

What Happens Next – July 25, 2021

Critical Race Theory, Golf Strategy, and Enforcing Non-Compete Agreements

Larry Bernstein:

Welcome to What Happens Next. My name is Larry Bernstein. What happens next offers listeners an in-depth analysis of the most pressing issues of the day. Our experts are given just six minutes to present, and that is followed by a question/answer period for deeper engagement. This week's topics include critical race theory, golf strategy, and enforcing non-competition agreements.

Larry Bernstein:

Our first speaker today will be Robert Pondiscio, who is a senior fellow at American Enterprise Institute and author of *How the Other Half Learns*. He spoke to us on What Happens Next previously about the Success Academy. Today, he will speak about how critical race theory took over in U.S. schools.

Larry Bernstein:

Our second speaker will be Scott Fawcett, who created Decade course management system that allows golf players to optimize target selection that considers pin placement and risk of nearby hazards. He will discuss shot selection in golf.

Larry Bernstein:

Our third speaker is Michael Wexler, who is a personal friend of mine and is also a partner at Seyfarth with expertise in trade secrets, computer fraud, and non-competition agreements. I've asked Michael today to talk about the enforceability of non-competition agreements. Specifically, I want to hear about Biden's new executive order, what do they mean and how will it impact these agreements? Second, what should public policy goals be? Should we prohibit non-competes for low wage employees? And third, today can firms and force a paid non-competition agreement for high wage employees who have had access to confidential information?

Larry Bernstein:

If you're interested in listening to a replay of today's What Happens Next program or any of our previous episodes, or wish to read the transcript, you can find them at our website, whathappensnextin6minutes.com. Replays are also available on Apple Podcasts, PodBean, and Spotify.

Larry Bernstein:

I would like to expand the What Happens Next audience so that more people can enjoy our programming. I started a social media outreach using Twitter to increase listener engagement.

Please use Twitter or email me during the show to ask questions during a live discussion. Our Twitter username is whathappensin6, where six is a number. I want to hear from you. You can always email me at larrybernstein1@gmail.com. Okay. Let's begin with our first speaker, Robert Pondiscio. Go ahead, Robert.

Robert Pondiscio:

Thanks Larry. One of the most famous lines Ernest Hemingway ever wrote is in *The Sun Also Rises*, and a character is asked how he went bankrupt. "Two ways," he responds, "gradually, and then suddenly." Well the same pace can be made for how critical race theory has come to dominate the conversation about K12 education in the U.S. It may seem like it came out of nowhere, driven by the death of George Floyd and the Black Lives Matter movement, but it's an overnight development that has been decades in the making.

If you're an American public-school teacher age 40 or under, maybe 50 or under, you've probably never known a day when race wasn't central to your profession and when efforts to close the achievement gap wasn't a singular focus of education policy. I was in ed school 20 years ago. I had to demonstrate a "commitment to teaching for social injustice" as a graduation requirement. I was trained in culturally relevant pedagogy that's informed by critical race theory. A major aim of the testing and accountability movement all the way back to No Child Left Behind more than 20 years ago has been aimed at closing the achievement gap.

I wrote a piece for *Commentary Magazine* about all this. It started with an email from John Podhoretz, the editor. He wanted an article on the California ethnic studies curriculum framework. I pushed back on that critique, because if there's one thing I know about curriculum, it's that it's seldom ever taught as written. There was a RAND study a few years ago that showed that almost every teacher in America, literally 99% of elementary school teachers, 96% of secondary school teachers, draws upon "materials I developed and/or selected myself in teaching ELA, English language arts," and a similar percentage for math.

Governors, state lawmakers, school boards have less influence over what gets in front of students on a given day than do Google, Pinterest, and the lesson sharing website Teachers Pay Teachers. Those are the three most common places where teachers go to look for lesson plans and curriculum materials. Nearly three out of four social studies teachers in a separate land report agreed with this statement, textbooks are becoming less and less important in my classroom, and that materials that teachers "found, modified, or created from scratch" make up the majority of what gets taught. Only one in four secondary school social studies teachers cited resources provided by their schools or districts as comprising the majority of what they use in class on a given day.

This suggests that while there may be good reasons to argue for or against state so-called CRT bans, they might not have the effect that you think. We actually know very little about what happens in a given classroom on any given day. So if advocates and activists think that they have accomplished anything by getting something put in or taken out of the state's curriculum or frameworks or standards, they may very likely be mistaken.

Now mind you, this is not all a nefarious plot. There's good reasons for teachers to differentiate materials, look the readings that engage students, et cetera. But let me give you a specific example of the 1619 Project. This is kind of a good example of the sort of choose your own adventure nature of curriculum and instruction. So the 1619 Project needs no introduction. I trust everybody is familiar with it. It made any number of controversial and widely discredited claims, including that the American Revolution was fought primarily to preserve slavery.

Well, a curriculum for the 1619 Project is produced by, by the Pulitzer Center. If you look at their website, they claim that more than 5,000 schools and classrooms in all 50 states are using it. But I found exactly three districts that have formally authorized it for use, and they are Chicago, Buffalo, and Newark, New Jersey. Now to be clear, the Pulitzer Center is not lying about the other 4,997. Teachers are doing what teachers do. They're searching, they're sampling, they're looking for lessons and readings on a given day to engage students. How is it framed? What are the readings that are being assigned with 1619? It's unknown and unknowable.

So what this means is that the curriculum and lesson planning, what children read and hear on a given day falls into a gray area between the culture of education and decades of case law. Courts have affirmed for years that local school boards wield nearly complete power to set curriculum. In the eyes of the law, meanwhile, public school teachers are considered "hired speech." In 2007, an Indiana teacher lost her job for criticizing the impending war in Iraq. A federal appeals court ruled that, and this is a quote, "The First Amendment does not entitle primary and secondary teachers when conducting the education of captive audiences to cover topics or advocate viewpoints that depart from the curriculum adopted by their school systems."

So there's a tremendous gray area between what the law says and the culture of education in which teachers are encouraged to ally with students, to pick curriculum, to express their own opinions, as it were. There was an event that happened last year, where a teacher in Massachusetts went on Twitter and bragged about getting homework taken out of the curriculum. There was a lot of pushback. But the simple fact of the matter is she's a part of a movement called Disrupt Texts, which describes itself as "A crowdsourced grassroots effort by teachers for teachers to challenge the traditional canon."

Well, teachers generally don't have the authority to mount a crowdsourced grassroots effort to challenge or set curriculum. So on the one hand, it would be impractical for school boards to weigh in on every instructional decision. On the other hand, if there's a controversial issue like critical race theory, it would make sense that a wise teacher would think to himself or herself, "This might require some level or approval of authorization from a school administrator or district supervisor before I launch in."

So where does this leave us? In some, professional education emphasizing social justice imperatives, and more than two decades of public policy in the gap closing had racialized K12 education long before critical race theory became a buzz phrase in the political football. The anodyne language of anti-racism ... I mean, who isn't opposed to racism ... probably lands for most teachers as just the latest effort in a decade-long effort to improve education outcomes for students of color.

There's nothing inherently wrong with ethnic studies, with culturally relevant pedagogy, even critical race theory in public schools. No reasonable objection will be made or accepted I think to the earnest desire for black and brown students, American children, after all, to see their histories and cultures woven firmly into their education.

The problem is that, in its more radical versions, we're now seeing schools drifting into conflict with their public purpose. But the bottom line is it's going to be very, very hard to dislodge critical race theory by any name. It's been gaining ground in American K12 education for a very long time. The challenge of dislodging it from schools should not be underestimated.

Larry Bernstein:

Robert, thank you. I want to start with some basic questions. What is critical race theory and why do you find it objectionable?

Robert Pondiscio:

Well, I'm not sure that I would characterize that I find it objectionable. I think it is a theory, it is a lens through which to view history and culture, and I wouldn't argue that it deserves a place of privilege or I wouldn't argue that it deserves to be banned. I mean, it is one lens among many that an educated person should have to look at history and culture through.

Larry Bernstein:

Can you give me an example of its application?

Robert Pondiscio:

I'm a curriculum guy, so I'll focus on curriculum applications. If you have the idea ... and this has been one of those ideas that's been at loose in American education for decades now ... that children should be able to ... or that the curriculum should be dominated as it were by knowledge and culture and literature and art, et cetera, that is relevant to that child's culture ... in other words, what we call culturally relevant pedagogy, well then that is by definition limiting.

