Supreme Courts
What Happens Next - 02.05.2023

Larry Bernstein:

Welcome to What Happens Next. My name is Larry Bernstein. What Happens Next is a podcast which covers economics, finance, politics, and sports. I give the speaker just six minutes to make his opening argument.

Today's topic is the US Supreme Court Docket and Reducing the Power of Israel's Supreme Court

Our speakers will be Ilya Shapiro who is the Director of Constitutional Studies at the Manhattan Institute. We are going to hear from Ilya about what happened last term besides Dobbs and what to expect from the Supreme Court. This year's big cases will be on affirmative action, limiting state courts influence in elections, and interstate commerce. Ilya spoke on this podcast previously about free speech.

Our second speaker is Eugene Kontorovich who is a Professor of International Law at George Mason's Law School and works with the Kohelet Policy Forum on legal reforms related to Israel's Supreme Court. Israel's Supreme Court has been flexing its muscle lately and has rejected the Knesset's laws that it feels are unreasonable including political compromises on the military draft as well as firing a cabinet minister that it viewed as unqualified because of previous legal troubles. We will hear from Eugene about Prime Minister Netanyahu's proposed judicial reforms and the hysteria it has triggered in Israel's legal community.

There is much to cover so buckle up.

I make this podcast to learn, and I offer it free of charge. If you enjoy today's podcast, please subscribe from our website for weekly emails so that you can continue to enjoy this content.

Ok, let us begin with Ilya's opening six-minute remarks.

Ilya Shapiro:

Good to be with you, Larry. So, last term, the much advertised, expected, feared, longed for conservative Supreme Court majority coalesced after many false starts, misfires disappointments. Going back decades, Richard Nixon pledged in the 1968 campaign to reverse Warren Court activism.

Even Dwight Eisenhower before him, he appointed Earl Warren and Bill Brennan, who he considered his only two mistakes of his entire presidency. But conservatives will remember this past term as the one when they finally, finally had enough votes to overcome defections. This is five years after Neil Gorsuch was confirmed, the second term with Amy Coney Barrett, and this Republican-appointed majority asserted itself.

Now, this is not just looking at the top few cases. The statistics bear this out of the term, 60 opinions in argued cases, fourteen involved a 6-3 so-called partisan split.

And to those we can add ten 5-4 decisions in all of which the three liberal justices stuck together. So, we can call 40% of the cases last term ideological, including the big ones on school choice, religion, guns, vaccine mandates, environmental regulation, and, of course, abortion. Only a quarter of the cases, 15 of them, were unanimous.

Those are really striking numbers. I've been a court watcher for a while, and this is very different from any year since I've been taking a look. Typically, the court is unanimous about half the time, and they are split ideologically, maybe 15% to 25% of the time. That was reversed this last term. And when you look at those 5-4 cases, you think, oh that's just John Roberts switching over. But in all three of the 5-4 cases where the conservatives won, it was not Roberts with the liberals, it was Gorsuch with the liberals.

In the seven liberal wins, every conservative except Alito moved over, with Roberts and Kavanaugh moving over twice. Having a margin of error matters. There is a lot of fluidity and differing approaches to originalism and history-based modes of analysis on the right. In practice, it comes together to make for stability in the law.

Whether you like it or not, it's more predictable than what we've seen when we got used to Anthony Kennedy, or beforehand Lewis Powell or Sandra O'Connor, as kind of the swing boat jump ball.

While some liberals say that the sky is falling in their fear reversal of all the Warren Court's groovy civil rights wins of the 1960s, I think really what we're seeing is a stripping of the legal wallpaper of the Warren Burger 1970s.

This also means, to a large extent, this is much less the Roberts Court than it has been since Justice Kennedy retired a few years ago. Kavanaugh is still the median justice–he was in the majority 95% of the time–I do not think we can really call it the Kavanaugh Court. He has not had a signature opinion. And if anything, this was the breakout term for Clarence Thomas, the Senior Associate Justice, who wrote the majority opinion in the Second Amendment case.

This term, the court is not backing off the gas in terms of blockbuster issues. We have affirmative action, racial preferences, and college admissions. Can a graphic designer be compelled to create a website for same-sex weddings, the extra territorial effects of pig farming regulations, and election regulation–always hot and politically salient.

Larry Bernstein:

What does it mean that Kavanaugh is the median justice? Does his opinion matter more than other justices because he is breaking ties, or is it simply a function of the current makeup of the court?

Ilya Shapiro:

It is more a mathematical phenomenon, meaning he is in the majority, most of the time. But he is not a swing in the sense that he's not unpredictable per se, just means he's in the occasional cases where Alito and Thomas peel off to the right, he's still with the middle.

Larry Bernstein:

Does this mean that Kavanaugh is the most liberal member of the conservative six?

Ilya Shapiro:

Depends how you define liberal. Roberts is with the liberals more than more than Kavanaugh. And in the biggest controversial issues, for example, with abortion, it was Roberts who did not join the majority in overturning Roe. He still would have upheld the Mississippi law on narrower grounds. And that has happened several times. It is not ideological, it's more in terms of being cautious.

Roberts likes incrementalism or minimalism. Kavanaugh also perhaps does not want to go as far as fast all the time, but that is more pronounced on whether to take cases. They need four votes to take up a case. Some of the bigger controversial ones, he might not to do that.

Larry Bernstein:

What does Roberts think of his role as Chief Justice and how did it affect his vote in the Obamacare case?

