Gerrymandering and Economic Liberty
What Happens Next - 07.09.2023

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

Today's Topic is Gerrymandering and Economic Liberty

Our first speaker will be retired Federal Judge Gary Feinerman who recently joined the law firm Latham and Watkins as a partner in litigation.

Gary will discuss the recent case in North Carolina related to gerrymandering and whether the state courts can overrule the state legislature's redistricting maps.

Our second speaker is Renée Flaherty who is the attorney who successfully argued the case of Jackson v. Raffensperger in the Georgia Supreme Court. This case is about the limits of state authority to regulate occupations. Jackson teaches new mothers how to breastfeed, but the state changed the licensing requirements demanding that she meet minimum education requirements that would prevent her from doing her chosen profession which is counseling lactation care.

Renée is an attorney with the Institute for Justice, a not-for-profit that challenges government overreach on licensing and regulation as well as infringement on individual property rights.

Let's begin today's podcast with retired Judge Gary Feinerman's opening six-minute remarks.

Gary Feinerman:
Larry thanks for inviting me back.

The Supreme Court just ended another monumental term. Last week, you discussed the affirmative action case Students for Fair Admissions versus Harvard and University of North Carolina. There's also the case that I'm going to talk about today Moore versus Harper, which has been described by former Fourth Circuit Judge Michael Luttig as the most significant case in recent memory. In terms of the factual backdrop after the 2020 census, the North Carolina Legislature redrew the state's congressional districts.

The legislature engaged in a highly effective political gerrymander. Although North Carolina is close to a 50/50 State, Democrats versus Republicans, the map had ten Republican and three Democratic majority districts, which was an extraordinarily efficient political gerrymander, even by the standards that you and I are used to here in Illinois.

Four years ago, the US Supreme Court in a case called Rucho versus Common Cause, held that the federal Constitution does not prohibit partisan gerrymandering. So, you can no longer go to federal court and argue that what the North Carolina legislature did in this case violated the federal Constitution. But states have their own constitutions, and many state constitutions either explicitly prohibit partisan gerrymandering or have more general provisions that state courts have interpreted to prohibit partisan gerrymandering.

North Carolina citizens brought suit in North Carolina State Court, and last year, the North Carolina Supreme Court held that the North Carolina Constitution prohibits political gerrymandering, and that that prohibition invalidated the legislature's map as an unlawful political gerrymander. The state supreme court directed the state trial court to draw a new map that resulted in a less skewed congressional delegation.

The supporters of the map petitioned this US Supreme Court and the court heard argument and issued its decision last week. The legal backdrop here has become known as the independent state legislature theory. That theory arises from the Elections Clause, which is Article One Section Four of the US Constitution states that the times, places, and manners of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations. What the proponents of the independent state legislature theory said and argued is that the Elections Clause reposes in state legislatures the authority to set election rules and draw maps for congressional elections for federal elections. And that the only body that can countermand the state legislature in this arena is Congress.

According to the proponents of the independent state legislature theory, a state court may not invalidate a state legislative enactment with respect to maps or other regulation of federal elections by pointing to the state constitution or some other provision of state law.

So, the map's challengers had a couple arguments in response. They pointed to the text of the elections clause, and argued that phrase carries with it an implicit understanding that the state legislature must act in accord with substantive and procedural rules set by state law including judicial review by the state courts for compliance with the state constitution.

They also pointed to historical practice at the founding that state courts did have the power to ensure that the state legislatures comply with state constitutions including in the context of federal elections.

So why is this important? If the proponents of the independent state legislature theory prevailed, it would have upset long settled understandings regarding the relationship between state

legislatures and state courts. It would allow state legislatures to operate in a state constitution free zone when it comes to federal elections. And there was also a political component. The state legislative maps are themselves gerrymandered, and unless they engage in self-control, if there's no state constitutional constraint enforceable in state court against political gerrymandering, they will gerrymander US House districts to the maximum extent possible with no recourse in federal court due to Rucho, which I discussed a moment ago, or in state court, if in fact the independent state legislature doctrine prevailed.

