

## Low of the Land Ep. 3: Considering the Court

### **Dani Apodaca 0:27**

Welcome to Low of the Land! I'm Dani Apodaca.

### **Mark Gyourko 0:31**

And I'm Mark Gyourko. From rulings on same sex marriage to the Trump travel ban, the Supreme Court has been at the center of many of the 21st century's most decisive political battles. We're here today to ask what to make of this. For a long time, the courts were thought of as the quiet, boring branch of government, but something has clearly changed.

### **Dani Apodaca 0:49**

We spoke with two experts, each familiar with the court in a different way to better understand these developments. Adam Liptak has covered the Supreme Court for the New York Times for nearly two decades. Michael Shumsky is a partner at Kirkland & Ellis, for whom he litigates regularly in front of the Supreme Court, and he lectures at Columbia Law School about the court.

### **Mark Gyourko 1:09**

We began by winding back the story to the 1950s when Earl Warren served as Chief Justice. Warren was quite unlike many of today's justices. He was serving as governor of California at the time of his nomination by President Eisenhower and had recently run for president twice. Liberals tend to remember the Warren Court fondly due to its landmark rulings against school segregation and Jim Crow laws. But Warren's retirement in 1969, began a changing of the guard for the court. With this as a reference, we asked our guests for their thoughts on the court's subsequent history. And what if anything, these developments can tell us about the present moment. Here's Adam Liptak on the key turning points.

### **Adam Liptak 1:45**

I guess the biggest one, of course, was the shift from the Warren Court, a famously liberal court from 1953 to 1969. Which did, in many ways, advance progressive causes, but was an exception in the greater scheme of the Supreme Court's history. The Supreme Court was and is fundamentally a conservative institution that moves slowly, that is resistant to change. And after the Warren Court ends, in '69, we've had a series of courts, you know, all named after Chief Justices: Burger, Rehnquist and now Roberts, all of them fundamentally conservative. And then, I guess, the next biggest change is that the current court seems to be even more conservative, that the change and the switch from Justice Kennedy who, although appointed by Reagan and although Republican, was a centrist-moderate who had some instincts in cases on abortion and gay rights and affirmative action that lean left. He has now been replaced by someone we expect to be Justice Kavanaugh. Expect to be, don't have a ton of evidence yet, to be a hardcore conservative. Meaning the court now will take a further shift to the right.

### **Dani Apodaca 3:14**

And here's Shumsky.

**Michael Shumsky 3:16**

I mean, I think that's a great question. And I think you're absolutely right to start with the Warren Court. I think that was itself a pretty transformative court, for a lot of different reasons, right? A lot of social upheaval in the country at the time that Earl Warren took over. But also Earl Warren was a different kind of Chief Justice. He'd been the governor of California. And so he came at the job of being a Supreme Court justice from a totally different background from virtually anybody who preceded him, which is, you know, a governor, a politician on the court. I think the the Warren Court obviously was transformative in its own right. And a lot of that continued after Warren was replaced with Chief Justice Burger.

But to me, the real transformation came, I don't know, early-on maybe midway through the Burger court, with the nomination and confirmation of William Rehnquist as an Associate Justice. And to me, I think that was probably the most transformative moment in the modern Court's history. Because I think, then-Justice Rehnquist approached issues a fundamentally different way than any of the justices had come to approach issues throughout the Warren and early Burger Courts was a conservative voice. I think not necessarily in the same way that we think about conservatives today, but articulated a kind of Goldwater-Republican conservative view when approached to the law. And he spent really the first, I don't know, 10 years that he was on the court writing these lonely dissents. He was often on the losing end of 8-1 decisions and 7-2 decisions.

But over time, those dissenting opinions became incredibly influential, particularly for younger, more conservative lawyers. And that's what really paved the way for Justice Scalia to join the court in the mid-1980s. And for the kind of conservative majority that we have on the Supreme Court today to emerge. And I think in a lot of ways, that's a real sort of reversal from the heyday of the Warren and the Burger Courts. But the moment that it really began was with Rehnquist taking a seat on the Supreme Court and really articulating a new view of the law that that hadn't been articulated for 25-30 years before he joined the court.

**Dani Apodaca 6:06**

Both Mr. Liptak and Professor Shumsky, highlight the fact that the Supreme Court has really taken a more conservative turn, since the days have worn as Chief Justice. But it's interesting that Mr. Liptak envisions a liberal Warren Court as more of an aberration in what is inherently a conservative body. I think one way through which we can understand this inherent conservatism of the Court is by considering originalism, which we now associate with the most conservative members of the court, notably Scalia.

