

## **You Might Be Right - Polarization and the Courts - Transcript**

*Transcripts are machine and human generated and lightly edited for accuracy. They may contain errors.*

**John McGinnis:** I don't see any risk of a partisan interference with the election by the court. I'm also heartened by the fact that the Congress reformed the Electoral Count Act that I think is going to make it harder for losers in the election to cause problems in Congress and then by extension, in the court.

**Steve Vladeck:** This is a very different public relationship with the court than existed at the time of Bush versus Gore. And so, what I worry about is that you'll have justices, even acting in the best of faith, whose sort of ideological views are going to push them to vote in ways that align with their partisan preferences, where it might be hard to find some kind of consensus here.

**Marianne Wanamaker:** Welcome to "You Might Be Right," a place for civil conversations about tough topics brought to you by the Baker School of Public Policy and Public Affairs at the University of Tennessee, with funding support from members of our Producers Circle. To learn more about how you can support our work, visit [Youmightberight.org](http://Youmightberight.org).

Public trust in the Supreme Court is at a near record low and perceptions of the court are deeply partisan, making it yet another issue where American views are highly polarized. In this episode, our hosts, former Tennessee Governors Phil Bredesen and Bill Haslam, and their guests discuss the impact of polarization on the Supreme Court. Is the court as partisan as Americans think it is – and should we consider reforming the court to help rebuild trust?

**Bill Haslam:** Welcome back, Phil. I think we have one of those topics today that everybody should lean in on because I think it really matters.

**Phil Bredesen:** I think we've got two really, really good guests and know an awful lot about this subject and got some very different views, exactly the kind of thing we're trying to do.

**Bill Haslam:** So this fall we've been focusing on the polarization in the country and the impact that it has on institutions kind of across the board. Today we're going to talk about judiciary and how the political polarization might be affecting even the court's decisions.

**Phil Bredesen:** I think that's not talked about maybe as much as some of the other kinds of polarization, but it's really important because the courts may well have a role to play in this election. They have a role to play in a lot of the issues that have been so contentious between the parties.

**Bill Haslam:** And even more fundamentally, one of my biggest concerns about the country is a dwindling sense of belief around our institutions. And I personally think that having a confidence in the judiciary as an institution is really important for who we want to be as a country.

**Phil Bredesen:** I think that's right. And with this election coming up, there may well be some need for refereeing. And this question about the court system's believability and something like that is a really important one. We should ask our guests about that.

**Bill Haslam:** Let's do that.

Phil, we're pleased to have, I think, two really great guests with us this morning. Our first is Steven Vladeck. He's a professor of law at Georgetown where he's nationally recognized expert on the court's, constitutional law, national security law, and military justice. He joined Georgetown after 19 years at the University of Miami School of Law, American University, Washington College of Law, and most recently, the University of Texas Law School. He's the author of the New York Times best-selling book, *The Shadow Docket, How The Supreme Court Uses Stealth Rulings To Amass Power And Undermine The Republic*, a finalist for the 2024 ABA Silver Gavel Award. He's argued over a dozen cases before the U.S. Supreme Court, the Texas Supreme Court, various others. He co-hosts the award-winning – we need to be an award-winning, we need to be able to say that about our podcast sometime – the award-winning National Security Law podcast.

He's also CNN Supreme Court analyst, so a lot of you have heard him there. 2004 graduate of Yale Law, clerked for the U.S. Court of Appeals for the ninth circuit and the 11th. While he's originally from New York, he lives in D.C. now with his wife and two daughters and their dog.

**Phil Bredesen:** I'm glad to have him here. By the way, I have a friend who can work on an award for us and we can talk about– Anyway.

**Bill Haslam:** That might be our best hope.

**Steve Vladeck:** It's just a matter of time, but you guys need better guests, I think that's a real issue.

**Phil Bredesen:** Well Steve, thanks for being on with this. And I want to just really start out, I mean there's been all this talk about polarization in our politics between Republicans and Democrats and liberals and conservatives. And my question really, just to start with, has the court, by its actions, I mean has it contributed to and helped to drive that polarization or have they really been outside of that?

**Steve Vladeck:** So I think two things are true. I think the court has contributed a bit, but not on purpose and I think it's important to draw that distinction. So guys, for the first time in American history since 2010, we have a Supreme Court where the ideological orientation of the justices maps perfectly on to the party of the president who appointed them. We tend to think today that there are six Republican appointees and three Democratic appointees. We never talked about the Supreme Court that way before 2010 because you still had liberal Republicans, you still had some conservative Democrats.

And so, I think part of the problem is that when the court today splits ideologically, something it has done in major cases for its entire history, today alone, that split reflects our partisan political divisions in ways that it wouldn't have in the past. So when folks see that the Supreme Court rules six to three in favor of sort of reigning in the administrative state or six to three in limiting racial preferences in undergraduate admissions, and it's the six Republicans against the three Democrats, I think the average American is going to assume that there are some partisan politics in that, when I think actually part of it is really more just a reflection of this unusual alignment between the current justices' ideologies and which presidents appointed them.

