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SPEAKERS

Anthony Sanders, Jeff Rowes, Trace Mitchell

A **Anthony Sanders** 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, November 22, 2022. It is, of course, Thanksgiving week. So Happy Thanksgiving to all the Short Circuit listeners, we're very thankful for you listening to us, some of you for quite a few years, if you've been with us from the beginning. And one person who has been with us for a long time, and that I'm very thankful for is my colleague, Jeff Rowes at the Institute for Justice, who joins us here today. Jeff, welcome back to the Short Circuit.

J **Jeff Rowes** 01:07

Yeah, thank you, Anthony. It's a pleasure to be here as always.

A **Anthony Sanders** 01:10

And another person who I'm thankful for, but I have not had the pleasure of introducing to our Short Circuit listeners before, is Trace Mitchell. Trace is a litigation fellow at the Institute for Justice. He's litigating for liberty. And in his spare time, he reads a few opinions, and then asksif he can talk about them on Short Circuit. So I'm so happy that he's joining us for the first time today. Trace, welcome.

T **Trace Mitchell** 01:36

Thank you so much. It's entirely my pleasure. And I appreciate you having me.

A **Anthony Sanders** 01:40

Well, we hope you listeners are going to appreciate this episode. So as I previewed last week, we have a little bit of a Thanksgiving treat here today. So one of the things that the Institute for Justice is founded upon to, to push forward in the public consciousness and judicial consciousness, is the right to earn a living. Now, unfortunately, we don't talk about it all that much. Because there aren't a lot of super great cases on the right to earn a living that you hear about these days. We did though talk about one just a few weeks ago, and it was a case that a couple colleagues of mine were litigating that they were asking the US Supreme Court to take. And it was a challenge to a certificate of need law for home care workers in Kentucky. Well, out of nowhere, a couple of weeks ago -- a case that we had nothing to do with and we didn't file anything in -- a Fifth Circuit opinion, a concurring opinion, mentioned this case, and also mentioned a lot of other sources about the right to earn a living. So we're going to be getting that to that in a moment. We're also going to be getting to another Fifth Circuit opinion in another totally different case about the non-delegation doctrine, which is something we've talked about on Short Circuit before, that we at the Institute for Justice have litigated often on and are litigating currently. And so Trace is going to talk about that case. Now this, the right to earn a living opinion is a concurrence by Judge Jim Ho. And as I said, last week, we had two concurrences, in what we talked about with our friends at the MacArthur Justice Center, and that was both by Judge Jim Ho. So that was HoHo. And this third one here is Ho, so you put them together, you have hohoho. Now, some people may not realize, but it's reported in the popular press, it's no secret that Judge Ho and his family every year send out a Christmas card that says something like hohoho from the Ho's trying to get people in the holiday spirit, which we will be getting into in the next few weeks on Short Circuit in a big way. And one thing we really want to get in the spirit of is the right to earn a living so Jeff, take it away, right to earn a living in tanning salons. I'm guessing you don't frequent many tanning salons yourself.

J Jeff Rowes 04:09

I do not and as a Canadian, we didn't particularly care about getting a tan.

A Anthony Sanders 04:17

Yead, that'd be kind of dangerous for a Canadian I would think.

J Jeff Rowes 04:19

Yeah, that's right. But this is definitely a sunny and sizzling case. It is the Golden Glow case. And the thing that is interesting about this as a constitutional case, a 14th Amendment right to earn a living case, is that it was short and simple. But the judges seem to wish that it was longer and more complex. And the majority opinion began with the phrase, we are constrained to rule for the government in this case. They didn't want to. And Judge Ho's concurrence explains why. So let me jump back into the facts. This is one of the many cases that are now percolating up into the federal courts of appeals. That began during the pandemic, as challenges to pandemic lockdown restrictions on businesses. And so here we have a tanning salon in Columbus, Mississippi. When the town passed a lockdown, they distinguished between essential and non essential businesses. One of the essential businesses was bars, apparently, in Columbus, Mississippi, even though the apocalypse is sweeping through, you've got to keep serving that whiskey.

