

## UCLA Institute for Technology, Law and Policy

### Podcast Episode 2: Eugene Volokh of UCLA Law on "Civil liberties in an epidemic"

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Biography: Eugene Volokh is a professor at the UCLA School of Law and is a widely cited legal scholar in areas including constitutional law, criminal law, and tort law. He is the founder and coauthor of the Volokh Conspiracy blog, a member of the American Law Institute, and was a Supreme Court clerk for Justice Sandra Day O'Connor.

Transcript:

(Note: This transcript has been lightly edited for clarity. The transcript is presented “as is” with no representations or warranties regarding accuracy. Please consult the original audio for the definitive record of the interview.)

John Villasenor: Great. Okay. Thank you very much. I'd like to welcome you, Professor Volokh, as well as everybody else who's online at the moment to our discussion. And this discussion is titled “Civil Liberties in an Epidemic: A Conversation with Professor Eugene Volokh.” I should first of all say that obviously we're here motivated by the Covid-19 pandemic, and you might wonder why is the word epidemic in the title, and it's in part because some of the civil liberties questions that are arising also arise if you have something which is an epidemic but not a pandemic. In fact, one of the key Supreme Court cases arises from just such a circumstance.

So, I'm going to start by just giving a brief introduction, a brief biography of Professor Volokh, and then we'll go into some questions. So, Professor Volokh is a professor at the UCLA School of Law and is a widely cited legal scholar in areas including constitutional law, criminal law, and tort law. He is the founder and coauthor of the Volokh Conspiracy blog, a member of the American Law Institute, and was a Supreme Court clerk for Justice Sandra Day O'Connor. He is also the author of too many law review articles to count. So, first of all, I'd like to start by thanking you for joining us to talk about these profoundly important questions.

Eugene Volokh: Thank you very much for having me.

John Villasenor: Okay. So, let me start with a foundational question, I think it might be helpful to remind people of the 1905 Supreme Court decision in *Jacobson v. Massachusetts*, and you very often see reference to that decision in various popular press articles these days, but you don't really see as much

of a discussion about what that case was about. So, maybe if you don't mind giving us a sense of that, that would be really appreciated.

Eugene Volokh: Sure. So, that case came up when epidemics were real epidemics. This is a very serious thing we're facing, but my sense is the best numbers I've seen is that it has a death rate of maybe 0.4%. Smallpox has a death rate of about one in three. The one difference between smallpox and coronavirus is that smallpox, for a long time, for centuries, there had been a mechanism for dealing with, which was immunization, vaccination, inoculation, I think there may be subtle differences between them. It's an interesting fact, by the way, the word vaccine comes into English language from vaccinia, which is the Latin term for cowpox. In Spanish, as I understand it, vaca, V-A-C-A, is cow, vache, in French. There's presumably a common root in Latin. Because it was discovered that milkmaids who had been infected with cowpox, member of the same family, were immune to smallpox, or perhaps largely perhaps entirely. I think probably entirely.

Eugene Volokh: So, they were immune to smallpox, and that was the first indication that maybe there's some ways of dealing with this horrific disease. And then also, it was discovered that if you infect people, as I understand it, with the pus from people who are recovering from smallpox, then that's inoculation; that's something that could provide immunity as well, although it was dangerous. You could die from the inoculation. Just the death rate was a lot less. So, that's my rough understanding. Apologies to people who actually know the epidemiology, but my rough understanding of smallpox, which is a tremendous scourge. So, in the United States for centuries, and certainly by 1905, it was generally understood that people will be inoculated. Now, by then, it was also understood that people have probably a constitutional right not to have medical procedures performed on them without their consent. This is a pretty basic right. If you have any notion of substantive due process, any kind of unenumerated liberty, certainly the right not to have things stuck into your body is an important thing.

Eugene Volokh: But the court said this has to yield to the interest in public health. Incidentally, 7-2 decision; two justices would have dissented, although they did not write an opinion, Justices Brewer and Peckham. But the majority of the court and opinion for Justice Harlan says, look, this is constitutionally permissible, because our rights sometimes have to yield to the public health. That's just the reality. And it was written in broad language that understandably has been read broadly, so it's now understood not just as a precedent in favor of compulsory vaccination laws, but also as a precedent in favor of other restraints on liberty.

John Villasenor: Well, thank you very much. Okay, so let me ask the first question specific to the current situation. There's been a lot of talk about using mobile phones to combat the spread of the virus. For example, location tracking would enable the government to know if you've been in proximity to an infected person. Clearly, this raises some privacy concerns, so what are some of those privacy concerns? Particularly to the extent that if history is any guide, once these location databases are created and placed in the hands of the government, the government might be tempted to use that information in the future for purposes wholly unrelated to stopping the spread of the virus.