Before the broadcast, we were talking about E.D. Hirsch Jr., who was kind of my guiding light. His insight has been that look what kids learn has to reflect the same basic broad background knowledge that literate Americans have and assume that you have too. So Hirsch's work has been kind of misinterpreted over the years as trying to "impose a cannon" when it's really not. It's a curatorial effort. His insight is that language proficiency works when every American, regardless of their background, shares the same basic knowledge allusions, cultural references, as it were, as every other American.

So one unassailable insight that really can't be gainsaid, but it requires that public education really attend to that and ensure that every kid, regardless of their background or economic status, ends their K12 education with the same array of mental furniture as more privileged American kids.

Larry Bernstein:

Last week we had Angus Fletcher from Ohio State, and he recommended a different approach. What he wanted was that each child could bring in their own book to English and read whatever they wanted, and then use that as an opportunity to have a broader discussion about literature. And then the homework assignments, instead of being an analysis of literature, would allow students a chance to do their own creative work to match the storyline as the book that they were reading. How do you think about the relevance of having a specific canon E.D. Hirsch wants or allowing either individual teachers or individual students to design their own curriculums?

Robert Pondiscio:

I'm going to push back on the idea that what Hirsch advocates for is imposing a canon. It's really not. I think that to really understand where he's coming from and where I'm coming from, you have to understand the fundamental misnomer that it sounds like your previous guest also was laboring under. We tend to think of reading as a skill, reading comprehension as a skill, in other words, like riding a bike or throwing a ball, but once you've learned how to ride a bike, you can ride any bike. And we think of language the same way. Once you learn how to read, well, then you can read anything, a novel, a sports page, et cetera.

It really doesn't work that way. There's 26 letters of the alphabet and the words that that form them, but language is really context-specific. I mean, a simple example, think of the word "shot." It means something very different on a basketball court, in a bar, or in a doctor's office. You have to understand the context to understand which version of the word shot the writer or speaker is talking about.

So at a large level, language really is ... the 26 letters in the words are the tip of the iceberg and all the context is the stuff below the waterline. So a better example, a cultural example, might be if somebody refers to an Achilles' heel or a Pandora's box or an Ahab or a white whale. If you understand Greek mythology, if you understand Moby Dick, those references are not lost upon you. If you don't understand those things, then it goes over your head.

I often describe text as like a child's game of Jenga, where every block is a bit of vocabulary or background knowledge. If you've play that game with your kids or grandkids, you can pull out a few blocks and it's fine. At one point you pull out one block too many, and the entire thing collapses. So that's kind of a useful metaphor for how language works.

The idea that that every kid can choose their own adventure, so to speak, and read what they want is predicated on this assumption that reading is a skill, that is not context dependent. But it really is context-dependent. It's one of the most difficult things I find for educated people to wrap their head around because we are all language-rich, we are all knowledge-rich, so it feels to us like a skill, because we have the benefit of so much of that mental furniture.

But I taught for years fifth graders in a low-income, low-performing school in the south Bronx, which is why I became a Hirsch-ian, because he describes like nobody else had exactly what I saw in my classroom every day, kids who could "read," they could decode, but they struggled with comprehension. And we were spending all of our time trying to teach reading as a skill, try to teach it as a cultural construct, in other words, ensuring that all of the things that the kids

were reading and writing about reflected their interests and experience, and it was like going to the gym and doing nothing but working out your arms. You would think ... you don't look like Popeye when that happens. It just has no good effect.

Larry Bernstein:

You mentioned the Disrupt Texts movement. Specifically in your article, you referenced ... it's Heather Levine is the individual who was successful in not teaching the Odyssey and removing it from her classroom despite that fact that it was in the curriculum. Who represents this Disrupt Texts movement? What are they trying to achieve? Are they successful? Should we care?

Robert Pondiscio:

It's hard to say, but what we should care about ... in other words, if it let's say you are concerned with critical race theory. Well, let's say you were concerned with racial essentialism and children being taught that there are immutable characteristics to being white or black, et cetera, which is a gross oversimplification, but a useful one of what people object to about this critical lens. I mean, kids being sorted into affinity groups, for example, by race in classrooms.

Well, a lot of teachers think that they have not just the right, but the duty to ensure that everything that kids read reflects their own experience and interest. So, this Disrupt Texts movement, and I'm not a spokesman for it, obviously, takes this idea to its logical extension and wants to realign the curriculum to the interests and culture of kids of color, and perhaps to "decolonize the cannon at large."

Well, there's nothing wrong with that impulse, but the point is that that's something that teachers assume they have the right and authority to do, but they really don't. And this is neither a criticism or a complaint. If it's the culture of teaching, and I was taught this myself at ed school 20 years ago. When I was taught to try to come up with readings to engage my students, it was exactly the same impulse. It was a surprise to me some years later to find out that that decades of case law say something very, very different.

Now, to be clear, I'm not sure a lot of school boards want this authority because as a practical matter, it wouldn't be possible for a school board to review every single lesson plan and be aware of every single thing that happens in the classroom every single day. But to answer a question you're not asking, Larry, while I have some serious misgivings about the bills to "ban critical race theory," I can see some good coming from this.

In other words, where some critics have said, "Well, this is going to have a chilling effect on teacher speech and on curriculum," if this says to teachers across the country, "Oh, this is a subject, race, that I should tread carefully on. Before I teach this unit on the 1619 Project, maybe I should check with somebody. Maybe I should check with my assistant principal or the school board or whatnot." Well, that will be a good thing. In other words, teachers should be aware of where the landmines exist, and when they're teaching material that some folks in the community might have an opinion about.

I mean, at the end of the day, we have 13,000 school districts in this country. That's the system we have, and it's not going to change anytime soon or ever. We really do run on local control,

and teachers at some level have drifted far from this idea that the community has a say in this. So we're seeing these ... every day on Twitter, you see another video from a school board of parents complaining about this or that that's happening in your schools. Well like it or not, that's the system we have and that's the system we're going to have.

Larry Bernstein:

In your talk, you mentioned sort of the abandonment of textbooks as the primary teaching vehicle in the classroom, and that teachers were grabbing lesson plans online. It just seems like almost 20 years ago, there was an enormous fight for common core, where we were going to have consistent textbooks across the nation. How did we abandon the textbook in favor of ad hoc or arbitrary lesson plans as the means for educating our young?

Robert Pondiscio:

Yeah, those are two different phenomenon. I mean, textbooks have been kind of battled over for years. Common core is a different kettle of fish. I'm intimately involved or was intimately involved in the argument for a common core. But the key thing to understand there is that common core is not a curriculum. Common core is standards.

The analogy I always use in defending, frankly, common core, the battle that I more or less lost, was look, if you decide to build a tool shed or a skyscraper, you have to build it to code. So the standards, common core in this case, don't tell you what to teach, but once you decide what it is, what texts, what books, et cetera, you're going to teach, you have to teach them to standard. In other words, you have to build it to code.

So people were under the great misimpression that common core was going to homogenize the curriculum and dictate what kids read all day, that every single kid would be reading the same thing in unison with every other kid all the way across the country. Well, that's just not so. That's what curriculum could do if we had a national curriculum, which we can't. I mean, the Constitution forbids it. But standards are just not the same thing as curriculum.

We had Paul Rossi on our show a few months ago. Paul was the Grace Church math teacher who opposed teaching sixth graders that they're oppressors. To what extent has this sort of idea of white children as oppressors taken hold in the classroom, as something to be taught either in assemblies or in the classroom generally?

Well, this is the unknown and unknowable that I referred to because you essentially have 3.7 million teachers who ... and again, I don't want to suggest that this is some kind of subversive plot, but the culture of education, for reasons both good and ill, encourages teachers to "make it their own." So you really have no idea. When the 1619 Project is being taught, well, is the teacher also assigning, say, a John McWhorter essay? You really don't know the professional development that teachers have been exposed to. You don't know the teacher's conversational style. I mean, every kid in America is kind of hardwired to listen for cues and more or less either knowingly or unconsciously reflect back the teacher's views to him or her.