Ilya Shapiro:

Roberts certainly was the man in the middle in the Obamacare case. He is an institutionalist. His big hero is John Marshall, to elevate the reputation of the court to keep it out of political fights. I do not think he has been successful in that, not necessarily because he is not skillful. I just do not think it is possible. And for that matter, it may have backfired because certain of his maneuverings is seen as more nakedly political rather than a disagreement over how the constitution can be viewed. I do not think he has been successful on his own terms of extricating the court from the larger political discourse.

Larry Bernstein:

Let us discuss next the current affirmative action cases with Harvard and the University of North Carolina. In discovery, Harvard admitted to using consistently low personality reviews for Asian Americans to keep their acceptance rate low. How do you think the Supreme Court will rule on this case and will they reject the Bakke decision as part of its ruling?

Ilya Shapiro:

I am glad you asked me about Bakke because that is the original sin of our modern affirmative action jurisprudence. It was an interesting case, a challenge to racial quotas at UC Davis Medical School. Four justices said, “no, you can't use race.” Four justices said, “yes you can, because of the long history of discrimination.” And Justice Lewis Powell in the middle said, “no, I don't buy either of those. I think educational diversity can be a compelling state interest. And as long as race is one of many factors, never determinative, you can consider it to advance that very important interest in educational diversity.”

And that is why our whole public policy debate for more than four decades now has not been about whether it is just to compensate the descendants of slaves.

Instead, it's about diversity. From that seed that was planted by Justice Powell, we have the whole modern tree of DEI offices that enforce all kinds of orthodoxy. At this point, after several iterations and challenges involving the University of Michigan, University of Texas, there are different ways of using race in different admissions program. I think that point about the downgrading of Asian personalities, even as the qualified numbers of Asians in the overall pool

has increased their total rate of admission at Harvard, Princeton, UNC, schools that are selective has not changed. I think the justices, the majority, is going to say, “there's just no way to do this in a constitutional way.”

It just stinks too bad. There is no way for practical purposes to satisfy at least the statutory requirement of the Civil Rights Act, if not the 14th Amendment.

Larry Bernstein:

If the Supreme Court does rule against Harvard in this affirmative action case, I suspect that Harvard will use other means to get to the same result because the admissions officers and its board want a class that has more blacks and Hispanics and fewer Asians. Will the court anticipate Harvard’s actions to undermine the court’s decision?

Ilya Shapiro:

Well, in civil rights law, you cannot use pretext to achieve the same racial discriminatory goals. If there's massive resistance to a ruling against Harvard and then there is going to be follow on litigation about whether something really is just a proxy for trying to use the same old racial characteristics. If, on the other hand, the schools say, “okay, we really want to help the truly disadvantaged not just doctors’ and lawyers’ kids who happen to be black or Hispanic. We are going to look at zip codes, we are going to look at socioeconomics. Not just the bare racial characteristic. In fact, we're going to remove the racial box that you won't be able to check that at all.”

That is going to be a closer case if they do socioeconomic preferences, a true diversity, not just rich kids of all different colors. But hopefully different schools will try different things, and we will have follow on litigation to be sure, as you always do when there is a watershed moment in an important area of jurisprudence. This is not the end it is perhaps only the end of the beginning.

Larry Bernstein:

In Justice O'Connor's opinion, she said the Court will reconsider affirmative action 25 years after her opinion was drafted. Is this unusual for the Supreme Court to put a timestamp on its decision?

Ilya Shapiro:

Yeah, that was an odd point of the opinion. O'Connor was the swing vote in the Michigan cases in 2003 that said that you cannot use mechanistic methods, quotas for race, but you can do this holistic one of many factors, and her expectation in 25 years it would no longer be necessary.

We are 20 years later, and we are nowhere near an organic sun setting of racial preference. If anything, it is expanded. I do not think it'll matter one way or another. I do not think the justices will be like, “well, you know, 20 years is close enough to 25,” or, “oh, no it's still okay for another five years.”

Larry Bernstein:

Roberts famously said that the way to stop discrimination based on race is to stop discriminating based on race. Do you suspect that Roberts will be the one to write the Harvard opinion?

Ilya Shapiro:

Yes. I think he will take it for himself.

Larry Bernstein:

Tell us about the North Carolina election case.

Ilya Shapiro:

There is an issue that comes up with increasing frequency and acrimony around election time. And that is whether there's a federal constitutional violation or remedy for that violation when a state court rewrites state election law that's devised by the state legislature. Election law, like tort law, criminal law, family law, is state law.

Congress sets when federal elections are and there are the Voting Rights Act protections that you can't discriminate based on various characteristics. Otherwise, states figure out whether you are going to be voting on a machine or by hand. Well, what happens if a state supreme court which is interpreting state law in all these other areas, interprets state election law in such a way that is just rewriting the law not interpreting it.

Because there is a provision in the constitution, the election clause, that says that the manner of holding elections for senators and representatives shall be prescribed by the legislature of the state. If a court rewrites the law, that is not the legislature writing the law. And if we are concerned about that, how do you draw the line? Maybe the Supreme Court could say, "regardless, that line is here where the North Carolina Supreme Court threw out districting maps because they didn't guarantee fair or free elections under the North Carolina Constitution." That is the basis on which the court threw out the state legislatures work.

The strongest argument for the challengers that are going against what the North Carolina Supreme Court did: they invoke what is known as the independent state legislature doctrine that is that state courts are neither here nor there. Unlike with tort law or criminal law, or family law, there is a federal constitutional provision that says, "prescribed by the legislature thereof." That means courts do not play a role at all. But that cannot be, because the governor plays a role, signs the bill. Is the governor part of the legislature? If there is a dispute over what the given state law means, do we just let that dispute lie?

