



Jackie McDermott: [00:00:00] Welcome to Live at the National Constitution Center. We're back with a new theme song and a new season. I'm Jackie McDermott, the show's producer. Today, NCC president Jeffrey Rosen was joined by Attorney General Phil Weiser of Colorado and Attorney General Mark Brnovich of Arizona for a bipartisan conversation on issues facing their states today and what the Constitution, especially federalism, means to them. Here's Jeff.

Jeffrey Rosen: [00:00:30] Ladies and gentlemen, welcome to the National Constitution Center and today's program of America's Town hall. I am Jeffrey Rosen, the president of this wonderful institution. And let's begin as we always do by inspiring ourselves with the Constitution Center's galvanizing mission statement, which comes from Congress.

The National Constitution Center is the only institution in America, chartered by Congress to increase awareness and understanding of the Constitution among the American people on a non partisan basis. Before we begin, I want to share my excitement about our new America's Town Hall season. And there are a bunch of great programs coming up. Tomorrow, at 2:00 PM, this Wednesday, we will host a discussion in partnership with the philanthropy round table about the Constitution Center's constitution drafting project. We have commissioned three teams, conservative, progressive, and libertarian, to draft constitutions from scratch. And the team leaders will talk about their constitutions and you will be as inspired, as I and my colleagues am, about the unexpected areas of agreement that all of them converged around as well as the thoughtful disagreement about how to resurrect and strengthen the guardrails of democracy. On Friday, in partnership with the University of Pennsylvania, at noon, we'll host an annual symposium on the past present and future of presidential elections.

It is an all-star cast of scholars, political scientists, journalists, and public officials. And please join. Next Tuesday, February 2nd, Michael Gerhart, our scholar in residence, will launch his new book, "Lincoln's Mentor: the education of a leader," joined by the great historians, H.W. Brands and Judith Giesberg.

And then if that's not enough, on Friday, February 15th, we'll have Joanne Freeman, Robert McDonald and Peter Onuf to discuss their new book, "Revolutionary prophecies, the founders, and America's future." Check out the full schedule at constitutioncenter.org/debate. Friends, I'm so happy to welcome you to the latest in our great partnership of programs with the Center for Excellence in Governance at the National Association of Attorneys General. And it is so meaningful for the Constitution Center to convene Attorneys General of different perspectives, Rs and Ds, to educate us thoughtfully about the crucially important constitutional issues that they deal with every day.

We'll take your questions throughout the show, put them in the chat box or the Q and A box and I will introduce them when I can. And now it is my great pleasure to introduce our panelists. Phil Weiser is the 39th Attorney General of Colorado. He previously served as Professor of Law and Dean at the University of Colorado Law School, where he founded the Silicon Valley Flat Iron Center for Law, Technology and Entrepreneurship.



He served in senior leadership positions in the Obama Administration and was appointed deputy assistant attorney general in the U.S. Department of Justice, as well as senior advisor for technology and innovation at the White House's National Economics Council. He previously clerked for Justices Byron white and Ruth Bader Ginsburg. General Weiser, thank you so much for joining.

Phil Weiser: [00:03:46] Great to be here, Jeff.

Jeffrey Rosen: [00:03:48] Mark Brnovich is the 26th Attorney General of Arizona. He spent most of his professional life as a prosecutor at the state, local, and federal levels. He worked in a gang repeat offender unit and went on to be assistant attorney general with the Arizona Attorney General's office.

He has been a judge pro tem of Maricopa County Superior Court, command staff judge advocate in the U.S. Army National guard, the director for constitutional government at the Goldwater Institute and director of the Arizona Department of Gaming. He was elected by his bipartisan colleagues to serve as chair of the Conference of Western Attorney Generals. General Brnovich, thank you so much for joining.

Mark Brnovich: [00:04:26] Thanks, Jeff.

Jeffrey Rosen: [00:04:26] General Weiser, let us begin with you. Ever since the 1990s when you were a scholar and a commentator, you wrote about the importance of what the scholar, Professor Wexler, famously called 'our federalism.'" Today, progressives such as Dean Heather Gerken of Yale have recognized your prescience and have talked about the importance of federalism or states' rights for progressives, of course conservatives and libertarians have long embraced federalism. Please tell our audience, why is federalism important and why should citizens of all perspectives supported regardless of who's in power?

Phil Weiser: [00:05:03] Thanks, Jeff. The functioning of American governance is premised on the role of states. And this happens actually on the state level with county and municipal governance. This shared governance system can have tensions built in. It also has great leverage. And here's what I mean. When the Telecommunications Act of 1996 was being implemented, a lot of the heavy lifting was being done by state agencies who are operating within a federal regulatory framework. That's a familiar concept. It works in our environmental laws. It works in our healthcare laws. States are laboratories of democracy. They act as pioneers. They're able to be on the ground, close to people, trying different things. If you imagine a unitary federal system with just branch offices, you lose that connection to the people of each state. You wouldn't have local experimentation with local flavor. It would all be coming from the top. And whether it's issues around marijuana or other, gaming, federal issues as well, states are again at the cutting edge, trying new things. And that's a positive element of American governance.

Jeffrey Rosen: [00:06:19] General Brnovich, you also have been an eloquent advocate for federalism in cases before courts and throughout your professional life, do you agree or disagree with General Weiser? And why do you think that federalism is important?



Mark Brnovich: [00:06:33] Well, of course I disagree with everything that General Weiser said because he's a Democrat, isn't that what we're supposed to do nowadays? Not agree with anything? I will say in all seriousness that it is a pleasure to be on this event today with Phil. He is very principled. Sometimes he can be a little intimidating. You go through that resume and I'm like, oh my God, I'm just a public school kid. But you know, he is a sharp guy. He is a sharp guy. And but I will say that we do agree in this sense. I like to joke a lot now that we are all Federalists now. During the Obama Administration, when there were Republican Attorneys General that had sued the Obama Administration. There were a lot of folks that said, oh my gosh, you shouldn't be doing that. You know, we should defer to the federal government, let the federal government, you know, finally get something done.