**Bill Haslam:** And is that a historical anomaly or is something going on that's caused that to happen?

**Steve Vladeck:** I think it's both, Governor. I think it's a historical anomaly in the sense that we have a long history in this country of appointments that were not efforts to pick the most ideologically extreme person of my party, if I'm the president. There are sort of famous cross-party appointments, there are appointments of moderates because they were moderate. And I think part of this is a reflection of the way the Senate is working today, or not working, as the case may be, which is there's more of an incentive now to pick folks who are on your team than that might've been true in the past.

**Phil Bredezen:** There've been a lot of concerns about some ethics issues in the court as well. Have they played into this?

**Steve Vladeck:** So I think so. Part of the problem is that when the justices are divided the way they are, almost every issue involving the court sorts us into our camps, where, if the alleged misbehavior is by a Republican appointee, it's the Democrats who are the most vocal critics, it's the Republicans who are the most vocal defenders and vice versa. I think the problem is that every single conversation about any controversy surrounding the court ends up sorting us into Sharks and Jets, where we don't really talk about the court as an institution. We don't talk about how this court today, for example, is behaving in some ways that are different from its predecessors that are not in any way ideologically charged. And so I think part of the problem is that we are so convinced that everything today is partisan, that we map partisan behavior onto every single public debate about the Supreme Court that we're having, guys, in ways that I think entrenches the conversation unhelpfully. Because now any reform conversation looks like it's just a partisan attack, as opposed to trying to talk about how we make our institutions healthier.

**Bill Haslam:** Yeah, I think it does become self-fulfilling prophecy. I think you're exactly right. Let's talk about a couple of cases recently that have gotten a lot of attention. Let me ask you, first, about the presidential immunity decision, and you might start by just explaining for our non-legal listeners exactly what the decision was and what it meant.

**Steve Vladeck:** Sure. I mean, so the immunity decision was basically about whether and to what extent a former president can or cannot be criminally prosecuted for a conduct he has allegedly engaged in while he was President.

**Bill Haslam:** Can I stop you for a second? You said former president. Is what is happening with whoever is in office at that time, was that up for debate as well or was that a separate issue?

**Steve Vladeck:** I think that's a separate issue. I mean, just as a matter of executive branch bureaucracy, I think it would be very hard for a current president to prosecute himself. Now, I mean of course, I think a state effort to prosecute a sitting president, Governor, would be covered by the same analysis. So just in general, can a president, current or former, be prosecuted for conduct while he's in office? And the Supreme Court handed down, I don't want to say it's a mixed ruling, but it's a complicated ruling, where the court first said there's basically three tiers of conduct. There's core executive conduct, stuff that Congress can't touch at all for which a president is absolutely immune, says the Supreme Court in this decision. There's unofficial conduct, at the other end of the spectrum, for which the president's not immune. And then there's this intermediate territory of what the Supreme Court called official acts where the court says there's a presumptive immunity that maybe can be overcome, but where the court was not frankly perfectly clear about how that would be overcome.

And so, I think the complication with the ruling is twofold. One, in the short term, it has this effect of making it much harder to figure out what former President Trump can and cannot be prosecuted for. But two, guys, in the long term, it really is an endorsement of a lot of executive power, the likes of which the Supreme Court has not previously endorsed. And I think one of the concerns that folks like I have with it is that, put aside the question of prosecuting President Trump, 10, 15 years from now, what kind of precedent is this case going to set? And if it's saying the president has that much more power that Congress can't interfere with, how's that going to affect, for example, oversight? How's that going to affect efforts by Congress to pass statutes limiting the President's power to use certain authorities, whether it's in the national security space or otherwise?

There's sort of really two different features to the ruling. One is the president has a lot of immunity that's going to make it hard to prosecute him for stuff he does well in office. But two, there's this broader endorsement of what the court calls preclusive executive power, power that the president has that Congress can't limit or regulate. And I'll just say my longer term concerns about that part of the ruling, not the specific prosecuting former president's piece.

**Phil Bredezen:** And I think a lot of people were, I mean, taken back by, first of all, the breadth of the ruling when the case they were considering did not require anything like that. And second of all, just the seeming untetheredness of that ruling to any of the historical precedents or what the Constitution actually says. What was going on there? What was Roberts thinking?

**Steve Vladeck:** It's a great question. I think it's worth talking a bit about the vote count. So the six Republican appointees all ruled in one way, shape or form for former President Trump. But Justice Amy Coney Barrett, as you guys know, wrote this narrower opinion that actually tried very hard to draw brighter lines and to say, "Here's exactly what can be used in this case. Here's what the district court should do in this case." This case being the January 6th

prosecution for President Trump. Governor, what I find striking is that Chief Justice Roberts could have joined Justice Barrett in that kind of middle-of-the-road, compromising opinion.

**Bill Haslam:** Which he's done several times recently, right?

**Steve Vladeck:** Yes, sir, right. Which has been a hallmark, I think, of a fair amount of his jurisprudence during his now 19 years on the court. And instead he really drove the bus toward the majority opinion we got, which was just a five justice majority opinion, where it was Roberts joined by Thomas, Alito, Gorsuch, and Kavanaugh. And what I find striking about it is, as you say, a lot of what the opinion says wasn't necessary. Some of what the opinion says is actually affirmatively confusing, which here's an area where I think we would want bright lines, not blurry ones.