Eugene Volokh: Yeah, I think that's a huge problem. You can think of it as a kind of slippery slope problem, and I think those are very real. I wrote a 100-page article in the *Harvard Law Review* almost 20 years ago about slippery slopes, I think. Sometimes they are very real concerns. Sometimes we have to do things that put us out on a slippery slope, and the most we can do is try to stop slipping down. So, it's an interesting and difficult question. I'll tell you, as a constitutional matter, my sense is that most of the things that I've heard talked about for tracking purposes are likely to be constitutional. The Fourth Amendment, recall, bans unreasonable searches and seizures. Not all searches and seizures, unreasonable. And while the court at the time said, well, probable cause is one necessary component, probable cause and a warrant are necessary components for certain kinds of searches to be reasonable, that's not a categorical rule. It's not there in the text of the Fourth Amendment. The Fourth Amendment says warrants shall only issue on probable cause. It doesn't say searches should only happen pursuant to warrants and probable cause.

Eugene Volokh: And the Court has in particular recognized that the so-called special needs doctrine under which searches that are aimed not at purposes of law enforcement, but are rather aimed at public safety accomplished in other ways than catching and prosecuting criminals. The requirement of a warrant as a requirement of probable cause is relaxed. One classic example of that was drug tests of railroad employees, which the Court said was constitutional because of a concern about public safety. Another called *Camara v. [Municipal] Court* involves basically blanket searches in particular neighborhoods for possible violation of health codes. So, this is searching people's homes, but because it was aimed at protecting the public health and not in the first instance of trying to catch a criminal, the court said that the probable cause requirement there would be at least recast sharply.

Eugene Volokh: So, I think it's constitutional. Of course, the question is, is it a good idea? Is it a good idea from a public health perspective? Sometimes, these things are touted and it turns out on reflection they don't really do much good or maybe do more harm than good in some situations. Another question is, is

it something that is likely to even if it's constitutional give the government too much data for the future, too much power? Maybe one solution, for example, is to mandate that any data that's gathered this way must be deleted within some amount of time. On the theory that past that time, the contact tracing function is no longer that important, and the worry is that if it's kept past that time, then the government simply will say, "Oh, we're trying to catch criminals or terrorists. We're going to subpoena all of this data that Google or Apple and such have gathered."

Eugene Volokh: So, I think there are really important questions about implementation here, but I do think that the Constitution, even without *Jacobson*, I think the Constitution leaves the government considerable latitude to design these kinds of surveillance systems. Even if there's searches and seizures, of course, if the systems are set up on a consent basis, like an opt-in feature, which may be helpful because a lot of people may actually want to provide for this kind of tracking because they want to be notified if they may have been in contact with someone and might need medical care and also don't want to infect their friends and loved ones. But in any event, I think a lot depends on how it's implemented to say whether it's a good idea. I think it would be constitutional probably in most ways that it would be implemented.

John Villasenor: Okay. Thank you very much. Let me also remind people who are in attendance that you're free to send questions via the chat channel at any time, including questions on the topics that we've just discussed. So, let me move on to the next question. There's also been some talk of doing widespread antibody testing and giving people who have antibodies for Covid-19 what is sometimes called in quotes an "immunity passport"—some sort of digital certificate or something that you'd show on your smartphone or something that would give them more freedom to work and travel. And of course, that implies that people who don't have antibodies would be disfavored under the law in terms of their right to work and travel. And if it takes longer than expected to develop a vaccine, do you worry over time that this approach would create a new formally disfavored underclass of people? And what are the civil liberties concerns that that would raise?

Eugene Volokh: Well, I wouldn't call it an underclass. We'd have two different classes. But of course, the law often creates multiple classes of people, for hiring purposes, some people might say, "We want to hire someone who has a law degree and not people who don't have law degrees," for certain jobs, right? There are all sorts of discriminations within the law. Most of them—the ones that don't fall in these narrow categories of race, religion, sex—most of them are subject to the rational basis test under the equal protection clause. And the question is whether the classification is rationally related to a legitimate government interest, and the answer

surely is yes. If, for example, we want that to have people working in certain jobs who are immune, both in order to protect them, that we know they're going to be exposed. By the way, assuming that there is long-term immunity. It's an interesting-

John Villasenor: Right. It's a question, but let's assume-

Eugene Volokh: Let's assume so.

John Villasenor: Let's assume for the purpose of this question, yes.

Eugene Volokh: Let's assume so. So, if we want to have people doing certain jobs where they're exposed to and exposed a lot of people, it may be really important, both for their health and the health of others who are not yet infected, for them to be once we're immune. So, I think it's perfectly rationally related to a legitimate government interest. That's all that it takes for classifications based on health status, and even if you required some heightened scrutiny, intermediate scrutiny, let's say, maybe even strict scrutiny, it seems to me it would be really quite well-tailored to that interest. A lot of the objections that people have to certain classifications are . . . sex is an example. Sex is a very poor proxy for certain kinds of things. On the other hand, as a proxy for whether you're going to be able to get pregnant, it's a very strong proxy, right? It's very closely connected to that.