And the irony of course, was in the last four years, now you have the democratic Attorney generals suing or sued President Trump twice as often as President Obama was sued during those eight years. And so I think that, depending on who's in office, sometimes we are fair weathered federalists, so to speak. But the reality is, and I have been always consistent on this is that I remind folks all the time that the federal government did not create the states. The States created the federal government. And if you go back and you read, you know, Federalist 45, Federalist 51, you know, the folks that crafted our Constitution expected and understood that the states would be the place where much of that political power resided, that the powers of the federal government were few and defined, as they said.

And the Federalists and the authors of our Constitution fully expected, fully expected for the states to be a check on the federal government. Remember, even in Federalist 51, Madison articulates, we want to have a checks and balances between the judiciary, the executive, and the legislative branches. You know, we all think of that. We learned it, you know, in our public schools. But, the reality is the Federalists also fully expected--the people that wrote our Constitution--for the states to be a check on that federal government. And when it came to fundamental issues of public health, safety, welfare, those were issues that were supposed to be left to the state.

So, you know, Phil alluded to, you know, issues regarding marijuana, but, you know, I wrote an article and, you know filed a brief, a letter brief in 2017 regarding the professional amateur sports protection act, which I felt was unconstitutional because the federal government was trying to commandeer the states.

And quite frankly, an issue like gambling was something that should have been left to the states, not the federal government to preempt. And so there are a lot of issues and unintended consequences, when we let the federal government get bigger and bigger and bigger, and I just grabbed my pocket constitution and I remind folks, especially, here at the National Constitution Center that this is an amazing document. It's, you know, less than 7,500 words total. And yet it has this amazing framework. That really is just, it's such an amazing document on many levels, just this notion of the checks and balances within the federal government, but also the states serving as that check on the federal government.



And so I think it's very, very important that we have states and state attorneys general that understand their role is to ensure that everyone plays by the rules, whether they're a Democrat or Republican.

Jeffrey Rosen: [00:09:49] Thank you so much for that important reminder for us not to be fair-weather Federalists and also for your inspiring quotation of Federalist 51, friends who were watching check it out, after the show, we'll link it in the chat box, but Madison says as General Brnovich reminds us in the compound Republic of America, the power surrendered by the people as first divided between two distinct governments, and then the portion, allotted to each, subdivided among distinct and separate governments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Great citation General.

General Weiser, you wrote a very illuminating statement about the state of our federalism, which you will post on your website and we will distribute in connection with this program. And you write in that piece, as we begin a new presidential administration, we can see how today's level of political polarization challenges federalism as a constitutional principle.

Last fall, for example, we witnessed the collision of federalism and political polarization, when Texas went to the Supreme Court to challenge other states' election management. Fortunately, the Court turned away this petition, yet the fact that Texas even brought such an action underscores the importance of ensuring that our constitutional commitment to federalism can weather a challenging political winds. Tell us more about that extraordinary lawsuit, why you think the Court did the right thing, and what role courts do have in reviewing other states' election administration?

Phil Weiser: [00:11:13] So Jeff, let me start with your prior statement, which is really important. The power given to states is a protection of liberty. Part of what our founders were terrified of was, could there be authoritarianism in the United States of America? Would we cease to be a Republic and be some version of an authoritarian regime? That was a core goal, to prevent that from happening a core strategy was: presidential elections were to be managed by the states.

So the other part you didn't pick up in my or didn't mention now, was I was arguing to the Supreme Court that states should manage elections and state rules around electors, could they be faithless, electors need to be heated, and the federal government should not interfere with that. And that was a matter of constitutional interpretation that the Supreme Court unanimously agreed with.

We call it the Bocket case, people in Washington call it by a different name. But in any event, it was a case that came out of both Washington and Colorado. Why that's so important is because states need to be sovereign in managing the presidential election. That protects Liberty. And we saw that this fall, we had states like Arizona, where Mark had a situation that he did with real integrity to manage. What was the situation? Arizona. And President Biden won Arizona in Georgia. The Attorney General, the secretary state acted with integrity to the rule of law, hand-counted the ballots. The idea that you could have a state like Texas asking the Supreme Court to engage in some general oversight at the federal level of state



conduct to elections is anathema to the architecture I just mentioned. And it was important that the Supreme Court and federal courts more generally respected the role that states play in managing elections. That is a strength of our system. It's a protection of Liberty.

Jeffrey Rosen: [00:13:13] General Brnovich, General Weiser, just complimented your principled handling of that very difficult situation in Arizona. You were there to witness the certification with Governor Ducey. I understood that there are limits to what you can say about that situation, but what can you tell us about the role that federalism played in the peaceful resolution of that challenging certification. And do you agree with General Weiser that the Chiafalo case, which he argued before the Supreme Court, that the Court was right unanimously to hold that states may punish so-called faithless electors, who don't vote for the candidate that they're pledged to vote for, in order to protect federalism.

Mark Brnovich: [00:13:53] Well, first of all, because Phil argued it, of course he was right, right? I mean no, it was-- oh, I mean, come on. You know, that's a lay-up. No, but in all seriousness we actually joined the brief supporting that position because I think it is the right position. And, you know, once again, if you really believe in federalism and you're not a fair-weather Federalist, I mean, the framers of our Constitution, they understood what the system was, they created the electoral college for a reason.

And I think the irony was that, you know, just even a few years back, people were very critical of the electoral college. They talked about, let's go to a majority vote, especially even after 2016. And I think the fact that the system worked and, you know, the dam didn't break, and we saw that in individual states, they were able to conduct their elections. They were able to certify their electors. The system did exactly what it's supposed to do. It worked the way the framers intended. The only thing I would say, and maybe I misheard him a little bit, when Phil first started talking, he started talking about the power given to the states, and I just wanted to make sure he wasn't saying that power is given to the federal government or given by the Constitution.