And I guess, back to where we started, is the court acting in a way that is exacerbating our polarization? Here was a chance, I thought, for the court to try to step above the partisan politics of the moment and to try to find some kind of consensus. And for reasons I don't fully understand, the Chief Justice just didn't take that bait, didn't take that opportunity.

**Phil Bredezen:** We have election coming up as we talk here, which seems to me almost certainly to be contentious in the aftermath. One of the functions you might expect the judicial system and the Supreme Court to supply in something like this is a referee function, much as they did in 2000, for example. Have they lost the ability to do that with the support of people or can they still function that way?

**Steve Vladeck:** It's a great question. I very much hope we don't find out, but I think the problem is 2020 was a very different setup than 2000. In 2000, the entire presidential election, as you guys know, came down to a single state and came down to a particular set of disputes about recounts in that single state. And that I think was sort of a perfect storm for the Supreme Court to step in, versus 2020 where we had three or four states where the claims were not that strong, where the margins were much larger. I mean, remember the ultimate margin in 2000 was 537 votes in Florida. So I guess, I think this court will certainly feel like it has to step in, if we're in more of a 2000-like scenario. But, Governor, it's exactly right to worry about whether the court has the capital to spend, that it was able to spend in 2000.

I mean, this is a very different public relationship with the court than existed at the time of Bush versus Gore. And so what I worry about is that you'll have justices, even acting in the best of faith, whose sort of ideological views are going to push them to vote in ways that align with their partisan preferences, where it might be hard to find some kind of consensus view. 2020, I think, was a success story for the Supreme Court. The court stayed out of the Pennsylvania dispute, it stayed out of Texas's effort to litigate the cases in a state versus state context. I guess there's nothing in the court's recent behavior that gives me confidence that if we're in more of a 2000 type of dispute, that the court either would stay out or that the court would try to find a way through that didn't just reinforce all of these concerns. And that's part of why I started by saying I really hope we don't find out.

**Bill Haslam:** Let me go back to one other case that's gotten a lot of attention, the Chevron decision. And again, I'm going to ask you to explain for our listeners briefly what was decided and then I'd love your view on that.

**Steve Vladeck:** Sure. So the center of question here is a battle over what to do when Congress passes a statute and the text is not super clear on what it means. So imagine a statute that says, "Hey, Environmental Protection Agency, you're allowed to impose reasonable pollution limits on any 'stationary source of pollution.'" Well, there are two questions baked into that language. One is what's reasonable and two is what's a stationary source of pollution? So historically, and since the 1980s, the Supreme Court has taken the position under a series of cases known as the Chevron Doctrine, because that was the first case, that if an agency, like the EPA, resolves an ambiguity in a statute in a way that's reasonable, the agency's interpretation should prevail, even if I, the judge, might have read it the other way. And so basically it's sort of a who gets the benefit of the doubt when a statute is ambiguous. Do we give it to the agency or do we give it to the judge?

What the Supreme Court did earlier this year, in this case called *Loper-Brite*, is it overruled the Chevron Doctrine. It said, "No, we're not going to give the benefit of the doubt to the agency. Instead, in every single case, we're going to ask, 'Well, what is the best meaning of the text,' without regard to what the agency thinks the best meaning of the text is." And so the result is that you're going to have some meaningful number of cases where an agency thinks that a statute allows it to do one thing and the courts say, "Actually, it only allows you to do this other thing." And that's really how the – that's why this decision has been, I think, so criticized because it really is a transfer of power, not from Democrats to Republicans or Republicans to Democrats, but from executive branch agencies to federal judges. And say what you will about federal judges, whether they're appointed by Democrats or Republicans, the one thing they all have in common is that they are less directly accountable than the executive branch, than the folks we elect to Congress. And I think that's where you see the concerns.

**Bill Haslam:** And I understand that. I guess I have two thoughts. Number one, or one of those, is a hope that I think the legislative branch has abdicated a lot of its authority. It hasn't been taken from, they haven't been willing to go make the hard decisions and have those hard votes. And so, I'm actually hoping this might be one of the things that says, "I know you're evenly divided in the Senate and the House, but go work out these hard ones and learn how to compromise and make it happen." I guess that's number one. Number two, my thought is I have seen, and again, I'm the Republican on the panel, but I've seen a lot of agencies, I think, take way more power than they were given in making decisions that I don't think have been helpful. So I don't see the cases being, I didn't see it as being bad news. Now, you tell me I'm wrong, maybe.

**Steve Vladeck:** No, I mean, Governor, I think it part of what it is it a sort of two-part question about institutional capacity and institutional responsibility. So I couldn't agree with you more that Congress has abdicated a lot of its responsibility for tackling big policy questions like

immigration policy, for stepping in and actually owning some of our big public debates. And the result has been as, I mean you're both governors, you know this as well as anyone, when the legislature hasn't been super express, that creates more pressure on the executive to find authority in statutes that might not be as good of a fit. And that of course increases the litigation risk. The problem I see is, not just that our current Congress, I think it's not any surprise to say this, is rather dysfunctional, but rather I think even an ideal Congress I think is not set up to provide the kind of micromanaging of these agencies that we want.

