



Episode 1,800: The War on Business, and How to Fight Back

Guest: Anastasia Boden

WOODS: Can you start off by saying a little something about the Pacific Legal Foundation itself?

BODEN: Sure, the Pacific Legal Foundation is a nonprofit legal organization that represents people free of charge when their constitutional rights are being violated. And we specialize in economic liberty. That's my specialization, at least, representing entrepreneurs, small businesses when they're trying to start up but they are inhibited by red tape, essentially, and anti-competitive regulations. And we do a little bit of property rights work and environmental work. We really sort of run the gamut. And we've been to the Supreme Court many times. So that's our goal, is to get to the big court and change the world to promote constitutional rights.

WOODS: All right, very good. Now, in your work, you've helped a lot of people at the local level with their businesses. And one of the things that you've been involved in has to do with something called competitors' veto laws. And when I first looked at that, it reminded me of what we see in the case of a lot of hospitals, the so-called certificate of need, where the hospitals themselves will get to decide whether there needs to be another hospital bill. It seems like there might be a vested interest that work there. So it's a very strange kind of setup, and I wonder is that similar to what the so-called competitors' veto laws are?

BODEN: That's exactly what they are. They are certificate-of-need laws. We call them competitors' veto laws, because we think that better describes the process.

WOODS: Right.

BODEN: The government says, yeah, you have to come in and prove need. Well, the only way you prove need is by getting your competitors' permission to operate. So that's just our shorthand for them.

WOODS: All right, well, it's perfect, because of course, you want that version of the phrase to stick. So what would be some types of firms where that kind of law comes into play?

BODEN: Yeah, you see these laws in the transportation industry. So moving companies, limousines, taxis, and of course, that's some of the most absurd places to see these laws, because those industries should truly be the first wrung of economic opportunity for people. It should be one of the easiest ways to start a business, to start a moving company or something of that nature, because all you need is a truck, to slap your name on the side of it,

and now you have a business, you're an entrepreneur. And yet in that industry, you have to go in, prove that you're needed, which essentially means asking your competitors "pretty please," and they never say yes. In competitors' veto states, they just exercise this competitors' veto all the time. And so we're keeping out people who need economic opportunity the most from these industries.

But you also see competitors' veto laws, as you mentioned, in the healthcare industry. So to build a new medical facility, to purchase equipment, like MRIs, in some states just to add hospital beds. Before a hospital can add a hospital bed, it has to go through this onerous and anti-competitive and often futile certificate-of-need process. And so that's really detrimental. This costs lives. Particularly during health emergencies where people need to be able to expand their practice very quickly, they can't. They can't adapt to emerging problems. So yes, transportation, medicine. In California, we have them oddly for apprenticeship programs in the contracting industry. So a handful of industries, these competitors' veto laws have caught on.

WOODS: So what does your work consists of? Do you represent a particular company that's trying to fight against this, or a bunch of companies? What does that actually look like?

BODEN: Yeah, we usually represent an entrepreneur who has been thwarted from the American dream, somebody who just – most of these people have no idea, and I mean, most Americans have no idea that these laws are on the books. So they go to get the appropriate permit, and they say, *Okay, certificate of need. What's that? Sounds easy enough. Of course, I'm needed. I've spoken to people in my community who want a new moving company, or who want a new ambulance business.* And they go through the process, and they're just shocked because they get protested and they're denied a license. And they come to us, or in some cases, we hear about them and we go to them and we represent them.

And our goal, even though we're just representing one entrepreneur or one small business, is to set precedent that these laws are unconstitutional, and also to set precedent more generally that the government cannot restrict your right to earn a living simply to protect the existing businesses, because that's exactly what these laws do. They don't promote health or safety. In fact, they divert resources from actual health and safety laws to this ridiculous and absurd certificate-of-need process.

And so we want courts out there to say explicitly, when you deny people economic opportunity, it has to be rationally related to some true public health or safety rationale. It can't be solely as a handout to the existing businesses. And shockingly, some courts have actually held that economic protectionism is perfectly fine, that the government can indeed burden your economic rights simply as a handout to some of the businesses. There's a couple circuits out there who have said, that's just politics. That's what politics is. And we think, no, that's not right. That violates due process of law. That violates basic principles of fairness and justice, and the law has to be doing something more than that.

