Individual Liberty in a Pandemic: Government's Power to Restrict Your Freedoms in a Crisis

A Conversation with Randy Barnett

April 23, 2020

Introduction, Tom Giovanetti

TG: My name is Tom Giovanetti. I'm the president of the Institute for Policy Innovation. We are a 33-year-old free-market think tank based in Dallas.

Our topic today is Individual Liberty in a Pandemic. We're delighted to have noted thinker, constitutional author, and constitutional scholar Randy Barnett with us. I also want to make a point of thanking those of you who not only joined us but also chose to make a donation to the organization. We very much appreciate that.

I'm very pleased to introduce Randy Barnett. Randy is the Carmack Waterhouse Professor of Legal Theory at Georgetown University where he teaches constitutional law, contracts, and legal theory.

Randy is the author of a number of excellent books; and—just personally speaking—they've been a tremendous influence on my thinking about the law and the Constitution. And so, I, personally, would recommend that if you're interested in these topics that you avail yourselves of those books.

A few of them are *The Structure of Liberty, Justice & the Rule of Law*, then—my favorite—*Restoring the Lost Constitution, the Presumption of Liberty*. Randy has a book out called *Our Republican Constitution, Securing the Liberty and Sovereignty of We the*

People. And a book that he just released with Josh Blackman, *An Introduction to Constitutional Law, 100 Supreme Court Cases Everyone Should Know*.

So you could just tell from the titles of those books that if you are a lover of liberty and if you believe that the Constitution is our greatest safeguard against tyranny and infringement of liberties, those are your kind of books.

And I think Randy's actually working on a book right now that is directly relevant to the topic we're going to be talking about today. So I'm sure he'll tell us a little more about that in a few minutes.

Randy, today what we want to talk about is the police power of government; and that's a phrase that is new to a lot of people as a result of the events of the last six or seven weeks. Some people have never heard the expression "the police power of the government" before. Some people are a little bit frightened by the idea of the police powers of government.

You see people expressing thoughts on social media about not finding any authorization in the Constitution for these kinds of emergency orders that we're seeing today. I saw someone posted something on Facebook a few weeks ago saying they went through the Bill of Rights, and they didn't see any asterisks next to any of the items in the Bill of Rights. And there are a lot of interesting questions right now about, what is the legal source of authority for the kinds of emergency measures that we're seeing today? What is the distribution of police power between the states and the federal government? How do we judge whether a particular emergency order may have gone too far? Is it possible that some of our individual liberties have actually been violated by some of the emergency orders in certain places? And, then, in general, what is the threat to individual liberty in situations like this, and how do we ensure that once we get ourselves clear of an emergency like the one we're in right now that we're not stuck with long term abrogations or reductions in our individual liberties?

So I think that's an extremely timely topic for today, and I'm thrilled that you were free to join us. So with that, I want to turn over the program to Randy Barnett.

Randy Barnett

RB: Well, thanks for having me Tom. I'm pleased to be here, as always. You only decided to ask me some of the hardest questions one can ask in constitutional law, and then you gave me 20 minutes to address it before we open this thing up for Q&A. So I want to thank you for that.

Before I start, I just want to say one thing about my most recent book with Josh Blackman, *An Introduction To Constitutional Law*, *100 Supreme Court Cases Everyone Should Know*: If you buy that book—and I think Amazon is now selling it for less than $20—you also get access to a series of 63 videos that Josh and I spent two years and $100,000 making, which explains these one hundred Supreme Court cases with graphics and illustrations and excerpts from recordings, both of oral arguments and the Supreme Court justices themselves handing down their own opinions. So it's a very entertaining accessible introduction to constitutional law. When you finish taking this course, which is what it amounts to, watching all these videos and reading the book, you will know more about constitutional law than many graduates of law school know.

Now let's get on to the police power. It's kind of funny that people don't know about the police power. It's no surprise. If you haven't heard about the police power, it's not your fault, really.

The Scope of Police Power Versus Specified Constitutional Rights

Constitutional law in this country used to turn on the police power. That is, every constitutional lawyer started with the police power; they didn't start with rights. What happened is that, basically, sometime after World War II, things got flipped; and we stopped talking about the police power, and we started talking about rights. What's the difference?

The police power is a theory, a concept, of what the powers of—in this case—state governments are. There is some sense in which the federal government has a bit of this as well; but let's just focus on state governments.

So to understand constitutionally what power state governments had, you needed to have a theory of the scope of their powers. The name for that concept was "police power," so you needed a theory of the police power. I'll say more about how that theory developed historically when I'm done with this introduction.

Constitutional rights played almost no role in constitutional law thinking during this time. All the work was being done by what is the true scope of the police power of states and other powers. I mean, we're setting aside, now, the tax power of states, which is a separate power than that of the police power.

What happened is after courts gave up trying to figure out what the limits of the police power were, they essentially defaulted to a position where we're not going to inquire into that. We're going to basically say, "Well it's kind of unlimited; but we're going to qualify it by constitutional rights." That if there are some specific—and they have to be pretty specific under this modern approach—constitutional rights like those you'll find in the first ten amendments, then we'll say, well, the police power has a more limited scope when the police power is being used to violate rights. You don't need to know anything about the police power; you just need to know something about rights.

That's not the way the police power developed, and I—in my books both, *Our Republican Constitution and Restoring the Lost Constitution*—have urged us to move back to the framework in which we first and foremost discuss the scope of the state's police power; and then only secondarily discuss rights.

One of the consequences of flipping to rights is that if you only have a few rights that are being protected because they're the only ones that happen to get put into the Constitution, then that's going to give state governments a lot more power than if you're protecting the full panoply of rights. And the best way to protect the full panoply of rights is to actually have a theory of what the limits of the state police power are in the first place. In other words, you don't have to talk about rights to figure out what the limits of the police power are.

Now, where did the concept of the police power come from? It's a very old concept. You can find evidence of it at the founding of the country. It wasn't called the police power right away. You'll see in the Federalist Papers, Alexander Hamilton, at one point, refers to the police of the states—the *police* of the states. As far as we know, John Marshall is one of the earliest persons—at least in the Supreme Court, he's *the* earliest person to refer to a police power in one of his opinions. So that's after the founding, but still a long time ago.

The reason why federal courts and the Supreme Court didn't talk very much about the police power of the states in Supreme Court opinions is because the principle limits on the police power of the states until the Civil War were state constitutions. State constitutions is what governed the scope of the police power. And state constitutions are also relevant to the situation we face today, as well, when we get to that.

So at least until 1868 or, at least, until the Civil War, there wasn't much need for federal courts to be talking about the police power of the states because there were no federal constraints on them other than, say, the Contracts Clause or a few other provisions which were special provisions.

State judges talked about the scope of the police power, and when they did they were very deferential to legislators in exercising their power.

So, let me just say, for a minute, what the police power is, at least in a general sense; and then, how the situation, with respect to the police power, changed in 1868 with the passage of the Fourteenth Amendment.