Because once again, my fundamental premise begins with no, it wasn't the federal government that created the states, it was the states that created the federal government. And that was, it goes back to that notion that the people were willing to give up some of their power, especially, you know, as the framers talked about when it came to issues of, you know, national security, you know, they wanted to make sure that when they had the Articles of Confederation, you had all these issues dealing with trade between the states. And so there are some things that are truly national in nature. And we understand, as the Federalists did, that the power of the federal government is at zenith when it comes to issues of, you know, foreign policy and, you know, military policy.

But, you know, when it comes to these issues of, you know, public health, safety, welfare, and quite frankly, how to conduct a state election, I do believe that those are issues that are best left to the states.

Phil Weiser: [00:15:46] Jeff, can I pick up on Mark's point? Cause it's a subtle point. In the Chiafalo decision, Justice Thomas, and I'm forgetting who joined him, wrote a separate



concurrence, making the point that Mark just made which is a subtle point, but it's important, which is, is it that the power was always with the states to handle elections?

And the Constitution left that power in place, or as the Constitution creates the architecture of our federalism, does it leave the power of elections with the state? So those are two subtle different positions. And how you think about the 10th amendment interplays that there's ongoing discussion about that. At the bottom line level from my standpoint, pragmatically, it doesn't matter. The power of elections is with the states. There's a very interesting scholarly debate about how we get there.

Jeffrey Rosen: [00:16:35] Fascinating.

Mark Brnovich: [00:16:36] I tell you what I feel like I'm auditioning for a law school interview. Let me guys know if you want me to teach at your schools.

Phil Weiser: [00:16:42] We'll welcome you in acting anytime, Mark.

Jeffrey Rosen: [00:16:44] Well, continuing this--

Mark Brnovich: [00:16:46] I got the beard for it.

Jeffrey Rosen: [00:16:48] Absolutely. Can we get the shoulder patches as well? General, you too have a Supreme Court case coming up. One of the most significant cases of this term is a pair actually of cases that'll be argued together, Arizona Republican Party versus Democratic National Committee and Brnovich versus Democratic National Committee.

And that's a four year legal battle on an Arizona policy that requires voters who vote in person to use their assigned precincts. There, the democratic national committee challenged the law in federal courts saying that it violated section two of the voting rights act. The U.S. Court of Appeals for the ninth circuit agreed that because racial minorities disproportionately use ballot harvesting and vote outside of their precincts, the voting rights act forbids the state from eliminating these practices.

So, tell us about your argument in this case that the bans on both out of precinct voting and ballot harvesting are commonplace used by Arizona and dozens of other states to prevent election fraud. And why you think in this case, respect for Federalism requires upholding the Arizona's policy?

Mark Brnovich: [00:17:48] Well, we were just talking about the states being able to oversee their elections and when it comes to issues regarding public health, safety, and welfare, that the federal government would defer to the states on those matters. Second, I mean, I think this is an important point Jeff, that we talk about the procedural history.

Remember, this case began, there was a 10 day trial. Democratic national committee filed this lawsuit. There was a 10 day trial. The state prevailed. It went to the ninth circuit. The state prevailed again. What happened was which, you know, people know is a little bit unusual is en banc, the ninth circuit then reversed itself.



And so procedurally, I think that's one of the reasons why the U.S. Supreme Court took this case, because there was vigorous dissents basically that objected to what the new en banc majority did. And at the end of the day there are, you know, two dozen states in this country that have laws related to out of precinct voting and even restrictions on ballot harvesting. And I think we saw in this last election more than ever, that people need to have confidence in the election system. You don't want people to question, or you don't want rumors or innuendos or a mob mentality developed with rumors saying this happened or that happened. And so I think when you have common sense election procedures in place that do not disenfranchise anyone, but end up resulting in people having confidence in the system it's important.

And I always point out, that if after the 2000 election, the Bush V Gore election and the debacle, everything that happened in Florida, there was a bipartisan commission that was by co-chaired by President Jimmy Carter, and Mr. Baker. And they came up with recommendations on election integrity, how to prevent fiascos from happening in the future. And one of the very recommendations that Jimmy Carter and that panel made was to restrict who handled a ballot to immediate family members, caregivers, and, you know, whoever the postal person was that was delivering it. And so even Jimmy Carter recognized that restrictions on ballot harvesting were a good thing, or at least he did 15 years ago.

You know, furthermore, the New York Times had front page stories in 2012 about issues related to mail-in ballots and potential problems. And so for us in Arizona, I mean about three quarters of the votes are handled via the mail. So, you know, I'm not saying we shouldn't have mail in ballot, I vote, you know, by mail sometimes.

But what I am saying is people need to have confidence and if the legislature passes a law that they think is addressing or helping ensure ballot integrity, it is no role for a federal judge or a federal court en banc to overturn that. And I think the fact that the U.S. Supreme Court accepted this case, I think is proof that they think what the ninth circuit did in overturning itself is suspect as well.

Jeffrey Rosen: [00:20:32] General Weiser, this is an area where Democrats tend to be on the other side and argue that election changes ostensibly made to combat voter fraud that have the effect or the intent of disenfranchising minorities should be struck down under the federal voting rights act. Do you have a view on the constitutional merits either of this case or of other election fraud cases? And if so, how, how do you reconcile that with your general commitment to federalism?

Phil Weiser: [00:21:02] I do. I think the most fundamental element of our democratic Republic is that the will of the people need to be heard. And I believe states should be able to conduct elections and address election integrity. I also believe in voting rights and that the stain of racism as an original sin is one that our nation continues to have to deal with. The voting rights act of 1965 was passed because of an ugly history that disenfranchised minorities, racial and ethnic minorities, on a systematic basis. What is painful about this history is the Supreme Court undermined section five, the pre-clearance requirement, in the Shelby County decision where justice Ruth Bader Ginsburg, whom I worked for, had the



following observation: throwing out the pre-clearance system, which says any voting changes have to be pre-cleared to make sure they're not discriminatory in terms of what happens, is like throwing out your umbrella when it's raining, because you're not getting wet.