I mean, there are 435 federal agencies. Even if Congress spent half of a day every year on each one, it still wouldn't come close to covering the waterfront. And so I think the problem is that, if we're going to have a large executive branch of the federal government, we should think about better ways to fix it. And so, Governor, I agree that there are agencies with too much power. The way you rein that in is by having a Senate that will only confirm a head of that agency who's committed to acting more within the lines the Senate thinks are appropriate. So to me, the solution in both cases is Congress, but not that the stop gap should be the courts. Seems like instead the focus in the interim should be, how do we create pressure on Congress without disabling the executive branch from responding to our biggest and most pressing social problems?

**Phil Bredezen:** We could talk about this one for a long time. I'm the Democrat on the panel and I've got concerns about federal agencies in that regard. But this seems in some ways to be similar to what went on with the immunity issue, which is sort of taking an issue which probably required some adjusting and completely throwing out a lot of precedent and others and to try to do some big, comprehensive thing.

Let me ask sort of a follow-up question to this. There's been a lot of talk and we've actually done some of this podcast with some people about reforms of the court, which generally fall in the category of either expanding its size or term limiting the justices. Your views on that?

**Steve Vladeck:** So I find those conversations to really reinforce the problem we started with, which is that everything feels partisan. That when it's about expanding on the court, it's actually always about expanding on the court so that Democrats can put say four more justices on the court. Term limits, I mean to be effective, I think term limits would actually probably have to be only 30 years from now when all the current justices are off the court. So where I start from, Governor, is I start from making sure we're all on the same page about what the actual problem is that we're trying to solve with these reforms. And when I look at the current Supreme Court, the problem I see is not that there are six Republican justices and three Democrats. The problem I see is that we have a court that does not think it should be accountable to the other branches, to an extent we haven't seen in generations.

Justice Alito gave a quote last summer, the Wall Street Journal, where he said, "No provision in the Constitution gives Congress the power to regulate the court." That's just not true. Chief Justice Roberts has declined invitations to testify on the ground that a Chief Justice testifying would raise separation of powers concerns. There are plenty of examples historically of Chief

Justices testifying. So I don't think this is about Republicans versus Democrats. I think this is a court that has become desensitized to what was true for most of our history, which was that it was routinely leveraged by the other branches. The branches would push and pull at each other. As James Madison wrote in Federalist 51, "Ambition will be made to counteract ambition." And, Governor, what I think has happened is that I think Congress has stopped pulling, Congress has stopped doing the kinds of things historically it did to leverage the court.

It has stopped managing the court's docket, it has stopped managing the court's budget, lots of other examples. And the court in turn, has stopped looking over its shoulder at Congress. And so to me, the way that we fix the court is really reforms that are focused on making the court more accountable. That doesn't come from more justices, that doesn't come from term limits, that comes from more congressional engagement in the day-to-day work of the court and the justices. It comes from Congress actually reasserting some control over the cases the court hears, something that did constantly until the 1980s.

On the ethics side, it comes not from imposing a radical set of new rules, but from, I think, creating an inspector general, someone who the court itself would appoint to do nothing other than monitor the Justices' behavior and their compliance with the rules as opposed to leaving it to the press. And so the conversation I think we ought to be having about court reform is one about making the court more accountable to the other branches, regardless of whether the current majority is Republican appointees, Democratic appointees, Mets fans, Yankees fans. That shouldn't matter. If the court is accountable enough. And I think that's where things have gone off the rails.

**Phil Bredezen:** Well, of course, the problem is it immediately, as you pointed out earlier, because of the makeup of the court becomes a partisan issue where one party is going to be in favor of an inspector general or whatever, and another is not. And someday they'll be presumably six Democrats and three Republicans and the same thing would happen in the opposite direction.

**Steve Vladeck:** And this is why I think the more that we can have conversations like this one where we're talking about the court not just as Republicans versus Democrats. I mean one data point that I think a lot of folks don't appreciate, the Supreme Court today is deciding fewer cases than at any point since the Civil War.

**Bill Haslam:** Wow, I did not know that.

**Steve Vladeck:** That's not a Republican versus Democrat. That's just an institution that no longer feels beholden to take up cases it previously used to take up. So the more we can shift our focus to things that have nothing to do with, "I'm a Republican or I'm a Democrat" and things that have everything to do with, "We want an institution that is in dialogue with the other institutions of government," I think the more we can make some progress.

**Bill Haslam:** Listen, you've been terrific. This has been a great conversation. We ask all of our



guests one final question. It's where the podcast gets its name, former Tennessee Senator Howard Baker had a saying, "Always remember the other person might be right." Can you give us an example of looking back like, "Yeah, I think the other side had it right, and I didn't quite nail that one."