So what the police power generally refers to is the power of the state governments to protect the rights of all its people. It’s the power of the state government to protect the rights of all its people.

State of Nature Versus Civil Society

One way to look at this is it's the power that is created in a state government—in *any* government—when you leave the state of nature. You protect your own rights in the

state of nature, but the state of nature is inconvenient because it's difficult to protect one's own rights all by themselves. There's other inconveniences about the state of nature as well. You lack an impartial tribunal justice, and you also lack known and standing laws.

So there are these well-known defects that John Locke talked about with respect to the state of nature. You enter into civil society; and in civil society, the government then gets the power to protect your rights on your behalf. And that's the most general way of describing the police power.

So the police power would include the power to criminalize rights violating conduct in the form of murder, rape, armed robbery, burglary, theft, statutes.

I was formerly a criminal prosecutor in Chicago at the Cook County State's Attorney's Office, and I became a state court prosecutor because those were the laws that I wanted to prosecute, laws that protected the rights of all of us.

Tort law, personal injury law, is another example of the police powers protecting our rights, only not necessarily by statute, sometimes by common law, judge-made law.

And these are all types of regimes to get types of statutes that protect our rights by punishing or imposing damage awards on people after our rights have been violated. So after you've been robbed then, you can punish somebody for doing it. After you've been in an automobile accident that somebody else caused, you can get damages afterwards.

Regulation

But the police power is not limited to punishing or exacting remedies after something has happened; it also includes measures that would prevent rights violations from happening in the first place. And these are measures that historically have gone by the name of *regulation*. Regulation is a rule of law that tells you how to do something in advance of doing it so as to reduce the chances that when you do that, you're going to harm your fellow citizens.

And, so, for example, we might have a building code in which, rather than waiting for a building to be improperly built and then somebody falls off a balcony with a rail that was

built too low and sues in tort, rather than doing that, you have a building code that specifies the minimum height of balcony railings to try to prevent somebody from falling off a negligently built balcony by preventing the negligently built balcony in the first place.

So this is what police power regulations do.

You can see that police power regulations regulate, in a sense, all of our liberty, so that our exercise of liberty does not harm the like liberty of others, of our fellow citizens, because we're all equal with respect to the fact that we all have liberty rights.

You can see that it's impossible to define the exact scope of the police power because it's impossible to define the exact scope of our liberty.

Every time we engage in activity that threatens the rights of others, there's the potential for a possible regulation of that activity using the state's police power.

So that's a more general concept of what the police power is. As I said there was no really well-worked-out theory of the police power up until 1868 because this was mostly handled as a matter of state constitutional law.

Change with the Fourteenth Amendment

But what happened in 1868 was very important because what happened was the federal government, both the courts and Congress, gained a new federal enumerated power over the states, and the second clause of Section 1 of the Fourteenth Amendment talks about this power and the restrictions that it places on state lawmaking. And what it says is that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Now some of you who know constitutional law will know that this particular provision was eliminated as a practical matter from the Constitution in an 1873 case five years after it was enacted in the Fourteenth Amendment, and it no longer actually operates in court.

But that took a long time for that to happen. I mean, it was 1873, but what the Fourteenth Amendment did was it changed the relationship of the federal government to the states. Now the federal government had some power to protect the privileges or immunities of citizens of a state from actions by their own state, a power the federal government lacked.

What this meant was whether the federal courts were enforcing the Privileges or Immunities Clause or the Due Process Clause in the Fourteenth Amendment that says "No person shall be denied life, liberty, or property without due process of law," or the Equal Protection Clause which says, "nor shall be anyone be denied the equal protection of the law," regardless of which of these three provisions the courts or Congress were enforcing, it required them to figure out, well, what was an infringement or an abridgment of a privilege or immunity of citizens the United States? You had to figure out what the privilege and immunities of the citizens of the United States were. That is, itself, a difficult question; or, at least, it is a separate question.

Let's just say for the sake of argument that it's liberty generally, the right to do what you will with what rightfully belongs to you. Let's just say that summarizes, at least, the core of the privileges and immunities of the citizens of the United States; and you can add first eight amendments to the Constitution as well.

If those are the privileges or immunities, you still need to ask, what constitutes an abridgment of them? It's not enough to know what the rights are. You have to know, well, when have the rights been violated?

The police power was the answer to that question. And that is we need a theory of what governments may properly do in order to protect our rights; and if they're acting properly to protect our rights, then they're not violating our rights. So that requires a theory of what governments are permitted to do, a police power theory. The very year that the Fourteenth amendment was enacted in 1868, Thomas Cooley, who was the long-standing dean of the Michigan law school and long-standing chief justice of the Michigan Supreme Court at the same time, published a treatise called—it has a very long name—but the shorthand name is "Constitutional Limitations." And it was a book about the

constitutional limitations on state legislative power. It was, in a sense, a theory of the police power.

And from that year forward, whether they were enforcing the Privilege and Immunities Clause, which they stopped doing in 1873 or the Due Process Clause or the Equal Protection Clause, which they expanded to make up for the loss of the privileges or immunities clause, courts developed a theory of the police power that basically tried to define whether the government was acting within its power to protect the health, safety, and welfare of its citizens, of its people. And sometimes the formulation was health, safety, welfare, and morals or public morals of the citizens. Sometimes *public morals* was added to that as well. We don't have to be concerned with that today, the addition of public morals. We're more concerned with the health and safety part.

So it quite it's quite clear, however, even from that general formulation, that laws that regulate our conduct in advance of our harming others to protect the health and safety of the general public, of our fellow citizens, are really what the police power is about. And they're really why you form a government in the first place, to better protect our rights. That, of course, leads to the question, what is the limit of those powers? Are there any limits of those powers? How do we know when those limits have been exceeded? These are difficult questions.

But at this point, Tom, I'll just ask you if you have any questions about what I've just said so far before we move on to any others.

Q&A

TG: I think that's terrific.

So let me ask you this: Apart from the Fourteenth amendment, you would look at the Ninth and Tenth Amendments, and you would say that the federal government has almost no power to issue public safety orders and things like that, that almost all those powers would be among those that were reserved to the state.

But I think one of the implications of what you just said is that because of the Fourteenth amendment, the federal government does actually have an active power and an active

obligation to issue protective orders and things like that, regardless of whether the states do or not. Is that correct?

RB: It's true that Congress does not have a plenary, general police power under the original meaning of the Constitution. That's not to say that under misinterpretations of the Constitution, we haven't arrived into an era in which Congress does claim something like a police power, even though they shouldn't have one. We have to distinguish between existing constitutional law and what the original meaning of the Constitution is. It's not the same thing.

Under the original meaning the Constitution, if that's what we're talking about, and the text of the Constitution, the federal government has an obligation to prevent state governments from violating our rights, our privileges or immunities. It also has the obligation to ensure that state governments provide each of us with a judicial process called the due process of law before any of us can be put to death, imprisoned, or fined. Life, liberty, or property.