It is courts that resolve it. I do not think the U.S. Supreme Court is going to buy that wholesale independent state legislature doctrine, but nor are they comfortable with the state court engaging in frolic and detour. In the gerrymandering cases, the U.S. Supreme Court ultimately threw up its hands. Maybe they will do the same thing here. Particularly when there's acrimony over elections, I hope that whatever the Supreme Court does, it lays out a clear rule, so we will not have to argue about whether a state supreme court was acting in a partisan manner.

Larry Bernstein:

The most famous election case of our generation was Bush vs. Gore. In that case the Florida state courts agreed with Gore's lawyers that there should be recounts, but only in the counties that Gore won to find more Gore votes. And the Supreme Court decided that selected recounts of specific counties violated the 14th amendment. There was a separate opinion written by Rehnquist and signed by Thomas and Scalia that said that the Florida Supreme Court was

making law and that violated the constitutional rules that only the state legislatures can make the election rules.

Ilya Shapiro:

Without that Rehnquist concurrence, I do not think we would have this case because that resurrected the independent state legislature doctrine. I think the point just was not needed in Bush v Gore because that was an equal protection issue. The idea that you cannot have different counties counting in different ways under the circumstances of that case. So, it was not necessary for other justices to join. If five justices joined, that would become the majority opinion. That was not the narrowest way of deciding that case. But certainly, that opinion in Bush v Gore more than 20 years ago was the read on which this case was built.

Larry Bernstein:

Next up is the pig farming case. Tell us why this case is so critical for interstate commerce.

Ilya Shapiro:

You have an increasing tendency of states issuing regulations that have spillover effects nationwide, particularly big states. If Texas or Florida, New York or California have some regulation, it typically is easier for you to just change your whole process to comply. But there is this doctrine that says that states cannot regulate or impede interstate commerce. This is known as the dormant commerce clause. That is the regular old commerce clause is Congress's power to regulate interstate commerce.

Well, what happens if Congress is not regulating? if states step in and start regulating that? There is a dispute that crosses ideological lines about what federal courts are supposed to do. There are some strong cases where states are engaged in protectionism. They treat imports from sister states differently than they treat the production of the same commodity from within state lines. That is clearly unconstitutional. But what if there is some regulation that affects the national market but isn't meant to privilege in-state actors necessarily?

99.8% of the nation's breeding sows are outside of California. Yet California, a major market, passed a voter-approved proposition to prevent animal cruelty that phased out certain methods of farm animal confinement and would have required larger pens for these breeding sows that is cost-prohibitive nationwide.

Because this regulation has such massive spillover effects, it affects manufacturing nationwide. The pork industry is particularly affected because it is hard to trace where the sow was kept under what conditions. It might be raised in one state, transported to another, butchered in another, it is hard to trace that sort of thing. So, all sorts of regulatory burdens are imposed by this law. The justices really struggled–it is another one where I have a hard time predicting what they are going to do.

Justice Gorsuch says that state protectionism, that is no good, but otherwise we are going to have an expansive commerce clause. I do not want Congress to have that much federal power either. And Thomas joins him on that. Presumably, the progressive justices will side with California because they want to side with progressive regulation. If it is Thomas and Gorsuch plus the three on the left, that is five right there. I am not sure that is exactly how it is going to come out. I think Roberts is going to get together with Kagan perhaps and organize some sort of very narrow ruling that that does not make sweeping claims about the dormant commerce clause.

Larry Bernstein:

Next case is a criminal conviction of a Cuomo campaign manager who got paid to lobby.

Ilya Shapiro:

Cuomo's campaign manager left government service in Albany–he became his campaign manager, employed by the campaign, not by the state government. And while he was employed, he was paid by a developer to help avoid union regulations. The Cuomo's campaign manager, Percoco is his last name, used his old executive office chief of staff, his phone, his computer, did not use government funds but used government facilities. It looks very shady. On the other hand, how do you distinguish that kind of private citizen acting in his personal, if shady, capacity?

This could be a case where it is definitely shady but hard to make into a federal crime.

Larry Bernstein:

Do you think Percoco will have his conviction vacated?

Ilya Shapiro:

Probably based on the way that the court has taken up in the context of Honest Services Fraud and the odd bedfellow coalition between the left and the right against the middle. I think it is more likely than not that he and the developer on the other side of the transaction will probably get acquitted on these charges.

Larry Bernstein:

One of Biden's first acts as president was the creation of a commission to evaluate the Supreme Court for changing life terms and potentially court packing, what happened with that?

Ilya Shapiro:

What happens with every Blue Commission report, the President thanks them in an Oval Office ceremony, and it gets filed away, never to be seen again. It's actually a fascinating report. I wrote my last book, *Supreme Disorder, Judicial Nominations, and the Politics of America's Highest Court* over the politics of judicial nominations.

I think it was like a 300-page report, but they did not have any policy recommendations. That was not their charge. Their charge was to evaluate and present the full parameters of the debate over various issues from court packing, expanding for political reasons, to term limits, new ethics rules, new rules for confirmation hearings.

But the commission, three quarters of them were liberals. There was never going to be agreement there–the left didn't agree with what the far-left wanted, let alone the more conservative members. In fact, a couple of conservative members quit before the final report. We probably will not know why exactly, but clearly there were tensions there. So, there were no ultimate recommendations. Certainly, after Dobbs, the left is not happy. And there was a push for court packing. But in the last Senate, Kyrsten Sinema and Joe Manchin said, "Nope, we're not going to break the filibuster to do that." Frankly, I do not think there were even 30 votes in the Democratic caucus to expand the court for political reasons.

Manchin and Sinema on that issue gave cover to a lot of senators who otherwise did not want to take that radical step. The filibuster could have been broken for some other reasons, whether voting rights or other things that Democrats care about. But that would be a tough vote, so it is sort of a moot issue for practical purposes. The talk of legitimacy, I think, is overwrought.