In the wake of abandoning the pre-clearance system in the Shelby County case, I think we are seeing creeping efforts that risk undermining racial and ethnic access to the franchise. The other provision is the one that involved in the case that Mark's litigating. He's doing his job, lawyer for the people of Arizona, to defend his laws. But the provision is section two of the voting rights act, which deals with, what if you've got a provision that has a discriminatory impact that undermines the operations of a system such that people of color are disenfranchised and section two provides a way to address it. So I do believe that voting rights and the commitment of the 15th amendment and the voting rights act are fundamental to democratic governance and that needs to coexist with federalism and state management of their elections.

Jeffrey Rosen: [00:22:55] General Brnovich, any further thoughts if you think they're necessary, and then--

Mark Brnovich: [00:22:59] Just, and you know, Phil is a brilliant, principled, you know, he's very professorial, so it's sometimes tough, you know, he's good and quick. But I just want to clear one thing up, look, no one, neither one of us want to disenfranchise anyone and, you know, and sometimes I think when you, you know, have had issues in the past, you know, 40, 50 years ago, you know, if you're a state, I mean, future generations shouldn't have to live with the stain of what someone's grandfather or great-grandfather or someone like me, I'm a first-generation American. I mean, my family wasn't even here when, what was happening, the terrible state of slavery in this country. And so you know, at some point you have to say, well, is there actual racism? Is there actual attempts to suppress people from voting or is it all conjecture or hypothetical? And at the end of the day, you know, there are certain states that I think get punished unnecessarily for, you know, something that's not happening anymore.

Phil Weiser: [00:24:01] I think my only comeback to that would be, Jeff, you'll know the date, something like 2002, on a bipartisan basis Congress reauthorized the voting rights act saying that there was important work that had to be done to continue to have equal access to the franchise. So this was a law that was enacted recently in recognition of the 15th amendment imperative to have equal voting rights and I think the Shelby County decision was a major mistake. And I think Congress may have to enact a new voting rights law telling the Supreme Court, we recognize this issue is still with us. And I look forward to the day Mark, when, when we can truly say that we have gotten past this legacy. I don't think we're there.

Mark Brnovich: [00:24:39] And I do think that part of the reason why Shelby County occurred is because you literally had states that were still under the supervision of the federal government. So you had the federal government basically coming and running



elections, even though there wasn't any evidence or proof of any sort of voter suppression or discrimination.

And so, you know, at some point there's also a fundamental fairness argument that, well, why should, you know, some county in Arizona have the federal government pre-clearing their voting sites and doing all this stuff, even though there's been no history of, you know, racism or discrimination. But then you've got other places and maybe, you know, and I'm picking this randomly, but you know, North Carolina, New Jersey that may have issues, but they don't have-- the federal government doesn't get to come in there. And actually, New Jersey actually did have a problem, but New York where the federal government comes in and controls their elections.

Jeffrey Rosen: [00:25:27] Thank you both very much for this important exchange friends who are watching your homework is to read the Shelby County case. 2013. It struck down parts of the voting rights act of, I think it was 2006 passed by both Houses of Congress as General Weiser said and signed by president Bush. Read Chief Justice Roberts' majority opinion and Justice Ginsburg's dissenting opinion, and if you find one more persuasive than the other than write to us jrosen@constitutioncenter.org. And let me know the constitutional reasons that you find one more persuasive than the other.

Alright let us turn to the question of COVID and the Constitution. Several of our friends in the Q and A box are asking, how can we get a handle on the Coronavirus if the states are each in control of their own situation? How do you rectify federal versus state rights with regard to COVID, especially with regard to distribution and the wastage associated with various states' autonomy? And, I consider the fractured COVID response by various states as one of the clearest examples of that sometimes federalism don't doesn't work.

General Weiser, rather than talking about the policy challenges of vaccine distribution, I'm going to ask you to jump in about the High Plains Harvest Church versus Polis case where the Supreme Court in December tossed out a pair of lower court rulings that had permitted states to enforce COVID related restrictions at worship services. One came out of Colorado where the justices throughout an August 10th order by a federal district court that denied a request by the High Plains Harvest Church, which is in Northern Colorado, to bar the states from enforcing capacity limits and Justice Elena Kagan and Justice Briar and Sotomayor dissented and said the case was moot. Tell us about that case and what it says about COVID and the Constitution.

Phil Weiser: [00:27:14] Let me try to answer this question, Jeff, on three levels. First and fundamentally, one of the benefits of federalism is each state was able to navigate the pandemic, and I agree with what Mark said, with health and safety concerns that reflected how its own citizens saw this and with its own governmental machinery. If you had a unitary response by the federal government that didn't allow for that, we'd be a lot worse off because frankly, the federal government over the last year's record doesn't look so good, but a number of states have been able to chart their own ways. And I've written separately about Colorado's charting its way. With respect to how to address religious freedom during the pandemic, that was a complex issue. There had been initial litigation on it and it came



out of California. Justice Roberts had eventually sided with the position to give states a little more freedom and deference on how to craft those rules.

We initially had been following that guidance. More recently, the Supreme Court changed their tune in a New York case. And so we then went ahead to comply with the new rulings. And that was ultimate issue and decided in the case you just mentioned. The question that the courts are going to have to deal with and this is a version of what we were just talking about with voting rights. There are some constitutional commitments, voting rights, freedom of religion, where federal judges have to ask, how much are they going to superintend or second guess either state elections or state pandemic restrictions. And my concern, which we'll see how it plays out cause we're in a new area here, is to be careful because the easiest and best treatment of religion is under the Smith case. You can't discriminate against religion. If you're allowing gatherings for one purpose, then you should allow it for another purpose and not screen against religion.

I do think, we'll see where the Court's jurisprudence on this goes. There's a risk that you might protect religion way more than anything else. And I don't know if that risk is going to be materialized, but I would say that that is a concern that we'll have to watch.