So it's almost impossible to say to what degree this is aberration or to what degree this is, again, the water in which people are swimming on. I mean, Paul Rossi has been bravely talking about this. There's a journalist at the Manhattan Institute named Chris Rufo who has made a

career out of surfacing incidents like this. And the one thing you can say with confidence is that a depressing number of them have come to life. So whether it's every classroom or just a few, it seems that the Chris Rufos of the world are not suffering from any shortage of material.

Michael Wexler:

Hey Robert, this is Michael. A question for you. We're in a period of change. We're in a period of change where you have folks who want to rip down statutes.

We have folks who want to get rid of symbols of what some perceive as racism, others perceive it in different ways. Where does critical race theory fit in with folks who would say rip down a statute, or don't teach about who that leader or general or whoever it was in the past, but where does that fit in? Because I'm not sure which side critical race theory comes down on when it comes to this sort of revision or denial of history that some folks would label it.

Robert Pondiscio:

That's a good question. I think as a practical matter it's useful to think of critical race theory as an educational, it's interest in education is what we're debating, but it's not limited to education. In other words, if your view of American society and culture, is that any time that you have a disparate outcome that is evidence of de facto racism, well, then there's really no end to it. In other words, this will not stop at the classroom. This will extend to crime and punishment, to public monuments, to hiring and firing, et cetera. The theory, and again, I'm probably not the best spokesperson for it, but the broad theory is that any disparate outcome is evidence of systemic racism. So, there's no end to venues in which you can perceive it.

Larry Bernstein:

I want to ask you a question about regional differences. Are we seeing radically different behavior in red states versus blue states, urban versus rural communities versus suburban communities, public schools versus private schools? Is it a huge variation across the sectors?

Robert Pondiscio:

Yeah, I think so. I mean, the anti CRT bills that we're seeing are almost exclusively coming out of red states. In blue states, you have kind of a strange phenomenon since you alluded to Paul Rossi, he teaches or taught at the Grace Church School in Manhattan, which I think the tuition there is on the order of \$55,000 a year. Now, the irony of course is, so therefore by definition, you've got some of the most privileged American's sending their sons and daughters to schools like that, to Manhattan exclusive private schools. It turns out that they are some of the most "woke schools" in the country. And Bari Weiss has done a good job of chronicling just the seething discontent of parents in that school who are complaining about the type of thing that Paul Rossi blew the whistle on, that their children are being separated into racial affinity groups, that their curriculum is entirely racially focused.

Now, the theory of school choice would say, and this is kind of an interesting sub-challenge here, but the school choice theory would say, well, when parents are upset with their schools, well they'll leave, and in the case of affluent Manhattan parents, you're talking about folks who

literally have any option open to them. They can go to a different private school, they can move to the suburbs, they can hire tutors to homeschool, et cetera. So why is it that those parents who have the most choice are the least likely to change schools? The going theory is that they still perceive those schools as kind of the brass lane to get their children into the Harvard's and Yale's of the world. But there's an interesting challenge right now in all this to, and I'm a choice guy, don't get me wrong, but there's an interesting challenge to those who say that choice is the answer here to critical race theory. Well, it doesn't seem to be working out that way among parents who have the most choice.

Larry Bernstein:

As a parent of, my kids are now in college, but I sent two children to private schools in New York. There was very little choice and you just couldn't move, it was extremely difficult to move from one school to another, and it wasn't obvious that the teachings would be different in the next school versus another one. I think that the idea that parents can just up and leave is very challenging. The one example we have is the Brearley parent who wrote a very nasty letter to the board saying that this has gone too far. But he'll be forever known as the Brearley parent throughout the community. You're sort of limited unless you want to create a public stink.

Robert Pondiscio:

That's right, and look, I was a Brearley parent as well. My daughter went to Brearley from K to eight. So there was a little bit of this going on 10 years ago, but now again, my point about this, gradually and then suddenly, what has been the progressive ethos that has been at loose in K-12 education for quite some time, and particularly among elite private schools, is now suddenly boiling very, very hot and on the front burner. So the parents liked it, the so-called Brearley dad that you just referred to, that's a really good example. They are few and far between however, I'm guessing that for every private school parent who was willing to be public about their discontent, there's probably a box car number larger who are talking about it privately. The wonder is why they continue to keep their kids in schools that subvert their interests and values.

Larry Bernstein:

It's funny, you talk about gradually then suddenly, but you seem to describe a system that's just evolving and moving in a particular direction, and it doesn't seem to be suddenly, it seems to be consistently, but do you see pushback coming? Do you see either from the teachers, the students or the parents, or the school board or the community that this won't last?

Robert Pondiscio:

Oh, you've seen the pushback already. I mean, you've seen it, I alluded to it in my talk every morning, maybe it's summer now, so it's died down but until recently, for several months, you'd see these videos of angry parents at school board saying, what exactly are you doing here? So I think this is just a theory, I don't have data for this, but my surmise is that this is an effect of COVID. In other words, that black box of the classroom where you don't know

precisely the nature of classroom interactions and discussions, well, suddenly that's been coming into our living rooms for the last year, thanks COVID.

Robert Pondiscio:

The cameras in the classroom with all the kids on Zoom, bring that classroom discussion into your home, quite literally. But in many cases, the discontent that parents were expressing as a direct result of, and having being able to peer into that black box. So, I mean, now that this issue has become in sharp relief for many parents, I don't think it's going to go away anytime soon. But I do wonder, obviously it was triggered by George Floyd and Black Lives Matter, but I think the pushback to that has been driven in large measure because of COVID and Zoom schools.

Larry Bernstein:

I ask each of our speakers to end at a note of optimism. What are you optimistic about?

Robert Pondiscio:

I don't think that these kinds of controversies are necessarily bad. In other words, I'm a local control guy as much as I'm a choice guy. Choice means that people will make choices that you don't necessarily like, but you have to support because you support the idea of choice. So, when my choice friends pushed back on me and say, hey, Pondiscio how come you don't love freedom? Why would you think that that choice is the answer to critical race theory? And they say, hey, how come you don't want democracy? Why do you view angry parents at school board as a problem to be avoided? Self-government is hard, and this is what it looks like, is when folks in a school board or folks in a district go to their school board and say, wait a minute, what do we believe in this district?

Do we think the country started in 1619 or 1776? It's unfortunate those debates become shouting matches, but they're important debate. And for good or for ill, and I think obviously for good, we were intended to have these debates. We were intended to hash these things out in public forum. And I don't think that that's something to be avoided. I think that's something to be embraced. Now, are we well equipped to have these discussions at the moment? I'd be a little bit more sanguine if I felt like we had better grasp of our own kind of civic traditions and history, but there's nothing inherently wrong with this conflict as long as we're willing to accept the judgment of our fellow citizens.

Larry Bernstein:

Robert, thank you. All right. Our next speaker is going to be Scott Fawcett. The topic is going to be golf selection. Now a number of members of my audience are huge golf fans and others are not. But I would say, hang in there if you are not a golf lover, there is a lot to learn here about sports and about life, and this is going to be something for the ages. All right, Scott Fawcett is a golf strategist, and he has his own company called Decade, which helps you choose what golf selection to reduce the total number of strokes.

Scott Fawcett:

Thank you. Well, it's often said that golf is like a microcosm of life and since life is all about problem solving and decision-making and dealing with frustration, which all checks out to me, it sounds like about every round of golf that I've ever played. You can really start taking a lot of just casual life advice and then trying to switch that into golf. And what I did with Decade was essentially optimized course management by combining millions of shots in the ShotLink database from the PGA tour with shot pattern information that we now have launch monitors. And so you've got to think of a shot pattern on the golf course as being like a shot gun glass.

I know that we all wish that we had a sniper rifle, but it's just not what we have, and unfortunately for us also, when you fire your shotgun on the golf course, only one pellet comes out at a time and you really have no idea which one is coming next. And so really codifying the decision making process to where young junior golfers are able to think essentially like Tiger Woods after about three or four hours of either lecture or online content watching has really revolutionized the game. And essentially, if you watch any golf right now, Bryson deChambeau, Will Zalatoris, Maverick McNealy has a chance to win today. All of these young players that are doing some pretty amazing things on the PGA tour, essentially I've worked with, at least 95% of them. And again, I failed as a professional golfer, largely because I was a lunatic, and so trying to look back at what I did wrong and how mental I got on the golf course is really what I try to teach my young players, how to avoid those things.