Eugene Volokh: So, if for example, the government wanted to run some program, where it wanted to . . . let's say, surrogate motherhood, we wanted to encourage surrogate motherhood, understandably would focus on women. Well, all right, that's heightened scrutiny, but it's very well connected. Likewise, it seems to me, with these immunity tests. Now, again, there is of course the question of whether it makes sense. Not everything that's constitutional is a good idea. So, some people have posed some objections to that. So, one concern is that maybe it will encourage some people to actually get infected, because they're hoping to get immunity, but in fact, they may become really sick and die, and maybe we think we need to paternalistically protect them from that. Or maybe they'll become sick and not die but consume a lot of healthcare resources that the rest of us have to pay for in many situations. Or maybe they'll get sick and not even go to the hospital, but they will be asymptomatic carriers that before they get the immunity, they will transmit it to lots of other people.

Eugene Volokh: So, maybe this will encourage particular kinds of risky behavior that we don't want to encourage. Very interesting questions, and I think it's important to ask whether it's a good idea. But again, I don't think the Constitution, even setting aside *Jacobson*, I don't think the normal, everyday, non-epidemic-era Constitution prohibits that sort of thing.

- John Villasenor: Okay. Thank you very much. Next question is, recently, some states have erected what are in essence border controls. These are checkpoints where people who wish to enter the state are told, for example, that they must quarantine themselves for 14 days. And while there are certainly some good epidemiological potential justifications for this, do states have the legal authority to set up these sorts of border controls?
- Eugene Volokh: Yeah, so I think the answer is probably yes, especially if there's some rational sense behind them. For example, if a state is neighboring a high incidence state and is itself a low incidence state, that would make sense. On the other hand, if a state is a high incidence state and it tries to block people from low incidence states that might be harder to justify, although maybe doing it for their own protection, it's hard to tell. But setting aside these questions of whether there's some reason to think that it's not legitimately based on epidemiological concerns, it seems to me that if it is based on those, it's the classic example of something that's usually unconstitutional, but it's permissible in the context of epidemics.
- Eugene Volokh: So, there's a case called *Edwards v. California* from 1941. This is following the Great Depression. Well, actually, it was during the Great Depression and the Dust Bowl where a lot of people from a whole lot of other places—the Okies, were coming out to California, and this is Grapes of Wrath is the story there—were coming out to California, and California wanted to block them, and the Court said, that's unconstitutional. It violates the Commerce Clause because it's a state trying to regulate interstate commerce. And some justices also said that it interferes with the privileges of American citizenship and the likes.
- Eugene Volokh: So, the Court struck it down, but Justice Jackson, who was a sensible fellow, who's worth reading, wrote a concurrence that I think is likely to be influential here. He says, "Look, that right to travel among the states is a very important right, but there are limits," like if someone's a fugitive from justice or if he's endangering others by carrying contagion about. That's a quote from there. And if you look at some earlier cases from about circa 1900, it was clear that these quarantine-type regulations are permissible even if people are not proven contagious, but if there's a worry that they might be contagious and we just don't know.
- Eugene Volokh: So, I think this is a situation where under the logic of *Jacobson* and these other cases that specifically talk about quarantines as restraints on travel, I think a restraint would be constitutionally permissible, even though it's true in normal times for normal reasons it would not be permissible.
- John Villasenor: Okay. Thank you very much. Again, I'll just remind those in attendance that you're free to send questions via the chat channel at any time. So, next question I have is, one of the other changes that we've seen are advisories

against and in some cases formal legal bans on non-essential medical procedures, and predictably, that's led to controversy over what constitutes-

Eugene Volokh: Oh, yes.

John Villasenor: ... non-essential.

Eugene Volokh: Right.

John Villasenor: The litigation is fast and furious, and I noted that on April 7th, the Fifth Circuit issued a ruling in relation to an executive order from the governor of Texas that had temporarily prohibited most abortions. But I think that might even have changed in the intervening days. So, can you explain sort of what some of these legal challenges are about and where they stand today?

Eugene Volokh: Sure. And let me broaden this a little bit by also asking what about guns, abortion and guns? Maybe people don't think about the two as connected, but actually, comparing the two rights is actually a pretty useful comparison. Nicholas Johnson, I want to say he's at Fordham, wrote a very interesting article on the subject some years ago. So, the Constitution secures a right to keep and bear arms. It's controversial what it might mean, but the Supreme Court has made clear that it is a right of individuals to have guns and therefore to acquire guns. And if you don't agree with that about the Second Amendment, 44 of the 50 state constitutions have right to bear arms provisions. And, many of them are perfectly clearly individual rights, whatever you may think about the Second Amendment. Some of them just are written in completely individual rights ways. So, generally, the government can't close down gun shops. Likewise, under *Roe* and under *Casey*, the government can't stop abortions. Again, you can query whether that's a sound interpretation of the Constitution, but that's the one we have, just like with the Second Amendment.

