**Moderate or Neuter the Supreme Court!**
What Happens Next - 08.26.2023

Larry Bernstein:
Welcome to What Happens Next. My name is Larry Bernstein. What Happens Next is a podcast which covers economics, political science, and culture.

Today's topic is Moderate or Neuter the Supreme Court!

Our speaker is Aaron Tang who is a law professor at UC Davis. He has written a new book entitled Supreme Hubris: How Overconfidence is Destroying the Court and How We Can Fix It.

Aaron wants that the court to be humbler in its rule making and do the least harm instead of trying to solve society's most difficult problems. Otherwise, if the majority of the court remains dogmatic, he believes that we should either pack the courts or strip the court of its power.

Let's now begin this podcast with Aaron Tang.

Aaron Tang:
Thank you, Larry for having me here to talk about the book Supreme Hubris, How Overconfidence is Destroying the Court and How We Can Fix It. I just want to make three points here at the outset.

First, today's Supreme Court is facing a legitimacy crisis.

Second, the conventional explanation that the court is increasingly unpopular because it is acted in such a nakedly partisan manner is wrong. The Supreme Court and its justices have always been partisan from the very moment of our founding. The greatest Chief Justice in history, John Marshall, when he was appointed in 1801, was basically a political operative for the Federalist Party and John Adams appointed him for the explicit purpose of blocking anything that Jeffersonian Republicans wanted to do.

For 30 some years, the Supreme Court under FDR was also highly partisan, and yet during these moments the Supreme Court actually grew in public standing. And so that suggests partisanship by itself is not the problem. There must be something else.

What I argue in the book is that what's different about today's court is actually a basic psychological trap that all of us are vulnerable to, myself included, and that is overconfidence bias. Today's justices are more confident than ever before that they, nine unelected lawyers in

their seventies sitting in a private conference room in Washington DC, that they actually can answer all of society's hardest problems for us with just the right lawyerly argument.

Overconfidence is problematic because as the leading behavioral psychologists like Danny Kahneman have shown, overconfidence is a forced multiplier. It takes other biases that we fall victim to like partisanship, and it makes them so much worse. If you had humbler partisan justices like the justices during the New Deal era or like John Marshall, those would be justices who could admit when maybe they didn't know all the answers, they could issue more modest, less harmful rulings. But today's court has no brake pedal remaking the law in its image and everything from gun safety to abortion to voting rights.

So that leads to the last point, Larry, which is once we diagnose overconfidence bias as the root problem, the path forward involves public pressure, with enough mobilizing and voting and demands for real court reform. Our best hope is that two justices today, will do what two justices did back in 1937, which is the last time the court faced this kind of legitimacy crisis. In 1937, it was Chief Justice Charles Evans Hughes and Justice Owen Roberts, who responded to public frustration with the court by embracing a much humbler approach to the hard cases that divide our society. And in the process, they became centrist power brokers on a legitimate court, a popular court rather than minority justices on a packed and de-legitimized court. And so, our best hope today is that two of the court's members can be pressured to do the same thing.

They can be pressured to do the Least Harm Principle. It admits that hard questions that divide the American people, there is no obvious answer. Obscure lawyers' arguments can't settle it. Both sides have good legal arguments. Both sides have important interests at stake, and so the court does something very wise. It says, you know what? We might get this case wrong, so if we get it wrong, which side would be able to fix our mistake more easily? Let's vote against them. That way we can ensure we're doing the least harm possible by leaving meaningful options in the hands of the actual people groups that are affected.

Larry Bernstein:
In your book you describe how some judges have incredible confidence in their legal judgment. You said that Scalia felt that he knew the correct answers immediately and that Ruth Bader Ginsburg was very sure of herself and her worldview. Meanwhile Kennedy seems always baffled, going on these long walks with his clerks trying to figure out which way to vote.
Do you prefer justices like Kennedy?