And we use math to essentially have better expectation management. So, you're not out there thinking you need to be hitting every shot close, making every single putt. Once you actually understand how many shots it should take to hole out from any given area, it's easy to not know, I shouldn't say it's easy, it's easier to not be a lunatic. And so really then you start learning that as scores, as you improve, as your scoring average drops through the 70s, which that's a pretty high level of player, it's definitely, I shouldn't even throw out a number, it's got to be in the top 10% of players out there. Your scoring average drops largely from making fewer bogeys far more than it does by making more birdies.

Scott Fawcett:

And so much of that is, it's interesting because there's so much of loss aversion in life and psychology, and so understanding that out there on the golf course, it's actually a good thing to be worried about loss aversion all the time and trying to, I tell my players, I don't want you to tip toe around and just try to not make mistakes. I want you to feel like you're playing aggressively while you're just tiptoeing around and trying to not make mistakes. So, what we've done is essentially quantify how large shot patterns is and then just overlay that with, again, a little bit of basic expectation that because at their core, all decisions are made from using some form of weighted average math, whether you realize it or not, even something as silly as crossing the street. I mean, depending on how big of a hurry you're in, you're going to probably want to hover right around 100%.

Whether you realize it or not, that's actually what you're doing with essentially every decision you ever make, where you're just weighing the potential outcomes and then how important is it for you to cross the street? How important is it for you to try to make a birdie in any given spot? And so systems, the Decade system, is essentially just a checklist that codifies what experienced people have taken decades to learn in any given genre and that's actually the

reason I can call it Decade, Will Zalatoris, after I caddied him a few years ago when he won the Texas Amateur in the US Junior, he sent me a text afterwards that just said, I'll never know how to thank you. You've given me 25 years of experience in five days. And so, you know what? I try to always encourage people, whatever your genre is, is to try to look for ways to systematize the decision-making process.

Mainly because as the brain is developing, and again, this is all just stuff, this was not intentional. I did create Decade on purpose. I did not think that it would change the way the game is taught, but what I've really come to realize over the last few years is that the developing brain, basically, it's not that young people under the age of 25 are idiots, they're actually really smart, they simply don't have all of the pieces of the prefrontal cortex specifically, to synthesize all of the information that's coming at you in order to make a coherent decision. Which is why 18-year-olds make far better soldiers than somebody like me with gray hair and a gray beard make, because I have enough experience to say that looks like a bad idea out there and they're still young enough, not dumb enough, but just not experienced enough to say, well, I'm going to live forever.

So these systems help people that do not have a fully developed brain yet. And then beyond that, what I really try to get players to focus on and what I really used to be a little bit timid about talking about, I think timid is actually the right word, I was trying to think of a better one. The idea of just meditation, I'm a huge Sam Harris fan, and I used to think whenever I failed as a meditator back in my 20's, when I was trying to play professional golf, I was under the impression that you were supposed to have no thoughts. And so naturally when my brain was constantly bombarded with thoughts, I thought I suck at this and would just head out the door and go right back to my fast paced brain. What the point of meditation really is, is rather recognizing these ruminating, recurring thought patterns and loops in order to stop them before they get out of control.

And in golf, so often people think, God, if I can go back 30 minutes, I would do this different or do that different and that's obviously not the way any sports work and golf is no different than that. And Tiger Woods just recently, he was on a Golf Digest event where he was teaching Jada Pinkett Smith, was the day before his car wreck, he was teaching her how to play golf and how to think her way around a golf course. And they started talking about meditation, which honestly, I've known for a long time, I'm the exact same age as Tiger. I've known for a long time that he has played in a meditative state. Honestly, back in the late 90s, early 2000s, we thought he was playing golf hypnotized. And it's really, this interview with Jada, she asked him, so when did you start meditating and Tigers to answer, he kind of laughed, and he said, when I was born.

And getting people to start seeing that we can talk about meditation. I'm going ahead just by answering my, what has me optimistic question right now? Dang it. But essentially just the fact that I used to feel like I was selling avocado and sprout sandwiches out in California anytime I would talk about meditation and now I feel really comfortable with all that and you're starting to see it a lot more in the mainstream. So with golf, it really is about understanding that you don't know what shot is coming next. The fact that we can make a math based decision in order to, again, codify the decision making process, and then for a lunatic like myself, hey dude, you actually can stop being a lunatic, you just have to have something like Sam Harris's Waking Up and then an actual meditation practice where when you find yourself under the gun, you can

finally take a deep breath, recognize that ruminating thought pattern, make a coherent math based decision and stop fritting away so many shots, which again is what most of us do in our lives on a daily basis.

Larry Bernstein:

I'm going to focus initially on the mental aspect. One of my best friends, John Karzen used to always tell me, just focus on the next golf shot. How important is next golf shot as your most important mission, let the past go and don't worry about so much about the shot after that, just focus right here, right now, this shot?

Scott Fawcett:

Well, there's about 20 different things that I say during my seminar, this is the most important thing you're going to leave with, and that is certainly one of them. There's a great saying, obviously, if you're depressed you're living in the past, if you have anxiety you're living in the future. And that's again, just defining the word presence. I've heard you've got to stay present and I heard that all before, but I just feel like we as humans because I hate social media more than you can imagine, but because of social media, we have such access to great brains, guys, again like Sam Harris and Jim Rowan and all kinds of old guys.

Scott Fawcett:

It remain present, just recognizing Sam's got a great way that he talks about the half-life of any emotion is extremely short, unless you are focusing on that emotion. And so if you're pissed off, you're typically thinking about something in the past, and so that's just not going to help you. There's another saying, if you find yourself in a hole, stop digging. If you're a surgeon, you nick an artery, fix it and move on. There's just all these little sayings but they're all about staying present and keeping your brain on the task at hand, because if it's already happened, there's nothing you can do to change it.

Larry Bernstein:

And as I think about the lesson you're trying to teach the kid, is that when you fire a shotgun, it could go anywhere, and when it does go into the bunker, it doesn't mean that it was a bad shot or a bad plan, it's just a statistical dispersion that you should be comfortable with. It just bad luck and it doesn't mean that you suck, it just means it was bad luck. Is that the key insight you want to also express?

Scott Fawcett:

Any shot you hit, it's just funny because in golf when you get mad, it's one of two things. You're trying to let everyone else know you're better than this or you're just wishing you were better than you are. So the idea of saying you don't suck, well, you hit the shot, so you're capable of that shot. So really you can't be too surprised. And yes, essentially the better player has a tighter, smaller shotgun pattern, but still, you can't remove all risks. You do have to take on some risk in order to play optimally, to shoot an optimal score. So there are just bad outcomes,

five to 10, 15% of the time, you should have a bad outcome otherwise you're playing too conservatively.

Just recognizing that that was a potential outcome, there is no reason to be necessarily mad about it. There's nothing you can do about it so you might as well just move on and try to make a better decision moving forward. I mean, so much of what I created with Decade, and then the psychology, is just stolen straight from poker. I'm a relatively avid poker player. And as I've got finance and economics degrees, I kind of realize golf is just a math game. All sports at their core are just math games but you have to understand the math in order to apply the math. And I think that's just what I accidentally created with Decade, was that exactly.

Larry Bernstein:

It's funny. I come from the fixed income arbitrage business and effectively, I think that Moneyball came from the application of finance theory to baseball, and now you're just applying those same mathematical statistical metrics to golf. But I think it's different though, in my world, in the bond world and in the financial modeling world, we're concerned about both expected value and also variance. We're very concerned about fatty tails, basically losing all our money. How do you think about expected value in relationship to variance?

Scott Fawcett:

Well, I mean, obviously they're just completely intertwined. I mean, you've got an expected value. The way golf works is if you have an eight foot putt, that is where is, it's 50/50 on the PGA tour. So, you average one and a half strokes to hole out. Obviously you can't hit the ball one and a half times, so you have a 50%, well, let's hope you don't three putt it, but you have a 50% chance of making it, a 50% chance of losing it. And again, then it's just the weighted average from there. So now if I know how many shots it takes to hole out from any given spot on the entire golf course, you just wind up making an entire, I mean, again, it's just a giant weighted average math problem. Again, this is where people, I am pretty good at math, but the actual math of Decade, it's not advanced at all, it is literally as basic as a sixth grader's weighted average test score.