WOODS: I want to rewind a little bit in your career, because you're fairly young. How long have you been with Pacific Legal Foundation?

BODEN: I've been here, let's see, nearly eight years, just under eight years.

WOODS: Wow. Did you go there right out of law school?

BODEN: Pretty much. I had a short stint at the Cato Institute and Washington Legal Foundation, but yeah, right after that I came here.

WOODS: So you knew, is it safe to assume, that you would wind up spending your career devoted to causes like this?

BODEN: Yeah, well, I went to law school because I wanted to do what I considered public interest work. I've always been a pretty passionate, wound-up person, and I wanted to fight for principle. And in fact, I went to Georgetown because I thought I wanted to be in government. I thought that was the way to do it. The more I thought about it and the more I studied history and under the tutelage of Professor Randy Barnett, as well, I sort of came to the understanding that I think government is very often the biggest perpetrator of injustice. And so actually, my calling was to sue the government. And I knew I wanted to do that, so there's not many places who do what we do, and Pacific Legal is certainly one of the most prominent places I do that. So yeah, it was a natural fit for me.

WOODS: I've profited very much from reading Randy Barnett. One quick inside baseball question before we continue: did you happen to get to know a faculty member there named John Hasnas?

BODEN: I did not know him at the time, but I have since seen him speak at conferences and approached him.

WOODS: Okay.

BODEN: Yeah.

WOODS: Yeah, okay, because when I was a youngster, let's say, in the early '90s, and I came across him I think in 1992, that guy just blew my mind. I was not ready to hear what he had to tell me. I just stubbornly refused to listen. And then years later, I realized, all right, I guess he was probably right about the things he was saying.

All right, so let's jump back into here. I'm also reading about you and the topic of occupational licensing. This one is particularly interesting, because people of our point of view, we understand the consequences that this can have for a lot of ambitious people who get thwarted in one way or another. But the general public thinks, of course, they're being protected by occupational licensing, so you seem like the bad guy.

BODEN: Yeah, that's right. I mean, we very often hear these accusations of, *You crazy libertarian, you just don't want any laws, you want people to be able to exploit each other or harm each other*, or whatever. And little do they know that, in fact, occupational licensing very often has little relationship to protecting public health or safety. There are tons of studies on this now going to show in the dental industry and mortgage lending and all these different industries that licensees do not tend to have better outcomes than people who are not licensed. And that's because occupational licensing laws are actually called for by the regulated groups themselves. They asked for these laws, because they recognized that these laws act as a barrier to new competition, and they want to insulate themselves from new

competition. And so they put up these hurdles through licensing laws to entrepreneurs, small businesses getting started.

So we go in there and all we ask is for – again, this is what we were speaking to earlier – the very moderate proposition that when the government regulates and when it takes away people's liberties, takes away their constitutional right to earn a living, that law has to have some relationship to public safety. It can't be simply to keep people out.

And there's also the related proposition that when courts scrutinize these laws, they have to make sure there's a real relationship there. They shouldn't just defer to the legislature, because it shouldn't – I should say they shouldn't just have a knee-jerk reaction to defer to the legislature without any more sort of inquiry, because often these legislators are again lobbying at the behest of the entrenched business interests and are not – I know some of us like to think that they're all angels in the legislature, but sometimes they've been co-opted and they are not legislating in the public interest. Or sometimes they're wrong. Imagine that. They think one thing is going to create one outcome, but it doesn't. It creates the opposite outcome.

And we think that when the legislature fails us or when it legislates to deprive people with less political clout or less resources to lobby for these laws or politically unfavorable groups in other ways, the courts have to be our safeguard. They are our last safeguard for individual liberty. And in order for that to have any sort of meaning, they have to actually scrutinize these laws. And unfortunately, in practice, there's this terrible practice now of judges, I think, being overly deferential to the legislature and really not enforcing constitutional rights.

And so we're trying to get a little bit more scrutiny for the right to earn a living, because when it comes to the First Amendment or something, if it's some favored constitutional right like free speech, then courts will look into the rationale for the law. But for some reason, it's right to earn a living – well, it's not *some reason*. There are reasons we can get into. But the right to earn a living, which is a precious constitutional right – it's one of our most fundamental constitutional rights – it's been relegated to nothing, and courts just don't care about it. And if it's in some sort of economic regulation, they tend to sort of just look the other way. And we think that's wrong.