Eugene Volokh: So, certainly a law that says we're going to close down gun shops because we don't like guns or we're going to close down abortion clinics because we think abortion is murder, that's clearly unconstitutional. But what about these general laws? Laws that target so many other businesses, that there's little reason to think they're just pretexts. So, for example, a lot of places for a while, I don't think this is the case anymore in LA, but for a while, the LA rule was that we're closing all these businesses that are non-essential including the gun shops. And likewise, Texas and various other states—Ohio is another one—say we're going to shut down non-essential medical procedures. A lot of them including abortion, because essential

means essential for protection of life and preventing serious risks to health.

Eugene Volokh: Now, you can [] ask whether the inclusion or exclusion of abortion was as a result of hostility to abortion—or rather than the decision to exclude it—but it's pretty clear the overall rule was not just “we don't like abortions, we're going to set this up as a pretext.” It shut down all sorts of medical procedures that are not strictly immediately necessary. I don't think that even a highly anti-abortion state would just shut them all down just to get at abortion. So, there's a plausible argument that we want to shut them down because they're non-essential, and interesting fact about those, the concern isn't so much that people will transmit contagion during the procedure, although that's always some risk, but it's that, that we'll use scarce personal protective equipment. They were enacted at a time when I think there was even sharper shortage, but I think even now there's a shortage of masks, shortage of various other equipment.

Eugene Volokh: So, the theory is, for any kinds of at least surgical procedures or other procedures that require personal protective equipment, so-called PPEs, this needs to stop. And so, one question is to what extent do the Second Amendment or does the right to privacy prevent even these applications, these general rules to constitutionally protected rights? So, some courts as to abortion have said, the right to abortion cannot be restricted. The Fifth Circuit has suggested that it could be, but even the Fifth Circuit refused to stay a trial court order that essentially protected the right to abortion as to women who are very close to viability. Because one way you could think about these kinds of restrictions, you could say they're not prohibitionist on a procedure, they're delays on a procedure. They say, “Look, don't get it now, get it maybe four weeks from now when the order will have expired because we have plenty of personal protective equipment already.” Or the shutdown is just over.

Eugene Volokh: But for some women, delay is denial, either because the delay was going to cause health problems, in which case the order wouldn't apply in any case, or because the delay would push the abortion past viability, at which point would be a crime under the laws of that state. So, even in the Fifth Circuit, even though the panel was quite skeptical of this abortion rights claim, even there, there's still a District Court order in effect which says that—at least when I last checked it a few days ago—that says that women who are very near viability should be allowed or do have a right to get an abortion, notwithstanding this concern about the epidemic.

Eugene Volokh: Let me just close by returning to guns. This issue came up in Pennsylvania Supreme Court where 4-3 the court declined to carve out gun shops from the general shutdown order. But I believe the Pennsylvania governor then reversed course, and the federal government said, “Oh, gun shops are



essential, but they still need to follow proper social distancing and such." In a gun shop, it's pretty easy to take proper protective steps. It's not like a political rally where everybody is right next to each other and are hugging or whatever else, maybe don't hug that much at political rallies. But in any event, so a lot of government officials have said in part because of Second Amendment concerns, even without a court order we're going to treat gun shops as essential. As my sense is in many states, abortion providers are also not restricted. So, that's the way it's been playing out. Nothing really definitive from the Supreme Court, and some disagreement among local courts.

John Villasenor: Okay. Thank you very much. So, my next question, and just for those in attendance, again, I'll mention you're free to send questions via the chat channel. I just have two more questions for Professor Volokh here, and then we'll turn to the chat questions. So, this has to do with religious services. Recently a church in Louisville, Kentucky, sued the city for prohibiting drive-in Easter services, and these would have been services where people stay in their cars and maintain at least six feet of separation, which of course is similar to some of the separation distances that people are asked to maintain when doing activities such as taking a walk or going to the grocery store that haven't been deemed unlawful. And I know that's not only in Kentucky, in a number of jurisdictions there has been some controversy about that. If you can explain a bit what that's about and what are your thoughts on that.

Eugene Volokh: Sure. So, there's a real concern, a very serious concern about coronavirus being spread at religious services. Those are places where a lot of people gather, often sit very close to each other. They're often friendly. They may give each other welcome hugs or handshakes or whatever else, maybe a hard habit to break in many respects. So, what happens if the government restricts this? Well, one possible objection is to say these are assemblies. You have a right peaceably to assemble. The court has said that right extends to assembling for political purposes but also religious purposes and other purposes. So, you have a right peaceably to assemble, and this is a restriction that basically doesn't just slightly burden the right, but outright prohibits the exercise of that right, especially if you're talking about restrictions not just in religious assembly, but on political assembly and other things, too, because these restrictions do apply to those kinds of assemblies.