Aaron Tang:
Yes, in a way. I do want to applaud Justice Kennedy for sometimes being humble and modest in a way that today's justices have a harder time doing with maybe the exception of Chief Justice John Roberts. But the best example I can give is Justice Kennedy's vote in Planned Parenthood

versus Casey. This is in 1992, Roe v. Wade has been settled law of the land for 19 years. There's a right to abortion that is guaranteed to pregnant people up until roughly 24 weeks in pregnancy and in 1992 you have what seems like six potential votes Republican appointees to overrule Roe versus Wade.

And Kennedy along with Sandra Day O'Connor and David Souter, they surprise everybody. They write this joint opinion reaffirming the right to abortion. What Justice Kennedy does in his opinion, is very emblematic of what I'm describing. He says, personally, morally, I'm opposed to abortion. Everybody knows Justice Kennedy a long-time Catholic, is personally pro-life, but the legal question of what the 14th Amendment means when it guarantees individuals a right to liberty, that could include a right to abortion. Who am I to say that I can mandate for 300 million Americans what liberty means? So I will defer. I will trust the judgment of all the justices who came before me, 12 Republican appointees in Planned Parenthood versus Casey and Roe voted on the right to abortion. Nine of those Republican appointees upheld the right to abortion. He's like, maybe I'll look around the room and trust these other smart people. That's the kind of humility that I think today's justices are sorely lacking.

Larry Bernstein:
Next topic is the Colorado baker case. Kennedy admits that there is a conflict of two basic principles. We want people to provide goods and services without discrimination, but Kennedy also was sympathetic to the baker's religious views. He eventually voted for the baker because of the state's antagonism towards religion. Was Kennedy's opinion sufficiently humble?

Aaron Tang:
He was trying. There were two possible ways that the Christian baker could have won. One way was the way that this past summer the Christian graphic designer won. She won on free speech grounds, which is the idea that the First Amendment guarantees her a right not to serve a gay or lesbian customer because it would require her to express a message she disagrees with. That's not humble, that's sweeping. Its leading to gaping holes in anti-discrimination law.

Kennedy knew that would be potentially dangerous and sweeping, and so he took a narrower route, he voted for the baker based on a case specific ticket, good for this train ride only, ground because it turns out that somewhere earlier in the case, a Colorado Civil Rights Commissioner had mentioned about how it's despicable when people use religion as an excuse to discriminate against people.

And Kennedy said that this shows that the State of Colorado was motivated by religious hostility, and so the baker wins because of that case specific reason without sending a broader rule. But I do think this is a really good instance where we could talk about a least harm approach. The least harm approach in this case is not to say, as Kennedy was thinking, make a gay couple go

somewhere else to buy a cake, it's okay if they're denied service, if they're told they're second-class citizens by some storefronts because there are other storefronts that'll serve them, that doesn't work. It wouldn't have worked for gay couples today. It wouldn't have worked for the black customer in 1950s who after all could have gone and barbecued at a black owned business rather than the segregated white business.

It turns out that the harm that the baker suffers is I am personally being forced to design something that expresses a message I disagree with. All they have to do is contract out the project, the cake or the wedding website to another employee or an independent contractor and say, I'm not going to touch this project. I don't believe in it. That's already okay under state law, but none of the conservative justices in the majority could see to that point. And so, we have the rule we have now.

Larry Bernstein:
Kennedy's decision does not end the dispute with the baker. Colorado finds a substitute administrator who is less religiously hostile to the Christian baker and Colorado demands again that the baker add the frosting to the cake. The baker fights back with endless litigation. Kennedy kicks the can down the road. What did Kennedy's humbleness accomplish?

What does the least harm principle mean when you cannot split the baby. Either the baker adds the frosting or he does not?

Aaron Tang:
This least harm principle, the court saying this is a hard case. Both sides have important credible arguments, and so we are going to rule to issue a rule that ensures that the losing side has options to protect themselves moving forward.

Larry Bernstein:
In your book you use the example of the Curzan case as a proper implementation of the least harm principle. Tell us about it and why you think it is a good model for jurisprudence?