A Anthony Sanders 05:40

I would second that, by the way, I mean, I think that's a good policy choice.

J Jeff Rowes 05:43

Yeah, Trace is also enthusiastically nodding his head. So anyway, someone who agreed with that and more was the owner of the Golden Glow tanning salon. And this is one of these kinds of places where you go in and you pay some money, and you lay in a tanning bed, and maybe you just get the old base tan before you go on your Caribbean cruise. And they came in and argued and said, Look, we're no less essential than a bar, and we can actually restructure our business, so we have one employee and then we can just do one client at a time. And so there's nobody mixing, there's not really a danger of this propagating the pandemic. And they filed a 14th amendment equal protection challenge, saying that this infringed their right to be treated the same as other businesses that were deemed essential. And the key thing that one needs to know here is that when it comes to the right to earn an honest living, it falls in the non fundamental rights box. There are two big boxes in the constitutional universe. Actually, let me let me re-say that. There is one tiny box in the constitutional universe. And one other box that's basically as big as the constitutional universe. And into that tiny box go our so-called fundamental rights. And those are the rights in the first eight amendments of the Bill of Rights and then what the Supreme Court recently said in the Dobbs decision were rights that are nowhere to be found in the Constitution. And these include things like the right to direct the upbringing of your children, probably the right not to have unwanted medical treatment, and a few other so called fundamental unenumerated, substantive due process rights. So as that translates into equal protection, you are in the rational basis box. And the rational basis box is the box for everything that isn't fundamental, and that's everything. That's owning a business, it's starting a business, it's buying a home, it's flying a kite, it's donating to charity, it's saving for retirement, everything you do -- even things that ordinary Americans would rate as in quotes, fundamental, to their own lives are treated as non fundamental for the purposes of the Constitution. And so when Golden Glow went into court, the court said, Look, this is we're in rational basis land at this point. And in rational basis land, you need a rational relationship to a legitimate government interest. And that can be justified even on conceivable facts. And the court said, we are constrained to find this rational -- that the distinction between bars and tanning salons meets the minimal rationality threshold. And then that was it. The case was short. It's simple as rational basis cases almost invariably are. And that's where Judge Ho steps in. And Judge Ho is willing to at least flirt with, if not actually commit, that gravest of all constitutional sins, Lochnerism.

A Anthony Sanders 09:12

Which he never mentions.

J Jeff Rowes 09:14

Well, he cites a law review article right at the beginning that is called Lochnerism under Lockdown. And the point Judge Ho was making is that, look, as the Supreme Court just said in

Dobbs, this court is committed to a tradition and history inquiry, when it's determining whether or not a substantive due process right is fundamental. And the history and tradition of the right to earn an honest living has a historical pedigree that is at least as impressive as other enumerated rights and unenumerated rights that the court has previously recognized. And Judge Ho is calling for this kind of serious history and tradition inquiry in the right to earn an honest living context. And if indeed, the right to earn a living is fundamental, then when it comes to rational basis review, whether it's equal protection or substantive due process, you get something more than the most dismissive version of the rational basis test. And Judge Ho sketches out the historical origins that extend to pre revolutionary times, through revolutionary times, through the ratification of the 14th Amendment in 1868. And he says, Look, there's two ways to do constitutional law. Either we can be principled and serious, or we can pick and choose. And this Court purports to be principled and serious. It just applied the tradition and history inquiry to the right to abortion in Dobbs. And it's time to apply that test with the same principled commitment to getting the law right in all areas. And so, Judge Ho says it's up to the Supreme Court to decide we can't change the rational basis test. And so his his opinion is interesting in that it is willing to openly say that the Supreme Court needs to take a case that does the tradition and history inquiry for the right to earn a living. And it's also important in another respect, which is, he's saying, We all get it, right. The federal judges, whether in the trial courts or in the courts of appeals, and all of the state judges, we all get it Supreme Court, you have told us that we're not allowed to take this right, seriously. No split of authority will ever arise when it comes to the rational basis test. And so that Supreme Court has to take a case because the Court itself is committed to getting the law right and applying its doctrine in a principled way across all areas of the Constitution. And that brings us to the the last, you know, call that Judge Ho made, which is he pointed out our case that you were talking about, the Kentucky certificate of need case involving the Nepali immigrants, saying that your honors on the Supreme Court, you're getting these petitions, one of these days you have to take them. This is a real right and you have to give us judges, who want to apply the law the correct way, permission to do that. And so one of the things we're committed to doing at the Institute for Justice, litigating economic liberty, is to provide the Supreme Court when we happen not to prevail with opportunities for it to change the right to earn a living from -- this is relegated to the deepest, darkest basement of the rational basis bin -- into something that is a meaningful inquiry into evidence and justifications. And we're going to keep doing that. We have plenty of cert petitions in the pipeline.

