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[00:00:00] **Speaker 1** I'm recording and I look at him. Yeah, you can talk to me.

[00:00:04] **Speaker 2** But I guess let's start with this last term, we saw a number of significant decisions. Evers versus Mark Klein had one and two with the stewardship and joint finance oversight and most recently with the Joint Committee for the Review of Administrative Rules. We saw things having to do with the attorney general and his ability to settle civil lawsuits. We saw stuff with promulgating rules for the spills law and whether they had to back and redo all this. Is there a way to summarize how significant all these cases are together in terms of really re-approaching that balance of power?

[00:00:42] **Speaker 1** I think that the cases that the court has been deciding is certainly, if not redoing but clarifying, the responsibilities of the branches of government. We didn't used to have those kinds of cases for the most part. And so I think the legislature, primarily an attorney general, just sort of developed their own process and belief and people accepted that. And because of the tension, I think, between the parties, there's much more tension that if you make an appointment, how long can the person serve? Or does the governor have that authority? We used to have some of the governor attacks on both Governor Thompson, I know, and Governor Walker. But I think that both at the national level and particularly at Wisconsin, there is a redefining and shifting of what people thought was the balance of power and what the court is saying is now the balance power. But as the court changes, you never know where the next step is going to be.

[00:01:44] **Speaker 2** Justice Hagedorn, in one of the oral arguments, called the Joint Committee for the Review of Administrative Rules kind of a gentleman's agreement, saying it may not fit the definition of the Constitution of the vested powers, but everyone just kind of agreed that that's the way it was, and there have been a couple of court cases since then, Martinez significantly, that it kind of upheld that framework. What does it take for a court, besides a shift in a majority, to come through and say, well, we need to really look at this from the ground up of whether this is even legal in the first place?

[00:02:12] **Speaker 1** Well, I do think as the parties and the issues tighten and become much more contested, that's really when the court has to step in. And so there are a lot of things that are habit or the way we always have done it or the informal rules, and as long as everybody's sort of agreeing to it, it works. But ultimately, I think that the parties are much more partisan. There's much more, it can be close to votes on things and people at the legislative level want to have control and the general wants control and a governor wants control. And as a result that sort of bubbles up to the court and the court I think for the most part has to tackle those things. I mean they either have to say there's a justification for it, not just a gentleman's agreements or parties agreements. There has to be a constitutional legal justification, or if not, we're gonna redefine it.

[00:03:16] **Speaker 2** I think one of the things that jumped out at me looking at all these cases is that they weren't often the 4-3 split you might have expected. Some of these were 7-1, or 6-1 or 7-0 in terms of like, no, this is not constitutional.

[00:03:28] **Speaker 1** Well, I think this past term, and I've talked about this, was interesting in terms of the splits on the court. And certainly in this area is one area you see it. I think there's a belief in our greater state that everything is 4-3, depending on who's in control of the court, and you look at the number of cases, particularly the second part of this term that came out, that were unanimous seven one six. You know. Sixth one, and split, and then odd bedfellows on top of it, you know, so you'd have people that you'd think would be together who are not together. So I think that's healthy. I really, I was glad to see that because I think a court that is totally predictable is really a court, that looks like a legislature.

[00:04:24] **Speaker 2** And that is a lot of what there was being discussed was who holds the, I mean, this is kind of a great civics class of a term. It's like the balance of power between the legislative, the executive, and it was the judicial coming in and deciding what works and what doesn't work.

[00:04:40] **Speaker 1** You know, I think as our civics lessons have faded out in high schools and a lot of people don't understand the three branches of government and the independence of the judiciary and holiday balance and checks and balances, I thin these cases are really doing a sharp analysis for people that there's conflict. I mean, that's the whole idea of the government is that there is conflict and The court is overseeing the legality and the constitutionality of what the other branches are doing. And I think that's healthy that people that are paying attention see that that's how our democracy was built. I don't like it when it shifts too often. That's my concern. It happens at the federal level and sometimes happens at state level. That the court has decided a case and then a year or two later it decides it in a different way. Because I think that's a problem. But defining things for the first time in a new way I think is very healthy for the court and it's healthy for our democracy.