Larry Bernstein:

They have not found the guy who leaked the Dobbs draft

Ilya Shapiro:

or girl

Larry Bernstein:

Trump recently said that the Politico reporters should be held in jail till they give up the leaker.

Ilya Shapiro:

It is possible the reporters themselves, Josh Gerstein at Politico, that he does not know who it is. This could have been done via a burner phone and dead drops.

Larry Bernstein:

Why didn't they say that?

Ilya Shapiro:

Oh, you do not reveal your sources.

Larry Bernstein:

How do you think it is going to play out?

Ilya Shapiro:

Well, the, the investigation was not quite as thorough as it could have been.

Larry Bernstein:

Why didn't Roberts call in the FBI?

Ilya Shapiro:

Because Roberts wanted it to be an internal thing. There's separation of powers issues. He didn't want the executive branch law enforcement looking into this thing.

The justices themselves were not interviewed.

And apparently there was not a full sweep of personal devices, only court issued devices. What about personal phones? Now, the affidavit they signed makes clear that if one of the clerks or other staff were the ones who did it, they have violated that federal law, they lied to a federal official during an investigation.

We are now eight months past the leak. I think we will not know unless there is a deep throat like Mark Felt who reveals himself 50 years later from Watergate.

Larry Bernstein:

I end each episode on a note of optimism. What are you optimistic about the current Supreme Court docket?

Ilya Shapiro:

Like last term, I think they're going to get more decisions right than wrong which is going to upset a lot of folks mainly on the left although not quite as much as Dobbs.

Abortion is a 50-50 issue with the American people somewhere in the middle. Even with affirmative action, with racial preferences, it's a three to one issue against it. While Twitter will explode and left-wing elites and law professors will be angry if affirmative action goes down, but the nation, including members of racial minorities, really want to end this, to bring in Roberts' phrase, “this sordid business of divvying us up by race.”

Larry Bernstein:

Thanks Ilya, and now to our second speaker Eugene Kontorovich who is a Professor of International Law at George Mason University’s Law School.

Eugene Kontorovich:

The proposed reforms to Israel's Supreme Court and judicial system suggested by the new Israeli government have caused a lot of controversy. I want to look beyond the hysteria and see what is really at stake. Is this really a threat to Israeli democracy, as some are claiming? Israel has the most powerful court in the world. It's also the most powerful branch in Israeli government. The court, unlike its counterparts in other countries, can decide any issue about any subject, including ongoing military operations, foreign relations, refugee policy, draft policy, and who can hold a cabinet office or who even can be Prime Minister. The Court is not limited by any notions of standing. They can deal with issues where nobody claims to have been hurt. They decide over 10,000 such petitions a year with no lower court proceedings, no factual record, just based on what they think is right.

How do they get this power? They made it up for themselves. Israel does not have a written constitution. But a couple decades ago, the Supreme Court led by Aharon Barak President of the Court said, “We've decided that we will exercise judicial review because we believe certain laws implicitly let us do so. And if the Knesset does not like it, the legislature, they can change those laws.” So now the Knesset is saying, “you know what? We don't like it. And we are in fact changing those laws.” And the Supreme Court is saying, “well, wait, maybe your amendments to the so-called quasi-constitution can be unconstitutional,” because the Supreme Court has now officially declared that it is the priestly guardian of an unwritten higher system of law that they are privy to. And that can override even constitutional measures adopted by democratically elected representatives.

Now, the members of this court are not picked by the political branches. They are not in any way democratically accountable. Indeed, it's the opposite of how things work in the United States. They are picked by a committee controlled by sitting Supreme Court justices. But 10,000 cases do not let them decide every single issue in in Israeli politics. Things will still escape them. So, they have invented a doctrine where the Attorney General that was formerly the lawyer for the government, is really a representative of the Supreme Court in the Executive branch and can

pre-veto executive policies without so much as a reasoned memo by simply saying, “I don't think the court will approve. I think it goes too far.” Just today, the Attorney General has said the Prime Minister is not disqualified from pursuing judicial reform because for 10 years he's been under criminal investigation.

Though it's very hard to see the link between the criminal investigations and the proposed reforms, which would not affect criminal investigations. The court also has decided that aside from striking down laws based on statutes that they claim are constitutional, they can also block government action even if it violates no statute. Even if it's explicitly authorized by statute, if they think the government fails to properly balance social interests of different parts of society, or simply goes too far. In other words, it is an all-powerful, aristocratic, priestly council, self-perpetuating that controls Israel.

What the reforms would do is give the government some real power in appointing justices to make it somewhat democratically connected. It would not be quite like America, where the Prime Minister would pick the justices, but the government would have more say over who the justices would be over the Judicial Selection Committee.

It would eliminate this idea that the government is bound by the advice of the Attorney General even when it disagrees with that advice or has contrary advice from the other from other counsel. And it would require that the Supreme Court only overturn things based on actual laws, not on their notions of good or bad, or the so-called reasonableness doctrine. And that they overturn the laws only by super majority vote. Because the laws that the court is interpreting as constitutional were not passed in any specific constitutional process. They were passed by simple majorities. For example, the Supreme Court uses a law called basic law Human dignity, which was passed 32-21. In other words, not even a majority of the Knesset was around to talk about it, because no one thought it was constitutional.

They use that to overturn laws passed by more than 60 Knesset members. These are all mild reforms: political role in the appointment of judges, the Attorney General works for the government, not the government working for the Attorney General. These are all basic ideas. The Supreme Court cannot just do whatever it wants. They can't overrule things that they simply find are unbalanced.