**Steve Vladeck:** Yeah, so when I really started writing about the court in detail maybe seven, eight, 10 years ago, I was more focused on the individual justices and I was more focused on critiquing individual behavior. I don't think I ever quite got to the point of accusing anyone of acting in bad faith, but of course, those accusations are out there. And then I read something by my former Dean Ward Farnsworth, who's definitely, I think, more on the other side of the political aisle than I am, and he was writing about Bush versus Gore, and if you don't mind, I'm going to read the quote. He says, "Those who accuse the majority of having partisan motives underestimate the good faith of the justices, but those who acquit the court of partisan behavior may overestimate the utility of good faith as a constraint on wishful thinking."

And what I learned from that, Governor, is that we all, both sides and I especially, should be assuming good faith on the part of those we disagree with and trying to help them see how even people acting in good faith can act in ways that are institutionally irresponsible. And that's something I've really tried to take through in my writing and my work since then.

**Phil Bredeesen:** Steve, thank you. This has been a great conversation and we really appreciate your time.

**Steve Vladeck:** Thank you for having me. It's a real treat.

**Bill Haslam:** No, you've been terrific. And the quote from your mentor was a good one. I'll go back and write that one down, that was well said. Thanks again. This has been a great conversation.

**Steve Vladeck:** Gentlemen, it's an honor. Thank you.

**Phil Bredeesen:** He knew what he was talking about.

**Bill Haslam:** He did. I was actually— he reinforced one of the things that I— there're two things that I think are driving us today. Number one, everything's become an ink spot test depending on where you're coming from, whether it be an action of President Trump or Kamala Harris, whatever it is, we just see everything through our own partisan lens. And then the second is, when he commented on the Supreme Court's making fewer decisions than they ever have, I think that's part of what the issue is. Legislatively, judicially, everyone's abdicating their responsibility to go make hard calls because that involves nuance and compromise and those are hard things to do today.

**Phil Bredeesen:** Yeah, the thing I took out that was interesting was the emphasis on you should stop maybe thinking about it so much in partisan terms and more in terms of a court which is

accumulating power for itself at the expense of the other branches.

**Bill Haslam:** One of the themes to me of this fall is our constitution was brilliantly designed to have these checks and balances to have the pushes and pulls that he was talking about. Unfortunately, we've let this polarization make those checks and balances bad things when I think they may be the thing that's helped us be such a great country.

**Phil Bredezen:** No, I mean the Congress was supposed to be the check against the power of the executive branch and it's turned into almost the opposite where you're required to be a supporter or an opponent of it.

**Bill Haslam:** Well, we've got more to talk about on this topic with another great guest.

**Phil Bredezen:** Look forward to it.

Bill, our next guest is obviously a brilliant man, John McGinnis. He's the Dix Professor of Constitutional Law at Northwestern, clerked for the U.S. Court of Appeals for the District of Columbia, was deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice from '87 to '91. He's the author of a book, Accelerating Democracy, Transforming Government through Technology. Recognized legal authority, won the Paul Bader Award from the Federalist Society whose given to an outstanding academic under the age of 40. He's on the roster of panelists to decide World Trade Organization disputes. Oh, I wanted that. His areas of expertise includes constitutional law, international law, antitrust law, international trade and law and technology. He's a magna cum laude graduate from Harvard College, has an M.A. from Oxford in Philosophy and Theology and a J.D. magna cum laude from the Harvard Law School.

John, it's great to have you on.

**John McGinnis:** Well, thank you very much. Look forward to the conversation.

**Bill Haslam:** Let me just start, John, this fall we're talking about polarization, its impact across the spectrum. And one of those places where we hope, but maybe fear that polarization will spread its influences on the judiciary and the court system, in particular the Supreme Court. Talk to us a little bit about whether we're right to be concerned about that and if polarization has affected the Supreme Court, exactly what that looks like.

**John McGinnis:** I think it's important to distinguish our partisan polarization from the Supreme Court. I do not think the Supreme Court acts in a partisan way. In other words, when this election happens, maybe in Washington, depending on who wins, people will look at, Republicans will look at Article II executive power in a different way if Trump wins than if Vice President Harris wins. So I don't think the Supreme Court is partisan in that respect at all. The difference, I think, is that the Supreme Court is divided jurisprudentially and now jurisprudential maps on to our two political parties.

And so that doesn't mean that the court is going to try to help any particular candidate, but it does mean that for many partisans, they look at either kind of justice with a very jaundiced eye because they have a very strong sense of how the court should go about deciding cases and that divides our parties today. Divides us, it divides in this way, the Supreme Court for the first time as a majority of originalist-oriented judges. In other words, they feel the constitution should be interpreted according to its original meaning and that is, I think, controversial with some members of the Democratic Party. So that's, I think, the source of tension, not partisanship in the usual sense.

**Phil Bredezen:** Well, as one of those members of the Democratic Party, in my case, I certainly can respect the need for the stability and structure that comes from an originalist interpretation, but when you look at recent decisions like the presidential immunity, they seem to me to be untethered to any kind of originalist view of their responsibility. Can you talk a little bit about that?