[00:05:40] **Speaker 2** So in speaking about that precedent, because the especially for J. Crar, there was the Martinez decision. And I think it was a planned parenthood. What I forget the exact Kate or maybe there was one just a few years ago in post covid that reexamined that same issue or post lame duck term that reexamine some of those same core issues and both of them found that the review of administrative rules from legislative oversight was constitutional. So what does it mean when? We see that many decades of precedent thrown out or upended over this.

[00:06:13] **Speaker 1** I always called myself a conservative judge because to be conservative is honoring precedence if you can or if not to move very slowly and change it. And the reason I feel strongly about that is that society, business, individuals, law enforcement can adjust to whatever the opinion is if you're swinging from side to sign. It really is disruptive for everybody. It's disruptive for the economy, for knowing what your role is and things. And so, you know, I don't like to see that happen. I understand why it does. And maybe, you now, philosophically, I may be happy it changed, but I worry about the fact that the court swings too far and really causes chaos on those other branches.

[00:07:03] **Speaker 2** And so the review of the administrative rules and to some degree the spills law, the DNR's ability to enforce PFAS legislation or create new standards without having to go through the rules process each time. That one seems to be the most widespread concern as to this could redraw the landscape out there. And conservatives on those committees are saying. You know, we now have no oversight, we have no ability to stop unchecked administrative executive power. And it's Democrats saying, well, you were the one stonewalling it in the first place. So is it ever relevant to look at what caused this or who's to blame for how we got to the point where it needed to be looking at this? Or is it just looking forward?

[00:07:51] **Speaker 1** Well, I think the court knows what's been happening. I don't know that, because of whose fault it is, should control how the case comes out. But it's a better understanding of how this arose. And it may give you a better understand on how you can lawfully interpret it and not have a complete overthrow of some principle. And so, I think that, that... You know the court doesn't live in a vacuum it reads they read the justices read the newspapers listen to the news and and certainly know what's going on but ultimately that's not their role their role is to say what what's constitutional what's legal the whole issue and again it's a federal level and a state level of the administrative agencies and who oversees them and who has control and what the level of deference the courts have to pay to those rules has been in controversy for a number of years and it's swung a little bit one way or another but I think we're heading now to saying we're not going to give the agencies the kind of control they've had in the past. But, you know, I think that the court has really tried, Wisconsin Supreme Court has tried to be conservative in the sense that it's moved slowly on those issues, and partly because of the divisions on the court.

[00:09:18] **Speaker 2** So in terms of the review of rules, the legislature was accused of having basically a pocket veto, where they could permanently uphold any rule as long as they wanted. Most of that came from the lame duck laws passed at the end of Walker's term, which were expressly designed to hamstring the Evers administration coming into power. That came to a head. But now the Republicans are removing all of that oversight. Means now that there's basically, they're saying that the administration's gonna be a little pocket legislature, that these agencies can create whatever rules they want. Is it ever the role of the court to look at what could happen on the other end if they have to rule that way?

[00:10:00] **Speaker 1** Well, that's not the lens in which they look, you don't look at it through a lens of what could happen. But the court considers that. You know, often when you're trying to draft an opinion, how you write it is as important as how it turns out. And the court is mindful of, you know, not wanting any branch to totally overpower another branch. And so, it may be a matter of how the decision is written as to whether or not... You know, the legislature's going to have some control over this. The legislature has control. They create the budget, they make the money, they provide the guidance, and then the agencies make their decision, and the question is, can you have this small group of legislators then throw it out at the end? And I think the court reached the right decision in that case, that there really was no authority for them to have that kind of veto. But maybe, and I haven't looked at this, but maybe there's some way for the legislature to ensure something else at a different point. And that's where you have to read the opinion carefully to see whether the court gave you some leeway on something else.

[00:11:09] **Speaker 2** For instance, we've seen with the Stewardship Fund being the oversight of JFC and the anonymous vetoes and holds, that Republicans are trying to redraft that bill but in a new way to still give them some oversight. Right. And we've see Republicans change how they write the budget out of fear of the way the governor's veto pen can work. Is it going to be that going forward we'll just see more creativity with those decisions in mind.