The US Supreme Court rejected that strong version of the independent state legislature doctrine by a 6-3 vote, and it upheld the decision of the North Carolina Supreme Court. Chief Justice Roberts wrote the opinion joined by Justice Kavanaugh and Barrett and the three liberal justices: Sotomayor, Kagan, and Jackson. And there were three dissenters Justices: Thomas, Alito, and Gorsuch. All three of them believed that the case was moot and shouldn't have been resolved on the merits. And Justices Thomas and Gorsuch went on to cast doubt on the majority's understanding of the elections clause.

So, what the majority held is that the elections clause does not insulate state legislatures from state judicial review when laws setting the rules for federal elections are challenged under state law. And the majority reasoned that the framers understood that when legislatures make laws, they're bound by the provisions of the very documents that gave them life. And here the documents are the state constitutions.

But the court was careful not to give state courts a blank check. The US Supreme Court held that when entertaining challenges to laws enacted by state legislatures regarding federal elections, state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.

So, what happens next? There are two areas where we could expect further litigation arising out of Moore versus Harper. The first is to answer the question, "What does it mean for a state court to transgress the ordinary bounds of judicial review?" In other words, how much deference will the U.S. Supreme Court give to state courts when state courts interpret and apply state constitutions to the work of state legislatures when it comes to federal elections?

The second issue that could arise is what's going to happen to the Electors Clause. The Electors Clause is a different clause of the Constitution, and it deals with the selection of electors for the Electoral College, which goes on to select the president.

And the Electors Clause states that "each state shall appoint in such manner as the legislature thereof may direct." And here we have the reference to the legislature, again. So, the question will become whether the US Supreme Court will apply the same construct from Moore versus

Harper about the relationship between state courts and state legislatures in the context of selecting electors for the Electoral College under the elections clause. I don't know the answer to that question but we could very well find out the answer in either late 2024 or early 2025.

Larry Bernstein:
The Independent State Legislature theory was rekindled during the case of Bush vs. Gore. As listeners may recall, the Florida recount was certified by the Secretary of State and then Gore litigated in the Florida courts. Gore sued successfully in Florida state courts to recount ballots only in the counties where Gore won. In Chief Justice Rehnquist's concurrence opinion, he stated that the Florida courts had gone rogue and were hijacking the job of the state legislature in determining the rules on how to select Florida's electors to the electoral college.

Gary Feinerman:
Chief Justice Rehnquist did write an opinion in Bush versus Gore, but it was a concurrence. It was not the majority; it was just for himself and Justices Scalia and Thomas. So, his view of the Electors Clause did not command the majority of the court. What the court held in Bush versus Gore is that what the Florida Supreme Court violated the Equal Protection Clause. It didn't turn on anything having to do with the Elections Clause or the Electors Clause.

Chief Justice Rehnquist did find that the Florida Supreme Court, for lack of a better phrase, went on a frolic and detour and wasn't really acting as a court in terms of interpreting state law. But still the Chief Justice's standard that he articulated in his concurrence, and the standard that Justice Souter articulated in his dissent, are fairly deferential to state courts in terms of their interpretation of state constitutions of decisions made by state legislatures in the federal election context.

Larry Bernstein:
When you were describing the facts of this case, you mentioned that the North Carolina Supreme Court ordered the lower court to create its own map. It is one thing to evaluate whether the congressional map is constitutional, and it is another thing for the court to create its own map and act like a legislature.

Gary Feinerman:
It's a very tough and interesting question that you raised. What oftentimes happens in these state cases is that the state supreme court will invalidate something that the legislature has done and then send it back to the legislature to draw a new map. And let's say that the state legislature digs in its heels and doesn't fully effectuate what the state supreme court had required, so it goes back to court. The state supreme court says, "nice try, but not good enough," and then sends it back. And you could see kind of a vicious cycle emerging, where nothing ever gets done. So, at some

point, just as a practical matter, the courts, whether it's a state trial court or state supreme court will have to step in and draw the map.

