

Pandemics, Lockdowns, and Limits on the Police Power

What are the limits on government power in a pandemic? On May 4, **Ilya Shapiro**, director of the Robert A. Levy Center for Constitutional Studies, held a virtual policy forum with one of today's preeminent constitutional theorists, Cato senior fellow and Georgetown University law professor **Randy Barnett**, to discuss the limits of the police power, the rational basis test, and what the government can and can't do in the name of keeping people safe from COVID-19.

ILYA SHAPIRO: We're now into the eighth week of our nationwide shutdowns with the pandemic, and people are feeling restless. Have some governors and mayors gone too far, as a constitutional matter, in telling people to leave public parks or roping off so-called nonessential items in their stores, which are among examples that have gotten national attention? For example, I recently found my local tennis court that I'd been using all this time newly chained up this week, which was a bizarre experience. What about prohibiting gatherings that exceed the maximum number of people, but that still enforce social distancing norms? Now the debate has shifted to opening up and what requirements should still be in place, such as mandatory mask wearing. Federalism and the balance of power between states and Washington are also still in play.

Here to join me in discussing these important issues is Randy Barnett, the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center and a senior fellow at the Cato Institute. Randy is also the coauthor with Josh Blackman of the spectacular *Introduction to Constitutional Law: 100 Supreme Court Cases That Everyone Should Know*.

Let's start with exactly where the state governments are getting this power to impose these shutdowns, and how we should think about these issues that arise

with closing or reopening in waves. Is that constitutional? Is there just a "know it when I see it" test to what's justified or not, and how do we evaluate these situations?

RANDY BARNETT: The basic concept that is at issue here with respect to health and safety laws by the state is called the police power. Everybody is to be forgiven if they don't know what the police power is, because it's not something that's taught in law schools anymore. The reason it's not taught is because some time ago it was decided by the courts that the police power is essentially unlimited and is constrained only by violations of express, fundamental rights that are in the Bill of Rights, like the First Amendment or the Second Amendment. If you don't have a fundamental right at stake, then the police power is almost unlimited. But historically, the police power was a more limited concept, and I think that's what is important for people to know about where it came from.

The police power in a nutshell is the power that states have to protect each of us from having our rights violated by other people. The most obvious examples of police power prohibitions are laws against murder, rape, armed robbery, and other violent crimes. But the state does not have to wait until a right is violated be-

fore it can take action to prevent rights from being violated. Drunk-driving laws are an example of that. Health and safety laws are another example. Building codes are an example. If you want to understand what the principal foundation of the police power is, you can start with the Declaration of Independence. It says, "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 are life, liberty, and the pursuit of happiness." Those are each individual liberty rights. And the next sentence says, "That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

The police power is the power that states have to secure the individual rights of "We, the people." So then the question is, "Is that power limited or unlimited?" As I said, under current law, it's more or less unlimited except for fundamental rights or equal protection challenges. What counts as a fundamental right, that's a whole other story. But mostly it has to be an explicitly enumerated right like freedom of speech, though the right of privacy is an unenumerated fundamental right that the courts have also recognized.

Prior to the modern era, and prior to the rise of this fundamental rights approach that came about in the 1950s, what the police power doctrines required is that if governments were pursuing a health and safety measure, they had to be doing so in good faith. That is, they must have provisions or means that are actually being used to have a health and safety benefit and not merely a pretext for a restriction that they might want for other reasons.

Now, how do you tell whether it's an actual restriction or a pretext? Well, you have to look at the fit between the means adopted and the end of health and safety. The government would have to provide an explanation for why this particular restriction on liberty is necessary and proper for protecting health and safety. That's the background of where we are today.

SHAPIRO: So we're now about eight weeks into, "Should there be general orders to shut down?" But what about specific things like visiting parks: is it constitutional for a governor to close a state park generally, even without looking at whether people are socially distancing while they're there?

BARNETT: As I alluded to earlier, courts essentially defer to state legislatures, or governors if they've been given power by their state legislature, to enact these health and safety measures. They largely would not second-guess the wisdom, as they would say, of these measures. And so it would be up to the political process to correct abuses of this power, unless you could identify a fundamental right that's being restricted.

That's the reason why the challenges that you see having some measure of success are lawsuits against measures that are restricting, for example, the free exercise of religion. In Kentucky, there was the case where they prohibited drive-in church services, even if everybody stayed in their car and social distancing was maintained. That particular challenge was successful because it was regarding a recognized, fundamental right, and the restriction seemed to have so little basis in protecting health and safety. If it's a recognized fundamental right (and remember, that's generally limited to enumerated rights), then you might be able to get the government to have to justify what it's doing. But if you're not dealing with an enumerated

right, then you usually won't be able to get much in the way of courts' requiring that sort of test.

SHAPIRO: So unless you can point to the Bill of Rights—that is, unless you're talking about a church or a gun shop perhaps—you're out of luck there, the deference is total, there's no limiting principle on that?