WOODS: I would imagine that the way this typically works would be that an individual or a firm would contact the Pacific Legal Foundation and say: here's the situation I'm facing. But I could also imagine there's some high-profile incident going on that catches your eye in the newspaper, and you see some entrepreneur, some businessman put upon by some injustice, and maybe you approach them. Does that ever happen?

BODEN: Oh, absolutely. It happens both ways. I mean, I could tell you all these great cases that I saw in a newspaper article. I recently challenged Virginia's happy hour law, to take one example, and that's because I had read some article about how advertising happy hour in Virginia was verboten. You could say "happy hour," and you could say what time. Oh, you could also say the word "drink specials." They were very specific. You could say "happy hour," "drink specials," and what type, but you could not advertise prices. And you could not use any sort of clever phrasing like Wednesday Wind Down or Fun Friday. I don't know. I guess I'm not that clever. I don't have that great of puns here. But Virginia had made happy hour advertising extremely narrow.

And the more I started Googling it, I found this guy, Chef Jeff. He's sort of a celebrity chef in Washington, DC. He's married to Norah O'Donnell, the TV anchor. They're quite a power couple. And he had been very outraged by this, and he had started tweeting things like, "I want everyone to know that it's illegal in Virginia for me to tell you that I'm having happy hour tonight at 8pm for \$6 a drink," you know.

WOODS: [laughing] That's great.

BODEN: Yeah, and so I called him up and I said, Hey, do you want to sue? And he said absolutely. So sometimes it's me calling up people, and other times it's people calling us up.

WOODS: I think sometimes about just the emails that I get from a lot of people. Now, I get some wonderful emails from some truly outstanding people. And then I get emails from completely crazy people. So I do my best to answer as many of the normal people as I can. Now everybody who didn't get a response from me is going to think I didn't think they were normal. I'm overwhelmed with email right now, because the virus stuff, everybody in the world is writing to me about it. And they want me to see this chart or this study they've done or whatever, and I can't possibly keep up with it. But the thing is, obviously, you have to sift through, I would think, some of the requests you get. Is it a matter of you wish you had more personnel so you could take on more cases? Or is there like a good equilibrium?

BODEN: Oh, absolutely. I mean, there's always more — I always say I sue the government for a living. There's no shortage of work here. We would love to have more resources, more attorneys. It's sometimes a matter of capacity. Sometimes it's a matter of it's just outside our expertise. We only do a handful of things. I get letters from prison, right? And I have no idea about that area of law. I feel like being an attorney is probably a little bit like being a doctor. If you're a doctor, your friends call you up all the time and they're like, "Oh, my toe hurts." And you're like, "Well, I'm a heart surgeon." Just because you're a doctor doesn't mean you know everything. And it's the same thing here. I get my friends, we get public inquiries. *Can you help me with this case?* I know nothing about that area of law. So sometimes it's just outside our expertise. Sometimes we don't have the capacity at the moment.

And even when there's a good case, we have to be extremely selective. Public interest law is so hard. As I mentioned, courts, they just tend to look the other way in a lot of cases, and so we really have to pick the cases with really good facts, with clients who can represent the case well, who can tell the story well, cases that don't have what we call vehicle problem or standing problems. We have such a limited capacity, and we have to use our donors' money well. We're a nonprofit, and we represent all these people for free. We just have to be extremely selective, because we're trying to vindicate our clients' rights, but we're also trying to change precedent at the end of the day, right? We want to get to the Supreme Court and make a better world. And so we have to be careful about what cases we pick.

WOODS: Obviously, you want to have at least a plausible, good outcome. It's like the just war theory. There has to be some plausible ending to it. There has to be some plausible way that it could ever be completed, so you do have to think in terms of that. Now, I can't help ask you obviously, given that we're just wrapping up 2020, which is a year you can't even say — you feel like it's a dirty word when you say it — that there must have been something noticeable in the types of cases you were getting asked to take on, something different about the cases in 2020. I suppose somebody must have filed some anti-shutdown cases and wanted your help?