Now, as a practical matter, I think that's what ultimately must happen in at least certain circumstances where there's a standoff. But I do recognize your argument that it's no longer the state legislature at that point. It's the state court. And, the U.S. Supreme Court will have to contend with in the aftermath of Moore versus Harper in determining what are the outer bounds of a state court's authority to interpret the state constitution consistent with the elections clause.

Larry Bernstein:
In Bush vs. Gore, the recount was under severe time constraints because under the law the results had to be tabulated by a certain date. There was chatter at the time that the state legislature could simply vote and determine that Bush was victorious in the election and then appoint the electors. How will real world constraints impact the future relationship between the courts and the state legislature?

Gary Feinerman:
I mean you may be drafting up storyboard cases that we're going to see in late ‘24 and early ‘25 where there may be challenges. And a state legislature may step in and just declare the winner of that state's electors for a presidential election, and then that will present the question that the Supreme Court did not have to reach in this case, because it was about congressional districts and not presidential electors as to what is the power of the state legislature in that situation. And can it be checked by a state court?

There's another issue that could come up. The state legislature came in afterwards and decided the winner, and I'll just quote it again. It says, each state shall appoint in such manner as the legislature thereof may direct. I think that there's a view that the Electors Clause allows the extent of the state legislature's power under the Electors Clause is to set the rules ahead of time before the election, and then not to come in afterwards and say, “okay, this is who we think won.” There are folks who disagree with that temporal reading of the state legislature's powers under the Electors Clause. And can the state courts step in and say no state legislature, what you just did in the instance of your hypothetical to just award electors after the election has occurred whether that violates the state constitution.

Larry Bernstein:
Some states through referendums limit gerrymandering, how does this square with the state legislature requirement in the Elections Clause?

Gary Feinerman:
The Supreme Court actually resolved that issue in 2015 in the Arizona State Legislature case where the citizens of Arizona adopted a constitutional provision that reposes in an independent commission the ability to draw congressional districts, and the legislature sued and said, “no, no <laugh>, the Elections Clause says that it's us.” And what the Supreme Court held in a five to four decision authored by Justice Ginsburg that a state commission in that context exercises legislative authority and therefore falls within the definition of a legislature in the Elections Clause. Interestingly enough, Chief Justice Roberts dissented from that decision, but in his opinion in Moore vs. Harper and just proving what an institutionalist Chief Justice Roberts is, he took the Arizona State Legislature case as settled law, and applied it and deployed it very effectively to advance the majorities decision in the case regarding the nature of the Elections Clause.

Larry Bernstein:
Moore vs. Harper was decided 6 to 3, and the six Republican judges were split in half. Was this a partisan issue?

Gary Feinerman:
It's not a partisan decision. Just on its face, it was a mixed bag at least with respect to the Republican appointees.

The justices are asking, “What is the meaning of the Constitution?” And in deciding the meaning of the constitution, they have their interpretive methodologies at a 30,000 foot level do not always map onto a conservative approach versus a liberal approach to interpretation. And the cards are going to fall where they might in terms of politics.

Larry Bernstein:
There have been elections that were virtual ties, and there has been other elections with malfeasance. In 1876, Congress and the Supreme Court had an electoral commission to determine the result. In 1960, there was evidence of cheating by the Democrats in JFK’s election over Nixon in Texas and Illinois. Who should determine these electoral outcomes that are complicated and inherently political?

Why do you favor courts to resolve disputes arising over an election? Should it be state legislatures, commissions or other organizations that can evaluate real-time complicated mixed up election disputes. Remember the Palm Beach ballots, the hanging chads, and other craziness in Florida in 2000 and more recently Trump’s disputed election in 2020.

Gary Feinerman:
There is no ideal forum in which to resolve these disputes. All are imperfect, whether there's election fraud, the courts are the best place to do it rather than a legislative body or an executive body.