A Anthony Sanders 13:04

And I should mention, I can't remember if I actually said this in the opening, but our petition was denied just yesterday, the day before we're recording this. So after this opinion came out, on November 21, by the Supreme Court. But as you say, Jeff, that's just one of others that we have cookin. And I know others have cookin and hopefully sooner or later the Supreme Court will be forced to consider these great arguments that that were summarized in the opinion. Trace your thoughts on tanning and earning a living?

T Trace Mitchell 13:41

Well, I will say I know a good bit more about tanning coming from Southwest Florida than then maybe somebody in Canada would. But we do it naturally there. Right. We don't we don't go to the salons or anything like that. But I think you know, Jeff hit the nail on the head when he said, one of the things that's really important is to recognize the impact that statements like this can

have from judges even in things like concurring and dissenting opinions. I was talking about this just the other day with somebody and kind of pontificating on how valuable I thought this was. And they said, well, it's just a concurring opinion. But if you think back to how many concurring and dissenting opinions eventually become the law of the land, right, or eventually, are cited down the road and looked back at and reincorporated, especially when it comes to things like this where you're not, as Jeff said, gonna get a clean circuit split. Right. You know, the Supreme Court has been relatively clear about its approach to this. And so you're not very likely going to get meaningful division between the circuits on this issue. But what you can do is have an increasing amount of the judiciary pontificate on the importance of judicial engagement and the importance of the right to earn a living. And as this history and tradition kind of analysis becomes increasingly prevalent. I think you you need to build this bedrock of support for what is a very well established right in American jurisprudence.

J Jeff Rowes 15:09

Yeah, one of the things that that I would add on there that is important is that in the Dobbs decision, the majority opinion says we have to faithfully do the tradition and history inquiry in order to ensure that this is principled decision making, and not in quotes freewheeling judicial policymaking, which purportedly characterized the Lochner era. And, you know, we at IJ think that's great. We should do that. And we should do that across the whole of the Constitution. And the problem right now is that there is a freewheeling judicial policy in place. And that is, if property rights and economic liberty are on the table, they get the most deferential, worst form of rational basis review. That is completely ahistorical. It is nowhere in the Constitution. And that is a raw judicial preference against those rights.