Eugene Volokh: And so far, the courts have rejected assembly clause challenges. New Hampshire Supreme Court I think, and at least a New Hampshire court, and most recently Pennsylvania Supreme Court has rejected those challenges broadly. Not just as to religious institutions. And I think that's probably right. And again, it's kind of about *Jacobson* or about strict scrutiny in First Amendment cases, when the government has a

compelling interest in preventing transmission of epidemic diseases. And the restriction is, while quite broad, at least leaves open the possibility of speaking on the internet and such. Not a perfect alternative, but something of an alternative. And it's content neutral. Then that's a pretty good reason for it to pass strict scrutiny. I think even though it's content neutral, it'd pass strict scrutiny because it's so broad, but I think it would pass.

Eugene Volokh: Next question, what about the free exercise of religion? Well, the U.S. Supreme Court in the *Employment Division v. Smith* case said free exercise is only a protection against targeted restrictions on religious practice. It's not a protection against generally applicable laws. So, then the question that arises is, are particular kinds of restriction generally applicable or not? So, one argument that was made in Louisville is, look, you're blocking churches from having drive-in services even though you're not blocking restaurants from having drive-through food service, even though people drive through and then open their windows and actually get things from the food provider and such. So, ultimately, in that case, perhaps incorrectly but still, the trial court was persuaded that that restriction was actually deliberately targeting churches as churches, and therefore, it was barred by the Free Exercise Clause.

Eugene Volokh: But let's say there's no particular reason to think that. So, let's say for example, drive-in services are allowed but in-person services are not, and they say, look, in-person political rallies are not allowed, in-person department store shopping is not allowed. We have a few exceptions for buying food and medicine, but that's to preserve life. So therefore, this does not at all target religion. Well, about 30 states have religious exemption regimes, not under the federal free-exercise clause. *Employment Division v. Smith* says, you don't get exemptions from generally applicable laws, but either under a state statute, so-called RFRAs, religious freedom restoration acts, or under an interpretation of the state constitutional provision, state constitutional free-exercise clause. And there, the question is whether again the restriction is narrowly tailored to compelling government interest.

Eugene Volokh: I think, again, a lot of these restrictions probably would be constitutional, but let me close with one other example, something that's pending in Kansas. There was a big controversy that ended up being a Kansas separation of powers conflict between the branches point, having to do with the emergency management statutes and how they should be interpreted. But the underlying controversy has to do with churches, and the churches were told they have to completely shut down in-person services. I don't think it applied to drive-in services, but completely shut down in-person services. But restaurants and bars are not shut down, so long as there's spacing of six feet between tables. For sit-down service is still allowed. Likewise, shopping malls are not shut down so long as

people aren't within arms' length of each other for more than 10 minutes at a time.

Eugene Volokh: So, there, the argument is even if that doesn't single out religion because it also restricts all sorts of other things, is it really narrowly tailored to compelling government interest to totally shutdown in-person services without the alternative of having them be also with social distancing when the government doesn't seem it necessary to shutdown restaurants or bars or shopping malls? That's an interesting question of the interpretation of the state religious exemption regime that we're going to have to see what reports to do it.

John Villasenor: Okay. Thank you very much. I had an additional question, but you already answered it in your previous answer. So, I'm going to go now to some of the questions submitted by the people who are in attendance. So, I'll start, first one is, going back to this idea of using mobile phones, with regard to using mobile phones to combat the spread of the virus. I'm reading the question here. Although it may be constitutional to do so, you acknowledge that the current Covid-19 death rate is not significant compared to previous epidemics, like smallpox you mentioned. So, in that sense, does the harm warrant the regulation? That's the question.

Eugene Volokh: That's a great question. It's a very hard question in part because we don't really have great tools to balance the harms and benefits in this kind of situation, right? This is a harm to privacy, not exactly to liberty, although indirectly it may end up being a harm to liberty. It's a benefit in terms of saving lives. I think it's important to always keep in perspective that we're not talking about the black death, we're not talking about smallpox, we're not talking about syphilis, let's say, in the past. We're talking about something that is deadly but not as deadly. That's important to keep in mind, but it's still quite deadly, so if you think this might save tens of thousands of lives, how do you balance that against the privacy risk, which is potentially significant but perhaps not that great?