And, finally, it has the obligation to see that states give us the protection of the laws. It's an affirmative duty on the part of states to protect us. That's why we established government: in order to avoid the perils of the state of nature. So they have an affirmative duty, and the federal government has a responsibility there as well.

As you said, I'm working on a new book. It's called *The Original Meaning of the Fourteenth Amendment;* and, in there, my co-author and I argue that that's not the kind of duty that's something the federal courts are very good at enforcing, but it is something that Congress can step in and enforce by creating statutory remedies where states fail to give them. But that's a separate question; we're not really dealing with that here.

TG: Sure. I don't want to gloss past the little nugget that you dropped that current constitutional law and the original meaning of the Constitution are two separate things.

RB: Right. Well, if you if you go back in terms of the books that I've written, this defines the subject matter of my books. *Restoring the Lost Constitution*, *the Presumption of Liberty* is about how you should interpret a written Constitution, and the answer is you should

interpret it according to its original meaning. And then it tries to answer, what is the original meaning of various clauses in the Constitution? It's about what the Constitution means.

My book, *Our Republican Constitution*, is about the proper role of judges in a constitutional republic. Assuming we know what a constitution means, what role do judges have in enforcing that Constitution?

And the most recent book, *An Introduction to Constitutional Law, 100 Supreme Court Cases Everyone Should Know,* is about what are the current doctrines that the Supreme Court is following? What has the Supreme Court done—and oftentimes failed to do—with respect to enforcing the original meaning of the Constitution? And we teach that by way of a narrative that starts at the beginning and works its way forward. That's a book only about what the Supreme Court has done. That's what we call constitutional law, and that's what you study in law school. Constitutional law is what the Supreme Court has done with respect to the Constitution. It isn't about the original meaning of the Constitution itself.

TG: OK, so when we get down to the current day where we have orders being issued by the federal government, by governors at the state level, even by county judges at the county level, and even by mayors at the local level that that—clearly, there's a tension between those orders and our normal expectations of individual liberties. Those powers are all a result of the development of common law over time and constitutional law over time, right?

RB: Let's just focus on state laws for a moment because the principal responsibility for health emergencies of the kind we're having are state's because the states have this police power. They are given the power to address problems of the kind that we currently are facing. And we can talk about what limits there are on that power. Sooner rather than later we should talk about that.

So the federal government does not really have that power. Let's put the federal government out of the picture for a moment. You then mentioned governors doing a bunch of stuff. Well, whether a governor has the authority to do what a governor is doing

is going to depend on the state constitution; and it's going to depend on whatever statutory authority the state legislature has given to the governor of that state. And that varies from state to state. I'm not an expert on state constitutional law; but early on in this crisis, I was reading different treatments that I saw—I don't remember what they were—about how the authorizations that governors have from their states to act in cases of emergency vary from state to state.

So to ask whether something is particularly legal in your state—you have to begin with both your state constitution and the state statutory regime that's been set up by the state legislature to delegate powers to the government. That's a question that in constitutional law we call separation of powers. And it's a separation-of-powers question under state constitutions.

Now, let's assume that the governor is acting within powers that have been appropriately delegated to the governor by the legislature. Let's assume that. Because, generally speaking, I think in most of these cases that's true; so it's not a big assumption. It's not a heroic assumption. But state AGs (attorneys general) should be looking into this, frankly, to make sure that it's true. But let's assume they're operating within their powers. What are the limits on those powers?

This is the hard question; and, in fact, it's so hard, this is one of the reasons why some people say we abandoned police power jurisprudence altogether because it was too hard to answer these questions. I don't think that's the real reason we abandoned it, but that's what's said. But I don't deny it's a hard question. And here's why: It's a judgment call.

Facing a threat of the kind we now have—we have a disease which has an uncertain pathology. We know more about it now than we did six weeks ago; but at the time this thing was going getting going, at least in this country, we saw that there was a real danger from this disease in other countries, so this wasn't a completely imaginary problem. There was evidence in front of our eyes that it was something real, but we didn't know—and we still don't know—that much about how its communicated. We're still trying to get a handle on how deadly it is because we need to know what the baseline is. We need to know how many people have been infected before we know how many deaths relate to

how many people have been infected. We don't know that yet, but we're going to find that out.

So the problem we have is that before we have a lot of answers to these questions, governors and government are going to take some steps—and we sort of expect them to—to try to ameliorate these problems, as long as it's a demonstrable problem. And I think that it given the experience that we saw in other countries, it was clearly a demonstrable problem that needed to be handled somehow, or *might* need to be handled somehow.

So they took initial steps. Let's say that. And these steps sometimes were precautionary, they were advisory, then they became ramped up into being something else. They took the steps that they took.

What does that mean? Well, here's what ideally should be the case, and then how we translate this into practice: Ideally, every step they take ought to be based on the best factual assessment of the nature of the problem and the means that are best tailored to address that problem. I mean, this is what police power jurisprudence is about. It's about the end, and it's about means to the end. If the end is health and safety, what's the appropriate means?

Well, the way you adjust means to ends, hopefully, is not on the basis of superstition. It's not on the basis of what you would like it to be or if you have some ulterior agenda or motive to do things. It's got to be on the basis of evidence or information.

In the early stages of a situation like this, the evidence is scarce, and the evidence is unreliable. So in the beginning, governments take actions; and one of the good things about having 50 state governments is they might take 50 different kinds of actions, and we can judge by the varying results that they're getting, really, which measures actually have the effect that we're hoping they will have, that governors hope they will have, and which measures do not.

Then once you are into the emergency, well enough along that you can start generating information like this, at that point, it's perfectly appropriate to start second-guessing the

decisions that governors and government have made up until this time. Not to condemn them as being somehow bad people; but to say, "Hey look. We understand. Measures had to be taken. These measures made sense given our lack of information; but now that we have more information, these measures may not make sense anymore."

And the burden ought to be, in some sense, on the government to show—not necessarily proof beyond a reasonable doubt that these measures make sense—but they actually are being implemented on the basis of the best available facts at their command; and they're not just being done out of superstition or to meet some kind of fear-based political demands of the kind that you see on Twitter and elsewhere.

So, at some point, when the government is placing us all under house arrest—as the Attorney General analogized this to—it's appropriate for us to ask, what is the health and safety justification for this? Tell us what it is. And then tell us why this means is an appropriate one given the cost in liberty and rights that it imposes on all of us.

So, I want to make a general theoretical point here: We are accustomed—modern-day Americans, thinking about the Constitution—are accustomed to thinking of rights as trump cards, that if you have a right, then there's nothing the government can do with respect to that right. We think about that in terms of our first amendment rights and other things. That's not historically how rights were dealt with.

We all had pre-existing rights. These rights were very general, and they were very broad and sweeping. This is what the 19th amendment tells us, "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." And the existence of these rights means that when government is regulating to protect our rights, it has to have a good-faith factual basis for what it's doing.