Jeffrey Rosen: [00:29:27] Thank you very much General Brnovich, what can you share about the constitutional dimensions of COVID and the Constitution? As a General Weiser said the Supreme Court's latest statement is the case Roman Catholic Diocese of Brooklyn versus New York, where that was a six to three case. The majority says that religion should not be unduly burdened. The three justices in dissent said that religious organization shouldn't get special treatment. Has Arizona had any religion cases? And tell us also about the case arising out of Tucson, where Tucson bar owners prevailed in an effort to halt a 10:00 PM COVID-19 curfew. Basically give us a sense of the state of COVID and the Constitution in Arizona.

Mark Brnovich: [00:30:10] Well, we have some ongoing cases and I think that people on this call probably appreciate that Arizona, even just a few weeks ago, was one of the--if it was a country, it would have been the worst country in the world. And I think there've been a lot of people frustrated in some of the inconsistencies. Back when COVID first started, I did some interviews, including on the local NPR affiliate back in late March, early April. And I, you know, as a student of history, I talked about the Spanish influenza and things that we could do as a society and it all started with making sure we have the necessary trace testing, making sure we have transparency in the government, locking down hotspots, and trying to respond with the scalpel instead of a bone saw.

And I think that part of the reason why there's there's a lot of frustration is because people aren't sure of what is or isn't going to happen and the inconsistencies and the way that we've done restrictions or who can do what and where. Right. So you're talking about the curfew. So, we actually issued an opinion several months ago, even before the U.S. Supreme Court case, basically saying that because of our constitutional rights, when it comes to things like restricting your right to assembly, your right to you know, attend your church, the government is most vulnerable and those types of restrictions, because we have these



constitutional protections versus let's say, you know, your ability to gather in a public park to play soccer, where maybe the government has a little more authority.

We also filed an Amicus brief in a case where the liquor and the bar owners, had actually challenged the governor's COVID restrictions, saying that bars, if they had a certain license, a class, you know, 12, 13 license, that they could not stay open, but if you were a restaurant that served liquor, you could stay open.

And so we wrote very strongly in our Amicus brief that at some point, you know, nine months into the pandemic, you have to start looking at, you know, the severity of the restrictions, the consistency of the restrictions, the impact that they have on people. And we felt that it was unconstitutional for the very reason, and Phil alluded to the Smith case and you know, what the U.S. Supreme Court was saying essentially is that, you know, if you're going to allow a restaurant to stay open or if you're going to allow, you know, people to go to the liquor store, then how is it that they can go exercise their first amendment rights to attend a church or even, you know, to attend an assembly protesting maybe what their government's doing.

And so I think that there is this constitutional overlay, but at some point we as Americans, whether you're Democrat or Republican, you cannot have this unfeathered transfer of power to a unitary executive, in this case, a state where a governor can in essence for nine months declare this statute unenforceable, this statute enforceable, that can say that these restrictions are okay, this business can stay open, this business can't. I mean, who are we in government to determine whose livelihood should be allowed to stay open and who shouldn't? And so I think that that's what people are asking for, is some consistency. So, you know, if the barbershops can stay open and the liquor store is going to stay open, then why can't the pub, if they're enforcing, you know, six feet, mask-wearing, the same restrictions. Why can't they stay open? It's that whole irrationality of it and the consistency of it. And I would argue that even under traditional U.S. Supreme Court test, I don't think on a rational basis, you can say that this establishment can stay open because they have food there, but this establishment can't stay open because they don't.

And that's why you end up in these crazy situations where, you know, the Best Buy is closed, but the Walmart can sell their TVs and essentially have a competitive advantage because they have a grocery store within that store.

Jeffrey Rosen: [00:33:50] Thank you so much for that General Weiser, one more beat because there were so many questions about it. Casey Goodman says the fractured COVID response is one of the clearest examples that sometimes federalism doesn't work. Aren't there some things other than common defense that are best done in a coordinated and consistent fashion? And we now have a new administration that's more willing to take a federal response on COVID from a national mask mandate on federal property and federally in transportation and interstate commerce to the possibility of invoking the defense production act for coordinated vaccine distribution, is COVID an area where a federal action should trump federalism or not?



Phil Weiser: [00:34:30] Well, three answers. First, one way to think about federalism is a hedging strategy. If you told me that the federal government bureaucracy administration was A plus plus plus all the time, then you might say why have federalism? You're just going to lower the grade. But let's live in the real world, where the federal government's grades are going to vary widely. And then grades across states are going to vary as well. Having states have more autonomy on issues like pandemic response, I believe can lead to a better outcome. And I will tell you in Colorado, I feel we did better over the last year than if we had the federal government controlling everything. Particularly given the way the federal government did handle last year.

The second point is, there's a diversity of interest. So to get to, you know, what Mark is talking about, some states may say we really care about having marijuana shops open or really care about having soccer games. But we don't care as much about having concerts or movie theaters. We can have a longer discussion about the rational basis test and constables and jurisprudence, but I also think to stand some states have different tailoring requirements, for whatever reasons. Federalism gives you an ability to not have a one size fits all solution. And then finally, yes, I agree. There are some areas where the federal government would be better and it was a travesty last spring that states were bidding against one another for ventilators. The federal government's absence of leadership on critical issues of coordination, on funding, on supply chain was painful, was a miss, and was an area that states couldn't succeed in.

States can compete against each other for things that the federal government could supply to everybody and vaccines are a good example of that. We're now seeing the federal government, you know, in the world supplying vaccines, hopefully that will ramp up. I don't think the states trying to come up with our own vaccines would be a good solution.

Jeffrey Rosen: [00:36:24] Thank you for that. Please do respond. I just want to put on the table some of the other questions because the Q & A box is blowing up. And we have from Barrel Bletcher, now that FEMA is involved, can feds establish nationwide standards for vaccinating, same age group at a time, to set up a nationwide system for registering for appointments. Counties are handling this poorly as they don't have the experience. Do you think, General Brnovich, that more of a federal response at this point for vaccine distribution would make sense or not?