**Mark Gyourko 6:34**

I asked Liptak about the role originalism has played in the courts evolution, but he suggested that it's one of a number of factors to consider.

**Michael Shumsky 6:41**

So, originalism, as you know, and as most of your listeners know, is an attempt to figure out what the framers understood. Or what the public at the time of the framing of the Constitution understood the Constitution to mean and to try to employ that in contemporary decision making. Originalism has never really captured the Supreme Court, there have only been two for-sure originalists on the court: Justice Scalia, who died in 2016, and Justice Thomas, who is currently on the court. There are signs that Justice

Gorsuch is an originalist too. But there aren't five votes to implement an Originalist strategy on the court. So it's not as powerful as some people might think, might think it is. It generally leads you to conservative results, but not always. Justice Scalia famously protected flag burning under the First Amendment, saying the framers would have done the same thing, occasionally protected criminal defendants' rights, saying the framers would have done the same thing. But even as I say that, it tells you that figuring out what the framers meant more than 200 years ago is very hard.

So I wouldn't overstate originalism, what I would say is that these days more so than in the past, presidents try to appoint people who are ideologically similar to them, and they've gotten better and better at it. So while we had Republican appointees in the past, like David Souter or John Paul Stevens, who turned out to be liberal, these days Democrats appoint liberals and Republicans appoint conservatives. And for various reasons, mostly luck, Republicans have had more chances to appoint people. And that means we have a now you know, solidly conservative leaning court.

**Dani Apodaca 8:41**

When I spoke to Professor Shumsky, he too seemed hesitant to associate originalism as an all powerful conservative philosophy. Actually, he highlighted the way that liberal justices also employed textualism to a certain extent, viewing it more of an issue of how much weight one ought to give to the original meaning of the Constitution in arriving at an interpretation.

**Michael Shumsky 9:01**

You know, even today, right? You have a lot of liberals who practice at least some form of originalism or express sort of great, you know, solicitude toward it. So Justice Kagan on the Supreme Court is a great example of that. I mean, to me, she sort of replaced Justice Scalia, in some respects as the most textualist of the justices on the court. But on constitutional issues, pays, you know, real attention and expresses a sort of deep interest in understanding what the original public meaning of the Constitution and the Bill of Rights is. And so it's an influence, I think, to Justice Scalia's credit, that he was able to persuade not just conservatives, not just sort of Republicans who might like a lot of the policy outcomes that flow from that, but as a methodological matter that he was able to convince more traditional liberals or Democrats, that there's a sort of value in understanding the constitution through that lens. I mean, I think to me the dividing line between liberals and conservatives on originalism as a philosophy is more over the amount of weight that you give to an originalist answer than it is over whether or not it's appropriate to engage in that kind of inquiry. Consider that as a factor in the analysis. And I think whereas, you know, to the extent that the original public meaning of the Constitution or the Bill of Rights can be discerned, you know, that's a stopping point for the originalist justices. I think the more liberal justices go further, but you know, as an approach, it's something that sort of spans the liberal conservative divide.

**Dani Apodaca 10:57**

I had certainly never considered the ways in which we might associate textualism with liberal justices. But then again, I never thought to associate any hardline philosophy with more liberal justices either. I asked Professor Shumsky about this actually. As he sees it, even though originalism often leads to results favorable to conservatives, it is actually a purely theoretical matter. It's a "neutral, consistent, results-disoriented philosophy," he said, but added that whether it's applied like that is a different question.

**Mark Gyourko 11:25**

I then asked Liptak, whether the Court's liberal wing has a similar driving force.

**Adam Liptak 11:31**

Liberals have less of a theory. Liberals mean, you have like, say Justice Stephen Breyer, who writes a book about how he interprets statutes in the Constitution. And it's like a six factor test and its purpose and consequences and context and text and history. And, you know, it leads him generally, but not always, to a liberal result. But it doesn't have the quick appeal and the formal consistency of say originalism. So I don't think liberals have that kind of theory. And I also think, to a large extent, they're playing defense. They're trying to preserve the victories of the Warren Court era, they're not generally trying to move the law in a progressive direction. The one example, that cuts in a different direction, has been gay rights, where the left side of the court plus Justice Kennedy really did achieve some stunning gains for gay men and lesbians. But I think those days are gone. In the specific area of gay rights, I don't think we'll move backwards, but I don't think we're gonna move forward either. And in other areas where liberals might like to see changes, say transgender rights, I don't think this court will be very sympathetic.

**Mark Gyourko 12:53**

He points to the victory for gay rights as one of the only recent instances when liberals managed to move the law positively, as opposed to just playing defense. But this begs another question, are such decisions, quote-on-quote, judicial activism? I was particularly interested to hear Liptak's response, given that he's a member of the media and has to think critically about descriptors like this.