Aaron Tang:
It's a 5-4 ruling. Conservative Chief Justice Bill Rehnquist writes the majority opinion, all four liberal justices are in dissent. I disagree with the outcome, and yet I still think this is one of the best opinions in the Supreme Court's history. In 1983, Nancy Cruzan, she's 25 years old driving on the back roads in Missouri and her car flips, hits a patch of ice, and she turns over in a ditch and her brain is without oxygen for 12 to 14 minutes.

No hope for cognitive function to restore in her brain. She's in a persistent vegetative state for seven years, no change. And her parents say, Nancy would've wanted to terminate treatment.

We'd like to allow her to die, and the State of Missouri says, no, you don't have clear and convincing evidence that she would want to have treatment terminated. We are choosing to keep her on life support forever. The case gets up to the Supreme Court. The legal question is, is there a constitutional right to die? The due process clause guarantee of liberty, does that include a right to die to terminate treatment with a preponderance of the evidence?

There are really important interests on both sides. The legal issues are hard. And so we're going to decide this case by asking if we get this case wrong, who would have better options for correcting or avoiding their harm?

The court says we're going to decide the case against whichever group has better options for avoiding its harm. If we allow the Cruzans to withdraw medical treatment for their daughter and she dies. And it turns out that either it was wrong because she didn't want to terminate treatment or it was wrong because the Constitution doesn't give her the right to do that. Well, that's a mistake that nobody can fix. Nancy Cruzan will die. Can't put that genie back in the bottle.

What if we rule against Nancy Cruzan say you have to stay on life support and we're wrong. It turns out she really wanted to have treatment terminated or there is a constitutional right. Well, in that case, there are lots of options that Nancy or her parents could do to avoid her harm. They can try to lobby the State of Missouri to allow them to withdraw treatment with less evidence. They could discover new evidence of her wishes. All future people who are in similar situations, they can execute living wills. That's a mistake the Supreme Court says that people can fix, they can avoid. So that's what we're going to do. The State of Missouri wins. Something amazing happens eight months after the decision is issued. Supreme Court issues this right to die decision that divides America. Very few people are unhappy after eight months.

And the reason is if you were worried about being forced to be on life support against your wishes, you just execute a living will and you solve that problem. And in Nancy's own case, turns out there was new evidence. There are these two women who saw the case on TV and they said, “actually we had a conversation with Nancy where she very clearly said she would not want to live in a persistent vegetative state.” And even the State of Missouri said, you're right. That's clear and convincing evidence. We'll withdraw our objection. Nancy passed away peacefully less than a year after the Supreme Court issued this decision.

Larry Bernstein:
Another example that you used for humility was Chief Justice Marshall’s opinion in Marbury versus Madison. The facts were that President John Adams on his last day in office appoints Marbury to be a judge but messes up a procedure and Jefferson uses that mistake to deny him the position. Marshall issues an opinion in that case that Jefferson wins but he includes in his opinion the concept of judicial review that the courts have the purview for this decision.

This is a hugely important decision that increases the power of the judiciary, and this is why we learn about the court case in 7th grade social studies. How is such an important and sweeping case an example of humility?

Aaron Tang:
The answer is to sort of quibble with what Marbury actually stands for. I want to distinguish between judicial review and judicial supremacy. Judicial review is the idea that when the Supreme Court interprets a law, it gets to look at the Constitution and decide if it actually thinks that statute is constitutional. Judicial supremacy is the further additional posit that what the Supreme Court said about the constitutionality of a law is the final word, the political branches, Congress, the President, the states, they cannot override the Supreme Court. Marbury is only about judicial review. It is not a decision about judicial supremacy. The judicial supremacy cases don't come until Cooper versus Aaron in 1955 and the United States versus Dickerson. Those are cases when a state tried to overrule Brown versus Board of Education.

In both of those cases, that's when the Supreme Court stood up for judicial supremacy saying, no, what we say is final. But Marbury only stands for the proposition that when we're deciding whether the Judiciary Act of 1789, which is the statute that's had issued in the case, whether that is constitutional, whether it's consistent with Article iii, we have to make that independent judgment for ourselves. We can't just assume that because Congress passed the statute that it's constitutional.