Mark Brnovich: [00:36:52] Well, I do think that in times of crisis, you know, we have FEMA and it was established to help. Let's say, for example, you know, you have some rural county in Louisiana, they may not have the resources or experience to effectively deal with it whether it's a hurricane or whether it's a pandemic.

And so, you know, we are Americans and we want to help, you know, our neighbors out and even our fellow states out. But I do want to make this point and Phil is alluding to it too, is that look, what happens in Manhattan, New York is different than maybe what happens in Manhattan, Kansas. And, you know, we are a very diverse country, geographically, urban versus rural, and so there are different needs requirements. And even this question is, and I'm not picking on Louisiana, but I mean, there are parts that, you know, what's going on



and, you know, outside of Shreveport, may be a different dynamic than what's going on outside of Phoenix, Arizona. And what's going on outside of, you know, Boulder, Colorado, is probably going to be different than what's going on in, you know, some small community in the panhandle of Florida.

And so I do think there are different communities that have different needs and the federal government is there as kind of that safety net to help out and be that force multiplier when necessary. But I do think, I do think just as a matter of, you know, philosophy. Look, we saw, as I alluded to, there was a lot of governors that became unitary executives with no checks, that literally, I mean, states like Arizona are still in an emergency declaration where, you know, the government is extending statutes, making budget issues, and even though legislature's now back in session, I mean, there's a lot of authority and power that's been transferred to one person that in essence is unaccountable.

The courts are supposed to be there to kind of run a check on this. And that I think becomes problematic if you multiply that. And now you have the federal government, being able to do that and dictate all 50 States. And one of the reasons why, going back to our original conversation when we were talking about, you know, Federalist 45 and 51 is that, look, the framers understood that government closest to the people would be more responsive. And they expected the states to be more responsive.

And so when you get an unelected, especially bureaucracy, sometimes in Washington, DC, you know, it is difficult sometimes for the states to get the federal government to do something or get the federal government, you know, to treat them fairly and equitably. And my secondary concern of that, you know, the other side of the coin is not only sometimes the inefficiency of the federal government, but the other side of that coin is, well, what happens when the federal government fills in that gap because I think there is no more permanent thing than a temporary government, federal government intervention. And, you know, Lyndon Johnson was, you know, famous for, you know, famously said, if you let a bully in your front yard, the next day's on your porch. And the day after that, he's shacking up with your wife.

Now, LBJ used a different term for that. But the point is, is that once you allow the federal government to fill that void, it ain't going away. And I think that it's problematic long-term for the health of our Republican democracy.

Phil Weiser: [00:39:50] If I could add one important point, the anti-commandeering doctrine responds to a core concern Mark just raised. The federal government can't commandeer the machinery of the states. And so on this point about FEMA, FEMA is not allowed to by its dictates, or Congress, by its dictates essentially takeover state public health departments and tell them what to do. Now, if FEMA built out local branch offices, it can do what it wants.

The reason that's important is that states have their own sovereignty to them and their own relationships with their populations. In Colorado, for example, I had to sue the federal government because they try to take this program, the Byrne JAG program, and totally



distort the purposes to commandeer state and local law enforcement to assist in federal immigration enforcement.

That was not something that the Byrne JAG law was made for and that violates to my mind the core principles of federalism. And so this anti-commandeering doctrine is an important principle that protects states from the sort of overreach that Mark was talking about.

Mark Brnovich: [00:40:55] And we, I did allude to this earlier in the PASPA case, which really discussed that recently. But I hope this means Phil, that if the federal government, the Biden Administration issues executive orders related to firearms, you may remember the U.S. Supreme Court had to deal with this issue and it said you couldn't force local sheriffs to basically enforce federal government, federal firearms laws.

And so I think we all need to be consistent on this and just the secondary point on that is, I was not, if it came across that way, I was not implying that FEMA, it should go into Shreveport or anywhere else and take over their health department. What I was trying to, and I think I said, is that they can be a force multiplier and they can come in and help when it comes, for example, to administering vaccines or whatever they're going to do to a public health system that may be overwhelmed, where we need to work collaboratively on a national level to help address those concerns.

But, even in Europe, even in Europe, they didn't have, I mean, Sweden was doing something different than the Czech Republic, which was doing something different than Croatia. I mean, even in Europe, there wasn't an unitary approach in how they dealt with the COVID response.

Phil Weiser: [00:41:58] And this is an important point actually, the Prince case, the case that Mark referred to about firearms, means the federal government can't commandeer state officials. Within a state, when you have a state law, local officials at the local level actually don't have that same sovereignty rights. And so states are constituted unitary under state law. And that's different from how the federal government is, which has to respect state sovereignty.

Jeffrey Rosen: [00:42:24] Thank you very much for that great exchange. I wanted--

Mark Brnovich: [00:42:27] Get that clip and save it. I'm on record. I believe in federalism. I'm not a fair-weather Federalist.

Jeffrey Rosen: [00:42:33] I want to turn to tech policy where I think you have some interesting areas of agreement as well. General Brnovich, you filed a lawsuit in Maricopa County against Google for deceptive and unfair practices used to obtain user location data, which Google you allege exploits for its advertising business. You brought that under the Arizona consumer fraud act. Tell us about that case and how you think states can play a role in enforcing limits on the tech companies?

Mark Brnovich: [00:43:01] Oh, Jeff, you're going to get me wound up now I'll tell you. I don't know how much time we have and every time I start talking about Google, my computer seems to go out. So just in case anything happens, know, that it's not our fault. But the



reality is, is that one of the great things that state AGS can do, Democrat or Republican, we have in our toolbox, our state consumer protection statutes, and especially over the last few years you've seen states engage more and more when it comes to issues, like, for example, when there was, the banking industry was taking advantage of consumers and, you know, engaging in what we call consumer fraud. And so we filed a lawsuit, I was the first AG in the country, in state court that basically alleges that companies like Google have misled consumers. That they are violating our consumer protection laws by making it difficult or impossible for people to opt out, not telling them the full rules and conditions, as far as their service. When you go on a Google search, I mean, they're collecting all this data. They know where you go, how long you're there.