So it does not mean they can't do anything because in the course of doing things that would look like they might infringe upon our rights, they might be trying to protect the rights of others.

The question is, have they gone too far in protecting our rights? It's the pre-existence of our rights that puts the burden on them to justify what they're doing as based on a factual record and a means to an end. And, then, at some point—this doesn't usually happen initially—but, at some point, the judicial branch needs to get involved when people bring lawsuits and challenges.

When somebody challenges, “Look, I'm subject to the stay-at-home order,” or “I am not being allowed to get a particular medical procedure because of the shutdown of the hospitals,” whatever it is, when they go to a court, and they sue, let's say, and say, "Look, this policy has to stop. This is violating my liberty,” then the court needs to turn to the government and say, "OK, fine. Tell me what your basis was for what you're doing and how the means you've adopted are tailored to this end and how other means that would have allowed the liberty to go on are not suitable.”

And you can give that government official the benefit of the doubt or not give the benefit of the doubt; but, at least, you should ask whether what they're doing is evidence based.

And if I see regulations of the kind that I saw on social media in Michigan, where you can go to a Home Depot and you can buy a lot of stuff, but you can't buy seeds—vegetable seeds—for your gardens because that section is roped off, I have a hard time understanding how that regulation marries up or fits the end of protecting public safety.

The only thing that I can imagine they might say is that, "Well, if there are fewer things to buy in the store, fewer people are going to go out and try to buy things at the stores.” But that's a very attenuated public safety rationale that doesn't really, in my view, justify saying that you can go to the store, and you could shop in aisle number 10, but you can't shop in aisle number 14. That doesn't make any sense to me at all.

And when things really don't make sense, after you ask respectfully for the justifications for them, that makes them unconstitutional because that means the government has exceeded its proper police power when it does those things.

And one last thing I want to say: that assumes the good faith of the government, that they're acting in good faith to protect our health and safety, but they might be mistaken. They might be short-sighted. They might be acting out of prejudice, whatever.

There are other times in which the government is not acting in good faith. They're actually using an emergency as an excuse or justification to adopt policies they might not otherwise be able to adopt, like, for example, closing gun stores.

I see no public health reasons why gun stores that maintain the proper social distancing—like liquor stores that maintain the proper social distancing—cannot be kept open so that people can exercise their right to keep and bear arms by going to a gun store.

But as soon as the government starts distinguishing between essential businesses and non-essential businesses and then decides, "Oh, guess what! Gun stores are not essential!" (although in some states they are deemed essential), then I suspect that the government is really exercising their police power as a pretext for actually restricting rights that they would like to see restricted.

And so we have to be on the lookout for pretext, and the only real way to figure out whether pretext exists is to ask the government to explain to us how do the means they've adopted relate to the end they say they're pursuing; and then we, independently, judge whether think there's an adequate fit there.

Discussion with Moderator

TG: You know, your example of the gun stores is a great one. Another example that people have seen is that they can take their dog in to be groomed because the pet stores are open, but they can't go in and get a haircut themselves, which—there doesn't seem to be much of a public-health differentiation between those two things.

RB: In my view, an appropriate use of the police power, an appropriate theory of the police power—we're entitled to ask those questions; and, at some point, we're entitled to get answers to those questions as a matter of law, in a courtroom.

Now let me repeat what I said earlier: Under modern constitutional law, there really is no theory of the police power. Police power is essentially unlimited. Courts gave up trying to come up with a theory of what the appropriate boundaries of the police power are; and, instead, they flipped over to constitutional rights as their main way of limiting the scope of state power.

So unless you can formulate your liberty in the form of a right that's protected by the Bill of Rights—like freedom of speech, press, assembly, or to free exercise of religion—you're kind of out of luck. And there is no enumerated right to get a haircut. There is no enumerated right to do any of those ordinary things that we do. Therefore, under current approaches that the courts will take, you're not going to get a hearing from a judge on that because there's no right of yours that a judge will deem to be fundamental that has been violated.

And, so, essentially, it gives state legislatures and governors, in this case, a carte blanche, if they're not violating an enumerated right.

But that's the regime in which we normally live. That's not a regime invented for this situation. This is the standard, normal approach to constitutional law that we all live under when we're not in an emergency situation.

TG: So there's no enumerated right to get a haircut, but there is an enumerated right to free exercise of religion. And, so, that brings up another one of examples we have seen where, in some states, a church service that's almost like a drive-in movie kind of church service has also been deemed to be against the emergency orders; whereas, it's not clear that there's any public health imperative there.

RB: Right. I mean, you're staying in your own car. By the way, cars are great for social distancing. Aren't we glad somebody invented cars and that millions of us are capable of driving them? I mean, in a situation like this, you wouldn't be able to invent that technology overnight. But we already have it, and it hasn't been outlawed yet!

So at any rate, those restrictions have already been challenged and challenged successfully; and settlements have been reached. In fact, I think yesterday a settlement

was reached in the more prominent of these cases that came out of Kentucky. I read the settlement order. It was kind of complicated as to all the duties everybody has to adhere to to try to keep everybody safe. But the idea was they can still have their drive-in church. They can still have their drive-in service.

But the only reason why they could get in front of a judge and get some kind of challenge going as to what the fit is between the problem and the solution is because there was an enumerated right at stake, the free exercise of religion.

TG: So it's no surprise that people who have not studied constitutional law are troubled by some of these things; but, I think, your point is this is not a tension between just illegitimate use of government and our rights. This is a tension between government trying to protect some of our rights at the expense of others of our rights.

RB: Right. Although in my view, if somebody does something that threatens our rights in a particular way, then they don't have a right to do that. So it's not like we give up some of our rights to protect others. We actually don't have the right to act in a way that unduly threatens harm to our fellow citizens. It's not a right we actually possess; therefore, it's not a restriction on our rights when we are stopped from doing that.

So let's assume that operating under the influence of alcohol creates a very enhanced risk of harm to other motorists and pedestrians. If we make that factual assumption, then we don't have a right to engage in that activity in the first place; it is not a restriction on our rights to be prevented from driving while under the influence of alcohol.

TG: Another source I think of some of the confusion and tension here goes back to your analysis that this is one of the weaknesses of an enumerated rights framework, and the problem has been that people look at the Bill of Rights, and they think that all of those enumerated rights are absolute somehow, as if there are no exceptions to any of those. And, of course, we know that that's not true. There are exceptions to all of our enumerated rights.

RB: That's because in my view—and, you know, my first book was *The Structure of Liberty, Justice* & *the Rule of Law*, in which I defend natural rights, and I say what those natural rights are: the right of private property, freedom of contract, the right of self-defense, the

right to have compensation. These are all right that we have, but no rights in that sense are absolute. All rights are relative to the rights of others. Our rights end where the next person's rights begin.

And so the challenge is always to figure out, what are the boundaries of our rights?