If you think that courts ought to interpret the Constitution, you agree with judicial review, you might not also agree with the idea that the Supreme Court's word is final. I think the case is humble because John Marshall had a choice. He very clearly has an outcome he prefers. He would like William Marbury who's a Federalist and a fellow John Adams appointee to be a judge.

Marshall's humble because he knows he can't do that. He knows the court isn't powerful enough. He knows Thomas Jefferson won't hand over that commission. And so he rules in Jefferson's favor. He says, you do not need to give Marbury the commission. He is not validly appointed because he, and this is sort of an arcane reason, he brought the lawsuit directly in the Supreme Court. The Supreme Court only has appellate jurisdiction in this case, not original jurisdiction. So, Jefferson wins.

But what's interesting is that William Marbury could have had his case heard again if he'd just gone to a trial court first and then appealed from the trial court up to the Supreme Court, that case would've been right back up in the Supreme Court. It's one of the greatest mysteries of common law history. Why William Marbury never did that.

Larry Bernstein:
Let’s apply your Least Harm Principle to the Brown vs. Board of Education case.

Aaron Tang:
Gosh, nobody wins when they say there are things wrong with Brown. Here's the way in which Brown is good. It actually gets the least harm analysis. It rules against the side that has better options, better ways for minimizing or avoiding its harm after it loses. That is to say, white segregationist parents, if they're told that their public schools will need to be open to black families, they have options. They can send their kids to private school; they can move to the suburbs or to the rural areas where there aren't as many black families. If they really are worried about having their kids sit in classrooms next to black kids. I obviously don't think that's a legitimate or credible interest, but the whole idea of the least harm principle is to say we're not here judging who is morally right and who is morally wrong.

Whereas black families, Linda Brown, there are no private integration academies that they can send their kids to. Black families are by and large poorer than white segregationist families. So, there are just very few options for black families to get access to integrated schools other than for the court to step in on their behalf. So, the court gets it right. It doesn't say that though, it instead says there's only one possible right answer. That right answer is based on social science evidence, it's based on evolving values. So that part of the opinion is not a least harm opinion.

I'm glad the court wrote the opinion. It's a profoundly important thing for the Supreme Court to say in a unanimous opinion that separate but equal is inherently unequal. It's a message to the American people about what equality ought to mean. That is powerful. And the biggest weakness of the least harm principle is that if you don't have a Supreme Court out there declaring the one thing, the law can only mean you might lose some of these really nice eloquent statements about the visionary ideals that we ought to stand for. But of course, if you are a centrist, a moderate, an independent, or a Democrat these days, this court is not issuing any kinds of those visionary rulings anyhow. And so, we might prefer an approach in which this court is issuing decisions that leave losing groups with options moving forward.

Larry Bernstein:
When I read your book, my takeaway was that your big idea is that for the big political issues of the day, leave it to the messy political process because life is complex and 9 judges should not use its sledgehammer to tell society what to do.  In Brown, integrating the schools is the biggest issue of that day. After Brown, there were billboards in the South that said “Impeach Warren.” The former Confederate states did not integrate their schools until after the Civil Rights Act in 1964. Why not wait for Congress to solve this inequity using your framework of humbleness?

Aaron Tang:
Did the court actually do more harm than good by rushing in and trying to settle this question for all of America. Getting out in front of where many southern states in particular were politically, and as you correctly pointed out, it was a decade before many of the southern states truly did integrate in a meaningful way? And it's so hard to answer that question because we have the benefit of hindsight. So, if you're telling me today that if the court doesn't issue Brown in 1954, it upholds Plessy versus Ferguson, but that within five years Congress acts. Congress requires equality and that the public actually shifts its attitudes and it becomes more in favor of integration than the court ordering it, then of course I would agree with you. And it seems like that's the implication of the way you frame the question, that you believe that that is true. And if you believe that's true, if that is true, then yes, I would prefer that. I just don't know if it actually is true. We can't go back in time into 1954 to decide what would actually happen.