They don't have judicial review because it's a parliamentary supremacy system based on Britain, based on the Westminster model. Now, you might disagree with some of the proposals. You might think maybe only some of them should pass, but the notion that this is going to fundamentally put Israel in some kind of authoritarian camp and that American Jews and Friends of Israel should be concerned is absurd.

Larry Bernstein:

Why has there been such hysteria over judicial reforms proposed by the Prime Minister of Israel that he is compared to Orban in Hungary?

Eugene Kontorovich:

Orban has become shorthand for a leader we don't like and has been called undemocratic. Now, he is not undemocratic in the simple sense that is to say he wins clear democratic elections by a lot but rather undemocratic in the sense he does not pursue substantive policies that Western

European elites believe should be pursued. But there's really no connection between the policies of Orban and the policies of Netanyahu in this matter.

Why don't we say he's like Biden, because Biden would have, but for Senator Joe Manchin, pushed through court packing, which would give him complete and total power of the court in every way.

The best analogy for what it's going to be like is it's going to be like Israel in 1993. I'm old enough to remember that.

Larry Bernstein:

Let's discuss the origins of judicial review with John Marshall's landmark decision in Marbury versus Madison. He creates judicial review out of whole cloth something similar to how Justice Barak creates judicial review in Israel. Marshall was thoughtful about the limitations of his judicial power and getting democratic approval or public opinion on his side. How do you think about Marshall's gambit and the American Supreme Court's concern about its role in the constitutional system?

Eugene Kontorovich:

I disagree with you about Marbury versus Madison. Justice Marshall formalized, announced and locked in judicial review but there was not the big blowback to it that there has been to Israel's judicial revolution. In Israel, for decades now, you have leading authorities, prominent left-wing professors like Ruth Gaon and Daniel Friedman saying, "this is simply not what it was meant to be. The court has too much power."

But in the United States, it's quite clear from the constitutional convention, it's made explicit in Federalist 78, that judicial review was contemplated to be a feature of the system. The question is, how far does the judicial review go? Are there limits on the court's power?

When Marshall announced judicial review, he announced it at the same time as introducing inherent limits on the court's power and Marbury versus Madison. He says, "there are decisions that are committed to the executive discretion, like who to pick for political appointed jobs, cabinet appointments, that we cannot interfere with because they are solely within the province of other branches. We cannot interfere at all in the actual running of other branches."

The Israeli Supreme Court accepts no such limit. They say, we can decide that someone who was picked to be a cabinet minister and who was qualified under the statutory criteria is just not a good enough guy for the job. They can even decide that about the Prime Minister.

Marshall and Marbury versus Madison said, we only interpret the Constitution not because we are specific guardians of the Constitution but because we have to decide cases that people bring.

And that's a limitation on the court. The American courts are seriously limited by doctrines of standing. They cannot reach out and decide any issue that strikes their fancy. It has to arise in a certain factual, chronological, temporal context, which leaves many issues outside their purview.

The Israeli Supreme Court has rejected that limitation and said, everything is decidable. The most famous example of this was they were building a private prison, like in America, a prison that would be managed by a company on behalf of the government. The government had issued a contract for this.

Someone brought an ideological petition saying, you need to strike this down as being unconstitutional because the idea of a private prison offends individual dignity. What's the prison actually going to be like? Does not matter. It is the concept. So, they struck down the prison that was not even opening.

Larry Bernstein:

I don't understand how the checks and balances work to contain judicial power in Israel. In the US, the Federal courts are appointed by the Executive and are confirmed by the Senate. Congress can pass laws that increase and decrease the power of the Federal courts. And sometimes in extreme situations, the executive can refuse to implement an order by the Supreme Court. This was famously the case when Abraham Lincoln told his cabinet that he could enforce all the rules but one, and thus refused to comply with Chief Justice Tawny's order related to Lincoln's suspension of the writ of habeus corpus during the civil war. How do these checks work in Israel?

Eugene Kontorovich:

Every branch of government needs checks on its power. No branch can be all powerful. Currently there is no such check on the Supreme Court's power. It is truly authoritarian. It is a 15 person Orban as they would put it. What if the Supreme Court, given that it's not limited by laws, given that it's not limited by statutes, makes an extraordinary decision. Like saying, for example, the Prime Minister cannot pursue measures of legal reform of the courts citing his own conflict of interest. That's what they're claiming. Now, of course, the courts have a massive conflict of interest deciding about cases and what involve their own powers, right?

If I were the Prime Minister, I would not listen to them because it would be a fundamental sabotaging of democracy. Now, I think Netanyahu would be very scared to not listen to the courts because they also have the lawyers, the lower judges, the bureaucratic system on their side. And it will lead to a real constitutional crisis. But when it directly contradicts and seeks to reverse democratic elections, and is inconsistent with checks and balances. That if the Prime Minister wants to reform the court and is disallowed from doing so, that is truly a coup.

And that goes against basic constitutional principles. I would point out that the American Supreme Court refuses to hear cases that even might affect potential restraints on the court. For example, cases about how impeachments are to be conducted, they say, "that's a political question. We can't hear it, because impeachment is one of the things that can be done to us if Congress thinks we're misbehaving about how constitutional amendments should be passed." They say, "we can't decide the process of constitutional amendments. Cause of course, one reason to amend the Constitution is you don't like our decisions." In Israel, the Supreme Court says the opposite.

Larry Bernstein:

Former President of the Israel Supreme Court, Aharon Barak, wrote a book called *The Judge in a Democracy*. In the book, he says that it's the role of the judge not only to interpret law but to make law. And what's strange about it is he doesn't put limitations on it in any material way. Nor does he find any sort of democratic checks necessary. Why do you think he created this legal concept and was he criticized for it?

