

After 20 years, merrily litigating for its cause

Institute for Justice takes key role in high-impact cases.

The Institute for Justice is celebrating 20 years of serious achievements in legal arenas ranging from school choice to free speech, eminent domain to the revival of the Constitution's "privileges and immunities" clause.

Tony Mauro
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Few lawyers can boast that they've had a piece of pizza named after them. But Bert Gall of the Institute for Justice can.

"It's the Bert Gall slice, topped with bacon," Gall said proudly.

D.C. Slices, a Washington food-truck business, gave Gall pizza immortality because he heads up the latest campaign of the Arlington, Va.-based IJ. In lawsuits across the country, Gall is challenging the regulation of increasingly popular mobile food vendors. Often backed by brick-and-mortar restaurants threatened by the competition, the regulations restrict or ban food trucks in certain zones. Some cities even require them to keep moving until hailed, as if they were ice cream trucks.

"It's a classic David v. Goliath battle," Gall said, "and it's been a ton of fun."

It is also a classic initiative for the Institute for Justice: highly visible, with sympathetic clients and a ham-handed enemy — and it is scrappy and fun, besides. The institute celebrates its 20th anniversary this month. "We try not to take ourselves too seriously," said founder and president William "Chip" Mellor. "The fight is important, but you've got to find occasions to laugh." Columnist George Will's early description of the institute as a "merry band of libertarian litigators" is touted on its Web site.

But the merriment does not mask the institute's serious achievements in legal arenas in its two decades of existence, ranging from school choice to free speech, eminent domain to the revival of the Constitution's "privileges or immunities" clause.

The institute's targeted focus on its core issues, as well as its trademark approach to litigation — pumped with publicity and backed by research — have been keys to its success, Mellor said. The food-vendor initiative, for example, was launched with a report called "Streets of Dreams" on bothersome regulations nationwide. And media attention — *The Washington Post* food section highlighted the vendor campaign last week — is almost as important to the institute as a courtroom victory.

"We've known from the outset that litigation alone is not enough to achieve the goals we've set," said Mellor, who served in the Reagan administration and in other think tanks and public interest groups before launching IJ with Clint Bolick in 1991. "There has to be a campaign for national awareness as well."

THE HOME FRONT

No case exemplifies that more than *Kelo v. City of New London*. The institute championed the cause of Susette Kelo, a Connecticut homeowner who challenged the taking of her home by eminent domain to make way for a hotel and retail redevelopment plan. But in its 2005 decision, the U.S. Supreme Court said the taking was constitutional as part of an economic-development plan.

The institute could have licked its wounds and moved on to another issue. But it barely missed a beat. As part of its litigation strategy, the institute had already built a constituency for its position through heavy publicity, including a sympathetic piece on *60 Minutes*.

So when the loss in *Kelo* was announced, the institute launched a "Hands off My Home" campaign and promoted the phrase "eminent domain abuse," turning an esoteric concept of property rights into a populist battle cry. Since then, 44 states have passed laws restricting the use of eminent domain. If the institute had won *Kelo*, similar change might have taken place, but probably only after years or decades of further litigation.

"Its single greatest triumph came from turning that loss into a public relations victory," said Cato Institute vice president Roger Pilon. "They've really done a great job of packaging cases in ways where litigation is only one part of the effort to change the debate." In part Pilon credits the institute's vice president for communications, John Kramer.

The latest sign of the institute's media success: A book on the eminent domain battle will soon be turned into a movie starring Brooke Shields as Kelo.

The Kelo campaign brought its share of criticism from municipal leaders, including New York City Mayor Michael Bloomberg. "The institute's demagogic eminent domain campaign threatens the long-term economic viability of our greatest cities," said Vermont Law School professor John Echeverria, head of its environmental law center. "Effective redevelopment depends on government being able to overcome holdout problems" with eminent domain powers.

The eminent domain battle represented one of what Mellor calls the "four pillars" of its mission: economic liberty, property rights, free speech and school choice. To avoid "mission creep," Mellor said he has had to say no to cases that would otherwise be enticing.

UNDER THE GUN

Several years ago, that discipline led it to sidestep an issue that could have won it more friends, at least among conservatives: the individual right to bear arms under the Second Amendment. Yet, in a way, that battle was infused with the institute's DNA.

The initial strategy that led to the gun rights victory in *D.C. v. Heller* was hatched in the institute's offices, Mellor said. Senior attorneys Clark Neily and Steve Simpson came to him with a plan to fight for the individual right "in the IJ fashion" by finding sympathetic clients to file suit, supplemented with a strategy of research and media publicity.

Mellor said no. "It's not an IJ issue," he said. "It's not central to our mission." But the Cato Institute's Robert Levy, a member of the Institute for Justice's board of directors, decided to finance the litigation, and he brought in D.C. practitioner Alan Gura to argue it. It was no coincidence that both Levy and Gura had once been interns at the Institute for Justice. "The team that took it up to the Supreme Court used the IJ approach to litigation," Mellor said.

That influence continued with the sequel to *Heller*: *McDonald v. Chicago*, which applied the individual right established by *Heller* to gun regulations at the state and local level. Gura argued that *Heller* should apply to the states because of the 14th Amendment's "privileges or immunities" clause — a risky argument that only won the vote of Justice Clarence Thomas. But that was the fifth vote that tipped the decision toward limiting state gun regulations. Since its founding, the Institute for Justice has argued for the resurrection of that clause, in part to provide a more solid foundation than other parts of the Constitution for economic as well as individual rights.

"I was crushed" that the Court rejected the privileges or immunities argument, Mellor said. "But we were glad that Alan argued it. It took a lot of courage and tenacity," and stirred fresh debate over the long-dormant issue.

With chapters in Arizona, Minnesota, Texas, Washington state and soon Florida, the institute is continuing to bolster its first victory, on school choice. In 2002, it argued and won the Supreme Court case *Zelman v. Simmons-Harris*, which as Mellor put it, "removed the constitutional cloud" over school-choice programs that include religious schools. The movement continues to grow at the state level, Mellor said. But litigation continues, especially in states with so-called "Blaine Amendments" that strictly bar the use of taxpayer funds to support religion.

Looking ahead, Mellor does not worry about running out of issues to keep his staff of 33 lawyers plus 32 others busy. The institute's annual budget is \$13 million, and almost all of its litigation stays in-house. If anything, Mellor said, the nation's economic woes and the public discontent with government has had "a silver lining" for his group. "Never has it been more evident to more people that constitutional limits on governmental power are essential but sorely lacking," he said. "I'm very optimistic. There are still a lot of problems out there."