BODEN: Yeah, absolutely. I mean, one thing is 2020 made some of my work all the more salient with these certificate of need laws. That became a very popular talking point, because it became all the more real how absurd it is to not let people expand their medical practice at will or to buy new medical equipment as they see fit. So it enhanced the importance of my work there. And it brought to mind a lot of telemedicine cases. We're very interested in telemedicine right now, and yet the government has made it incredibly difficult for many people to engage in telemedicine.

But also there was an influx of lockdown cases, that's for sure. And in fact, I've been involved in a few cases of that nature. There was one here in Napa County, where closer to the beginning of the pandemic, the county had allowed pretty much every retail store to open with restrictions, except for art galleries. And an art gallery, that's one of the safest places, one would think. At least our art gallery that we represented, they have a ton of space. They can very easily limit how many people go in. They can require masking. They can require social distancing. And yet there was this arbitrary rule where all of their neighbors could open up – toy stores, furniture, stores, antique stores, Walmart, what have you – but not an art gallery. It's just so plainly arbitrary on its face.

And we got ready to sue. We had all the documents ready. These people, they're so wonderful, the Courtier Gallery in Napa, because they were willing to stand up before it was even – this was at the beginning when everyone was being more quiet about any sort of trepidation they had about the orders coming out. And they were willing to stand up, so we were all ready to file. And I called up the county the day before, which you have to do when you're filing for an immediate injunction. And I called them up and I said, "Hey, we're going to sue tomorrow. I'm just giving you notice." And nobody answered, so I left a voicemail. I wrote an email, and a couple hours later, they called back and they said, "Oh, actually, under our interpretation, our galleries are allowed to open."

And that's very often what happens. That happens a lot in my practice, is we threaten to sue or we do sue, and they change the law. That's what happened with the Virginia happy hour case. In the court, the government was saying, hey, Judge, if you get this happy hour advertising law off of the books, people will die. That's what they were literally telling the judge. And meanwhile, they were quietly working in the background to get rid of the case. They were lobbying the legislature to change the law to get rid of the happy hour restrictions. So the hypocrisy is just incredibly frustrating. They're also very afraid of a court precedent that will curb their power in the future, so they want to avoid getting to the merits of the decision. So sometimes we just threaten to sue and they changed their mind.

But getting back to your question, yeah, we have been involved in a few lockdown things, given the nature of 2020 and given the nature of how ill-equipped states are to handle emergencies like these. Now it's just so apparent that state's emergency statutes are very poorly written and just grant blanket power to the governor. And when you have one-man rule, it just inevitably ends in arbitrariness like this, where – it was part of the state rules too with the galleries. The governor had said *all retail except for art galleries*. Well, that makes no sense.

Or in North Carolina right now, every single establishment that sells alcohol for on-premises consumption is open, except for a small class called private bars, membership-only private bars. They're the only ones who have to stay closed right now. And to my mind, that's because of the lobbying power of the breweries, the wineries, the distilleries, the restaurants, and

everyone else. It has nothing to do with public safety. These bars can abide by the same health and safety standard. There's something nefarious going on, if not just outright arbitrary.

But that's the result of one-man rule. That's what happens when you have these very poorly written emergency statutes that allow one person to micromanage the economy into perpetuity, with no checks. And so we've gotten quite a few inquiries of this nature, same as you, just flooded with these inquiries and trying our best to wade through them.

WOODS: Well, it seems to me there are a couple of different ways to tackle them. And I say this as somebody who knows nothing of the legal side of things. But since so much of what's been done in these states has been done as a result of a governor's say-so – for example, in California, as you know, there was the suit with Gallagher and Kiley about Governor Newsome and what he'd been doing with executive orders and so on, that you could argue – you don't even have to get into the merits of the particular thing that the governor is saying. The mere fact that he's saying it and ordering it and not seeking counsel of the legislature seems like you could tackle it more easily than saying, Well, here's the science showing that – although I know that there was at least one case that where a judge said, I don't see that there's science showing that restaurants are a major center of the spread. But you wouldn't even have to get into that. You could just say the governor cannot govern like an autocrat indefinitely.

BODEN: Yeah, that's absolutely right. And we have our own case in California. Actually, I'm not on that case, but we have a case on behalf of mini golf, a miniature golf place that wants to open. Of course, they can social distance and abide by all of these health and safety restrictions. I mean, they won't allow one group to go to the next hole until that group has moved on.