And variance is just a part of it. Again, I have about a 10% chance, like almost by definition of hitting an outlier shot, regardless of whatever you realize, you are making it up as a 20 handicap, have a 10% chance of hitting one of your 10% worse shots, just like a PGA tour player does. And so making sure that where you're aiming, those things again, they're just part of the potential outcomes. It is just part of the deal and I mean, variants again, I really do look back at just variants and weighted average as being the root of all decision-making decisions. So when you're talking about bonds and fixed income, you've got a 20% chance of whatever outcome, a 20% chance, and then you can get as detailed as you want, and then you just add it all together and here's your expected value at the end of the day.

Larry Bernstein:

I want to go to putting as an example. Your focus in your general videos relates to recommendations for a fabulous scratch golfer. I happened to be a 12 handicap and so I wanted to give an example of concerns for our typical audience member, at least who play golf. And

that is, let's say you have a 15 or 20 foot putt and the odds of me making that putt are pretty remote. I'm not a particularly good putter.

But I probably can make a putt from three feet. Should I just have in my mind a three foot radius circle around that pin and just trying to get within that and not really try to necessarily make it? Is it the same logic that you apply to not getting in the hazard off of your drives? Should I apply that same thought to putting, make sure I two putt, give up on one putt?

Scott Fawcett:

As a 12 from outside of about 15 feet, yes. Literally the first slide in my seminar says stop trying to make putts and it's kind of tongue in cheek-

Larry Bernstein:

Oh, so it is?

Scott Fawcett:

Yeah, it's kind of tongue in cheek, but it's also not. You have to just trust that... I like to try to explain it, it's so much easier to do with my hands, but if you think of a beehive swarm, if you had a beehive swarm of golf balls rolling at a hole, the hole would get in the way of a few putts, by definition. And then if you had the beehive that is hit too hard, so if you have this putt that you hit too hard, that's the part that's going to start to try to lip out. And so there was a guy, and I don't want to say him by name, but he used to say that every putt should be hit 17 inches past the hole.

And that's correct if you can control your speed to the inch, which nobody can. And so really when somebody says, "How far should you hit a putt past the hole?" the only real answer is it depends on your skill level and how long is the putt. But on the PGA tour, the best putters in the world, they're going to leave 20 to 25% of their putts short from about 15 to 20 feet. And so if you think of a bell curve, I've got a bell curve of potential speed outcomes. So distances, I'm going to hit the putt anywhere from, let's just make this number up, it's about four feet long. Then if I'm 20 feet, I might hit it two feet short of my target, or two feet longer than my target.

Well, if I can move that bell curve to where only about 25% of it is short of the hole, I've now actually put the vast majority of the bell curve, the meat, the middle, centered just past the hole, which actually makes the hole as large as possible, meaning you're going to have fewer lip outs if the ball is rolling six inches by then three feet by. So you've really accomplished two things. You've made the hole as big as possible for the vast majority of your putts and you've also optimized the average length of your second putt because instead of having some four footers coming back, you've now got one footers that you have left short. You've essentially just swapped out again the 20% tail roughly from being four foot long to one foot short. Again, obviously not perfectly, but that's basically what you've done. And again, on the PGA tour from four feet, the make rate is 88% and that's not four feet exactly. That is three foot one inch to four foot. Again, I failed at professional golf, so I can't say this, but that's not very good.

It's not mind boggling, but these are obviously the best players in the world. So it by definition has to be mind boggling, but it's just not. And understanding these things, it's okay to leave a

putt short. Tiger, when he won the Masters in 2019, he made the turn, he had to chip out of a bush on number 10, he then hit a shot about 18 feet or so past the pin on number 10, and he left it short six inches and just kind of smiled, walked up, tapped it in and was kind of laughing as he was walking off the green. Literally 100% of the rest of the field if they left that putt short would have given some sort of emotion with their hands like hit it, get it there, something. And here's Tiger just knowing, it would've been nice if that thing had got there, but in order to never leave any short, I will have four and five footers coming back. That's just the way it works. So you just got to deal with it.

Larry Bernstein:

When I watched your videos, one of the things I thought was really interesting was you said, "Okay, my drive goes a certain distance." Mine happens to go like 260. So if you go 260 and you see that there are hazards at the 260 yard point, you need to place your target significantly away from that hazard. And you then said, "The dispersion for a professional golfer at that distance is approximately 65 yards." And you said, "Okay, at 65 yards across is there a room at the 260-yard distance to stay in play without going in the hazard? And if there's not, then you may want to consider using less club so that you don't go in the hazard." I guess my first question for you as someone who doesn't hit it that far and doesn't know his dispersion, how can I find out what the 12 handicap dispersion is, or mine specifically is? Do you recommend that we use TrackMan? Do you go out to the range and figure out what my dispersion is? How do I evaluate that question?

Scott Fawcett:

In a perfect world, yes, you would have access to a TrackMan or a Quad, just any sort of a launch monitor. Those things are \$25,000 a piece. So not a whole lot of people haven't, but you can go rent them at your local golf course or your local club fitting shops would probably be the best place to do it, where you just go in for an hour and you can figure some of these things out. And honestly, you can also get on your driving range at your home course and get on Google Earth, the thing is just mind boggling how accurate it is and you can find a spot from, okay, the left edge of that green out there in the middle of the range all the way over to the edge of the range is 50 yards. Here's the center of that and just start practicing.

You want to practice into these grid that you know how big they are because then when you go out onto the course, again, this is all theoretical, you're trying to shoot your lowest score as possible, you've gotten on the satellites and you have looked at how the width of certain holes at different areas and then you can really dig deep and get a lot of confidence of hey, I keep it inside of this 50 yard wide pattern on the driving range, 90% of the time, there's 60 yards out there between the lakes and that house on the right. If I don't get in my own way, I should be fine here. And that's really the power that you start getting from that because when you look at PGA tour shot patterns on number 18 at PGA West has a lake all along the left, and you will literally see balls scattered from that lake all the way to over 100 yards right of the lake.

And there's literally no chance on earth, shot patterns for PGA tour players would be that big on the driving range. And again, this is at the PGA tour level guys thinking mid swing, don't go left. Well, I know exactly where that one's going when you think that, and you probably think

that yourself from time to time since you're a 12. Trust me tour players do the exact same thing, which some of the dumb stuff that... I feel like that's why I teach these guys so well because I can look at them and be like, "Trust me, there's nothing you have ever thought that I haven't thought and thought worse. You're not going to out crazy me." And once guys can really kind of see and trust that fact and I can just tell them from the ShotLink images like, "Here's what you were thinking on that shot."

And they're like, "My gosh, yes, that is exactly what I was thinking or trying to do" because there's just outlier shots that make no sense. And again, I hate saying they're entirely mental because that's kind of a non-answer, but they're basically entirely mental. And again, once you take these young players, we used to think that you would have to get out on tour and learn all the shots and that's why you kind of peaked in golf in your early thirties. It's not that. You actually had to get out on tour, let your brain finish developing by the time you're about 25 and then figure out how to pull your head out of your butt in order to play golf correctly. And then you started peaking. Well, now most of these kids I work with from college moving forward and just using ShotLink and launch monitors and just all this stuff, you can literally get a kid thinking like a PGA tour veteran, I mean literally like Tiger Woods in under a day. It's pretty remarkable. Now, the patience and discipline-

Larry Bernstein:

Is the problem that we have this false sense of confidence that we could hit it to that pin and that pin is just well-protected by that hazard and we should just stay away from the hazard? Is that the biggest error we make our overconfidence in our ability not to hit it in that bunker?

Scott Fawcett:

I honestly believe it's just the fact that we want to make birdies. I really do believe that ultimately we're all out there thinking I want to shoot low, so I need to make some birdies. And just it's not about making more birdies. It is entirely about avoiding mistakes. And if you have a corporate turnaround specialist come in to take a company to turn it around, they don't come in and think, all right, well, how can we start selling a lot more product? The first question is where can we trim the fat? And it's exactly the same in golf that. It really is just interesting how ubiquitous some of those ideas are across all genres. For the most part, you want to start by making fewer mistakes. And kind of the one step that I always give in my seminar is a person who averages 95 compared to a person who averages 79, the 79 shooter only averages one birdie more per round.