I mean, they know more about you than your spouse does. I mean, how long you spend somewhere and it's not only just what you're reading online, it's your physical location. There are things that you never thought you can send it to, that they are doing and tracking. And when they get all this information, they are able to not only target you for advertising, but they're able to essentially, you know, mine that data to even manipulate you at times.

And so I think this is a huge problem. And so we've sued them in state court using our consumer protection laws, but we also are involved with, you know, Phil and other states in a multi-state action and antitrust action against Google and there's also one against Facebook. And, you know, Justice Brandeis, you know, talked a lot about antitrust law. And I don't know if I use the he's the 50 laboratories of democracy the states are, but another thing he talked a lot about is that any entity, whether it's public or private, if it becomes too big and too powerful, it becomes a threat to our democracy. And so standard oil, Rockefeller, standard oil was broken up when it controlled less of a market share than Google does.

And, you know, so we could go on for hours talking about this, but we know when you talk about manipulation, when you do a search result in your phone, I mean, are you getting the results that are based on actual results or because some advertiser has paid Google. When you pop up on that first page of results, are you being manipulated? Are you being nudged? Are there certain stories you're getting? And I mean, the reality is, I think everyone knows this, is that because of social media, because of, you know, what's going on with big tech, I mean, I think it's increased the polarization in this country and there is a conscious effort to manipulate us in certain directions whether we're left or right.

And I think that I believe that we as humans, there's dignity in all of us. And I believe my information. I have a proprietary right in it. I think we, as Madison said, we have rights in our property and property in our rights. And I think that if some company, big tech company, wants to basically take everything that I do say, look at, where I'm at, if they want to use all that information, they should let me know about it. They should get my consent. And quite frankly, at some point they should pay me for it. I mean, because that's what really the big tech companies are doing. They have monetized all this information. They're really advertising companies.



Jeffrey Rosen: [00:46:13] Thank you for all that. Thank you for invoking the great Justice Brandeis in his opposition to what he so memorably called the curse of bigness in business and government and his insistence that the purpose of the separation of powers was not to protect efficiency, but liberty. General Weiser, you've written and thought so deeply about tech policy. In your piece for this show, you wrote that the antitrust division of the Department of Justice failed to respect cooperative federalism when it claimed that once the federal government declined to challenge a merger, states were barred from doing so. Do you agree with General Weiser about Justice Brandeis' wisdom about the curse of bigness? Tell us more about the suit that you're joining him in against the platforms and what role can the states play in challenging the power of the platforms?

Phil Weiser: [00:47:02] Jeff, there's a lot there. Let me go through it. And first note what Mark was saying, and it's important. The federal government sometimes can be asleep at the switch and they can decline to bring antitrust and consumer protection cases because we have a system of cooperative federalism where our federal antitrust laws and also a number of federal consumer protection laws, Dodd-Frank for example, authorized state AGS to bring actions, that is a redundancy, that is a safety valve.

And that safety valve is critical. In the case against Google that you and Mark talked about, the multi-state, we brought allegations, we brought theories of harm that the federal government didn't bring. Because we have our own capacity to bring such cases and our case, obviously I'm biased because we worked on this, is more robust and more appropriate. What I'd like to see is the federal government embrace all of our theories, so that it's a more fullsome complaint. The federal government's initial complaint was a more streamlined one. That is a brilliant part of our system. And when you refer to in my published remarks, people get on our website, coag.gov, I note that there was a merger here in Colorado, and the FTC said, we're going to leave it alone. And somebody even said to me, I think this was an outside observer, well, it's only Colorado Springs. They're not that big a market. And I'm like, Hey, those are my people you're talking about. Colorado Springs is a very big market.

And we care about those consumers. We want them to have benefits of competition. So, we took action in a case where the FTC fail to. And any suggestion that states lack that right is wrong as a matter of antitrust law. And let me get to a final point, which is near and dear to both Mark's and my heart, because we led a 40 state coalition on this point, under airline consumer protection, the department of transportation is the primary overseer. We believe the airline consumer protection rights should be enforced, not just at the federal level, but also by state AGS. And this is important because during the pandemic, a lot of the complaints I've gotten have been about airlines, one particular, Frontier Airlines, a ton of complaints that they're not honoring the consumer protection requirements related to credits and available refunds.

I want to be able to protect our consumers. That's an example, when you put all the power or centralize power or primary lodge the power at the federal level, you actually leave consumers worse off.



Jeffrey Rosen: [00:49:22] Thank you so much for that. General Brnovich, on tech policy, there is an Arizona bill pending that would reform section two 30 of the communications decency act. Friends, that may sound technical, but two 30, recall, is the federal law that immunizes the platforms like Facebook and Google for liability, for any content they host, as long as they don't review it. And if it were revised, that would require them to do a lot more content review, and some people think that would be good and others bad. I want to ask you about whether your office has taken a position on that bill, including do you believe it's consistent with the Constitution for one state unilaterally to revise section two 30 rather than to have the federal government do it?

Mark Brnovich: [00:50:06] I have not taken a position on that bill. I do believe though that, and I've talked about this before, not in this context of section two 30, but even when California was passing some of its privacy legislation, that I do think that states do have a role, once again, when it comes to public health and safety, that you know, they can step in and, you know, pass regulations that address, for example, consumer privacy. And there there's two things that I want to kind of just piggyback off of what Phil said too, is that one is, in the airlines is a classic example, and this is even what you're getting out of this question.

There's this whole notion of federal preemption. That have the feds taken up the field and the feds have to do it because you know, the complexity or they have some statutory scheme and, you know, the state should be preempted from doing anything in certain fields. And I think that in the airline industry, we see the effects of that.