There are two kinds of liberty that were historically discussed in the state of nature, that is before you have government: there's the Hobbesian concept of liberty, which was developed by Thomas Hobbes in the book *Leviathan*; and there's the Lockean kind of liberty that Locke explained in *Two Treatises of Government.*

The Hobbesian state of liberty, that is, the liberty you have without government is the liberty to do anything you will. That's the Hobbesian state of liberty.

And if that's what you think liberty is—by the way, the right to do anything you will with whatever you want, including with other people's bodies, that was the Hobbesian state of liberty.

So what Hobbes said is what we need government to do—we leave the state of nature; we need government to restrict our liberties because if everybody tried to act on the liberty of doing anything they will, even including using other people's bodies and property, then life would be nasty, solitary, brutish, and short. And we leave the state of nature so the government restricts our liberties so that we can establish some kind of peace with each other. That's the Hobbesian concept of liberty.

Then there's a Lockean concept of liberty. The Lockean concept of liberty is that even in a state of nature, our liberty is bounded by the like liberties of other people.

The concept of liberty we have in the state of nature is the liberty to do anything we want with what rightfully belongs to us. That's a bounded conception of liberty. That's the Lockean conception of liberty.

And, then, you enter into a civil society not to restrict your liberty, but to better protect your liberty, to protect your liberties in ways that you yourself, living by yourself, are

generally not capable of doing. In other words, you want to make yourself better off by entering into a civil society than you were in a state of nature.

And how do you do that? You do that by having a civil society in which there are known and standing laws so you know what the law expects of you. That there are independent tribunals of justice to adjudicate disputes, who are neutral, not people who are just acting out of their own self-interests. And there's an enforcement power, or an executive power, to protect your rights better than we can protect them for ourselves. That's why we enter into civil society.

But, then, the measure of whether that government that's founded for that reason is warranted or not, or justified or not, is, are they actually protecting the rights we had to start with better than we can protect them ourselves—in which case we're better off; or, are they themselves violating our rights—in which case we're worse off.

Now, to give away the punchline here, the founders were Lockeans; they were not Hobbseans. And the Lockean theory of government was put in the Declaration of Independence in two key sentences; and I will say them:

Sentence number one: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these which are Life, Liberty and the pursuit of Happiness." That's a statement of natural rights.

Sentence number two states the theory of government: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed…" "To secure these rights" is the police power. The police power is the power necessary to secure these rights for which governments are instituted among men deriving their just powers from the consent of the governed.

TG: That's terrific, and I've never heard it expressed that way.

Randy, in summary, the point here is that the kinds of executive orders that we're seeing being used here to protect public health are not in and of themselves illegitimate or

totalitarian, though in some details and in some specifics, they may go too far in violating some of our rights in order to protect other of our rights.

RB: Well, I would say they quite likely are starting to border on going too far in restricting the exercise of our liberty and, therefore, violating our rights. It's the going too far that makes it a rights violation.

Simply because we can't do whatever we want doesn't mean our rights are being violated. I can't get up now and walk over to my neighbor's house and start watching TV there. I can't do whatever I want. There are a lot of things I can't do.

The liberty that the Constitution protects is a bounded liberty. But the key is to know what those boundaries are and to and to stick with them and to hold government to them as. Well government can't cross those boundaries any more than our fellow citizens can.

Audience Q & A

TG: Very good. I'm going to start taking some questions. And the first question is, "What about churches who exercise proper social distancing for worship or other religious services?"

I guess the question there—we know the churches were major sources of outbreaks in several places; and, as a regular attender of religious services, I recognized the danger there, and I've been quite content to participate in my church's services sitting on the couch at home on television.

But, do you think it's possible that religious services could actually be conducted while respecting social distancing and things like that? Have you seen any instances where you think that the executive orders have gone too far on religious services?

RB: I'm just not in a position to answer this or any other technical question about safety measures. I mean, I have my own opinions about this stuff; but they're opinions as a citizen. They're not opinions as a constitutional law professor talking about constitutional theory.

I thought that the drive-in church services were like perfect because everybody comes in their own self-contained capsule. So what's the justification for restricting them?

Before we know whether this regulation is unreasonable or not, we need to give the government the opportunity to tell us why they're doing it.

I mean, if they're just saying, "You can't buy vegetable seeds, and don't bother me with why," then, of course, that should be unconstitutional. But before we reach that conclusion, we have to ask them why. So let's ask them why. What's wrong with drive-in services?

Well, I don't remember all the litany of things they said, but one of the things they said was, "Well, people are going to want to get out of cars and use the bathroom. They won't stay in their cars. They're going to go to their cars and use the bathroom. When they get out of their cars to use bathroom, that might be a problem."

Yeah, well, the consent decree or the settlement that was signed in the lawsuit in Kentucky basically described the procedures by which people—if they had to leave the car—would leave the car and go into the church to use the bathroom. And it would it be social distancing of the kind we see in the stores.

I don't see any reason why this can't be done. But, then again, that's not my expertise.

If it were a case I was involved with as a lawyer, I would have to familiarize myself—as I do when I'm involved in a lawsuit—with the facts of my client's situation, and then I would have to familiarize myself with what the government's justification was; and then I would bring my own critical faculties to bear to see if what they're saying makes sense. They have to make sense.

What people are objecting to, and I think why people are protesting—there are lots of reasons why people protest. I'm not giving all the reasons—But one of the things that causes people to protest is if they think they are being subjected to arbitrary law.

And the article that I asked you to distribute to the group was an article that I wrote last year called "No Arbitrary Power: An Originalist Theory of the Due Process of Law." It's

arbitrary power that people object to. And what is the definition of *arbitrary*? "Do it because I told you to. Do it because I say so." That's arbitrary.

What's the opposite of arbitrary? "Do it for the following reasons." That's reasonable; that's rational. That's reasonable; that's not arbitrary. Government cannot act arbitrarily. State legislatures cannot act arbitrarily.

The police power is not a power to act arbitrarily. They must still be acting according to reason. And we as citizens and the ultimate sovereigns of this country are entitled to know what their reasons are, and then we're entitled—if we wish to—to challenge that and get a ruling from an impartial magistrate known as a judge as to whether those reasons are actually the real reasons and whether they're adequate.

TG: This is a question from an audience member: "One, does the government have the right to bankrupt our society; and, two, do we need pandemic legislation to restrict such efforts?"

RB: I think they clearly do not have the right to bankrupt our society; and putting everybody under house arrest is a very good way of doing that.

I think that if the threat were of the kind that many of our fellow citizens believe it to be—and just go on Twitter, and they'll tell you about it—if you believe that the threat is what they believe the threat to be, you might, in your own mind, think it was more justified to make everybody stay at home than you do.

And if you disagree with that, it may very well be because you don't share your fellow citizens' view as to how serious a threat this virus is or how much risk everybody runs if people are allowed to go outside their homes.

And I don't want to get into in this podcast to what I think. I think it's pretty obvious I'm a little more skeptical about what the true scope of this disease is. But that's really what's going to separate us from our fellow citizens who are on the other side of this question; and, that is, they view—and my colleagues, my law professor colleagues' view—this as some terrible mortal threat like in a movie.