Eugene Kontorovich:

So first of all, it's important to point out that this is not an idea that is uniformly embraced in Israel. The Supreme judges and the legal establishment obviously strongly support Barak because they are proteges of Barak. This panel that is controlled by judges picks not only the judges of the Supreme Court. They also pick the lower court judges, also a retired justice sits on the panel that appoints the Attorney General. The Attorney General typically becomes a Supreme Court justice if he behaves nicely. Every law professor in Israel wants to be on the Supreme Court.

So, there's a huge amount of self-perpetuation, cronyism. But many prominent officials, including former Justice Landau, Justice Minister David Friedman, have sharply criticized the court in Israel and have actually been blocked from becoming Supreme Court Justice because of their criticism of the court.

Why did Barak do this? I think he wanted power. It's important to see the rise of the judicial power in Israel in historical context. Israel for 40 years was a one-party state ruled by socialist parties of Ben-Gurian's coalition. During those 40 years, no one ever suggested that there was any doctrine other than absolute parliamentary sovereignty. And the court kept its head down completely.

And people saw that you might have government not by the best and most enlightened people as they saw it, that they come to feel that democracy had to be protected from itself from elections. I think arrogance is massive. They truly believe that their opinions are neutral. That is to say that politicians are moved by biased sentiment and that the judges reflect only abstract truth.

Larry Bernstein:

In the Wikipedia entry for the Supreme Court of Israel, and under the list of Presidents of the Supreme Court not only does it list the current and previous ones, but it lists the future Presidents of their Supreme Court going out to the year 2039. How absurd is that?

Eugene Kontorovich:

So let me explain how that happens. Judges in Israel do not serve for life tenure. They serve until mandatory retirement. So for all government jobs, all non-elected offices, there's mandatory retirement in Israel. It's one of these socialist vestiges. Interestingly, the court has approved a mandatory retirement age for themselves that is higher than anyone else's mandatory retirement age. Which one wonders how it conflicts with the principle of equality that they have discovered in the Constitution. But as a result, everyone sticks around to the end. It's one of the highest paying jobs in Israeli public service.

The chief justice is by seniority. The government does not pick the president of the court. That is very important because the president has a vast power. It's a 15-member court, and judges sit in three judge panels, and the president is in control and significant part of the composition of those panels. So even if there's a few more conservative judges on the court, the president can largely assign things to panels that are going to be favorable to them. So, the President has vast power, more power relatively speaking than the Chief Justice in the United States.

Larry Bernstein:

You mentioned that the Attorney General is selected by the courts and not by the Prime Minister. Can the Prime Minister fire the Attorney General?

Eugene Kontorovich:

Theoretically, yes, but also according to the Supreme Court, the Attorney General can determine that firing to be illegal. So basically, no, it's not happened.

Larry Bernstein:

And if he did, can the Prime Minister appoint his replacement?

Eugene Kontorovich:

The Prime Minister can only pick his replacement from candidates approved by this committee.

Eugene Kontorovich:

Some of the reforms seek to give the government the power to pick their own legal advisors. That's thought to be a threat to judicial independence, which is funny because it actually has nothing to do with the judiciary. It's about the executive branch.

Larry Bernstein:

This is not the first time where we see of constitutional disagreements in the world. One of my former Salomon Brothers colleagues Martin Redrado became the head of the Central Bank of Argentina, and the President of Argentina Cristina Kirchner fired him. And he said, no, you cannot fire me. I am an independent central banker. He refused to leave his office. There was a standoff, the banker lost in the end. Who's going to win this one?

Eugene Kontorovich:

Nobody knows. The stakes are very high. I'll point out there's a difference between a Central Bank governor and the Attorney General <laugh> government's lawyer, and it's supposed to represent the government. It's hard to say because the other side, the opposition to the reforms, are using truly scorched earth tactics. And trying to suggest that this is going to cause economic harm that foreign investors are going to pull out of Israel.

Of course, those things are self-fulfilling prophecies. When foreign investors read headlines like, “Israel may become unsafe to investors, Israeli businessmen say they might worry a little.” Ultimately, I do not think any economic harm is going to come to Israel, but there might be some short-term noise that is that unsettles people, and they're trying to use that as a tactic.

They're also trying to invite foreign intervention by the United States to create diplomatic penalties. In short, they are trying to use a wide variety of undemocratic tactics using outside tools to protect their undemocratic system of the Supreme Court. In the end, I suspect at least some of these reforms will pass. But just today, the Attorney General is trying to basically impeach the Prime Minister and the Supreme Court backs them.

The stakes are only mounting, the opponents now are threatening Civil War. I cannot imagine anyone's going to have a war for the Supreme Court, but that is being threatened. The idea is to

scare supporters of the reforms who don't want a civil war, who don't want to harm Israel to say, “if you go down this path, we're going to burn everything down with us.” Then who blinks first?

I believe the coalition is truly committed to this because they know that if they back down now, there's no future. That is to say, if the reforms are not implemented now, then the Supreme Court will be fully confirmed as being the Supreme priestly council that decides all issues in Israel, this will be their greatest moment, and there will be completely unchallengeable in the future.

Larry Bernstein:

The UK does not have a constitution like in Israel. The House of Lords acted in some ways as a check on Parliament but there's also judiciary and the judiciary started creating obstacles for Brexit. And Boris Johnson, who was Prime Minister basically said, “the courts did not have standing and that power is vested in parliament. Why is the high court in the UK viewed so differently than in Israel?