So, as Phil mentioned, we've gotten a lot of complaints. In fact, I know people personally, people, even within my--work here, within my family--that booked tickets, had those flights canceled, and cannot get a refund. I have seen advertising by the airlines that I think sometimes crosses the line when it comes to advertising restrictions or claims as far as false advertising and promotions that they're doing.

And I think part of the reason why we have so many consumer issues, whether it's processing refunds, whether it's people on airlines and you know, the way they're treated or not is because of the fact that the airlines, you know, essentially they've co-opted a lot of the federal regulators in DC with FAA, and there's no one there that has that stick out there protecting consumers.

And so, as Phil mentioned, him and I coauthored a letter that is an ad policy now, that urges the federal government, if you're going to give the airlines bailouts, they are getting billions of dollars of bailouts, and you know, whether that's wise thing or unwise thing, putting that argument aside, if you're going to do that, my goodness, give Arizona consumers, Colorado consumers, that they can go to their state AG and the state AG can tell the airlines, if you don't process these refunds, or if you're engaging in misleading advertising practices we're going to sue your ass. I mean, so I think we have to have that authority. And I think a lot of people are really passionate about this. Second thing that I think is really important, I should have brought up earlier. And Phil is so kind and generous when he makes me sound smarter. When he like rephrases the way I say something.



But, Phil had alluded to you know, the state's right to file an antitrust lawsuit. And I think this is one thing that's important. Even when we started this presentation and the email went out, I'm really a stickler here. I always tell folks that states do not have rights. States have powers. States have powers that are given to them by the people. The federal government has powers. But the people, you know, the ninth amendment, there are rights that are reserved to the people. So, I think states have authority and they have power to do certain things, but states don't have rights. People have rights, not government.

Jeffrey Rosen: [00:52:54] That is a powerful statement and it answers one of the questions, which said do the powers of the government come ultimately from the people or the state to the federal government? And you've just said, as the framers believed, that ultimate power of course belongs to We the People.

Mark Brnovich: [00:53:12] I was such a good litigator. I anticipated the question.

Jeffrey Rosen: [00:53:14] Great, great, great job. That's an important constitutional one, which of course was at the center of the very debate about the meaning of the founding and was settled in favor of popular sovereignty. Well, it's time for closing statements in this completely illuminating and rich discussion. And General Weiser, the first is to you. It's a version of what we started off with, but in light of this discussion, tell your concluding thoughts and tell our friends why federalism is important and why they should care about it as a principle, regardless of whether they favor the particular policies that it leads to.

Phil Weiser: [00:53:47] We are fortunate to be living in a constitutional framework that divides up power. That allocates power in a way that protects people, and that creates better opportunities for problem solving. Having individual states creates a chance for people in those states to be heard, at the state level, at local levels. And what often I'm seeing, is the closer you get to the people, the less you see of the toxic polarization you see in Washington. State AGs work better together than I see people working better in Congress. I work better with my DAs in my state than I see in Washington. So when people think about government, they often get turned off. They get cynical, they lose trust. My suggestion? Look at your state government. Look at your local governments. Look at how state AGs work together. That's the model for what we need to bring to Washington.

And so the federalism gift we have is helping us get through this pandemic. It's helping us show what government of we, the people, government of the people by the people for the people look like. And so I'm very proud of our federalism and proud to be a state official.

Jeffrey Rosen: [00:54:54] Thank you for that eloquent statement about the federalism gift we have. General Brnovich, the last word is to you. Why should our great We the People friends care about federalism and why should they not be what you, so memorably called, fair-weather Federalists?

Mark Brnovich: [00:55:10] Well, I think first and foremost, it's what the Constitution requires. And second of all, it really is the best form of governments that we know. This notion that government that's closest to the people will be more responsive, is an important concept. And as I talked about earlier, having this tension, having the states zealously guard



their powers, is something very, very important. Our framers, the framers of our Constitution realized that the best way to form a long and lasting union was to have these laboratories of democracy that we referred to, even though they didn't use that term, we know that Justice Brandeis used it. And Justice Brandeis in a 1932 dissent said something, which I want to quote exactly, you know, he said, "it is one of the happy incidents of the Federalist system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel and social economic experiments without risk to the rest of the country."

And so when we see things that are happening in this country and whether it's, you know, whatever, regardless what you think about marijuana, regardless of what you think about the affordable healthcare act, that was based on a Massachusetts experiment in 2006. You know, areas related to different ways of providing, you know, welfare and the social net.

In Arizona, we helped the FinTech sandbox that dealt with banking regulations. So there are all these things out there where the states can be on the forefront of coming up with new and innovative solutions. Sometimes they may work sometimes they may not. But I do think that no matter where you're at, there's a reason why the cliché one size does not fit all--it's a reason why it's a cliché and we all appreciate it. So to me, it is important that we continue to have the 50 states serving as a check on the federal government and, ultimately, and maybe this is a conversation for another day, we need to get back to appreciating that any government that's big enough to give you everything, is big enough to take it away.

And I do think ultimately when we talk about our life, liberty, and property, the bigger the federal government gets, the less responsive it gets. And I think the more dangerous it becomes.

Jeffrey Rosen: [00:57:11] Thank you for that wonderful closing statement. Thanks for the great repeated shout-out to Justice Brandeis. Friends, that was the *New State Ice* versus *Liebmann* decision, and you can check it out and learn from it. And thanks to our great partners at the NAAG center for excellence in government. It is so meaningful to convene these civil and deep, constitutional conversations. And we will very much look forward to the next one. And please join me in thanking our great guests, General Phil Weiser and Mark Brnovich.

Thanks to all.

Phil Weiser: [00:57:39] Thank you guys.

Mark Brnovich: [00:57:40] Thanks everybody. Peace

Jackie McDermott: [00:57:44] This episode was produced by me, Jackie McDermott, along with Lana Ulrich and John Guerra. It was engineered by David Stotts. Please rate, review, and subscribe to Live at the National Constitution Center on Apple podcasts, Spotify, or wherever you listen, and join us back here next week for another new program.

On behalf of the National Constitution Center, I'm Jackie McDermott.