WOODS: You're still six feet away. I mean, nobody is within six feet of you on a mini golf course. I don't care where you are. That's just not happening.

BODEN: Right? On its face, it's so absurd. And we have sued under these theories that the governor – California's emergency services statute is especially crazy. I mean, it just says on its face, the governor can exercise all legislative power. That can't be right. With no check or balance? So we have brought up sort of procedural challenge to the scope of that granted power to the governor in that case. But in other cases, we just say this is arbitrary. Like there's no good distinction between an art gallery and an antique shop. Or in North Carolina, we would say there's no good distinction between a private bar and a brewery, except for the fact that we know the brewery lobbied the governor. So we do both. It's a two-pronged attack, I would say.

WOODS: It seems to me, just as an outside observer, that the courts have been the one place where there has been at least some remote possibility of some remedy or some change being made. Good luck writing a letter to your governor or wherever else, but it does seem like in the court from time to time we have seen things struck down. We have seen governors reviewed. So maybe that reaffirms you that you're doing the right thing?

BODEN: Yeah, it has been amazing, because as somebody who does these cases all the time when there's not a pandemic, courts are not always friendly to these claims. And you would think – you never know which way the pandemic is going to cut, because on the one hand, it might give a court all the more reason to be like, Well, I'm not wading into this. It's a

pandemic, and the government needs this power. But on the other hand, it actually has in practice, I think, sort of cut the other way, where there have been a handful of successful cases – you mentioned that one with the restaurants. I mean, that was sort of extraordinary circumstances, because in LA, I think they sued the restriction on outdoor dining, and the government just flat-out said, we have no evidence that a restriction on outdoor dining will have any relationship to curbing infections. They just admitted that. It's crazy. But even in other states where the government has put up a fight, we have seen some successful cases. And it is really heartening and it's reaffirming to see, as an economic liberty attorney, courts actually engaging with these laws and being a refuge for people whose rights are being violated.

WOODS: Tell me about the podcast that you've started not too long ago with, I guess – is it with Pacific Legal Foundation?

BODEN: Yeah, it's through Pacific Legal Foundation. I have a podcast called Dissed with Elizabeth Slattery, my colleague and formerly of the Heritage Foundation. And basically, we just take a deep dive into Supreme Court dissents. Some are modern, some are old, more historical episodes. The theory is sort of that dissent is more important than ever, right now. There's this sort of movement, this trend that everyone has to be on the same page, everyone has to speak the same orthodoxy. And in fact, if you're not on the same page, you should be censored or you're awful or you're whatever. Throw out whatever epithet you want about somebody who disagrees with you nowadays. And I think Supreme Court dissents are a great example of a way that people can disagree about really important things, but do so in a respectful manner.

And what's really interesting also is that some of these dissents end up being the majority view over time. And so we sort of trace that and look at the motivations: why did judges vote the way that they did? How do their views change over time? How do they persuade future justices? And I mean, I just think the Supreme Court is fascinating. But dissents, in particular, are fascinating. Everyone thinks about the majority opinion. They think, well, the majority opinion is the law, so let's read that. No, no, no, let's look at the dissent. The dissent has something really interesting to say because it pokes out the flaws in the majority argument. And sometimes it ends up being a more widely held view over time. So that's our podcast.

BODEN: Well, I think there was a book Regnery put out maybe 10, 15 years ago called *Scalia Dissents*. And that was a collection of Scalia's dissent, and they made for very interesting reading. And I've often thought that in a variety of cases, it would be very interesting to read the dissent, because the dissent is not necessarily wrong just because a couple of extra people disagreed with them. Half of the time, it's political anyway. Doesn't mean it's wrong. I'd love to see the reasoning arguing against the decision, because that reasoning is probably correct. So it'd be a very useful intellectual exercise to do that, so I think that's a that's a terrific idea. Pacific Legal Foundation, what's the website?

BODEN: It's PacificLegal.org. You can follow us on Twitter @PacificLegal. We have a blog. Reach out to us on basically any social media platform. We're there.

WOODS: Well, Anastasia, thanks for your time today and for the important work you're doing during the most challenging year of our lives. We appreciate it.

BODEN: Hey, thank you, and it was so good to talk with you.