Eugene Kontorovich:

First of all, the Supreme Court of UK is a relatively recent invention, was created by some judicial reforms about 20 years ago. The Supreme Court in the UK has not said that it can invalidate proposals to limit its own power, it would be incomprehensible.

I asked UK lawyers about this. The Supreme Court was created in 2005, let's say parliament wanted to pass a bill limiting its powers. For the Chief Justice of the Supreme Court to take to the streets, to meet with legislative proponents of opponents of the reform bill to lobby government officials against it and speak out against it in public before it was even passed, would be inconceivable. That's what the Israeli Supreme Court is doing, because they see this as their own prerogative.

Larry Bernstein:

One of the things that has brought judicial reforms to the forefront is the Supreme Court’s decision to prevent Deri to be a minister in Netanyahu’s cabinet. Tell us about that.

Eugene Kontorovich:

Aryeh Deri is the head of the Shas party that represents economically disadvantaged and traditionally marginalized constituency people from Arab countries who were not involved in political power until the Likud, which started winning elections in 1977. The Sephardic Jews in Israel.

The leaders of parties typically serve in cabinet positions. That's how you make a coalition. Unlike the UK where you might have three parties in a government, you often have six, seven or more parties. You cement the relationship with them by having the party heads become ministers in the government. That's how coalition deals are made in every government left or right.

Deri as the head of one of the larger parties in the coalition was given some cabinet positions. Deri, despite being a very popular politician with Sephardim, also had a long series of legal woes, including multiple convictions for bribery and financial offenses. In Israel, the law said that if you have been convicted of a crime that's determined to be a crime of moral turpitude, you cannot have a cabinet position.

In Deri's case, it was not clear if his crime was such, because the court had not made that determination–he took a plea bargain. But, in any case, to make matters abundantly clear, the Knesset passed a law saying, if you're convicted of a crime but not sentenced to jail, you can be a cabinet official. It's not limited to Deri, but they passed this to ensure that the Supreme Court could not interpret the statutes to say that Deri could not be in the cabinet.

So, the Supreme Court said, "It's true, he is authorized by law to be a cabinet member. But you know what, it's unreasonable. He has been convicted of crimes." Now, of course, his voters know that he has been convicted of crimes. They thought that the system was against him or that the crimes were insignificant.

No one would have a constitutional crisis over Deri being in the cabinet. But there is a bigger issue, which is the Haredi draft. In Israel there's a deferral of army service for people who are studying full-time. They can defer the Army service for a few years. And that is how many ultra-Orthodox men managed to devote themselves to Torah study and not be in the army. This is part of both a longstanding social compromise and also a longstanding social controversy about the extent to which they should be exempt from the army.

Finally, a compromise was reached between the two sides about how much service and when, and how long their deferral would be, and how many people get the deferral. A compromise that was accepted by the Haredim and the secular politicians, including Lieberman, the enemy of the Haredim.

The Supreme Court then said, "you know what? That compromise is unconstitutional because it's unequal. It does not apply the same draft rules to them." Never mind that there's an entire class of Israeli citizens that are exempt from the draft entirely. Israeli Arabs are not drafted at all. They didn't like the compromise.

And the Knesset re-legislated a couple different versions of this compromise, each time less favorable to Haredim. And the court said, "no, not good enough, not good enough." So, the court has taken a role of deciding who should be drafted and what a proper balance between Army service and Torah studies should be–issues that they have absolutely no expertise with. And because those compromises were essential to securing the governing coalitions, it led to the collapse of a government. Five elections in a row all triggered by the Supreme Court pulling the plug on this massive democratic compromise.

Larry Bernstein:

I want to go back to Court's decision to deny a cabinet position to Deri. Previously on one of my podcasts, I had Harvey Silverglate as a guest who is a legal partner of Alan Dershowitz and the author of *Three Felonies a Day*. He ran the Massachusetts ACLU, and he discussed a case where there was a plea bargain with the Speaker of the Massachusetts State legislature. And in that plea bargain, the Speaker agreed not to run for office for five years. And I asked Silverglate if he supports a plea that limits the democratic process. Here is what Silverglate said "I do not approve of any plea bargain where a public official agrees not to run, because we're a democracy. We have these little twerps that are called voters, that's us, and it's up to us to decide who gets to run and who wins elections. Not the court, not the Attorney General. It's frankly unconstitutional." Why do the Israeli courts oppose letting the voters decide who will be their publicly elected officials?

Eugene Kontorovich:

In Israel, there is no constitution. So, it's almost certainly not unconstitutional. I believe that people should be able to elect whoever they want. It would weaken democracy if courts and prosecutors could invalidate people from office absent some extraordinary process. In America, we do have a process to invalidate people from standing from office, which is impeachment. But that requires significant involvement, super majority of people who are democratically accountable.

Larry Bernstein:

Why is there hysteria about judicial reforms because they are not permanent and can be changed with a majority of any future Knesset?

Eugene Kontorovich:

That's a very important point–that nothing being done by this government is set in stone. So why create this sense of constitutional crisis? It's the end of democracy. It's not the end of anything, because the next time the left wins elections, they can put all their rules back. I don't know if they will by the way, but they could, these are not constitutional rules that are being passed. They're not entrenched in any way. The next government could override all of this.

Part of the hysteria of the left in reaction to this is anxiety that they have viable election chances. Secondly, these reforms will permanently deflate the idea created by the Supreme Court that it is above anyone. And that's why this is such a heated struggle, because currently the Supreme Court has claimed absolute power. We don't expect people who claim absolute power to give it up easily. They don't want to depend on elections or politics for absolute power.

Larry Bernstein:

Do the left and the right in Israel view Supreme Court activism differently?