ILYA SHAPIRO

“
Have some
governors and
mayors gone too far,
as a constitutional
matter?
”

BARNETT: In principle, you're supposed to get what's called rational basis review. That is that the means adopted must be rationally related to a legitimate state end. Health and safety are, of course, a legitimate state end. So then the question is, "Is there a rational relationship?" That was also the historical test across the board for police power questions, and it used to have somewhat more teeth because it was the

only real limit. What changed from the historical test to today is the 1955 case *Williamson v. Lee Optical*, in which the Supreme Court essentially adopted what's still known as the rational basis test, but that I call the conceivable basis test. That is that the court will find that there is a rational basis, if the court can conceive of effectively any possible reason why the legislature or governor might have done it.

Even if the legislature or the governor can't come up with its own explanation, courts will have the duty to make one up for them. If that's the standard that's going to be applied to modern rational basis, which is usually but not always the case, then, of course, you will lose unless you have an enumerated right. This is not the way it was supposed to be after passage of the Fourteenth Amendment.

SHAPIRO: But wouldn't even modern courts look at things differently depending on the facts on the ground? The situation is, after all, different now than it was seven, eight weeks ago. So setting aside how they would have ruled when these orders were first imposed in reaction to the pandemic, let's consider right now. A lot of states and cities are rescinding their orders or reopening in waves. Let's say a governor or a mayor says: "Oh no, no, no, this is even worse than we thought; we are now going to make sure that nobody goes out for anything. Even the grocery store is closed. You have to order your food. Police, if they see anyone outside, instant arrest." Would that not be challengeable?

BARNETT: It should be. And whether it is or not will depend on local judges' deciding whether to give the rational basis test some teeth, as they say. The Institute for Justice has actually made a pretty good living challenging local regulations as irrational and getting local judges, state court judges, or lower federal court judges to go along, notwithstanding what the Supreme

Court has said about the rational basis test. So yeah, you might be able to get a judge to go there and strike something down as irrational. That's stuff that's already happened some. But I suspect that if you went up the chain on appeal and it actually got to the Supreme Court, that by and large, I think it would not have much success.

Let me add one thing. The appropriate approach to the police power is very fact dependent. That is, on the facts is a given means related to the claimed end? So as the facts change, the constitutionality of a measure will change along with them. That's something that most people don't think about. They think if I have a right, then I have a right and you can't do anything to me about it. But with respect to the police power, it's very fact-based. In the beginning of a pandemic, when we don't know anything about this disease, except for the fact that it's killing lots of people in other countries, taking a broad, general measure is likely to be reasonable in light of our lack of knowledge. But as more knowledge comes in, it's imperative under this conception of the police power for the government to become more sensitive to the information we now have and actually make its remedies, its restrictions on liberty, more narrowly tailored to the problem that we have.

Because remember, the key to all of this is, first come rights and then comes government, paraphrasing what the Declaration of Independence says. Just because our rights may be reasonably regulated, doesn't mean we don't have them at all. The reason why it's important that we do still have them, is it continues to put the burden on the government to have to justify what it's doing. Or at least, the government must continue to have a rational explanation on the basis of facts for why it's restricting our liberties. If we didn't have those liberties in the first place, if government was the source of all our lib-

erties, then it could do what it wanted. Because our liberties come first, government really needs a justification for what it's doing.

SHAPIRO: So what you're saying is, under a proper interpretation of the Constitution, there would be more successful as-applied challenges to certain restrictions,



RANDY BARNETT

“
First come rights
and then comes
government.
”

even if we can all accept that there is a general police power to issue restrictions during a pandemic. Quarantines and the like go back centuries, even before the Constitution. But with modern courts, it largely depends on which judge you draw, I suppose? That is, on whether they will find a particular restriction reasonable or justified?

BARNETT: Exactly. It doesn't have to be correct. It just has to be based on actual facts and justified that way. For example,

take Michigan Governor Whitmer's restriction on what you can buy when you go to Home Depot: it's OK to buy some things, but you can't buy seeds for your garden. I defy the government to come up with a justification for why it's OK for people to go up aisle 12, but it's not OK to go up aisle 14. That's an irrational law, and an irrational law should be unconstitutional under any conception of the police power. Under any conception of the rational basis test, an irrational law that has no justification should not be upheld.

SHAPIRO: Well, I think that Governor Whitmer would reply with arguments: First, we want to decrease traffic flow to the store. And if people are going there for nonessential goods, there'll be more people going there.

And second, since we're only permitting these stores that sell both essential and nonessential goods to open, but we're not permitting the stores that only sell nonessential goods, it's just not fair. So a Walmart that has both food and lawn furniture is allowed to open, but a store that only sells lawn furniture is not allowed to open. So there would be effectively an equal protection problem in not roping off those so-called nonessential goods. What do you think about those arguments?

BARNETT: That would have been the argument I would have offered on behalf of the government if they'd asked me to. You do have to ask yourself under the irrationality standard, whether a law is arbitrary; “arbitrary” is another word that's used instead of irrational. Indeed, it's used more frequently than irrational. An arbitrary law is one under which two people are being treated differently without adequate justification, so that's really the hurdle the government should have to meet, and with a lot of these restrictions I think that's a difficult case to make. ■