And other people who think that these measures are not warranted, don't view this threat that way. I don't think they deny this as a serious matter, but they think there are a lot of things that are serious matters; and another serious matter is people not being able to get routine health care anymore, and people not being able to earn a living and feed their families, and people being confined in homes with spouses who may abuse them, and mental health problems that people face.

These are all problems that are created by this policy, and you have to compare that with the threat that is supposedly being addressed. And if you don't think the threat is what our fellow citizens think the threat is, you're going to come out a different conclusion than they do.

TG: Randy, related to that: When the federal government exerts its police power in a situation like this and tells a business that it's forced to shut down, could that be seen as a taking?

RB: Under takings law, it's not a taking if it's a legitimate exercise of the police power.

So, again, you don't have the right to use your property in a way that will harm the rights of others. So it's not a taking to stop you from doing that, in principle.

A characteristic taking is—suppose that there is a benefit that everybody is going to gain by means of taking your property and using it for the benefit of everybody else. Now you're being singled out to pay a price that everybody else is going to get the benefit of. If that is what the situation is, then you're entitled to just compensation because you shouldn't have to bear the burden that everybody else benefits from.

But this is more of an imposition that's being imposed on everybody, not just on some people. Although it has a differential cost. Some people are a lot better off than others in this situation

TG: Sure. We have an audience question: "It appears that states are going to do reopen things at different times. How does the Constitution address if one person from one state, let's just say from Texas, goes into Oklahoma for a service that's not legal in the state of Texas; and then comes back to Texas, therefore, possibly endangering their fellow

citizens in Texas? How do we deal with people moving from state to state when there are different laws in each state about which types of businesses are open?"

RB: Right. It's a good question, and it's a hard question. First of all, the federal government actually does have power to regulate interstate commerce. That is a power they really have. It says, "Congress shall have power to regulate commerce among the several states."

Commerce is the buying, selling, trading, and movement of people and goods from one place to another. That's what commerce consists of.

And, so, when somebody's going from one state to another, Congress does have the power to regulate that. And within their powers, you could say that they have a police power. That is, when an activity is within federal jurisdiction and not state jurisdiction, like the power to regulate interstate commerce, then, essentially, Congress has what functionally amounts to a power to regulate that particular activity in light of the health and safety of the people. So there's kind of like a mini, special police power within any of the enumerated powers that Congress has.

So Congress could pass a law that regulates this.

Now, I don't know that they have. So then the issue is what power the President has to, on his own, have an executive order to do something about that, and I would say I think the President needs to be authorized by Congress before he is allowed to engage in a regulation like this.

Now the harder question is, what can states do with respect to citizens of their state going to another state and coming back? Citizens of another state coming into their state? What can a state do?

Well, we have the privileges and immunities clause of Article 4 which essentially establishes a right to travel from one state to another. So, as American citizens, we have a right to travel from one state to another and to be treated equally when we get to the state to the other citizens who are there. So we start off with a right to travel.

That right to travel, like all our other rights, going back to the beginning, can be reasonably regulated, but they must be reasonable regulations. So I would say that would not amount to a ban. I mean this is just my own opinion now. I've given you the framework. Now I'm giving you an opinion within the framework, but you could disagree with my opinion.

That would not include a travel ban from one state to another. It could include, you know, inspections of people like you would inspect produce that goes from one state to another to ensure that the produce, when it arrives, is healthy. You might have a state inspection regime, as long as that is not interfering essentially with the free flow of commerce that goes in between one state and another.

So it's not an easy question; but, again, we're talking about risks here; and we're not talking about certainties.

TG: We have another audience question. "Earlier in the country's history, we had a lot of moral laws, such as mandatory church attendance. What are the ramifications of moral laws on police powers?"

RB: This is a hard question. It would take too long for me to fully answer it. Let me say that the morals prong of the police power is the most controversial and difficult prong to handle. I've written a lot about this. I don't want to go too far into this because it takes us too far away from what we're talking about.

But there's health, safety, and morals. Is it private morals, morals behind closed doors, public morals, moral conduct that happens in public spaces like parks and alleyways and streets that government can control? There's a lot of debate about the scope of this.

It's not exactly the case that morals legislation was all that prevalent at the actual founding. There was some, particularly in New England where they had a Puritan heritage. You had a lot more blue laws and morality laws in New England that you didn't have uniformly across the country.

Where we started to get an expansion of the police power to include morals happened in what's called the Second Great Awakening, which happened in the 1820s and 1830s,

which was a religious revival that swept through the country after the founding, and some people think it was a reaction to the more deistic and perhaps less religious attitude of the founders themselves.

And it was during that period that there became a great campaign waged against two practices: alcohol and state lotteries—which is a form of gambling. These were lotteries run by state governments themselves. And so there was a huge moral movement, a very, very powerful political movement, against alcohol in the form of temperance and against lotteries.

And as usually happens when there is a major, major social movement, public movement, government eventually yields to this and they start passing laws.

And, then, eventually courts yield to this because judges are just human beings, and they are they exist in the same world the rest of us live in. But, initially, judges resisted this. They resisted it. But, eventually, I think due to the overwhelming political popularity of banning alcohol in particular localities—it didn't get banned everywhere—and lottery tickets, they actually bent and manipulated the police power doctrine to uphold these doctrines.

That was the beginning, in some sense, of the decline of the police power because it was those precedents that later on progressives in the 1880s, 90s, and into the twentieth century used, cited, as examples of why the police power was much broader then other people were then claiming. They'd say, "Oh, no. Look at those cases from the 1820s and 1830s. Look how broad it was!" So progressives cited those cases; and, so, that those cases had a tendency to undermine the approach I was describing at the beginning. But I apologize for having to give so truncated an answer because it's a complicated question.

TG: Next audience question. "My question is about motivated reasoning. People think Covid is a catastrophe if they like Nancy Pelosi; and they think it's just a little flu if they like Donald Trump. To what extent do you think current judicial procedures are insulated from that motivated reasoning? Does your general approach to the role of the judiciary

and requiring evidence for police power measures depend on a re-evaluation of the entire constitutional order, or is it a proper approach that we could implement now by challenging things in the courts?"

RB: Well, look, of course there's motivated reasoning. Motivated reasoning is always the reasoning that our opponents have, never us. And confirmation bias is also something that is a phenomenon that only our opponents are subjected; it's something that we are never subjected to. I, myself, have found that this pandemic has confirmed all of my priors.

(No, I'm just kidding! Some of my priors have actually been changing in the last year or two, anyway, before with this pandemic hit.)

It's a great question. Here's what I think: The change that we would have to make from current practice—let me just say what law is now. The law is now that even when restricting a liberty, government must have a rational basis for doing so. That is the law. The measures they adopt must be reasonably related to a legitimate state end. That is the official standard that they apply.

I think that standard can be tightened up a little bit, but let me just take that standard as the way it is.