A Anthony Sanders 16:05

I should add that there are at time glimpses of circuit splits on these types of issues, right, that you will have some circuits that completely reject the type of analysis in a rational basis case or say things about what facts you can make up as a judge in a rational basis case. Whereas other circuits will go the other way. They're pretty narrow, but they can make a difference for some parties. And so that could be a reason that some of these cases would go up. And I know, that's what our colleagues in the Kentucky case argued for part of the petition. Well, one more less exciting part of this case, but I thought it was was worth mentioning is this, of course, is the latest of quite a few pandemic type cases that we've talked about on Short Circuit. Of all the different litigation issues that have come on -- both constitutional and just other parts of the law -- that we've discussed, a lot of them that are constitutional challenges have been declared moot in the last year or so because you know, there'll be like some mask mandate that there's a challenge to and it goes up in the case -- says well, you're asking for an injunction, it looks like that, that mandate is long gone. It looks like it's never coming back. We'd just be speculative if we granted your injunction at this point. And so we're not. This case that doesn't come up and no, the parties lost. So it didn't really matter. But it didn't come up. And that's because this was actually as a challenge to a city ordinance, and not to a state statute or to an or an order by the governor of a state. And so you can sue for damages under the famous Section 1983 that we talked about a lot here on Short Circuit. And it's not a suit against a state where you can't get damages, usually, and you have to go for injunctive relief, that only goes forward. So there's one little quirk about how some of this pandemic litigation is still going on and hasn't become moot. And I'm sure there's plenty of other cities dealing with lawsuits like

this that are percolating up. And so we will, for good or for bad, we will be left with more pandemic decisions in the coming months and perhaps the even the next few years. So that's exciting, too. But you know what, one more exciting than that is the non-delegation doctrine. So the non-delegation doctrine you hear thrown around a lot in certain circles over the last few years. Some excitedly. Some more with a kind of sense of panic about the Supreme Court is going to bring this thing back, which hardly ever has actually been used at the Supreme Court. But it's been a long time if it has. I know some of the justices on the Supreme Court are interested in, but I thought this case, that Trace is going to introduce in a moment, is is really interesting. Because it's actually about a part of this whole discussion that doesn't get discussed that much. And that's delegation to private parties. So not a delegation to like the EPA to do whatever it wants, which is what a lot of this non delegation talk is about. But actually to a private party that's not even part of the government. So take it away.

T Trace Mitchell 19:37

Yeah, it's it's an incredibly interesting case. I'm a little bit sad because I missed the the Texas recording a couple of weeks ago and this is so on fours when it comes to Texas. But as you said, it is really interesting because it deals with -- for even people who are interested and in the know about the non delegation doctrine -- it deals with something a little bit unique in that it's this private non delegation doctrine, something that doesn't often come up or is often discussed. Because, you know, Congress for good reason does not that often delegate its powers to entirely private industries. And so what this case is, is it's a challenge by the Horsemen's Benevolent and Protective Associations. So it's the national one and a collection of state ones -- something I did not know existed before this, later joined by the state of Texas and the Texas Racing Commission -- challenging a congressional law referred to as the Horse Racing Integrity and Safety Act. I'm going to call it HISA for the rest. It could be High-za, but its integrity, not integrity. So I'm going His-ugh.

A Anthony Sanders 20:42

Yeah. I like his-ugh.

T Trace Mitchell 20:45

And so HISA was enacted in 2020. And it followed kind of this spate of doping scandals and safety concerns. And what it did was it said, we need to nationalize the governance of the horse racing industry. So this is an area where there's a lot of problems that are emerging, and we need a federal framework for dealing with some of these problems. But it went about doing so in a somewhat interesting way. Instead of creating a new agency and/or tasking some other agency with the the task of regulating this very interesting area. Instead, what it did was it created a private entity, a nonprofit corporation, referred to as the Horse Racing Integrity and Safety Authority. I'm going to refer to it as The Authority throughout the rest of this discussion. But what it does is it operates, quote, under unquote, the Federal Trade Commission's oversight. But one of the things we'll discuss is how little oversight that actually ends up being in this area. And so the authority is tasked with kind of three primary areas that it's going to work on. One is anti doping, you know, making sure that these horses are not not all jacked up. Another is medication control. And then the third is racetrack safety. And The Authority is given

the ability to promulgate rules, it's given the ability to conduct various types of investigations into this area to determine what needs to happen. And then what it does is it proposes the rule, and then the FTC kind of takes the ball from there. But as I'll try to explain the FTC has very limited authority over The Authority, kind of ironically.