The other 15 shots of improvement are literally bogey and higher avoidance. It's not about making more birdies. This is entirely about avoiding mistakes. And then as your scoring average drops from 79 down to the tour level of 70, 70 to 80% of that improvement through the 70s is by making fewer mistakes. I can't tell you to go out and make more birdies. "Okay, well, how?" "Well get better at golf." That's not very actionable. I can tell you to go out there and make fewer mistakes because everybody in their stomach knows I'm kind of trying something here that's probably dumb.

Larry Bernstein:

I often hear on the course, "I didn't come here to lay up." And I think that's exactly the opposite we're supposed to do. You came here to score well, you got to lay up.

Scott Fawcett:

This is where I hate the words aggressive or conservative. It's just mathematically correct. Maybe you shouldn't be laying up. Given certain parameters, off the tee. If I had to boil proper golf strategy into a nutshell, it would be off the tee play very, very, very aggressively. I want you hitting driver everywhere it's physically possible. And then into the greens, it would tend a little bit towards the conservative side. The idea of just laying up, again, where you're going with that, a lot of times people are like, "Well, I just not really feeling good with my drivers. So I'll just hit three wood out there and get it in play." The three wood just not go much straighter. You might hit five or 7% more fairways with three wood drivers simply because it goes shorter, so it has less time to get offline.

But 100% of three woods go 30 to 60 yards shorter than your driver. And then we go right back to the weighted average math, and it will just never be supported that you would be better off being 40 yards longer on your approach shot in order to have 5% more fairways. The best analogy I have for people is if you and I were flipping coins and every time you won I gave you \$10, and every time I won you gave me \$20, you wouldn't do that for very long. You would figure this out real quickly, this is a pretty bad idea. And I would even say that if we flipped the coins and you win and I give you \$10, you did not win money there. "But I have \$10 in my hand." "No, if we do this very often, you're not going to win money." And so that's really what you have to boil again all decisions in life down to is something that trivial as math. Will I get hit crossing this street? Maybe. I'm going to wait until a better time.

Larry Bernstein:

And let's say you hit a great drive it's a par five and you're just within range of going for it, but there's hazards all over the place, how do you think about whether or not you should go forward to two?

Scott Fawcett:

This is the hardest part of golf because golf is the only sport in the world that's not played on a uniform field of competition. And so giving generic answers on specific holes is essentially impossible. That said, if there's 50 yards between water hazards, which are usually going to be kind of the penalties that we really want to try to avoid, water hazards and out of bounds. But if there's just some bunkers and stuff up there, send it, get it up there. But again, it's just really difficult. Golf is just different. If I told you that I was playing basketball last night and I was at the top of the key and a defender from the wing shifted onto me, you kind of know what I'm talking about. You can kind of picture that. But if I tell you I'm on a par 5, I'm 240, should I go for it? Well, I need a lot more information.

Larry Bernstein:

Tell me more.

Scott Fawcett:

Yeah, tell me more. And that's what does suck. I do agree sometimes Decade, it's not complex. Seven minus two is the most advanced math there is, but there's a lot to it. There's literally 10 hours of content in the Decade app because there's a lot to teach and there's a lot of unique situations.

Larry Bernstein:

Tell me about wind. How does that affect our decision-making? It certainly adds a lot of uncertainty to stuff.

Scott Fawcett:

Exactly. If wind were steady, so a 10 mile an hour wind, if it were just blowing 10, you could perfectly compute for that. But at 10 mile an hour wind is blowing five to 15, a 20 mile an hour wind is blowing 10 to 30. And so how do you control? What's really at the end of its core is every single sport, ball sport I should say, track and field. I was trying to think. Surely there's other sports. Every sport that involves a ball, basically the most powerful person with the most control, that combination, is who's going to be the best at that sport. And wind, because golf is the largest outdoor sport played with the ball in the air the longest of any sport in the world, the subtle variants in wind make your shot patterns huge.

So a couple of years ago they had this robot set up on number 16 at TPC Scottsdale during the Pro-Am and it hit a hole in one, and everybody's like, "Oh my God, this robot hit a hole in one! It's golf mastered." And my buddy was running the robot that day and he said the wind was down and off the right about five miles an hour, so blowing like two to seven, barely more than your air conditioner. And yes, it made a hole in one and it also hit balls in the left bunker. It missed the green right some. It had a shotgun blast and that was because this wind is just barely off the right and it's just enough. So again, if you've got any wind whatsoever, you just keep getting more and more conservative towards the middle of the green. And days when it's windy scores, simply aren't going to be low. So let's get it on the green as fast as physically possible and try to get out of there with the lowest score possible.

Larry Bernstein:

What suggestions would you have for practice for a 12 handicap golfer? What should I be working on?

Scott Fawcett:

I go against the grain of intelligent golf instruction. There's a lot of guys in golf instruction who try to apply studies from other genres and variable practice, and you have to challenge the brain and the brain keeps making these maps, and you've got to keep changing them in order for the brain to learn it. I get it. I got it. But golf is the only sport where you have a ball that you're not looking at the target. There's so much going on in golf. And so for the 12 handicap, for the tour player, I think that block practice, which is doing the exact same thing over and over and over again, is by far the best way to practice. And it's just not even close in my opinion. This is opinion. It's how I play. I'm a pretty good golfer and I literally hit the same shot

over and over and over again because what I feel like the variable practice, the random practice crowd has missed is it's the time between trials that actually matters for the brain to reorganize its action plan or map or whatever the correct terminology is.

And time between trials is not exclusive to random practice, but having the exact same shot shape, getting yourself in the exact same orientation to the ball, training your eyes to see the target line, figuring out, I'm hitting 80% of my shots right at the target, you can only do those things with block practice. So I do believe that you have to be engaged, but once you're engaged, do the exact same thing over and over again. Tiger literally, my understanding is it's just exhausting to practice with him because he goes so slow. He'll hit five or six balls, go grab some water, think, come back. And you're like, he's got all day. Well, he used to have all day to do whatever he wanted to do. It is about slowing down, but about really trying to own and command one shot with your full shot, and then just practicing your speed control and putting. That's all you should be doing with your putting practice is speed drills.

Larry Bernstein:

I agree with that. I end each session with a note of optimism. What are you optimistic about the teaching of golf?

Scott Fawcett:

Finally, we're getting there. Golf is just so unique. We used to have you'd to have this model swing where your golf club was staying on plane and there's this... We've definitely just come to realize that all of the traditional... I shouldn't say all of it. There's no such thing as a fundamental. There are fundamentals and fingerprints for each player. You can have a super strong grip like Dustin Johnson, and it's fine. You can have a super weak grip, like Bryson DeChambeau, and it's fine. There really is no fundamentals in golf anymore. It's all about match-ups.

And so if you're going to go out and get a lesson from an instructor, the first question I would ask him is, "Tell me your opinion on match-ups. Here's my grip, here's my swing. What kind of match-ups would you be looking for?" And if they can't answer that question, I'd move on to another instructor most likely, but you've got to be understanding like well, this guy's grip is strong, so this is what his body dynamic is, what he needs to be doing. Because if you just take somebody and you're trying to get them to swing on plane or whatever it is, you just cannot use... There is no model golf swing anymore. And I think that's probably the most important thing.

Larry Bernstein:

One last question. When you watch golf on television and you listen to the moderators discuss it, do you feel like they're just talking nonsense? And if so, how should the moderation of golf to the public audience be changed?

Scott Fawcett:

They're getting better. So I used to get into a lot of Twitter arguments with Brandel Chamblee and some other commentators, and I'll give Brandel credit. Well, I had to corner him. I'm a pretty dumb six one 210. I had to corner Brandel one day and force him to listen to me in order to understand where I'm coming from. But once he saw that I kind of know what I'm talking about, this was four or so years ago, I give him credit, he came to one of my seminars in Orlando, Frank Novelo, A lot of these guys are now reaching out to me and they're learning. There are still quite a few guys that honestly I'll be interested to see if they keep the jobs because the viewing public, I've only got 50,000 followers or so across social media, but there's 50,000 educated brains out there that are educating their friends.