[00:11:37] **Speaker 1** Well, I think that's what happens on decisions that particularly upend what people have been doing. And I think what happens is that the branches get more creative and they look at the court or what the court has said to see if there's a way they can craft something to be able to do it. And that's the court's role is ultimately to take a look at it and to see whether as constitutional or not. But that's how it's supposed to work. And that's why the decision itself is as important as the holding, because the holding just tells you what happens to the parties or this issue. But how the court set it, what tests it set up, those tests are really critical for people to say, what can we do? How can we this? And ultimately, I think government works best when there is creativity and negotiation. And, you know, you look at, it wasn't this term, but gerrymandering case, the whole map drawing case, you know and there's obviously great controversy and upset when the court decided to throw out the map and we're looking at these others, but ultimately everybody agreed on their map that the court didn't have to decide. And to me, you now, then it was unimpeachable, it couldn't be appealed. And I just think the government works best like that. And then the court will have to look ultimately if it still meets the test.

[00:13:05] **Speaker 2** You mentioned before that taking a conservative approach just usually just means moving slow, limited impact. And I'm thinking of Justice Hagedorn's in part, you know, dissent and his agreement with the decision that, you know he would have found the one is moot and then the other one would have gone into effect and then kind of leave it at that not up turning president. I mean, that seems to be that middle ground. And I think a lot of people do look in any of these cases, where is Hagedorne first to see if it feels like a partisan split or if it's where he is, where he sits.

[00:13:35] **Speaker 1** I hold Justice Haggard in the highest regard because looking at his opinions, he very much understands the role of the court. And so you could tell his judicial philosophy and some of your political philosophy seeps in and he's a conservative. But he understands the roll of the Court is different than the role legal counsel to the governor or a legislator. And, as a result, not everybody on his side wins, you know, and I think he writes very thoughtful opinions whether it's a dissent or a concurrence or the majority as to why he's doing that. And so I, you now, to me that's what you want from a judge is you want somebody who looks at it through a legal lens and a constitutional lens and not a political one.

[00:14:28] **Speaker 2** So Republicans are saying that the new fear here is unchecked administrative power. If that happens, their only way to go about anything will be to file lawsuits, right? It'll end up back in the court. So does it ever occur where the Supreme Court gets a second crack to try and say, oh, maybe we went too far? Or does that happen in the?

[00:14:52] **Speaker 1** There are times that the court does a reconsideration of a decision because things happen that they didn't expect to happen. Now that is, I can't think of a constitutional place where that's happened. But certainly in the develop of common law or interpretation, the court writes an opinion and then hears and sees that it's gone wild somehow. The court will not infrequently a few years later take the case back in some other permeation. But that's one of the things the court has to evaluate when it looks to take a case. Is that next case going to fit to address the issues that you're concerned about? But they certainly have narrowed a decision or broadened it or reinterpreted it. And that's something the court does, and particularly when you have unintended results. You know, as a justice, We always try to think of every way that the decision could impact any area of the law. You know, we kind of play devil's act. Well, what about this area? What about that area? Could this be interpreted for that? And even the questions that are all argument are often that, how would this apply to broad base? But there are always going to be times that no one foresees where somebody takes it. And so it is part of the role of the court to reconsider it and say there's a problem out there, we ought to at least take a look at it, and maybe they just reaffirm the prior decision, but you know, do a new reexamination of the issue.

[00:16:24] **Speaker 2** I know that you'll be shocked to hear that there might be hypocrisy in politics, but at the state level we have legislative republicans who are very worried about unchecked administrative authority. And at the federal level, we have democrats worried very much about uncheck administrative authority, and neither one of them seems to understand that it's completely opposite of what they're asking for and based entirely on what party or what person is in charge. And I mean, should we laugh at them? Can we call them out for that, or is that just the nature of politics?

[00:16:52] **Speaker 1** Well, I think the worry of the legislators, both federal and state, in terms of what the impact is, often reflects how they feel it's going to impact tomorrow. There's very little foresight in these discussions about what happens if the other party gets And we see that happening, right, we saw that happening at the state level. Where you know a governor is given a lot of authority and then suddenly a governor of the other party has it and then nobody then they don't like it. And so you know I think that is the nature of the the tension between the parties. I wish legislators would be looking a little bit down the road and say what's the best for the country or what's best for the state but it really is you know what's good for us tomorrow.

[00:17:48] **Speaker 2** Looking broadly at the state of the court, there's been upheaval since, you know, Janet Protasewicz won, and the majority did shift. We've seen, you know, new chief, well, two new chief justices, and Walsh Bradley was there temporarily. But going forward, what is this state of the court in your opinion? I mean, given your long understanding and history of it, can you put some context for people who do look too much in the moment?