A Anthony Sanders 22:40

Ah hah.

T Trace Mitchell 22:41

Exactly. And so the horsemen's associations back in 2021, decided to challenge this authority, realizing that it was an unconstitutional delegation. And so the way that this works is that The Authority proposes rules, as I said. And then in order to get them approved, it sends them to the Federal Trade Commission, who post them in the Federal Register. Then there's public comment, and the FTC itself considers them. But the FTC, as long as The Authority is, quote, unquote, consistent with the enabling statute, the FTC has absolutely no power to change, modify or amend. In fact, it must adopt the regulations as The Authority proposes it. And so if the FTC finds that it isn't consistent with the general broad principles to which The Authority is given its jurisdiction, then it can suggest modifications. But at that point, The Authority has the power to go back, reconsider its rule, potentially make a change. But at no point can the FTC tell The Authority what it can or cannot do. It cannot force The Authority to make modifications, and it cannot prevent The Authority from going forth under the approach that it wants to anyway, as it has no modifying authority. And so this originally went through the district court, which found that in fact, The Authority was within the constitutional limitations imposed on it by separation of powers principles. It said that, under existing authority, we actually don't find that this delegation is a problem. And by doing so, it rests on a couple of cases in which the Court has said so long as there is this agency, this actual government entity that has superseding authority, as long as this private party is under some legitimate government agency, then there's no problem here. The governing agency is able to kind of control this private party. It's able to supervise it, and so you don't have have the sort of problems that you typically see when you would give safe full authority to a private actor. Now, what it did do was recognize that the HISA regulatory model, quote pushes the boundaries of the public private collaboration. And it does so because unlike previous models, for example, the FCC FINRA model, which is the one that The Authority was actually based off of, unlike existing models, the governing agency, the supervising agency, does not actually have the power to add, modify, or amend any of The Authority's regulations. The Authority is given carte blanche authority to kind of take its will into effect and move forward without the FTC being able to look over its shoulder. And so the district court, though, found that because there was this approval authority, because The Authority still had to go through the FTC whenever it wanted to actually get some of these rules put into place. That was enough. That was enough of this sort of overarching ability to check the power of this private actor that there wasn't a private non delegation problem. Well, this went up to the Fifth Circuit. And the Fifth Circuit didn't agree. Under a de novo standard of review, the Fifth Circuit looked at this and said...

A Anthony Sanders 26:22

And which, just for our non lawyer listeners, that means they they don't have to defer to what

the district court thought.

T Trace Mitchell 26:28

Exactly, they're essentially starting from scratch. They're looking at it with fresh eyes, as I like to say. And so when the Fifth Circuit looked at this, it found that unlike what the district court had said, this was pretty different from previous cases where either the Supreme Court or the Fifth Circuit had upheld delegation. Unlike these previous cases, the FTC has no authority to modify, amend or change the rules that are followed and put forth by the authority. It doesn't have the ability to at the end of the day express its will over the authority. Now, it does have a somewhat narrower ability to enact interim rules. So in the case of an emergency under the APA, the FTC can enact certain very narrow time limited rules in order to get out of an emergency situation. But once the authority has enacted a rule, the FTC has no power to modify that or check the authority's regulatory approach. It certainly cannot check it for policy reasons, as the Fifth Circuit makes clear. The only area in which the FTC can review is for consistency with the enabling legislation. That's it. And so the Fifth Circuit said, no, no, no, we're not doing that here. This is a problem because at the end of the day, the federal government should be exercising federal power. And what it cannot do is give that power to private parties. And so whenever there's a situation where the FTC, or whatever the overseeing agency is, can actually meaningfully check the power of a private party, that's different. We've upheld that. We found that to be fine. But whenever we have this sort of what it calls supremacy of the private -- whenever we have the private actor that's above the regulatory agency, and the regulatory agency has no ability to check what they're doing, that's a private delegation, and that violates our constitutional principles. And so as such, it overturned the district court's decision and found that this was an unconstitutional private delegation.