Eugene Volokh: Another thing to keep in mind, of course, is that it's not just safety versus privacy, it's safety and liberty versus privacy, right? The hope is that with this contact tracing we could be let out of house arrest. In a sense, you could think there's a Fourth Amendment issue here. Not quite, but close to it. We're being seized in our own homes, really. We're not being allowed to go places. Lots of places are shut down. That's a serious interference with our liberty. So, one way of thinking about it is, is it worthwhile to incur some privacy costs which might turn into some liberty cost if the government ends up abusing this information, in order to give us a liberty, not just a safety benefit, but a liberty benefit in getting us out of our houses more quickly? That's, I think, a very interesting and difficult question. I don't know the answer to it. I do suspect that part of the answer

might be to try to think creatively, as I'm sure people are, about how we provide the maximum liberty and safety oomph with a minimal privacy cost.

Eugene Volokh: So, maybe our question shouldn't be, should this be allowed or not? Maybe our question should be, what kinds of constraints can we impose on it that are going to be robust constraints? So, not just, well, there's a rule that says you can't get access to it. Well, rules can be broken. Maybe if you do indeed say any information that's gathered has to be destroyed, not just by the government, but by Google and Apple, after a month, and maybe there'll be some auditing mechanism that guarantees its destruction, and coupled with some legal protections, they're not meaningless, it seems to me, to add these kinds of legal protections, an exclusionary rule for this or whatever else, then it seems to me that could provide us with the most benefit with the least cost.

John Villasenor: Got it. Okay. Getting quite a number of questions here, so I'll try to go through them a little more quickly. These are all interesting questions. So, next one is, what are the implications of First Amendment rights due to restrictions on public gatherings, particularly—and you already addressed that in part before—but particularly if these restrictions continue into the election season? And of course we saw what happened in Wisconsin.

Eugene Volokh: Right. So, I think there are two huge questions here. One is what this will do to First Amendment rights, but specifically the conduct of elections. Conduct of election campaigns, excuse me.

John Villasenor: Right, right, and the election itself, I would say, right?

Eugene Volokh: Right. The second question is, what is it going to do the actual election? I'm not sure there's a First Amendment right to have in-person voting, let's say, but it seems to me that it certainly would be a good idea to try to figure out some ways if things are going to continue being shut down in November, which we hope they won't be. But what if they are, to have some alternative to in-person vote? This having been said, my understanding is there are really serious election fraud concerns with mail-in voting, to be sure we have lots of mail-in voting, we've had it for a while, but I think many people think that there are possible problems, both with fraud and bribery and intimidation and the like. So, remember, one of the advances in the late-1800s came with the adoption of the secret ballot. Something where really nobody can know how you voted inside the voting booth. Mail-in ballots, people can know. People can say, "I'll pay you some money if you show me your ballot." It's illegal, but people can do that.

Eugene Volokh: So, there are serious risks with that, but at the same, there are obviously serious risks both to health from people voting in-person, and to democracy with people not voting. So, in Wisconsin, the complicated factor, at least according to Wisconsin Supreme Court, was that the statutes did not authorize the governor to suspend the rules there. And I think it's plausible to have statutes that do authorize the governor to suspend rules, but it's also possible and plausible not to. And it seems reasonable for a court to say, look, on the one hand, we really value people's health and people's ability to vote, but at the same time we also don't want the governor to be able to just by declaring an emergency mess around with the voting system. So, I think, whether you think Wisconsin Supreme Court got it right or not, I think it's vital that legislature spend at least a little bit of time thinking through this problem and making this decision now rather than this coming around November 1st and when it's too late for the legislature to step in.

Eugene Volokh: So, again, what the right solution to that is, I can't say with confidence what is the right legislative solution, but I do think legislatures need to do that. Now, returning to the first point, our election practices historically have been largely with . . . excuse me, election campaign practices, with huge rallies, with lower level candidates going from house to house shaking hands, kissing babies, quite unhygienic all of that, right? And my understanding actually is, for example, candidates often were obsessive about using hand sanitizer to the point where some people were actually quite put off, like, you shook hands with me and now he has to sensitize his hand because he thinks that I'm somehow dirty. No. Apparently, candidates realize that if they get a cold or flu and are knocked out of campaigning for a week or two, that could lose them the election.

Eugene Volokh: So, there's a lot unhygienic about past elections, but that's the way we've done things. Now, today, at least, it's possible to imagine a campaign being conducted largely online through Zoom sessions, Zoom town halls, Twitter, all these things. Question is, will we still be losing a lot from that for purposes of democracy? Maybe. But then the question is, even if we are, are we really prepared to have a situation where assuming there is a real risk, let's say a second wave of infection in some states, where we have these rallies and we have more democracy and we have more death as a result of this contagion? So, I think these are very difficult questions. I do think that as to the conduct of the elections, legislatures just need to step up to the plate and make sure that the governors have whatever authority they think is suitable for governors to have.

John Villasenor: Okay. Thank you very much. The next question is, what do you think about this whole issue of how the administration has handled things in terms of leaving decisions up to the state governments? And more broadly, what are some of the federalism issues that come up, and how much power

does the federal government have to, for example, order as opposed to advise nationwide, for example, lockdowns and things like that. What are your thoughts on that?