**John McGinnis:** Well, the question of how much originalism affects any decision in the Supreme Court is a complicated one. So that's a great example of that because that decision, I agree, is not really an originalist decision, but it wasn't argued on an originalist basis. The court, in some sense, takes the party's arguments as they come. The crucial decision in that case, the crucial precedent was a case about Fitzgerald, Nixon versus Fitzgerald, which was a case about immunity from civil actions. This was about immunity from criminal actions and the Justice Department, which was arguing against a former President Trump in this case, never asked for that case to be overruled according to, as being against originalist meaning. And that means the court had difficulty. It wasn't really open to the court, I think, to be a full on originalist court because the court has something called the party presentation rule. It doesn't go out of its way to overrule decisions unless one of the parties asks for it.

And the Justice Department was never going to ask for Fitzgerald to be overruled because that protects presidents, who of course are in the executive branch for which the Justice Department works, from tort suits. So that makes, in any particular case, it's a hard question to decide how far the justices will or should follow the original meaning because we've had 200 years of precedent as well.

**Bill Haslam:** One of the things that we've discussed before is, it feels like there's a lot of confusion about roles, I'll say. And the Chevron decision felt like it tried to, or feels like they were trying to, address that in terms of exactly what power does the executive branch have when Congress has not been as specific as we might like them to be. Comment, maybe explain a little bit what the Chevron decision said or did and then your thoughts on that decision.

**John McGinnis:** Well, I'm happy to do that. Actually, I was one of the lawyers who as an intern worked on the brief in the Chevron case. I watched it rise in the—

**Bill Haslam:** Just for our listeners, when would that have been? When was the original Chevron

case that—

**John McGinnis:** 1983.

**Bill Haslam:** Okay. And it said what?

**John McGinnis:** And the case said this, it said, "That when statutes are ambiguous, we are going to defer to any reasonable interpretation of the agency." That was its core holding. It wasn't really understood to be a famous case at the time, but over time, that became a case where it gave substantial powers to the agency. Essentially, it suggested that Congress delegated to the agency the power to fill in any ambiguities and why the court overruled that case, it said, "Well, that wasn't consistent with a part of the Administrative Procedure Act that Congress had also passed." Which said, "It's up to the court to make all legal decisions." And oddly enough, the court in Chevron never cited this provision of the Administrative Procedure Act. And so the court said, "Well, we got it wrong in 1983 and we finally make the decisions de novo on what questions of law are, agencies you decide the policy, but we make decisions on questions of law, after all, we're the experts in it and Congress told us to do that."

**Phil Bredezen:** Just to push back a little bit, I mean that seems like sort of an excessively legal argument and the Supreme Court is also a political body and the justices are politically appointed and politically confirmed and so on. And in something like the Chevron case, and I certainly am the Democrat here, but I have no objection to some reining in of administrative prerogatives in this regard, but it seemed like that case took just a whole bunch of established law, which had worked in a lot of cases to administer a very large, complex administrative state, and just threw it all out the window over what you're saying are failure to cite a particular case or something like that. That just doesn't seem like a reasonable interpretation of that. Why did they go so far?

**John McGinnis:** Well, I think it's important to say that they did not disturb previous decisions that were made under Chevron. So they're actually not throwing out any previous cases. There's a section in the case that says that, it's going forward. Well, I think the reason for that is that the Administrative Procedure Act is really the Bible of administrative law and the fact that it says that the court should decide questions de novo, I think is a very powerful argument. It's up to Congress to change that. Congress actually could, under the court's overruling of Chevron, change that decision. Then there'd be another question is that constitutional, but nothing prevents Congress under this recent decision, the Loper-Bright decision from actually changing that rule.

But you might also think this is an unfair rule because, after all, it permits the agency to have discretion to interpret the statute as it wants to, as opposed to defendants. That's an awfully powerful weapon in an agency's arsenal when it's fighting in litigation with one of our fellow citizens. It gets to interpret all ambiguities in its favor. So there seems something unfair about that as well as something that I think is contrary to the statute.

**Phil Bredeesen:** Yeah, well, to be fair, I mean the interpretations need to be reasonable readings of the original law. And I guess I'm sitting here as someone, as both of us were, formerly part of the executive branch, trying to figure out how to work smoothly with these very large, sprawling bureaucracies that are so important in so many ways, day in and day out, having some practical ways to deal with— I mean either not foreseeing an issue coming up in the Congress or really what I consider to be sort of the abdication of the legislative branch's responsibility to step up to some of these things, do things in regular order and get this stuff down. There needs to be some mechanism by which you can run a government.

**John McGinnis:** Well, that's right. I think this does require Congress to act rather than act through the executive. But to bring back to one of your themes of political polarization, I think Chevron contributes to political polarization in this way, that rather than— So each branch, so one of the facts about Chevron is different administrations are able under the Chevron standard to change the interpretation of the statute radically. For instance, to bring in net neutrality or get rid of net neutrality. And what that political effect means is that it puts a big premium on controlling the executive branch and coming up with the maximum interpretation that's in the interest of your political party, rather than, if you can't do that, which you can't do now under Chevron, what do you have to do? You have to go to Congress and get a compromise on the matter.