Larry Bernstein:
Obviously, we can never look forward with certainty, so I thought your key point is that the appropriate delegation of decision making for big political issues should be the democratic process. Courts should be humble and lay low. What am I missing?

Aaron Tang:
I don't have a ton of faith in the political process. I think democracy is broken in a lot of ways. So one thing that we haven't really put our finger on is sometimes the side that should lose in these big cases, the side that has better options moving forward. Those options are not the political process. Part of why I think Brown was right is because the losing white segregationist parents, they don't have to lobby, they don't have to go pass new statutes. They can just move. They can send their kids to private schools. They don't need to rely on democracy when democracy is, especially now, broken. I don't want to suggest that my theory is a let's trust democracy approach. It's a let's trust the people who lose to figure out whatever options are best for them, whether it's the political process or private ordering.

Elected officials, certainly Congress and in many state houses are not actually responsive to majoritarian interests. You have a huge majority of Americans today, just to give some examples, who support nationally the right to vote. They support an assault weapons ban, universal background checks, raising the gun age to 21, a right to abortion through 15 weeks. And yet because of veto gates, because of partisan gerrymandering, because of the corrosive influence of campaign finance, currently the majoritarian interest of the American people is not being actualized.

Larry Bernstein:
I was born in Illinois which is a Blue State and the state will likely have laws that allow for abortion on demand until late in the term and that is more liberal than the nation as a whole. I

moved a few years ago to Florida which is a Red State that will likely restrict abortion until early in the term and less than 15 weeks. Different states will have different rules. There is no consensus that is consistent across states. Why does that mean democracy is broken? Can you interpret this instead as a benefit of federalism?

Aaron Tang:
That's a great question. I would say at the state and local level the lesson over the past year is that abortion law is somewhat more responsive to the will of voters than I would've guessed. Like most recently in Ohio, where there's a ballot initiative that was basically a code for whether Ohio should be able to amend its constitution to install a right to abortion. The pro-choice position prevailed in that ballot initiative by 15 points. We had another initiative in Kansas, the pro-choice position prevailed, and so it does actually seem like, at least in some of these states, voters who want there to be some right to choose abortion have been able to effectuate their will. Not true in roughly 13 other states.

Abortion is really hard, not just morally and legally, but I think it's also hard on my least harm principle, right? One of the biggest critiques somebody could advance against my approach is to say sometimes deciding which side will have better options for avoiding its harm if it loses is itself a hard question. And abortion is an example. It's not clear which side, the pro-choice side of the pro-life side would have better options if it loses in the Supreme Court. I generally think democracy is probably not the right answer. I don't think it's right to say that pro-choice groups can just go protect the right to abortion in state houses or Congress because of these veto gates.

I would've loved to see somebody say on the court that if we rule against the pro-life position, we reaffirm Roe versus Wade that does not stop pro-life groups from protecting unborn fetuses in their view, unborn children. In fact, there's evidence that criminalizing abortion only reduces the incidents of abortion by somewhere between four and 10%. Because what happens is individuals, they'll engage in self-care, they'll travel out of state, they'll pay abortion pills, they'll have their abortions anyways. So, you're actually only saving a small number of unborn children from the pro-life position.

But options were not spoken about in the opinions.

Larry Bernstein:
We had a podcast a few weeks ago about the case between Asian Americans and Harvard. Chief Justice Roberts' opinion seemed humble because it banned the racial boxes but allowed applicant essays that included discussions of racial discrimination.

Aaron Tang:
I think that's exactly right. This is another case where I personally object to the outcome. I would've liked it to come out the other way. But the opinion that the Chief writes and the paragraph that you're talking about is quintessential least harm thinking. Roberts thinking, I know there are going to be some people who are angry that race can no longer be used in admissions. Where if you check the box and you're an underrepresented minority that this school can give you a plus factor in the application process. So, I'm going to throw them a bone, I'm going to talk about what other options they have. And it turns out the Chief Justice and apparently all the other justices in the majority are okay with schools giving a benefit, a plus factor to a student who talks about how race personally affected them.