Eugene Volokh: Well, again, so let me turn to what's the constitutional rule, what's constitutionally allowed, and then talk about how we think about what might make sense. So, as to the constitutional matter, Congress, it seems to me, under its power to regulate commerce among the several states, would have the power to order a nationwide shutdown of commercial enterprises, and I think it would have the power to order a nationwide reopening, or selective shutdown and reopening it, anyway.

John Villasenor: And let me just interrupt and ask, if I own a hair salon and I'm serving people who live in my neighborhood, under what grounds would Congress be able to reasonably argue that that's interstate commerce?

Eugene Volokh: Great question. This issue arose with regard to some issue to labor law. It also arose with regard to civil rights laws, which were justified as a regulation, like employment and public accommodations is regulation of interstate commerce. And the Court's view was, well, anything commercial in our interconnected economy that affects things going on even in a single state will also affect things in other states. So, the hair salon will buy products from out of state, the restaurants and bars certainly buy goods across state boundaries, people who travel maybe not so much go to hair salons where they travel, but they certainly do go to restaurants and bars. So, the orthodox doctrine, and you can always debate along the margins, but the orthodox doctrine following some cases, *Lopez*, *City of Boerne*, and *Morrison* in the mid-'90s, is that the federal government may regulate commerce including basically purely intrastate commerce because of effects on interstate commerce. Non-commercial activity may not have the power of directive, but commercial activity it does.

Eugene Volokh: But that's Congress. I think. My understanding, I haven't heard the exact statement, but I've certainly seen reputable people including co-bloggers of mine, the most reputable folk of all, talk about President Trump saying how he would have the power to lift lockdowns. I don't think he does. Certainly it's not an inherent power that he has by virtue of being president. You could imagine some delegation of that power by Congress, but my understanding is Congress never delegated any such power. So, as a constitutional matter, it seems to me Congress would have this power, president wouldn't, but the question is always what practically makes sense. Here, as I understand it, the one way of describing the situation is the president has tried to take an important role in guiding all of this, especially through his briefings. Certainly the federal government is spending huge amounts of money both on the stimulus and on trying to

help find a cure and deal with medical problems and such, but decisions as to the scope of shutdowns have been left largely to the governors.

Eugene Volokh: I think that's pretty consistent with American traditions, and maybe consistent with understanding of localism that governors may know more what is necessary for their state to survive, what both the risk is and what the consequence of an economic shutdown might be. That in some states, it's true, the risk is, at least at this point, a lot less than in other states. Some states that maybe are so spread out that it's just so much more necessary for day-to-day survival of people, they might think that it's necessary to have more limited shutdowns. Some states may be very heavy agricultural states, in which so many people are in essential industries that it may make sense to have a different approach in some respects. So, I do think that it's certainly consistent with American traditions of federalism. And people say, well, why did President Trump leave this all to the states? You could argue about whether it's a good idea or not, but it's certainly a very traditional American idea. But again, the question of what would be the most effective way of doing things, it's hard to figure out.

Eugene Volokh: Let me close with one other political point. One reason presidents have often left things to states is because whatever it might be, ought to be the right decision by some central planners, it may be that it's politically a non-starter. I think that's especially so right now, where President Trump, whether you like him or not, you have to admit is very controversial and is roundly disliked by many people. And there's an adversarial relationship between many state governments and the federal government on this. So, I think even if President Trump tried—and of course he has highly adversarial relationship with the party in control of one house of Congress. So, I think even if the president tried to do things on a national level through Congress or outside, I think it would be very difficult. So, I think under the circumstances, I don't know what the right solution would have been, but my sense is that it had to involve a good deal of deference to the judgment of the local authorities.

John Villasenor: Okay. And I guess this may be the last question. Just going back to the more local, the state level or maybe even county level, many people argue that the government's approach to essentially make everyone stay home except for essential errands like shopping for food and things like that, is not narrowly tailored, right? In other words, it's impacting everybody, even though some people may have already had this and may be immune, somebody who's very young may face different risks than somebody who's got underlying health conditions and is much older. And so, it is in some sense the opposite of narrowly tailored because it captures everybody. So, what are your thoughts on that issue?

Eugene Volokh: Well, so, I think there are two important things to keep in mind. First, I think this is an area where *Jacobson* does help shed some light. One of the things the court stressed was that courts in these situations ought to defer to reasonable plausible judgements of government officials as to what is medically necessary. There could be lots of disputes about it and often it's impossible to know. But, the courts should police this in some measure. As a general matter, they ought to be deferring to the judgments of people who were elected to try to protect the public and who may have a good deal . . . may have advisors who do have a good deal of public health knowledge that gives them at least some sense of what's likely to make sense. So, I do think that this is an area where courts understandably and I think rightly defer in considerable measure to reasonable judgements by government officials.