Both sides in 2020 generally understood that it was the court's job. And I believe that the Trump campaign or allies brought some 60 lawsuits and lost all but one of them. What I will say is that the federal courts did their job. I'll mention three. There was a case out of Pennsylvania where the Third Circuit ruled against President Trump in a decision written by Judge Bibas who was a Trump appointee. There was a case out of Wisconsin that went to the Seventh Circuit ruled against Trump, a decision authored by Judge Mike Kutter, a Trump appointee. There was a decision in the 11th Circuit resolved again against then President Trump. And it was a decision that was authored by Judge Kevin Newsom, a Trump appointee. So that very, very fraught situation that we faced in late 2020 and early 2021 went to the courts, and the courts resolved it under the law in a completely non-partisan manner because if the courts decided things in a partisan manner, those three decisions I mentioned, and probably many others among the 60 that were filed, would've come out a different way.

Larry Bernstein:
The founders thought that many elections would be settled by Congress. Why isn't the ultimate political body, the Congress, the best place to resolve disputes, especially when it is a repeating game with elections every two years?

Gary Feinerman:
Congress could come in under the Elections Clause and set the rules of the road for state legislatures. They haven't done it with respect to political gerrymandering, but they have done it with race discrimination under the Voting Rights Act. So could you get Congress, a political body, to pass a law saying that other legislatures can't engage in political gerrymandering? Not so sure that's going to happen, but I think it would certainly be within Congress's power.

Larry Bernstein:
The fact that Congress has not done anything about gerrymandering is indicative that Congress doesn't find gerrymandering that problematic otherwise they would do something about it.

Gary Feinerman:
Yes that could be. Many members of Congress on both sides come out of politically gerrymandered districts. So, in effect, to ask Congress to pass a law that doesn't allow for political gerrymandering would be asking several members to vote against their own interest. I'm not saying that it's not conceivable that individual legislators, whether they're in Congress or in state legislatures, would vote against their own electoral interests that certainly can happen.

And the better angels of their nature could prevail and that they will come together and achieve a consensus on a result that would be good for the body politics as a whole, as opposed to thinking solely about their own next election.

Some legislatures may do that, but oftentimes it has to be left to the voters in a state referendum, like what happened in Arizona, or state courts enforcing the state constitution. State constitutional provisions either directed towards elections, equality or fairness in general. And that was the North Carolina 2022 decision, and there were many other state court decisions as well that take a dim view of political gerrymandering.

Larry Bernstein:
Do you think that Moore vs. Harper means the death of the independent state legislature theory as an ongoing constitutional matter?

Gary Feinerman:
It is the death of the strong version of the independent state legislature theory, and by strong version, I mean, the theory that state legislatures can operate without interference from state courts reviewing state legislative actions for compliance with state constitution or other state law. It's not the end of this area of the law for the reasons that I mentioned in my opening, which is we don't know what constraints the US Supreme Court will impose on the state courts review with respect to federal elections. In other words, we don't know what the Supreme Court will consider the ordinary exercise of state judicial review. What will be deemed inbounds, what will be deemed out of bounds. And if you want to characterize that as under the rubric of the independent state legislature theory, then I suppose it's not dead, but certainly the strong version that we've all been talking about is no longer a viable theory.

Larry Bernstein:
Earlier you mentioned that Roberts was an institutionalist. So, even though Roberts voted in the dissent in the Arizona state commission gerrymandering case, he later applied the majorities view a few years later as settled law in the Moore case.

Meanwhile, Thomas does not behave that way. Thomas joined Rehnquist in the Concurrence in Bush vs. Gore, and then continued to advocate in his dissent in Moore with the same philosophical arguments of what the Constitution means and is not influenced by this so-called settled law.

What is the appropriate action for a Supreme Court Justice? Should you follow your own view on the constitutional framework or follow the majority’s opinion from settled cases?

Gary Feinerman:
Well, it depends on your view of stare decisis. Chief Justice Roberts has a stronger view of stare decisis than Justice Thomas has, and Justice Thomas has been forthright about this. He's written about this in separate opinions where he is saying that it would violate judicial function to place too much importance on stare decisis that the court has to decide things in accord with what the court believes is the decision and not be bound by prior decisions that the current court thinks are incorrect.

So if you strongly adhere to stare decisis, there are situations where you will overturn precedent, but only in very particular circumstances. And you will apply precedents even if you believe that they were wrongly decided. So long as the precedents don't fall within an exception to stare decisis, whereas Justice Thomas is more of the view that if it's wrong, it's wrong, and we ought to make it right.