"Well, he needs to get aggressive here and fire at this pin. And just sometimes you got to step up and make birdie." That stuff, commentators have better stop saying it real soon because my Twitter just gets lit up on the daily on the weekends with, "Oh my God, this guy said that and this guy said that." And I'm like, "Yeah." They just think that every single shot the guys hit should be perfect and it's just they don't understand the variance. They have a very fundamental lack of understanding of variance.

Larry Bernstein:

Scott, thank you so much.

Scott Fawcett:

Absolutely. Thank you for having me on.

Larry Bernstein:

Pleasure. We're going to our final speaker today, who is Michael Wexler. Michael is a partner at Seyfarth and he's an expert on trade secrets, computer fraud, as well as non-competition agreements. I've asked Michael to speak about the enforcement of non-competes and public policy options that are available. Michael, go ahead.

Michael Wexler:

Great. Thanks Larry. To answer the question specifically, are non-competition agreements enforceable, the general answer is yes, but that breaks down into two categories that you must consider when you take that answer. Number one, each of the 50 states in the United States differs with regard to how they treat non-compete agreements. And so there is an entire body of law in every single state where agreements are enforceable and enforceable in different ways? So that's always a factor you have to consider. The second factor that needs to be considered. When we answer that question today is that over the past couple of years, non-compete law has been evolving and it's been evolving because of different administrations in the White House, it's been evolving because of different technology, it's been evolving because of the movement with regard to low wage workers. And so now there are numerous factors that you have to consider when you answer that question yes.

Joe Biden signed an executive order July 9th. And in that executive order he said that he's instructing the FTC to take steps to curtail non-competition agreements or to curtail things that

prevent fair competition. Beyond that, President Biden did not put into place any criteria for the FTC to follow. So it is likely that the FTC will have to engage in an investigation, will have to come up with criteria with regard to how they might in some way curtail non-competition agreements.

But when you look at that in that context, you say, "Well, oh my gosh, isn't the FTC going to do away with non-competition agreements because the president said in his executive order, we need to curtail those things?" But the reality is that when you then look at this in context, then in 2016, for example, President Obama at the time had a white paper that came out from the White House, and that white paper went into and talk a lot about non-competition agreements and various views and opinions as to whether they stifle competition in particular ways. So, then we take that 2016 demarcation point, and you look forward, and you say, "Well, what's been going on over the past couple of years? And why does that matter?"

Over the past couple of years, approximately 20 or so states have put into place certain restrictions on who can sign non-compete agreements. And the general lay of the land with that is that in a number of those states, low-wage workers, and that is defined, depending on the state, in different ways. It could literally be looking at an average medium income. It could be looking at a set number and saying someone who makes under \$30,000 or \$40,000 can't sign a non-compete agreement, but that differs by state. And that was basically meant to protect lower wage workers, so that they could work in one place and go to another place and not have an agreement hanging over them that prevents them from getting opportunities to make more money, to better their lives, to better their family's lives.

So, when you take all of this in context, and you say, "Well, is a non-compete enforceable?" Well, yes it is. And when we talk about non-competes, in almost every state, you have a couple of criteria that put this into the context as to why you have to have non-competition agreements to protect certain things. And most states will say that non-competition agreements are meant to protect trade secrets. So, a secret formula, the secret sauce. Could be pricing, could be margins, could be a secret process, a manufacturing process. It could be a lot of things that a business uses in order to manufacture, to make a product, to sell a product, to provide a service.

And when you do those things, obviously, a business invests in the resources. They invest the time in order to come up with these things that they want to protect, because that's what they sell. That's what they sell, either a product or a service to the general public. And that's how they make money.

Also, you can use a non-competition agreement generally to protect customer relationships. A business will invest over many years in relationships, and the investment that they make to develop a relationship, to get a customer, to have that customer to continue to buy products or services from them, that investment is worthy of protection, generally, in most states.

And then, I suppose as a third thing, that some will say that non-competition agreements are meant to protect. And that's workforce, that a business will train people. They will compile. They will employ people, and through training and through time, they have a stable workforce. They have a workforce that is educated in their particular product or services. And then, non-competition agreements meant to also protect that.

So, when you put all of this in context, the reality is, is that a business then has to look at what are they protecting? Well, we're protecting customer relationships. We're protecting our workforce. We're protecting the product, the service that we sell. And if you look at that, and you say, "Well, are agreements enforceable?" Well, sure. They're enforceable, because at the end of the businesses won't invest money in order to come up with services and products if they can't protect it.

So, when we talk about should there be a public policy that disallows non-competes for low-wage employees, it's probably a good thing in certain circumstances, when you look at the type of employee that we're talking about. How much money do they make? What role do they fill? Is it someone who literally turns a knob on a machine in a manufacturing line, or is it someone who is actually creating the formula for the particular product that someone's selling?

So, when we put that in context, it makes sense that there may be public policy to limit who we apply non-competes to. And then, we talk about, when we then say, "Well, who has this information? Who has the information that we need to protect?" And so, when you look at high-wage employees, let's take a CEO. Let's take a CFO. Let's take vice presidents, executive vice presidents, regional managers, those types of employees. They have a lot of information about a business, and that's the information that needs protection. They have a lot of access to customers and a lot of information about customers.

And so, in those contexts, states, of course, will want to protect those things and protect businesses, because those people who have, we like to say, "More keys to the kingdom," if they have more keys to the kingdom, they make higher wages. Then, those are folks that we want to have non-competes, because they're the individuals who could most likely hurt a business if they go to a competitor and they share information, if they go to a competitor and they start going to the same customers that they worked at with their prior employer.

And so, the concept that you pay someone for a non-compete or higher-wage employees, that's a concept that's rooted in old England from many moons ago. And folks in the financial services industry in particular, they were placing evergreen provisions, provisions where someone would leave a business. They would be paid by that business to not compete for a period of time. Today, depending on the state, some states may require an evergreen type provision. Other states simply require that you give consideration when someone signs an agreement.

So, at the end of the day, even in states where people think non-compete agreements aren't enforceable, and we'll use California for a quick moment, because that always comes up. California, you can't force non-compete. Well, you can, under certain circumstances. It's not a complete ban. There are circumstances where you could enforce there. There's circumstances where you can enforce in other states, where folks typically hear, "Oh, you can't enforce there."

Well, in most states, almost all states, frankly, you can enforce a form of non-compete agreement under certain circumstances, including sale of a business, including a situation where you provide payments to someone not to compete and other criteria. So, the short answer to the question that we started with is, are non-competition agreements enforceable? And as a general matter, they are. And when you put it in context, then you can understand that.

And so, this is what the FTC will be looking at over, I suspect, the next several months, couple of years. And my prediction is, is that there will not be federal legislation to address non-competition agreements. There might be some FTC rules, but at the end of the day, states will likely still continue to have laws and have legislation and have case law from judges that will tell us are agreements enforceable and how and when are they enforceable.

Larry Bernstein:

Thanks, Michael. I'm going to go with a chronological order of your arguments and start with the Biden executive orders on July 9th. Is there any meat on that bone? Because this is predominantly a state law issue, and it's a state matter, if the federal government comes up with some bland executive order, is it basically meaningless? Or will it affect policy?

Michael Wexler:

I think it's a little more aspirational. When you look at his executive order in context, there are a number of items in his executive order, which are meant in different ways to lessen... I'll say to create more opportunities for people or to lessen restrictions on competition, because the general feeling of the Biden administration, at least in this executive order, is that competition is good. And how do we create competition while we remove barriers?

And if we remove certain barriers, then folks can compete more, and if folks compete more, that means that prices are lower for consumers. That also means that there's more opportunities for people to get better paying jobs and to switch positions. I think a lot of it is aspirational. I suspect that states will ultimately decide what they want to do. And most states will probably continue to do what they've always done. Some states may make some changes, especially the 20 or so states that have had some legislation with regard to low-wage workers.

I don't suspect we're going to see huge changes, but of course, we need to watch this. And obviously, folks who run businesses need to be aware of this and need to adjust accordingly if new legislation comes out, new laws, new case law, all those sorts of things. It's always a continuing process. I always tell clients that when you look at your agreements, and you look at how you're protecting things, it's a good thing to look at those things at least once a year, maybe twice a year, and just take stock of what's happened in the courts, what has happened in the legislatures, what's happening in the executive branch on these issues. And you want to stay ahead of that curve, and obviously address changes.