Larry Bernstein:
In the conclusion of your book, you mention that if the Supreme Court Justices do not start using humble opinions, then the solutions are court packing or stripping the Supreme Court of its power for Judicial Review. Please expand on that idea.

Aaron Tang:
The more credible Americans are in threatening to strip power from the Supreme Court jurisdiction stripping or to pack the court or to implement term limits, the more likely it is that the justices will actually become humbler and tack back to the middle. Because it's only when there's a credible threat.

Maybe the justices are going to say we'd rather be centrist, modest voices on a trusted court. I actually support every single reform proposal you suggested, they are absolutely credible and worth talking about. The best thing that can happen for the United States is that we don't need to do that. We don't need to pack the Supreme Court. We don't need to neuter it because the court has chosen itself to become the kind of institution that deserves our trust.

Larry Bernstein:
This idea of one branch threatening another branch or one party threatening its opposition often goes nuclear. For example, the Democrats went nuclear with ending the Senate filibuster for Federal appellate judge nominations, and then the Republicans responded by ending the filibuster for Supreme Court nominations. Ultimately, Justice Gorsuch was confirmed because of the end of the filibuster.

The benefit of the filibuster in the judicial confirmation case is that it encourages the President to appoint moderate justices because confirmation requires political compromises across party lines.

Why do you think that political threats with the Supreme Court will have a happy ending given that the recent judge filibuster experience went sour?

Aaron Tang:
The best-case scenario is that the threats, we don't need to actually carry them out because the court is more modest on its own. But let's assume that there's just nobody who will join the Chief in moderating. Now, the court reform, some of these proposals are good. The best proposal of the ones we've talked about is jurisdiction stripping. For example, suppose we can ever carve out from the filibuster and enact a new voting rights act that requires every single state when it's drawing electoral maps to have independent districting commissions so that you have drawing maps rather than Republicans and Democrats picking their voters.

Congress should also include in that new Voting Rights Act, a provision saying the federal courts shall not have jurisdiction to review the constitutionality of the Voting Rights Act. There's almost uniform consensus that that is within the explicit letter of the constitution, congress has the power to make exceptions.

Why is it a good approach? Because even if you assume as we ought to, the other side will respond in a tit for tat way, which is to say Republicans, when they have control of Congress, the presidency, that they'll pass statutes stripping the Supreme Court of power too.

That's something we can live with. Republicans aren't going to strip the court of jurisdiction when they control the court. So, the symmetry ends up not being so problematic and it solves a lot of the biggest concerns. I'm less excited about court packing and term limits for different reasons. Term limits I think are great.

If you only apply it to future justices, it'll be 50 years before the composition of the court changes because of term limits. We should still do it because I care about my grandkids. But it's not going to solve any of the legitimacy crisis we have today.

Larry Bernstein:
If Congress denies the Supreme Court jurisdiction in new laws, then it will have successfully neutered the judiciary. Imagine if the Defense of Marriage Act had included this jurisdiction stripping provision, then the courts would have no say in the gay marriage debate. Is that what you want?

Aaron Tang:
I agree with you a hundred percent right, and this is why I actually think it would be better for us not to have to strip the court of jurisdiction or to pack the court or implement term limits. There are all sorts of unintended, unpredictable consequences that are bad. It would be better to

credibly threaten those things and then hope the court moderates so that we don't ever have to see what those unintended consequences are.

Larry Bernstein:
Is the Supreme Court acting in a more moderate way during this last term?

Aaron Tang:
This past term is a sign that there are some conservative justices who are willing to join the Chief in bucking what you might expect Republicans to do. They rejected the independent state legislature theory. They ruled against the State of Texas when Texas challenged the Indian Child Welfare Act. It upheld a key provision of the Voting Rights Act and applied it against the State of Alabama. There's reason to think that there is appetite among some of the conservative justices to tack back towards the middle. I'm hoping they'll do it permanently. They'll signal a lasting philosophical approach. But again, if I'm wrong and nobody's willing to do that, then we may have to start talking about packing the court, term limits in a real serious way.

