gets to make such rules.	UK Covid-19 policy was generally inconsistent with this guideline. Rules have been designed by a small group of ministers, scientific advisors, and senior civil servants in London. During the early phases of the pandemic, there was very limited parliamentary oversight. More recently, MPs have complained about lack of effective and timely parliamentary oversight.
The individuals tasked with enforcing social-distancing rules should be drawn from each local communities.	To a certain extent, UK Covid-19 policy was consistent with this guideline. Police constables and police community support officers (PCSOs) in the UK's 45 regional police forces are recruited from the local territories. There are policies in place to ensure that police forces are demographically representative of local ethnic, racial, and religious makeup. However, the enforcement of Covid-19 regulations has seen tensions between police officers and communities in some London boroughs.

<p>The penalties for violating the rules should be finely graduated and there should be a low-cost system for the resolution of disputes related to them.</p>	<p>To a certain extent, UK Covid-19 policy was consistent with this guideline. Fines for violating social distancing rules are graduated and the threat of imprisonment is a rarely used and only as a last resort. However, the UK lacks a low-cost system in each community for the resolution of disputes about social distancing penalties, as an individual who wishes to appeal a conviction for violating the rules must use the normal criminal appeals process, which is costly in time and money.</p>
<p>Nested governance, with control over social distancing regulations being decentralised to the lowest possible level of government.</p>	<p>UK Covid-19 policy is largely inconsistent with this guideline, notwithstanding devolution to Scotland, Wales, and Northern Ireland. Policies for all of England have been designed in Whitehall and have been imposed on local areas over the objection of local elected officials, such as Manchester mayor Andy Burnham.</p>
<p>Avoidance of blueprint thinking</p>	<p>UK Covid-19 policy is clearly inconsistent with this guideline. Policymakers and their scientific advisers routinely use mechanical engineering analogies to understand how social distancing rules can be used to slow the spread of the virus. For instance, the term “circuit-breaker lockdown”, which involves an analogy with electrical systems, is frequently used.</p>