Larry Bernstein:

The second thing we talked about was how it affects low-wage workers. And this is what really has gotten into the public press, limitations for the guy who works at Taco Bell, who is preparing their meal, who wants to go over to McDonald's to serve fast food and being outraged when he finds out that he can't just do what he wants. Is your expectation that that's the sort of stuff that will end up being not enforceable?

Michael Wexler:

That trend will continue with low-wage workers, because close to half the states already have some form of legislation that says you can't or shouldn't have non-competition agreements for low-wage workers. And so, I suspect that trend will continue, because it seems to be very popular now, and in the current administration, and their view of competition and what the effects of competition are. I suspect that we'll have more states that do things. And unfortunately I say this, it could be a red-blue issue, and it shouldn't be. It should just be a worker issue, but it could be a red-blue issue. And you may see states fall along those lines.

Larry Bernstein:

And how will that fit? That red states will allow for enforcement and blue won't? Is that what you're saying?

Michael Wexler:

Democrats would tend to favor competition and would just take the executive order from the White House. You would say that the Democrats, and you assume Biden's the head of the party, right? You would say that Democrats are favoring competition and favoring ways to increase competition. And you would say Republicans, they would potentially favor business, and favoring business and favoring capitalism would mean we want more protections in place, so that we take businesses and make sure that the investment they're making in products and services and in workforce, that those things are protected. And so, that would potentially lend itself towards having more... Keeping things the same, as far as non-competition agreements.

Larry Bernstein:

Previously, when I spoke to you on this topic, you mentioned to me that making your non-competition extremely narrow increases likelihood of enforcement. How would you recommend constructing a non-compete to make it enforceable? How would you make it narrow, so that the employee could work almost everywhere, but exactly where you don't want them to?

Michael Wexler:

That's a great question. There's such a range with regard to how people put these non-competition agreements together. There's the obvious one that says, "You will not go work for one year for any competitor." The law technically says you need to have geographic and time restrictions on this thing.

So, you might say, "You can't go to any competitor in the United States, and you can't do that for a year." Query whether that's enforceable or not. It may be enforceable for the CEO of a big company, from going to their main competition and being a CEO there. That might make sense in that situation, but not for someone lower down in the chain. You may have agreements that say you can't work and compete within 100 miles of your current territory or your current office, that sort of thing.

Well, obviously, what we've just gone through and continue to go through with pandemics and with technology, we know that you can work from almost anywhere in many situations. And we

know that technology means that you can certainly compete beyond 100 miles through technology.

The best approach is to tailor these things to specific activities, to tailor these things in an appropriate time period, and to tailor things to an activity. So, for example, we'll take research and development. If you research and develop widget A, and you work for someone, and they have a non-compete that says you will not develop widget A for someone else for one year, that's very specific, because you worked on widget A for the last 12 years at your current employer. That's very specific.

If you have a sales person, a regional manager or someone who's in charge of customers, and you say, "Okay, you will not go to and solicit those specific customers that you did working for me, you're not going to go to a competitor for the next year and work with those customers, but you're free to work in your industry. You're free to sell product and services, but just to other customers."

And then, I should preface all this by saying that you always have a confidentiality agreement that says that someone who works for you shall not share your confidential information with competitors. And that, frankly, can be a lifetime commitment if information that they learn at your shop is something that's never in the public domain, and in fact remains secret. Then, they should not be permitted to share that information elsewhere. And that's kind of a basic restriction that most businesses have with regard to their employees.

Larry Bernstein:

Arbitration. It seems that there's going to be disputes about what's enforceable, what's not. Will this end up in court? Will this end up in arbitration? How would you feel if you were representing the employee versus the employer? Is speed of the essence? How do you think about this problem?

Michael Wexler:

Arbitration is an interesting thing, and there's a lot of different views on this. One view with arbitration is, is that some folks feel that it's faster, because you're not stuck in the courts, where it takes a lot more time, potentially, to resolve disputes. Some people will say arbitration's more expensive, because you have to actually pay for your judge, your arbitrator, and you pay for their time to hold hearings and their time to research and their time to write opinions.

Other folks will say arbitration is a good thing, because it's done confidentially. And whatever the result is, it's confidential, and it doesn't go into the public domain. And so, you always have that tension, which is better? And different views on why one is better or the other.

There's no wrong or right answer with regard to this. The answer really depends upon what's important to the business, what's important to the employee. If the employee wants a fast result, arbitration may be faster. If they want a result that doesn't cost them a lot of money with regard to the arbitration, then they potentially would rather be in court, because in court, you don't have to pay for the judge. In either forums, you pay for your attorney, so that doesn't necessarily make a huge difference that way.

It really depends on the motivation for the resolution process. I think a lot of folks, a lot of businesses, prefer arbitration in certain circumstances, where they want confidentiality of what happens. Whether they win or whether they lose, they prefer confidentiality. And they also prefer the speed with which arbitration can take place. And so, businesses may, if that's their motivation, that's their priority, they're going to go for an arbitration.

If a business says, "You know what? Whatever the result is, whether it's good or bad, we do this in a public forum, and the industry and our employees are going to know what happened, and that's fine with us. And so, we're just going to do this in court. And we'll do it in a forum that is not confidential and private."

And that makes perfect sense for some businesses. There's no wrong or right answer here. We have this discussion all the time with clients. When we write agreements, how do you want things resolved? And we have this issue all the time when we get into disputes, which is better? And again, it's based on the priorities of the individual. It's based on the priorities of the business.

Larry Bernstein:

It didn't always be the case that blue versus red states had different views on non-competition agreements. This is sort of a new thing. Will that affect how judges think about this problem or the arbitrators, in terms of what they think is the right answer? Or are they more contractually bound?

Michael Wexler:

Certainly in the ideal, fair world that we'd like to work in, in the judicial system, judges, arbitrators are supposed to follow the law. So, legislation, the rules on the books. And they're supposed to file case law. And the case law is made by judges making decisions and writing opinions. And so, we expect that judges and arbitrators will follow those rules and those opinions.

If you had a legislature that was controlled by one party or the other, and that legislature passes certain laws, and then the judges are bound to follow those laws, so they write opinions consistent with those laws. And then, we have a case, and judges and arbitrators have to follow, typically precedent.

And so, it certainly can have an effect, but it's not an overnight process. If you had dispute today, you would expect that the law on the books, and you would expect that the judges who interpret those laws and the judges who look at past opinions will follow that law and will follow those past opinions.

Larry Bernstein:

If you now have a chance to end your talk on a note of optimism, what would you be optimistic about as it relates to these non-competition agreements?

Michael Wexler:

There will always be non-competition agreements, because businesses aren't going to invest time and money in coming up with a product or a service to offer if they can't protect that product or service.

Everyone should note is that non-competition agreements protect workers, because if you have 100 workers at any level, and one worker leaves and takes something with them from that business, or goes and competes unfairly, right? And they don't follow a non-compete, that actually hurts the other 99 workers who are still in that business. I think when you put this in the context of what does non-competition protect?

It protects and entrepreneurs. It protects ingenuity, and it protects existing workers at a business so that someone doesn't take their job right out from under them, or they take the secret sauce that they produce and take it right out from under them.

Non-competition agreements, they will always be in existence in one form or another. And it's just smart to look and update agreements and look at changes in the law, and just make sure that your business is in tune with these things and takes the proper steps to protect what you have, and see what the law allows you to do.

I don't think it's a terrible thing. I think it's just a period of time where folks are looking at these issues and seeing, well, what's the best that we can do for the American worker? What's the best we can do for entrepreneurs? What's the best we can do for ingenuity? I think these agreements do help folks in the right circumstances.

Larry Bernstein:

Next week's episode will include James Meigs. James is going to talk about the Wuhan lab leaks. Andrew Hussey from the University of London will discuss the anger and frustration between working class French and the elites of France.

And finally, my college roommate, Josh Soven will talk about antitrust policy. He will talk about Lina Khan, big tech, and what the Biden administration hopes to achieve with antitrust.

If you're interested in listening to a replay of today's program, you may do so or read a transcript and find it on whathappensnextin6minutes.com, which is our website, and you can also find them available on Apple podcasts, Podbean and Spotify. I would like to thank today's speakers for their insights. I would also like to thank our listeners for their time and for engaging with these complex issues.

Please stay tuned for next Sunday to find out what happens next. Thank you and goodbye.