All of them have some negative consequences. I think jurisdiction stripping is less bad. It'll have bad consequences. Maybe I'd be upset about the Defense of Marriage Act, but liberals are never going to have a world where they get all of the outcomes they want from the Supreme Court, especially this Supreme Court with none of the bad side effects. What we want is a system that seems fair where the losses that both sides are tolerable because they have other things that they can do about it. That's what I think we need to be fighting for a humbler court rather than a packed court, a liberal court or a conservative court.

Larry Bernstein:
I was born during the Warren Court. And the liberal intelligentsia loved the Supreme Court with Brown, Gideon, and the Miranda Rights. My high school textbooks referred to FDR’s court packing as foolish and inconsistent with the constitution’s checks and balances. And now a generation later, progressives are ready to dump the judiciary. This is an incredible departure from a vision of an idealized Supreme Court.

Aaron Tang:
I agree progressives have sort of held up this idealized vision of the Supreme Court as Brown versus Board of Education, the neutral protector of rights that we care about. And I agree that that is a pipe dream. I agree we've sort of been tricked. I'm less rosy about the ability of democracy to solve the big problems that we face. And I'm less rosy about it because I don't think that democracy as it's currently structured in America is up to solving our problems. I think the fact that we're unable to pass a voting rights act, we're unable to pass meaningful gun safety measures at the federal level, but we've been unable to pass a right to abortion despite large popular support for that is a sign that we can't just say, neuter the Supreme Court, give power to

the people and everything will be fine. Where that lands me is with the hope that the Supreme Court will still sometimes intervene when democracy fails, when it works to the harm or to injure minority groups.

Larry Bernstein:
I end each episode with a note of optimism. What are you optimistic about?

Aaron Tang:
Supreme Court justices, at the end of the day, they're human beings, which means they have egos and they care about their legacies.

And so that means with every public opinion poll showing record levels of distrust in the court, every public protest about the court, every credible call for court reform that we've been talking about, all of those things send a message to these justices that they may have to choose between being laughing stocks on delegitimized courts or moving to center in a legitimate court.
Our best hope right now is that two of the justices get the message that we don't really need a more liberal court or a more conservative court. We certainly don't need a packed court, but we need as a humble court. We need a court that can admit that it doesn't have all the answers to these huge problems in our society and a court that therefore tries to do the least harm possible. That would be a court that reminds the American people, that when the court issues a decision, we don't like, we still have real options for fixing those decisions. Because when it comes to the hardest issues of the day, it is us, not nine unelected justices on the Supreme Court.

Larry Bernstein:
Thanks, Aaron for joining us.

If you missed last week’s show, check it out.

The podcast was Oppenheimer: Babes, Bombs, and Beers. The movie Oppenheimer is a blockbuster, and I explored the science, the bomb’s morality, and Christopher Nolan’s film making.

We had three speakers for this podcast. The first was Jeremy Bernstein, a physicist who worked with Oppenheimer at the Institute for Advanced Studies. Jeremy was the author of the book Oppenheimer: Portrait of an Enigma.

Jeremy discussed the scientific and engineering challenges that Oppenheimer and his team faced to build the atomic bomb.

We were also joined by our What Happens Next film critic Darren Schwartz who found the humor in weapons of mass destruction.

And in preparing for this podcast, I found out that Billy Herriott, the assistant golf pro at the Lake Shore Country Club, had made a road trip from Chicago to Indianapolis to watch Oppenheimer on the IMAX screen in its intended 70-millimeter film. So, we went deep into that experience as well.

I now want to make a plug for next week's podcast with Robert Kaplan who has a new book entitled The Loom of Time: Between Empire and Anarchy, from the Mediterranean to China. I first became acquainted with Robert after reading his blockbuster book Balkan Ghosts. In this new book he makes the case for realism as an approach to deal with the greater Middle East and the ongoing power struggle with the Chinese.

You can find our previous episodes and transcripts on our website whathappensnextin6minutes.com. Please subscribe to our weekly emails and follow us on Apple Podcasts or Spotify.

Thank you for joining me, good-bye.