[00:18:13] **Speaker 1** Well, you know, one of the things I've said to people that when you look at the court, every time it gets a new justice, there's a shifting, you know, everybody has to sort of take a look at where they are and, you know and there are some alliances and some issues that develop, so that that the personality of the court can change, the interactions can change and I'll give an example, a very historical example. Chief Justice Shirley Abraham said before she was chief and Justice Day, Raleigh Day, who became chief justice, did not have a good relationship when I was on the court. It was very clear, it was pretty open and then when Justice Day became Chief Justice and he was going to do it for one year until Justice Abraham said was going to take it over. He decided he was gonna change what was happening. So he was gonna work towards civility. We suddenly were going out to lunch once a week at the Madison Club. We were trying to be respectful to each other and and both Shirley and Raleigh rose to the occasion. I mean it was it just was a different court. And so in terms of interaction and personality, that can have a significant change. What's important is you get the kind of judges who could respect people who disagree with them. And we've had some problems with that in the last several years, where, in my view, particularly dissents have become very nasty towards other justices. That strikes at the heart of collegiality. And I think that that. You know, and so, you know, Ann Walsh Bradley has been an incredible member of the court for a long time, for 30 years. She's got all the historical knowledge of the Court. She was there when I was there. And that's going to be a piece that's missing from that Court. I mean, the rest of the Justices are relatively new compared to that. And so there's going be some adjusting in terms of power and information and you know, we'll have to see where it goes. I'm always hopeful that the court will become more collegial even if they totally disagree on their opinions and that people can have faith in the decisions that come out of that court.

[00:20:28] **Speaker 2** And we've got, bang, bang bang, a lot of judicial elections coming up in the next few years. We're in the thick of every year these are coming up. Does that impact a court in one term, knowing that one of their members is up?

[00:20:43] **Speaker 1** Elections impact the court, there's no question. You know, I'm just gonna back up for a moment so people understand, we are different, Wisconsin's different than other states that we only allow one justice to be up at a time. So places like Iowa and others, you suddenly can have three people that are off, they have three new justices which really can create chaos. And so actually our founding fathers were wise I think to say only one comes up. Particularly where people have a perception, and then justices too, that you have a conservative branch of the court and a more progressive branch of court in terms of philosophy, that that shifts when somebody keys up. This next year, that's not going to happen. So, you know, it's going to be, as people perceive from the outside, a four-three split. And it could become a 5-2 split, but that won't create the swing that we had over Jennifer Osei, which is election. And, you know, I think it doesn't affect the court in what cases it takes or timing of case. And I think the court, I know when I was there and I believe it's still that way, the court tries really hard not to issue opinions or decide opinions according to the class. You know, who's going to be here, can I delay it till the fall, can i... And that really doesn't go on. I think that's sort of a fundamental view for the justices and they pretty well follow it.

[00:22:17] **Speaker 2** It's one last question having to do with the national, but you mentioned redistricting. Obviously there is a national issue over redistricting with Texas and some other blue states looking at doing it right now. Wisconsin's court recently said no again to redistricting our federal congressional seats. And your view is that the right approach? Are they trying to send a message to stay above the fray? Or are they looking for technicalities to not have to wade into it? You know, there were a lot of voters who voted for to say what's in Crawford for their progressive intent that might be disappointed that they're not delivering on what they thought they were getting.

[00:22:56] **Speaker 1** Well, one of the things when they deny taking it at a certain time is you don't know why. And it could be a lot of different reasons. My guess is it wasn't timing. It might have been, you know, this case isn't in the right position. It has to be, more issues have to be decided by the lower courts before it comes to us. And so it's like the U.S. Supreme Court issuing a lot these interim decisions where nobody knows what the rationale is. And so, you know, I think that that issue will bubble up again, the court will probably face it again. Maybe it will take it next, it will be a new justice, you know, and so maybe the court will take this. But I think, you know, it's hard, you know, courts decide to take and not take cases for lots of different reasons, and it isn't always because they don't want to tackle the issue.

[00:23:50] **Speaker 2** Anything else that you'd like to address? No.

[00:23:52] **Speaker 1** I'll be pretty thorough.

[00:23:53] **Speaker 2** All right. Well, thank you so much for giving us time. You're welcome. I really appreciate it.