The problem with that standard—"a legitimate state end" is a little too vague for me. I want to have something more specific than "legitimate state end" because what I think is legitimate can be different from what you think is legitimate based on our motivated reasoning, so that's a bad standard. But let's just take it for what it is.

The problem is not as much that. The problem is that the way they answer the question under current law as to whether something is rationally related to a legitimate state end is by imagining a possible reason why it *might* be rationally related to a legitimate state end.

I this is what I have called in my writings "the conceivable basis test." It's called "the rational basis test" in law; but it's actually the conceivable basis test because all the government has to do to satisfy its requirement is to identify a *conceivable* reason why it *might* have done what it did, not that it actually *had* that reason and did it. And if the

government lawyers can't come up with one, the duty is on the judge to come up with one. If the judge can imagine one for the government lawyers.

Well, that's a standard that no challenger can ever meet. That's a standard that is always going to be satisfied by the government.

So that's the problem.

What I would argue needs to be changed is that government needs to actually identify, when challenged, and they go into court applying something like a rational basis test, government needs to say, "Here is why we're doing it, and here is why we did it." Which means they have to sort of identify why they did it when they did it, not later on in court when they have to come up with an explanation. "Oh, yeah, well, yeah. It could have had this problem." No, no. "Here's why we did it, and I can prove this is why we did it. Because we had these hearings, we took this evidence, we based our opinion on this evidence."

Now a lot of that might be bullshit, and oftentimes these legislative hearings are worthless. But it's better than nothing. It locks them into something.

And then courts can evaluate what has been put before them and say, first of all, does what they say makes sense? And many of these regulations do not seem to. And the duty is on the judges to ask that question, "Does it make sense?"

And, secondly, is there reason to believe that this isn't the reason why they're doing it? Is there reason for us to be suspicious? And there might be reason for us to be suspicious if, for example, the hardship is falling unduly on people who are out of power. If the hardship is falling unduly on people who are minorities. Or, if the hardship is falling unduly on people who want to exercise constitutional rights that are unpopular like the right to keep and bear arms, in some circles. Those all might give reasons for skepticism. And then the judge might be a little more cautious about accepting government's rationale.

But that's the change to our constitutional order that I think needs to be made. In my book, *Restoring the Lost Constitution*, I argue in favor of presumption of liberty in which the burden is on the government to meet the standard. I still favor that. But it would go a long way, even if the burden is on the challenger and not on the government to prove its case, that at least there's a burden of production on the government to actually identify its reasons for why it's doing it, the evidence it relied on; and, at that point, the courts could give that the benefit of the doubt. It could then be rebutted by the by the challenging party because at least there's something to be given the benefit of the doubt. It's not an arbitrary decision.

TG: OK, we have another audience question. "I'm concerned about the federal government's police powers under The Defense Production Act and The National Emergency Act. Do those acts actually suspend the Constitution in terms of things like just compensation? I've heard reports of medical supplies being commandeered."

RB: Right. I don't know enough about this to have an opinion about it. This goes to another phenomenon. We were just discussing motivated reasoning. There's another phenomenon that goes along with motivated reasoning these days. It's called "Twitter expertise," that within a day of whatever stuff has hit the fan, we all become epidemiologists, and we all know about what flattening the curve is. We're all experts on the original meaning of high crimes and misdemeanors. We just become instant experts. And, unfortunately, I believe, as a scholar, I need to know something about what I'm talking about before I give an opinion on it.

I know what The Defense Production Act is, and I know the ways in which it has been used in some circumstances; but I just don't know enough about it to know A, whether the act itself is really constitutional. It's been held to be constitutional. And B, whether it's being used in a constitutionally proper way. I just don't know.

TG: Fair enough. Randy, we have another audience question. "Is it possible to delineate the boundaries of the police power of the state in light of the inevitable changes in society—technological changes, changes in moral trends, economic trends? You referenced the

Declaration of Independence and how ‘to secure these rights, governments are instituted at the consent of the people.’ Perhaps, over time, that consent changes.”

RB: I understand the question. It's a good question. I want to take the second part first about the Declaration. I have a chapter about the Declaration in my book, *Our Republican Constitution*, which addresses this. I don't believe the “deriving their just powers from the consent of the governed” properly interpreted overrides the “to secure these rights, governments are instituted among men.”

In other words, I think first come rights, then comes government. These rights are inalienable. That means they can't be given away even if you consent to. So the consent of the governed in the next sentence cannot be properly interpreted as overriding the inalienable rights concept in the previous sentence.

So what was it about? What it was about was choosing your government as opposed to another government. The consent of the governed was we no longer wish to be governed by Great Britain. Now we wish to be governed by a different government. It isn't about day to day acquiescence to our state legislature and what they happen to want to impose upon us. That's not the consent of the governed.

And when legislators vote to impose things on us, just because we voted for them—if we did vote for them—it doesn't mean we consent to everything they do to us.

And, of course, what happens if you voted against them? Have you consented to everything a legislature’s done when you voted against them? When you lost? Or what if you didn't vote at all?

So I think that's not the appropriate way of reading the Declaration.

The consent of the governed just doesn't mean that commonly invoked meaning. It actually just means you get to choose which government you're going to live under. *Which* government.

That's the easy question. I went to the easy question first.

The harder question is, what happens with technological change? How do you really know about the scope of the police powers?

The police power is the flipside of our rights because the police power, as I've defined it, is simply the power of government to protect our rights. So both powers and rights are very, very general. When you put them in a very general way, they don't answer all the specific questions that need to be answered by a legal system.

So to have a general right to property—which is what I defend in my book, *The Structure of Liberty*, that we have a general right to private property—does not tell us exactly what the form of private property takes, or when do I use my private property in such a way that it's actually committing a tort against the private property of my next-door neighbor?

None of those questions are automatically answered just by stipulating we have a general right to property. These questions are typically answered on a case-by-case basis or as we go along and as technology develops. You take the general principles and you start applying them to particular situations.

We're seeing this today. The government itself is getting itself up to speed on, what is the actual nature of this virus, how does it spread, how deadly is it? People just did not have the answers to these questions six weeks ago. They don't necessarily have the answers to these questions today. We have some better sense—we have enough sense that people are starting to disagree: "Well, I say it's this way, and you say it's that way." Six or eight weeks ago, nobody could have said anything about it because we just didn't know.

So you have to tune up with particular knowledge; and, at some point down the road, you will be in a position to assess whether measures that are being taken actually line up, whether they're actually protecting the rights of others, or they're not.

This is one of the reasons why—and it's related to what we were talking about with judges and motivated reasoning—in the beginning of a crisis like this you're just not going to see judges getting involved too much. The judiciary, throughout our history, if they step in, they step in later. They step in a lot later because they don't want to get themselves in the middle of all this *mishegoss* (we say in Yiddish). They don't want to

get in the middle of all this mess that they can't sort out because everybody is in the process of sorting it out.