Eugene Volokh: The other point is also, I think we have to remember narrowly tailored has to in some measure mean as narrowly tailored as feasible. Obviously, we would prefer a situation where only those people who are infected, and therefore capable of communicating the illness, are locked up, in most ways. You could imagine some ways in which it's not preferable, but almost always it is much preferable, much preferable especially since the locking up will be quite brief because presumably we're going to quarantine you and then we're going to treat you, and either you die, unlikely but possible, or you survive, and in that case it's done. So, we just lock you up for a short amount of time. That would be by all means more narrowly tailored and preferable. It's just my understanding is we don't have the capacity to do that.

Eugene Volokh: First of all, my sense is we still don't quite have the testing capacity to run that many tests. I don't think we have the personnel to run that many tests, and on top of that, my understanding is the tests still have a considerable false negative rate, at least when I last checked. So, as a result, you can't tell who is and who is not contagious. So, I think that it may be that the shutdown, unpleasant as it is, is probably as well-tailored as possible given the limitations of the medical technology. Let me just mention one other thing. One thing that people always worry about, and perfectly rightly worry about, is that supposedly temporary restrictions on liberty will become extended and eventually become permanent. We'll lose our abortion rights, we'll lose our gun rights, speech rights, religious freedom rights, rights to travel, all of these things.

Eugene Volokh: Often, that's a very serious worry, and it's true that sometimes when the government has acquired emergency power, it then uses it another situation. But here, the very fact that the shutdown is so burdensome on so many people, it poses a very important political constraint on it. It's not just burdensome on us as individuals. It's burdensome on the government. It's burdensome on government officials who are responsible to the



people. But they also want tax revenue, right? They want their favorite programs. Those favorite programs aren't going to be feasible if the economy is destroyed. So, there's every incentive for people to try to open things up quickly, to try to lift these shutdown orders and the lockdown orders quickly. So, I don't worry too much about people keeping them in place well after they were no longer necessary.

Eugene Volokh: Now, there's some uncertainty as to when they will be necessary and when they won't be, but I think there's all sorts of pressure for people to keep them as limited as possible. Had this been a more narrow lockdown, we're only going to lock down people who we suspect of having some symptoms, but we'll do it for months and months because maybe it'll be latent or a long time, that might be more of a worry because there may be less political pressure to try to ease the lockdown quickly. But precisely because so many of us are burdened by this and so much economic devastation as well as personal trouble is happening as a result of it, I think there's a natural political safeguard that'll keep this from getting out of here.

John Villasenor: Well, thank you very much. We've just got about two minutes or so left. I just want to ask, Eugene, if you've got any closing comments you want to make just based on the holistic discussion here at all, anything else that you'd like to close with?

Eugene Volokh: Well, I just want to step back a bit. In many ways, I like to think of myself as libertarian-ish. I'm not an old card-carrying libertarian. Many libertarians would think I'm very far from real libertarian, but my preference is generally for liberty, as I think for many of us it is. My preference is also for free markets, for more economic behavior rather than less. You may have heard me defending some of these positions as a constitutional matter because the constitution isn't always libertarian, but I also think that they're probably a good idea as a policy matters. And the reason is, I think that time of epidemic undermines one very basic premise of our normal pro-liberty thinking, which is usually we go out in public, we hang out with other people, and some of us may misbehave, but we get to control whether we're misbehaving, we get to control whether we're threatening people. And if we do misbehave, then we get prosecuted or sued or whatever else. And if we don't, we're free to do what we want.

Eugene Volokh: So, one common argument, agree with it or not, but in favor of guns rights, is people should be able to have guns in order to protect themselves. And those people who abuse those rights should be punished, but not those people who use them lawfully. But the problem with epidemics, especially ones when there is asymptomatic people can transmit them, is we are dangerous to others without any control on our part. It's like if I don't just go out of the house carrying a gun, not

generally legal in California but in most other states you could easily get a license for it. If I go out carrying a gun, which every month randomly shoots someone without my doing anything, you'd say, well, wait a minute, that's not a gun you should be carrying.

Eugene Volokh: Well, the problem is, we are that kind of gun in a sense, at least potentially. We don't know. Some of us are unloaded, some of us are not infectious, but some of us might be. And we don't know that we are, and we are capable of causing this great damage to others. Both the persons around us and the other people that person might infect. And that's, I think, one reason why even those many people who have libertarian sympathies and who generally would very much bristle at restrictions on liberty right now are still bristling but they are treating them as necessary and not inconsistent with their general support for liberty. And I suppose at least for now, I am one of those people.

John Villasenor: Okay. Well, I want to thank you very much for taking the time, and thank you also to the participants who were in attendance and for sending a set of interesting questions. And we will get this posted on the UCLA Law website, and thank you very much.

Eugene Volokh: Thank you. All the best.