Larry Bernstein:
Justice Harlan in his famous dissent in Plessy vs Ferguson laid the groundwork for its reversal nearly sixty years later. Justice Ginsburg said that she writes her dissents so that future justices can find reason to overturn a particular decision. And Justice Alito laid out in Dobbs why he thought that Roe was wrongly decided and must be overturned. What do you think should be the appropriate standard for overturning precedent?

Gary Feinerman:
It just can't be solely because the current court believes that the prior court made a mistake. There must be an extenuating circumstance. One of the extenuating circumstances is if a precedent has proven itself to be unworkable; it's set a standard that courts in the ensuing years just aren't able to apply it sensibly. There's another exception to stare decisis is if the prior decision isn't just wrong but is egregiously wrong. Whether a prior decision is wrong or egregiously wrong is often in the eyes of the beholder. At least as to Alito and Ginsburg, they articulate the same construct, I believe, now they will disagree in its application.

If Justice Ginsburg were alive, I don't think she would agree that Roe versus Wade was egregiously wrong, which is what Justice Alito concluded. Ginsburg and Alito, I believe, apply the same construct. They just would reach different decisions in different cases as to whether something was wrong or something was egregiously wrong. I think Justice Thomas operates under a different construct. Where a prior decision doesn't have to be egregiously wrong to be overturned consistent with what he views as the proper role of stare decisis.

Larry Bernstein:
What are you optimistic about as it relates to the court’s decision in Moore vs. Harper?

Gary Feinerman:
Harper makes me optimistic that courts will view decisions and issues that have a political tinge to them in a manner that derives from their interpretive methodology and their view of the Constitution. The courts did that in 2020. I'm hopeful that the courts will continue to do that in 2024 and am optimistic that they will do so and then in the ensuing years.

Larry Bernstein:
Thanks Gary.

We now move to our second speaker Renée Flaherty who works with the not-for-profit law advocacy group the Institute for Justice that defends individual property rights and economic liberty.

I am a long-standing supporter of IJ and I've asked Renée to discuss her recent victorious case in Georgia.

Renée Flaherty:
Thank you for having me. My name is Renée Flaherty and I'm a senior attorney at the Institute for Justice. We're a nonprofit public interest law firm, founded in 1991, and we represent ordinary Americans for free and cases against the government when it violates their rights. And we're very busy because the government violates people's rights every day at every level: local, state, and federal. But our clients are special because they're working not just to change their own lives but to change the world. That's the point of public interest litigation. We're working to set precedent that helps everyone and that advances our mission. We work in many different areas: free speech, property rights, educational choice, and what I'm here to talk about today, economic liberty. Economic liberty is the right of every American to earn a living in the occupation of their choice without unreasonable interference from the government.

The case I'm here to talk about today was in Georgia but it set a precedent that judges all over the country will be looking at. And it all started with lactation consultants. Those are people, usually women, who help moms breastfeed their babies. So, it's an occupation that people have been doing since the dawn of time and doing it quite well and safely without interference from the government. But in 2016, Georgia decided to license lactation consultants. My client, Mary Jackson, who has over 30 years of experience as a lactation consultant, didn't qualify for a license. This is a woman who teaches doctors and nurses how to help breastfeeding moms.

And she's one of the leading experts in the country. She was going to lose her job, but instead she teamed up with IJ to challenge the law in court. We sued in 2018, and after five years of litigation in two trips up to the state supreme court, we won. The court ruled unanimously that Georgia's law violated my client's right to earn a living free from unreasonable interference from

the government. Unfortunately, judges often defer to government lawyers when they say that a law is justified, no matter what effect that law is going to have on real people or the real reasons behind the law. And what's special about the Georgia Supreme Court's decision in this case is that the judges held the government accountable for what it's doing. And that's a big deal because sadly, it's difficult to win this kind of case.

Larry Bernstein:
States regulate most professions. What makes an unreasonable government licensing requirement?