So, you know, when the American government was imprisoning American citizens of Japanese descent in camps because they said those citizens formed a threat to the west coast of the country in light of Pearl Harbor, the federal courts didn't stop them from doing that. And they, predictably, were not going to stop them from doing it.

After it was all over with, and there was evidence that those citizens really did not constitute a threat, the court stepped in and said, "Well, what was done was wrong." And they actually did hasten the undoing of that policy while the war was still going on but they waited until they could think themselves out. So it's just unrealistic to think the judges are going to step in sooner.

Although in the case of these religious-exercise cases and things that are just really off the scale like no drive-in services, you can get a judge or two to step up in there and they have done that.

TG: We have our last audience question. "Does the excess of the police power up require some basic level of competence and efficiency on the part of the state in pursuing its agreed-upon actions, say doing something about public health in the face of pandemic and for us to actually be obligated to obey it in that exercise of powers?"

RB: I think if I understand the question, yes. I mean, again, what's being barred by the Constitution is arbitrary power, that is power that's exercised according to will or desire or what you might call prejudice and not reason.

So the only reason why laws deserve any benefit of the doubt on the part of the citizenry is because we believe, on the basis of how these laws or edicts were made—and by *edicts* I'm talking about executive actions by presidents or prime ministers—that we have some confidence that these laws or edicts are being made on the basis of actual judgment that's reflecting real facts. And if we believe that's true because we know how they were made with careful deliberation, then we might give them the benefit of the doubt because we don't really know, and they might know.

And then later on, people who do know more can start questioning and challenging, and we might change our minds, and the benefit of the doubt will go away.

But if we think that these decisions are not being made on the basis of reasons informed by facts, then there's no good reason to give them the benefit of the doubt. We might go along with them because we don't want to be thrown in jail ourselves, but why should we give them the benefit of doubt unless they merit the benefit of the doubt on the basis of how they reach their decisions?

TG: And a follow up question: "Can you have some sensible reasons that we can agree upon for the actual conduct of those authorities being so atrociously bad and effectively not achieving the goals that they're exercising the police power for? Does that in any way, shape, or form change our obligation to obey the state in that instance?"

RB: In *Restoring* the *Lost Constitution*, I argued that a prima facie duty of obedience only exists when the mechanisms by which laws are made and imposed upon us without our consent—there's reason to believe that they both don't violate our rights and are necessary to protect the rights of others.

When you go into the store and you buy sausage, you don't know whether that sausage was contaminated or not; but you have confidence that the way the sausage was made reduces the chances that it was tainted by some disease or something. And, therefore, you're going to buy that sausage and you're going to cook it up without running at your own independent test on that sausage. In other words, you give the sausage the benefit of the doubt because you give the mechanism by which it was made the benefit of the doubt.

Now I used the word *sausage* advisedly because there's a famous aphorism attributed to Bismarck that says you don't want to know how either laws or sausages are made because it's an ugly process.

But you do want a law-making process and you also want an executive process that is sufficiently informed and acting on the basis of reason and facts so that it deserves the benefit the doubt even though you yourself do not know whether it's justified or not because we can't know everything about everything. Unless we are on Twitter, we

cannot know everything about everything. If we're on Twitter, we are empowered to know everything about everything. But if we're not on Twitter, we have to be more humble and we have to defer to those.

But they only get a benefit of the doubt from us, a moral benefit the doubt, if we have reason to believe that the way they've made their decisions is based on reason and fact and not based on prejudice and animus.

TG: Randy you have been you've been really generous with your time and with your thoughts today. And, by the way, I just want to personally tell you that your book on the presumption of liberty in the Constitution was just transformative to me in my thinking. That one book to me was almost like going to law school, and I really appreciate it.

You know, I think what a lot of people are concerned about is that it seems like any time there's a crisis or an emergency, we lose things permanently going forward. And I think the concern that a lot of people have right now, whether they have ever heard the phrase "police power" or not is they know this trend; and they see some of these governors that seem to really *enjoy* shutting down businesses, and you almost get the impression that some of these governors didn't even know they had these powers until someone told them that they did. And they're really relishing enjoying these powers.

Randy, what can we do is as active citizens to ensure that we don't permanently lose some of our individual liberties going forward after this once-in-a-hundred-years kind of a health crisis?

RB: If only I had the answer to this. Look, I think it's quite plain—and social media is good for this because social media tells us what's on people's minds in ways we normally don't know.

Sometimes it's disturbing to find out. I mean, we have a President who will freely tell us what's on his mind at any given hour of the day. Sometimes I would rather not know what was on his mind. I'd rather pretend I didn't know that was on his mind. But other times I'm happy to hear it.

But on Twitter and social media, on Facebook—I don't actually—my Facebook page is completely about family stuff, so I don't want to read politics on Facebook—but, on Twitter, I do. And, on Twitter, we find out what's really going on in people's minds.

And one of the things we find out when we actually find out what's going on in people's minds is that people are relishing this opportunity to override our constitutional checks, to override private property, to take to control and command of the economy, to shut down the economy because look at all the environmental benefits. They're relishing how clean the air is in LA right now. No smog. Isn't this wonderful?

4It's a little bit like the motivated reasoning we discussed earlier. They're enjoying this! I mean, they say they're not because they're afraid of the pain and suffering that this is causing, and I believe that some of them actually do not like that. But, on the other hand, there is this big upside to them, and that is that these powers that they always hope would be there are now being exercised, and they're not going to want them to go away.

So, I don't know what the answer is to how we stop them other than we have to fight them intellectually, the way we have been fighting them all along.

And I think the good news to come out of this is that the judiciary that we have at the end of the first Trump term is not the same judiciary we had at the end of two terms of President Obama or even two terms of George W. Bush.

We've been appointing judges for a very long time who were very deferential to government power. A lot of these judges that are currently appointed are probably also deferential to government power because conservatives oftentimes take that view. But I think they're *less* so, less so, more skeptical.

It was one of the judges recently appointed who ruled against this shutdown of the drive-in services. That was a Trump-appointed judge who did that.

It really matters who's on the courts. That's why it matters who's being put on the courts; and, generally speaking, we're getting better judges than we've ever had before in my lifetime, going back to, and including Ronald Reagan.

So judges are not going to get us out of this. They never have, and they never will. They're a lagging indicator. But they are not an unimportant feature here. They can hold things up and throw sand in the gears.

It's really up to us to continue to assert our rights.

TG: Well, Randy, that is a terrific note of optimism, and I really appreciate that. As I said earlier, you were very generous with your time today, and I'm sure that we've all enjoyed having an hour and a half to ask you questions and hear your thoughts on this, so thank you very much.

And I want to thank everybody who joined us today. I hope you enjoyed it. I hope you will watch your email for announcements of further events. Please do keep your eye on your email for further—For those of us in the policy world, this may be what it is for the next few weeks and months. This may be the way we do what we do. But we at IPI are enthusiastically diving into this space, and we hope that you will join us for future events. Again, thanks very much; and, Randy, particularly thanks to you.