And political science shows that the president of either party represents the median of his party, he doesn't represent the middle of the road of the American people. We're going to get more compromises in Congress because of the absence of Chevron because people will not just wait around hoping that their champion will become president and get the interpretation that's maximumly in their own interest. So I think this is actually, if you think about this, a decision for compromise, focus us on what we have in common. So I think it goes exactly to the theme, how do we deal with polarization? And one way is to encourage compromises in Congress rather than a fiat in the executive branch.

**Bill Haslam:** Quick comment on some of the judicial reforms proposed, including expanding the court, term limits, et cetera. Views there that you'd be willing to share.

**John McGinnis:** Well, expanding the court would be just a disaster, I think, because of course it wouldn't be just one time. When the next time there was a unified government. The idea, to remind your listeners, expanding the court is for a lot of justices to be added, and that's only going to happen when there's unified Democratic or Republican government because people don't like the decisions of the Supreme Court. And what will happen is, the very next time there's unified government on the other way, there'll be more people expanded to the court. The court will cease to be a court. It will look something like the British House of Lords, it will become less of a legal body. So I think that would be a disaster. The term limits, I think, is more complicated. I think done by statute that is just unconstitutional. They've been given life tenure, not a limited term. So I think it's clearly unconstitutional as a matter of constitutional law.

Whether it would be good as a constitutional amendment, I think, is harder to understand. You

might think it's good because, after all, many of our justices can live on and on and new issues will come up. On the other hand, you might say, well, that book makes them less partisan because after all, a president appoints them in the light of what's going on now in the country and 30 years later it's not going to be very partisan. We have examples of that in American history. Franklin Delano Roosevelt appointed all the justices at one point to the Supreme Court. You might think, well, that was going to be a solid party majority on all issues, but issues came up that they didn't really foresee at the time, issues of civil rights, and they became quite divided on those matters.

So it's not clear to me that this will tamp down on partisanship and polarization. Indeed, you might worry, that by having each president –these proposals will give each president two nominations each term – this will make the court more of a campaign issue and therefore will actually increase partisanship around the court. So I'm uncertain about whether it would be a good idea as a constitutional amendment, but as a statutory matter, it's unconstitutional and it would obviously clearly be an attack on the current composition of the court, which would invite further attacks the next time there was unified government. So I would oppose that.

**Phil Bredesen:** In all its discussion of polarization on the court, there's also a subtext in there of some ethics issues which have arisen, particularly regard to one of the Supreme Court members. Your view on whether the court is handling this appropriately or what they might do or what might happen in this regard?

**John McGinnis:** Well, I think obviously things can always be improved, and I'll say a word about that in a moment. I think, frankly, most of these ethical– So what you would worry about ethics on the Supreme Court, if you thought actually the justices were changing their decisions because of actions other people were taking outside of arguments and litigation. I think there's no evidence of that. And so, I'm really not worried, so much worried about it, I'm more worried that these are being used as attacks on the Supreme Court.

That said, I think the Supreme Court has to be very careful and take that into account in our social media day, and I think there probably should be a law brought in because the Supreme Court I don't think has the power to tell justices not to accept gifts. I am for a law that says essentially there'd be no gifts other than from relatives over a certain amount. I think that would actually be extremely useful and that would police matters to a great extent.

**Bill Haslam:** John, a couple last questions for you. I think we hope not, but maybe fear, that the Supreme Court might be called on to play a referee's role of some sort with the '24 election. It's going to be close. We know there will be challenges to it. With the dwindling lack of trust in the court as an institution, comment on that, that how confident you are in the Supreme Court's role should they have to play that role in this election.

**John McGinnis:** I'm very confident about that. One thing I think that should give our listeners confidence is the litigation that were brought by various actors against the result of the 2020 election, which some people thought to declare President Trump the winner or throw out votes

for President Biden, were uniformly rejected by the federal courts. They were uniformly rejected by judges that Trump appointed. So I think that should give us a lot of confidence. It went nowhere in the Supreme Court. I don't see any reason to worry that the courts, federal courts of any kind will shade their decisions because of partisan considerations. Again, I don't believe any of the justices are partisan. They have different views, jurisprudential views of the law, and of course that sometimes can play out as I think it did play out to some extent in Bush versus Gore. But I don't see any risk of a partisan interference with the election by the court.

I think actually, we can be quite assured that the court will act in a nonpartisan way in disposing of these challenges. I'm also heartened by the fact that the Congress reformed the Electoral Count Act that I think is going to make it harder for losers in the election to cause problems in Congress and then by extension, in the court. So I'm optimistic that we're not going to see substantial problems, at least from the federal courts. Now, the state courts, which come from partisan elections, I'm less confident, but this is going to be a federal election where, ultimately, federal courts will decide.

**Phil Bredezen:** John, as we finish up here, a question we've asked our guests generally. This podcast takes its name from Senator Baker's, Howard Baker's famous quote about listening and keeping an open mind because as he says, "Sometimes the other person might be right." In that vein, we'll just ask you about maybe a time in your own background and history when you realize that someone offering a different view than the one you held might be right and you changed your mind about an issue.