Eugene Kontorovich:

The reason the left doesn't mind this so much is because generally the legal professional class is drawn from the left and agrees with them. The Supreme Court, for example, has applied doctrines very inconsistently in ways that help left-wing governments and harm right-wing governments. We can give many examples of where various rules have been applied completely diametrically differently based on who's in power. The left trusts the court for that reason and the right does not.

Larry Bernstein:

In America, the courts are part of the democratic political discourse. The president appoints the judges, and the senate confirms them. Supreme Court nominates is an election topic. Why does Israeli’s legal class oppose including the judicial branch in the democratic political process?

Eugene Kontorovich:

First of all, because they've managed to succeed in avoiding it so far. And because they truly believe that they are all that stands between Israel and Turkish authoritarianism. I don't think they have any good basis for that belief. But they have contempt for elected officials. They

consider them unenlightened. They consider them not representatives of good values. And they look down on the American system.

By the way, if you press them on this, they say, “We don't want to be like America. Look how it is in America. They have discussions over the Supreme Court. It's politicized.”

One of the mild parts of this proposal actually says that there should be public hearings about the about the Chief Justice. The Supreme Court finds that outrageous, it's beneath their dignity. They're gonna be drawn into public hearings. Now, they don't mind making public speeches against the government, but public hearings, how dare you inquire into who they are. Their vast arrogance that has been fostered by yes men. They don't have clerks who disagree with them, they're surrounded by people who agree with them in academia, in the legal bar.

That creates a kind of monoculture. Even the mildest things like simply having a public discussion over who should be on the court, they consider to be contradictory to professionalism. They've created a cult of neutral professionalism, even though there is some professional aspect in interpreting statutes. They simply say, certain government policies do not properly balance the benefits to one group in society.

On the other hand, government policies that they like, like the disengagement from Gaza, which involved pulling 10,000 Jews from their homes, taking all of their property and resettling them elsewhere. They say it's worth it.

Larry Bernstein:

In Justice Barak's book, he has negative things to say about the 18th century political philosopher Montesquieu, who is most famous for his views endorsing checks and balances in government and was the intellectual theorist that Madison applied in the American constitution. Today in the US, there are differences between the left and the right about certain aspects of checks and balances. The left does not like the Senate because it has 2 equal votes per state, and they oppose the filibuster. The left finds the electoral college antiquated. They don't like it when the Supreme Court is appointed with majority of Republican justices and want to pack the court with their political allies. Why does the American left oppose Montisquieu’s framework of checks and balances?

Eugene Kontorovich:

Limits on power only makes sense if you think nobody has a monopoly on truth or wisdom. Bizarrely it's also at a time when postmodernist antinomian ideas have also come to command a lot of currency in relativist ideas on the left. They have come to believe that there is one right answer. So, power should be held by those who have that a that answer and limitations on it would not be a good idea. In Israel, the left believes that the electoral system is not in their favor. Demographic trends disfavor them, and they really need to secure the power of this elderly priestly class of lawyers to run the country and make sure things don't go bad.

Larry Bernstein:

Will the Supreme Court accept a law passed by the Knesset that limits their power?

Eugene Kontorovich:

I think in the current atmosphere it's very possible that they will not. And part of creating this hysteria in the West and the headlines and the letters from American Jews and these statements by Blinken and the letters from professors is to give legitimacy to the court's refusal.

If it does that, that will create a massive constitutional crisis. It won't be a disaster for Israel because even if the court wins, it will have fundamentally lost the favor of the majority of the country. If the court does that, Israel will never be the same. If the court accepts it. Israel can be the exactly the same..

Larry Bernstein:

What are you optimistic about?

Eugene Kontorovich:

I'm optimistic much of this reform will pass. I don't think all of it will pass. I think there'll be compromises. The coalition is willing to compromise and not just push through everything. Unlike the judicial faction, which assumed all the powers they wanted without asking anyone. It really should lower the tenor of debate. One good thing about this controversy is now many people who are critics of the reform say, “We do agree that the judiciary has gone too far.” They weren't saying that before this push came. So now let's talk about what the reforms should be.

Larry Bernstein:

Thanks to Ilya and Eugene for joining us today.

If you missed last week’s show, check it out. The Topic was How Should I Invest My Money and my guests were Victor Haghani and Myron Scholes.

Victor is a former Salomon Brothers colleague of mine and he was one of the founders of Long-Term Capital Management. A decade ago, Victor founded a wealth advisor, Elm Wealth.

Victor’s wealth management strategy focuses on low fees, tax efficiency, and optimal diversification to deliver risk-adjusted, after-tax returns for clients.

Our second speaker is Myron Scholes who won the Nobel Prize for his contributions to options theory, which is just a tiny fraction of his many contributions to finance. Myron spoke about the importance of diversification both across assets and time. Myron was an early advocate of low-cost index funds and believes that you need to dynamically change your investment portfolio when market risk conditions change.

I want to make a plug for next week’s program about the election of the Speaker of the House McCarthy. Why did it take 15 votes and what rule changes did McCarthy agree to that will affect the legislative process? What happened and why should we care?

Our speaker will be Gisela Sin who is a Political Science Professor at the University of Illinois. and the author of the book entitled Separation of Powers and Legislative Organization: The President, the Senate, and Political Parties in the Making of House Rules.

We will also hear from Republican Congressman from Tennessee Mark Green who will discuss the challenges that McCarthy faced to pull the caucus together and what it was like to participate in this 4-day saga on the House floor.

You can find our previous episodes and transcripts on our website whathappensnextin6minutes.com.

If you enjoyed today's podcast, please subscribe to our weekly emails, and follow us on Apple Podcasts or Spotify.

I would like to thank our audience for your continued engagement with these important issues, good-bye.