**Michael Shumsky 13:12**

I do think there is such a thing as a non-activist judge. But first, let's try to define the term. It's a good question. A lot of people, politicians in particular, use activism to mean decisions that they don't agree with. That's, of course, a perfectly meaningless way to talk about it. But there is a way to define and measure activism. And that would usually be a propensity to strike down statutes or executive actions or to overturn precedent. And the truth is that the Supreme Court doesn't do a ton of it. It rarely overturns precedent, it rarely strikes down statutes. And conservatives and liberals really do these two things, these measurable kinds of activism at about the same rate.

So I remember once interviewing Justice Ginsburg, and she says that the court she told me that the Roberts Court is the most activist in recent history. I don't think the data bears that out. She gave an example. She said, isn't it terrible, that the Supreme Court struck down the heart of the Voting Rights Act? Because that's very activist and she had, of course, been in dissent in that case, but a day or two earlier, she had voted to strike down the Defense of Marriage Act, an anti-gay rights federal law. And she didn't do that as activism. And what the point of this little anecdote is meant to tell you is that even activism in this measurable sense of striking down statutes is kind of in the eye of the beholder. People who think that some statutes are plainly unconstitutional need to be struck down don't view themselves as activists. But those same people when they see their colleagues striking down statutes that they think are good statutes think that's activism. So it's a slippery term, and I'm not sure it's particularly valuable.

**Dani Apodaca 15:05**

Professor Shumsky expressed a similar hesitancy to employ the term, saying that it gets employed when one party doesn't agree with the decision and uses it to suggest that a decision comes as a result of a policy preference. But he did point out a useful way to think about judicial activism in terms of judicial review, by which we mean the power of the Supreme Court to assess the constitutional legality of a statute passed by Congress. He pointed out that the judicial review is an ongoing question because it gets critiqued as not being mandated by the Constitution. Professor Shumsky has a solid legal justification for why it is explaining that Article Three of the Constitution empowers courts to resolve cases and controversies, and that someone can take up a violation of the Constitution much in the same way that they can take up a tort case, for example.

**Adam Liptak 15:52**

We think about judicial review with regard to the Supreme Court, but Professor Shumsky actually pointed out that there's a lot of action currently ongoing in the lower courts.

**Mark Gyourko 16:01**

You know, you asked about the sort of the current court. And the notion that we have a president today that maybe not very you're particularly solicitous toward our constitutional norms, and our separation of powers and structure. And to me, what's happening right now is a really interesting dialogue unfolding in the courts about what to do about that. Certainly, you've got a lot of courts: lower courts, individual District Court judges, and, you know, the occasional Circuit Court of Appeals that are striking down executive actions. And you know, in a fairly sweeping fashion, what we haven't seen as much today is the Supreme Court, following that lead. We've seen a lot of these decisions, stayed or enjoined or overturned by the Court. And I think the Court right now is really trying to figure out what to do about this. I found the Court's decision in the travel ban case to be fascinating for, you know, a number of reasons.

But the most striking things to me in the majority opinion by the Chief Justice, by Chief Justice Roberts, were sort of 1) I think, a thinly veiled criticism of President Trump. I mean, the opinion is sort of lard and I don't mean that in a pejorative way, but of examples of past presidents that have talked about the value of immigration in our society, and how immigrants have contributed to it. And it's not judicial, it's not jurisprudential. But it's in the opinion to, sort of, show I think in a very subtle way, or a real disagreement by the court with what the President did. But it's immediately followed, in the opinion, by sort of a statement that the Chief Justice makes, which I've been, you know, quite struck by which is that the decision that they're reaching is not a decision about the president. It's a decision about the authority of the Office of the Presidency. And I have found that to be sort of particularly striking in the court's opinion, and I think it, you know, remains very much to be seen over the course of the next, you know, decade what happens to Trump-ism, not only in the lower courts, but but at the Supreme Court.

And I'll just say the reason I say a decade, I mean, you know, normally we think, you know, it could be two years could be six, but it takes a long time for cases to get up to the Supreme Court. And so I think the Court is going to have plenty of opportunities to deal with the fallout of the upheaval that we're experiencing right now long after. Not that anybody will forget about this, but I'll just say, metaphorically speaking long after Trump is forgotten.

**Adam Liptak 19:05**

That's all for this episode of Low of the Land. There's no end in sight for controversies at the Supreme Court. But hopefully you learned as much as we did about the Court's recent history and how we can talk about it moving forward.

**Dani Apodaca 19:15**

Thanks for listening.