Renée Flaherty:
When the government wants to regulate an occupation, you have to ask why are they doing it? Is it to actually protect the public health and safety or is it for a different reason? And in this case, with lactation consult consultants, the reason for the law was actually pretty clear. It was because one group of privately certified lactation consultants lobbied the legislature to get the license passed. And according to the court, this is not a legitimate aim of the government to protect one group from competition from another.

Larry Bernstein:
This is not the first time that the Institute for Justice has fought to limit the power of the state to require needless licenses. Tell us about your ongoing battle to allow individuals to braid hair.

Renée Flaherty:
We've done many different cases about braiding. IJs very first case in 1991 when it was founded, was on behalf of braiders in Washington, DC. They were required to get a full cosmetologist's license just to braid hair. And whenever you get a cosmetologist's license, you usually don't learn how to braid. You're learning how to cut and use chemicals and do all sorts of things that braiders don't do. And so, it was an absolutely useless credential for them. So, we had that case in DC where we sued and then they changed the law, which was great.

Larry Bernstein:
In the Georgia lactation case, what were the constitutional issues related to economic liberty and pursuing your occupation without government interference.

Renée Flaherty:
So, the decision in Georgia was under the state's constitution. Georgia's constitution protects the right to earn a living without unreasonable interference from the government under its due process clause. And so that was the claim that we brought in state court in Georgia because state constitutions often provide more protection for economic liberty than the federal constitution. So, it can be easier to win these cases at the state level because state judges are much more

concerned about their own constitution, special protections for economic liberty than, unfortunately, federal judges are most of the time.

Larry Bernstein:
And why is that?

Renée Flaherty:
I think that state judges are more interested in protecting individual rights under their state constitutions because it's important to them to pay attention to how their state is unique. And so, you have a lot of case law in various states that push back against government power. And often it is where people are making a living in these ordinary occupations like lactation consulting. And in Georgia, there are a lot of cases striking down plumbing licensing. And they actually tried to license photographers in Georgia, which is crazy. And that was struck down under Georgia's due process clause. IJ has had success in state courts in Pennsylvania and Texas as both of their state constitutions have been found to provide greater protection for economic liberty than the federal constitution.

Larry Bernstein:
In the Georgia plumbing cases, the law required licensing for plumbers working on new construction but not existing buildings. And the court viewed that as arbitrary and shut it down. Tell us about that.

Renée Flaherty:
Often laws that aren't really connected to health and safety have these problematic exemptions. That's kind of a symptom of an underlying problem. And that's something that the justices in the lactation consultant's case pointed out. If a law is not really connected to the public health and safety, it's going to be like Swiss cheese. There are going to be all of these holes and exemptions for people to get through because at root there's no pressing health and safety concerns. And so, you can exempt people without a problem. For example, in the lactation consultant's case, you didn't have to get a license as long as you did the work for free, as long as you weren't getting paid for it. If you worked for the government, you didn't have to get a license. If you were a doctor or a nurse, you didn't have to get a license, even if you had no training in helping breastfeeding moms. And so, the court pointed out, if there are that many exemptions, is there really the public health and safety concern that would merit such a restrictive license?

Larry Bernstein:
The federal constitution incorporates the 14th amendment which had been construed in the Lochner decision to give individuals economic liberty as it relates to employment. Lochner was overturned and now the government has much broader authority to regulate your occupation. Does the federal constitution protect economic liberty after the repeal of Lochner?

Renée Flaherty:
Lochner is the favorite boogeyman of federal judges whenever they're saying, we need to defer to the government because we don't want to be like Lochner. That's just the one of the most reviled cases. And if you look at the facts in Lochner, it was a case about baker's and how many hours they could work. Bakers who were immigrants were willing to work very long hours to support their family. They were trying to earn a living but the existing bakers weren't happy with the competition.

So, you have a law that at root really was protectionist, but the court was trying to say that there were health and safety concerns. And so now federal judges always point to Lochner when they say, oh, the court can get out of control with protecting economic liberty. But state judges usually aren't so afraid of Lochner because they don't feel bound to what federal judges said in the 1930s about economic liberty. And they can look to their own state constitutions and their own case law that provide similar protections to Lochner, but they don't feel bound to reject it.