J Jeff Rowes 28:43

This is an interesting area of the law. And the thing I love about this case, is that in some sense this statute is like the final boss level form of the public choice problem, right? So like public choice theory, this is like government without the Romans, right, like, you know, people who lobby for laws do so according to their own incentives. Legislators do things according to their own incentives. And a big problem that economists have noted is this problem of regulatory capture where you have a government agency, but you, you basically staff, the government agency with, you know, folks who are from the industry. And the kind of the worst manifestations of this are the occupational licensing boards at the state level, where, you know, you have the funeral board, for example, the regulatory board overseeing the funeral industry is composed of funeral directors to themselves. And in this HISA case, the horse racing folks are like, Hey, let's cut out the middleman. Like, instead of, instead of us being a government board that's regulating ourselves, let's just cut to the chase and just give us the government power to regulate ourselves. And, and so I was very glad to see that the Fifth Circuit is reining this in. And because the structural protections of the Constitution are things that courts have long, long neglected. Like notice how we find the outer limit of the non delegation principle only at the point where the Congress essentially like a king has just like tapped this organization on the shoulder and said, You are now you know, you're now invested with sovereign powers and go out and exercise them according to your discretion. It's almost kind of medieval. And so the court is reining that in. It's part of our checks and balances. But I would like the courts to learn a lesson from this, which is, what's happening here is what's happening in materially similar

ways, frankly, in all kinds of regulatory contexts. And that the so-called government oversight that prevents a delegation from occurring in other cases, is so minuscule, so ineffective, as in the case of occupational licensing boards, where they're all just people in the regulated industry, that we should be very careful about those kinds of boards or just attributing what they're doing to a neutral government regulator regulating in the public interest. So anyway, this is interesting. And I think that in much the same way that maybe in the 90s, there was a turn towards, an apparent turn towards the Dormant Commerce power as a restriction on what could happen or the affirmative commerce power on a restriction on what the federal government could do, that we're maybe seeing a turn now on some of these other structural protections, which could include affirmative commerce power, the non delegation power, and maybe some others that are not rights in the sense that they're in the 10th Amendment, but they are structural checks on the federal government, and that the current Supreme Court may be quite receptive to looking at the structural limitations on federal government power.

T Trace Mitchell 32:04

You know, Jeff, I hope so. And as you alluded to, immediately what I thought of was North Carolina State Board of Dental Examiners v. FTC, which is a 2014 case, where for a very long time, there's been this Parker doctrine or the state action doctrine that says, essentially, in the area of antitrust, even though occupational licensing boards are kind of the quintessential example of a collusive group of industry incumbents getting together to restrict entry, we're going to give this sort of carte blanche immunity to state actors. And in 2014, the FTC looked at a the North Carolina State Board of Dental Examiners and said, Yeah, but you got to have some regulatory oversight here. You cannot just create a private entity that's allowed to restrict competition and engage in pretty blatant antitrust violations purely because it calls itself a state actor. And so it refused to apply the Parker state action doctrine in that case, because it found that no, this was, in fact, a private board that didn't have that sort of government oversight. And so I'm hoping as government oversight becomes a bigger issue across the board, we will have more courts take this issue seriously. And like the Fifth Circuit, really scrutinize these relationships to make sure that our constitutional structure is functioning the way it should. That when when the Constitution says that the legislative power is invested with Congress, it meaningfully means that.

A Anthony Sanders 33:32

Yeah, you wonder why they didn't just make this authority, as you say Trace, some kind of, you know, federal board. Because there's there's a zillion other federal bodies of some kind that regulate all kinds of all kinds of aspects of the economy. And yet here, they said, we're just gonna make it private. I mean, I'm sure it's because they weren't subject to, you know, things like FOIA laws or the appointment process is a lot easier. And so they just say, well, they're completely private group, and we'll consider the rules that they have, but essentially, give them this this governmental power.