**John McGinnis:** Well, one I think is about legislative history. So to give your listeners a background, Justice Scalia, who is often a champion of conservatives, was very much against legislative history. He thought legislative history was irrelevant to interpreting statutes. And I—

**Bill Haslam:** Just real quick, legislative history means what for our listeners?

**John McGinnis:** So what legislative history means is actually the committee reports, what people say on the floor, and the thought, Justice Scalia said, "That's not relevant. It's only the text is relevant because only that was passed by Congress." And I think along with many other conservatives, I thought, well, Justice Scalia said it, that's likely right, and I've come to believe that's absolutely wrong because we want to understand, how we want to understand a text, we want to understand in the context of the rules, the legal rules that are applied at the time.

And when Justice Scalia came to the bench, legislative history was well understood as a method of interpretation. To be sure first you looked at the text and you used legislative history to resolve ambiguities, but it wasn't up to Justice Scalia to do a spring-cleaning of jurisprudence. It's up to the positive law, what we've settled at the time to resolve ambiguities. And that's a powerful rule. And I would note that the Supreme Court justices, including Justice Scalia, use the Federalist Papers and what I think you would understand as the ratification history of the Constitution to interpret the Constitution. I think quite wisely they do that because that's part of the interpretation rules of the time. So that's a jurisprudential matter that I've changed my mind

180 degrees about and, really, against what was generally thought to be the conservative view of excluding legislative history.

**Bill Haslam:** John, thank you so much. This has actually been a really helpful conversation. We appreciate the insight you've brought and in the manner in which you did it. So thank you for joining us. We appreciate both your time and the great help you've been to us.

**John McGinnis:** Well, thank you very much. I've enjoyed it very much.

**Bill Haslam:** Well, Phil, what do you think?

**Phil Bredeesen:** It was interesting. I found him to have this view of the law as this thing which exists out there in some pristine form in the fabric of the universe. And yet, if you've been in an executive job in government, it's more complicated than that in some ways. I mean, sometimes you have to, as governor, just figure out how to get something done. And I have to think about this a bit more, but the basic premise that all this stuff comes down to in the court about how somebody didn't bring up the appropriate case, strikes me as a little bit of sophistry, but I need to process it.

**Bill Haslam:** No, I agree. I do think maybe the point would be, his view of the law would be, without that standard out there, then what prevents people like you and me who get elected from saying, "Well, I know it's not exactly what it says, but I got the right answer. I'm going to figure this out and do it my way."

**Phil Bredeesen:** There's certainly have been cases for both of us where something was ambiguous, and so you're a leader, you step in and make it work. I mean, for me, I remember when Katrina, the hurricane, was here, there was a bunch of stuff we had to do because of the number of people that are coming into the state. And it's unclear exactly what you can do in terms of, I don't know, telling a pharmacist to fill a prescription for people and likewise. So that's the reason you elect executive branch people. It's just to take unforeseen circumstances into account and try to figure out ways to resolve them that are consistent with the intent of the law.

**Bill Haslam:** I agree with that. I do think, and going back to what we talked about before, we have a constitution that I think is, while it's not perfect, it's pretty daggum good, but it's only good if each branch plays its proper role. And in my mind, what we've had, like I said, is this kind of historic failure of the legislative branch to realize that they're in a 50/50 world. If you're going to address key issues, there are compromises have to be made. And because of that, when they're passing historically low number of laws, or at least ones that actually make a difference, and yet the Supreme Court taking up fewer cases, it's left this big role for the executive branch. I'm an executive branch guy, I believe in that, but I don't think it works as well when the right checks and balances aren't in place.

**Phil Bredeesen:** No, I mean there's a lot of examples of that right now. I mean, you think about something like immigration. I mean, there's no particular reason that ought to be in either



executive branch or in the judicial branch, and that's where it lives at the moment because the Congress has simply refused to take it up.

**Bill Haslam:** Well, another one would be the student debt. President Biden thought the Congress should address it. They didn't. So he did it by executive order. The court has yet to clarify whether that can exactly happen.

**Phil Bredesen:** They've been up and down in different aspects of it.

**Bill Haslam:** Exactly. So again, but I think that comes back to Congress should have stepped in and actually had the discussion, made a decision about whether we're going to do this or not. Then you wouldn't be in the complicated or the unclear situation we're in now.

**Phil Bredesen:** This has been an interesting section.

**Bill Haslam:** It has. Thanks for joining.

**Marianne Wanamaker:** Thanks for listening to "You Might Be Right." Be sure to follow on Apple Podcasts, Spotify, or wherever you listen to your favorite shows. And please help spread the word by sharing, rating and reviewing the show.

Thank you, Governors Bredesen and Haslam, for hosting these conversations. "You Might Be Right" is brought to you by the Baker School of Public Policy and Public Affairs at the University of Tennessee with support from the Boyd Fund for Leadership and Civil Discourse. To learn more about the show and our work, go to [youmightberight.org](http://youmightberight.org) and follow the show on social media @YMBRpodcast.

This episode was produced in partnership with Relationary Marketing and Stones River Group.