Larry Bernstein:
How do Federal Judges view economic liberty and constitutional protections in a post-Lochner world?

Renée Flaherty:
Unfortunately, they don't like it. <laugh>. We've had less success in federal court than we have had in state court. A very recent example, one of my cases Washington DC requires a college degree for daycare providers. A regulation that was enacted by an administrative agency in 2016. And they said, now to be a daycare provider in DC and care for babies infant zero to three, you had to have an associate's degree. And my client, Lummi Sanchez is an immigrant, and she moved to the US in the nineties and decided to pursue her dream of caring for children. And she's had a home daycare since 2006, and she has a college degree, but it's from her home country of the Dominican Republic, and it's not in early childhood studies. So, she didn't qualify under these new regulations, even though she is an amazing daycare provider. So, we teamed up with her and we sued and after five years in court and two appeals, we lost that one in federal court.

Larry Bernstein:
My niece is a high school student and she babysits. Does she really need a college degree to babysit?

Renée Flaherty:
Babysitters were exempt from DC's regulation. So there again, you've got an exemption to a law. I think it's fine to license daycares, but you have to look at what the regulation requires, which

was a college degree. And you have to say, is there a real connection between the provider having a college degree and those kids being safe and happy?

Larry Bernstein:
Do you think that lawyers need to be licensed?

Renée Flaherty:
<laugh>, I have absolutely no interest in protecting my own cartel from competition <laugh>. I think that there are a lot of things that lawyers do that can be done by ordinary people.

A lot of it is just helping people fill out forms. And the majority of what I do is just speech. With lawyer licensing, a great deal that ordinary people can do without even going to law school. I'm not afraid to say that lawyer licensing is up for grabs.

Larry Bernstein:
What do judges think about these economic liberty cases?

Renée Flaherty:
Back when we were founded in 1991, we were often kind of laughed out of court when we went in and tried to litigate economic liberty cases. But if you flash forward to now, there has been a lot of success. It's obviously taken 30 years, but people's attitude is different. And that includes judges, that includes legislators and the general public. And IJ, we don't just litigate cases in the court of law, we litigate them in the court of public opinion. So, we have a communications team, we have a team that does research to find facts to back up the things that we say whenever we go into court. And we have a legislative team that crafts model legislation and hopes that legislatures will enact it. And we've had success on all fronts. And I think that our big wins, like in the lactation consultant case, like in the Patel case in Texas all contribute to that. And it's like a giant snowball that we hope will just keep going and going and bring people more economic liberty.

Larry Bernstein:
Tell us about the Patel case.

Renée Flaherty:
This involved eyebrow threaders who use a cotton thread to remove unwanted hair from your eyebrows. A very simple thing, it's an ancient Middle Eastern art. A lot of immigrants do that, and Texas wanted them to get a full aesthetician's license. So that would involve learning how to wax, maybe even give massages. It was just mostly irrelevant to what they do. And so, we challenged that on behalf of a threader. And that case probably took five years and we won in the Texas Supreme Court, and they said that when you challenge an economic regulation in Texas,

the review is meaningful. A judge is actually going to look at the real reasons behind a law and about whether it's protecting the health and safety. And in this case, they said that it's not, it's too burdensome to require a threader to get hundreds of hours of training and spend thousands of dollars to do something that they already know how to do.

Larry Bernstein:
Let’s change topics to civil forfeiture.

Renée Flaherty:
Civil forfeiture is a huge problem all across the country. And the government can actually take your money without even charging you with a crime. You don't have to be charged. You don't have to have done anything wrong or even contemplated doing anything wrong, and they can take your cash just because you have it. And the reason why is because they have a profit incentive. They get to keep part or maybe even all of what they seize. And so naturally that's going to lead to seizing more cash. And it's happened to ordinary Americans carrying cash for whatever reason, and this is sometimes people's life savings.

There was a case where there was a woman who was going to build a medical clinic in Nigeria, and she had her money seized. She was a nurse and that was both her savings and money that people had given her to start the clinic. There was a guy who was an immigrant from Asia and was raising money and collecting charity to build an orphanage. So, you've got these ridiculous situations where the government has just taken someone's property when they've done nothing wrong.