J Jeff Rowes 34:12

Yeah, I don't know the history, how this worked out, but I'm willing to wager that there were some high profile incidents, they're like doped horses. There are horses dying because they're doped or, or whatever. Maybe even some people getting hurt, like the jockeys riding them or

something like that. And so the industry gets wind, you know, that this is the perfect opportunity for someone in Congress to say, well, we got to crack down on this, we got to crack down on this doping and gambling and all this other kind of stuff. And industry says to itself, hey, some regulation is coming down the pipe. So let's like jump on it and get in front of it. And then suddenly you run in and say, you know, we recognize those a rampant problem of doping and gambling and corruption in the horse racing industry. And we're here to tell you that the best people to take take care of all of that corruption and doping and gambling in horse racing industry is the horse racing industry. And let's not get any crazy bureaucrats involved in this. And it's almost comical, right? And that's not that's not me saying, you know, let's have more bureaucrats getting involved in things. But this is almost like a caricature of government.

T Trace Mitchell 35:21

Right, I think Congress saw a problem, they trotted out a solution, and then they were off to the races.

A Anthony Sanders 35:29

That was really good.

J Jeff Rowes 35:32

That's a low moment for Short Circuit.

A Anthony Sanders 35:36

I bless that very much. And that reminds me that we have this case that we're at IJ litigating about a very similar issue in the nautical world, where there is a Pilots Association that essentially has been given governmental power, but they are in no way a part of the government. And so that's, that's a case that people can check out, we'll put a link up on the show notes. Also reminds me of all the fun we've had in that case using maritime puns. Because there's even more of those in the English language than there are those to do with horses. Although there are quite a quite a few of those, too. I'll close by also noting that this is a really interesting opinion in threading the needle about what has said about the non delegation doctrine when it relates to private parties. And one kind of interesting nuance of it is that it's a little bit unclear in the case law. What's more important the what are called the Vesting Clause in Article One of the Constitution, which says that, that, that the Legislative power is vested in the Congress. So the implication is, well, they can't like divest it of themselves into someone else, or is it more of a due process problem in the in the due process clause of the Fifth Amendment? And when it comes to private non delegation, there are some due process cases, and then there are some the indicate it's more of a vesting thing. The court seems to go more with the Vesting Clause, but it hints that this could be a due process issue. And so is that something to look for in the future? I know that our friend, Sasha Volokh, a law professor, and he blogs at the Volokh Conspiracy, has said that there is no such thing as a private non delegation doctrine is just part of the non delegation doctrine itself. But I think Sasha's argument is more of a Vesting Clause thing. And so there there may be some fruitful

investigation here under a more of a due process principle, that he recognizes, from what I've read in his scholarship, where it's just part of a fundamental aspect of due process that the government can't just say, Okay, I'm going to make this group of folks over here, you know, the ability to just make law when that group of folks have no connection to the government. And that's just a bridge too far when it comes to some kind of procedural due process principle.

T Trace Mitchell 38:19

It's a really interesting point. And it's something that the Fifth Circuit actually brings up just in a footnote, footnote 23, in their opinion, where they essentially throw their hands up in the air. And while a lot of the language throughout it would imply that it is this Vesting Clause that's the issue at hand. They kind of say, well, it's an interesting issue for academic inquiry, but it's not all that relevant to our actual application of the rule. But it's something that I really hope future courts will seriously grapple with, because I do think it has some serious implications.

A Anthony Sanders 38:50

That is seriously true. Another thing that is seriously true is for you guys to have a happy Thanksgiving, for all of our listeners to have a happy Thanksgiving, and to share it with with all those who are close and near and dear to you. We thank you listeners for listening to us. I'd like to thank Trace and Jeff for coming on the show today. It's been a lot of fun. And I want the rest of you, whether you're Thanksgiving or not, to get engaged.