Larry Bernstein:
Winning lawsuits is only part of the solution. I suspect that you need to embarrass senior government officials to change behavior. You sued the Feds because they seized a motel owned by an innocent Indian immigrant after a random drug deal went down in one of the motel rooms. And after you won the lawsuit, Eric Holder changed the policy on seizing innocent party’s property because of the public outcry.

Renée Flaherty:
Unfortunately, the reforms that you're talking about were quite modest. That was about the Federal Equitable Sharing Program. And that's a program where even when state law enforcement seizes assets with civil forfeiture, they can share it with federal agents because in a lot of states they'll have stricter civil forfeiture laws. So, it's harder to seize property from people without convicting them of a crime, but they can get around those stricter laws by using the Federal Equitable Sharing Program. And that was what Holder made very modest reforms to and it left intact the majority of the program. But fortunately, there is a bill pending in Congress right now that could actually make some real reforms to civil forfeiture at the federal level. And IJ has

been involved with that for a long time. It only gets so far, every year, but I think this year it's gotten further than it's ever gotten before and it has bipartisan support. So hopefully after IJ has pushed for years and years through communications, through litigation, through legislation, we might actually see some real reform.

Larry Bernstein:
You work for a public interest law firm, what does that mean?

Renée Flaherty:
Public interest law is bringing strategic cases to further that mission. You're being choosy about the issues and the clients you work with. And in the case of the Institute for Justice, our mission is to increase freedom in the areas that we work in. We're a nonprofit and we represent our clients for free, and we look for those special types of clients. Other public interest firms, the ACLU, the NAACP they both have missions that they're furthering through their litigation, the court of public opinion, and legislation.

Larry Bernstein:
Do you sometimes find that you win by losing?

Renée Flaherty:
Yes. Absolutely. That's the Kilo versus New London case.

In many ways a heartbreaking loss for IJ because we had this entire neighborhood that was going to be taken by an eminent domain for building condos and shopping and everything for the people who were going to work at Pfizer. So, taking property and handing it over to a private entity for private use, whereas eminent domain is meant to take property for a public use like a road or a park or a hospital or something like that. But in this case, the US Supreme Court said, actually, it's okay for the government to take property and hand it over to a private entity for a private use. In 2005, we lost that case, but we immediately turned around and said, how can we use this? And we said, this has happened, but at the state level, you don't have to tolerate this. States, you can change your laws and prevent this from happening in your own states. And so, the reaction was huge and everybody was up in arms about it. And so, the vast majority of states reformed their eminent domain laws as a result of Kilo. And it's pretty rare that you get a case like Kilo. We won so much that those cases are vanishing, and that's a great thing.

Larry Bernstein:
I end each episode on a note of optimism. Renée, what are you optimistic about as it relates to economic liberty?

Renée Flaherty:
I'm optimistic about bringing economic liberty claims under state constitutions. I think that there are a lot of judges who are out there looking at their state constitution and eager for these cases to come before them. And I'm optimistic that we'll be able to find those opportunities and bring those cases and win.

Larry Bernstein:
Thanks to Gary and Renée for joining us today.

If you missed last week's show, check it out. The topic was Asians Get to Attend Harvard!

Our speaker was Rick Banks who is the Jackson Eli Reynolds Professor of Law at Stanford Law School and the co-founder and Faculty Director of the Stanford Center for Racial Justice. You may recall that Rick was previously the co-host for this podcast What Happens Next along with me during most of 2020. Rick discussed the Supreme Court decision in the Students for Fair Admissions cases against Harvard and the University of North Carolina.

I now want to make a plug for next week's podcast with Thomas Malone who is a Professor of Management at MIT's Sloan School and is the Director of the MIT Center for Collective Intelligence. Tom is the author of the book Superminds: The Surprising Power of People and Computers Thinking Together.

AI is the big topic right now, and I want to learn from Tom about how we will interact with AI-based algorithms to become a Supermind using the best that humans can do with the awesome power of the most advanced computers working together.

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.