



TRANSCRIPT

Key Conversations with Phi Beta Kappa

Political Scientist Corey Brettschneider on Why We Should Distrust Our Presidents

Brown University's Corey Brettschneider has spent years studying constitutional law and the purpose and limits of the presidency. As the 2020 election draws near, he speaks with Fred about the likelihood of bringing back constraints to the most powerful office in the land, why the words in the oath of office matter, and what our current political climate reveals about civil liberties, civil rights and the constitutional powers of the three branches of government.

Fred Lawrence: This podcast episode was generously funded by two anonymous donors. If you would like to support the podcast in similar ways, please contact Hadley Kelly, at hkelly@pbk.org. Thanks for listening.

Hello and welcome to Key Conversations with Phi Beta Kappa. I'm Fred Lawrence, Secretary and CEO of the Phi Beta Kappa Society. On this podcast, we welcome leading thinkers, visionaries, and artists who shape our collective understanding of some of today's most pressing and consequential matters. Many of them are Phi Beta Kappa Visiting Scholars, who travel the country for us visiting campuses and presenting free lectures that we invite you to attend. For the Visiting Scholars schedule, please visit pbk.org.

Joining me today is Dr. Corey Brettschneider, Professor of Political Science at Brown University, where he teaches constitutional law and politics. His teaching and writing focus on issues central to our democracy, including free speech, the role of the courts in our system of government, and religious freedom. His new book, *The Oath and the Office: A Guide to the Constitution for Future Presidents*, identifies timeless principles that can help guide us as citizens in an increasingly fragile democracy. Professor Brettschneider has taught as a visiting professor at the law schools at Fordham University, Harvard University, and the University of Chicago, and we're delighted that this year he is Phi Beta Kappa's Carl F. Cranor Visiting Scholar.

Welcome, Professor Brettschneider.

Corey Brettschneider:

Thank you and a pleasure to speak with you and I'm looking forward to the conversation.

Lawrence: Well, we have so many issues to talk through with the upcoming presidential election just around the corner, and I do want to turn to your views of constitutional law, and many of the pressing issues of our time, but I want to start by going back a little bit into your journey and tell us a little bit about growing up and whether there was a moment when you said to yourself, "I want to study the United States Constitution."

Brettschneider:

I would say that certainly I was interested in politics, but in a very different way than I am now, and I tell a story in the book about being a young kid and my dad was working for a local politician in Queens and we were walking in the parade in Queens Day, and in front of my is Mayor Koch, a larger than life figure, somebody who I just sort of thought was the most amazing person in the world. And anyway, in the middle of this he says to the politician next to him, "I'd like some ice cream. Vanilla." And the politician snaps at an aide who's actually walking next to me and says, "Go get the mayor some ice cream. Vanilla." And this grown man runs across a field in the middle of Flushing Meadow Park and comes back somehow balancing this vanilla ice cream, keeping it from falling over and hands it to the mayor, who starts licking on this very cold ice cream on this extremely hot day.

And I tell the story in the book that my thought at that time was, "You know what? I want to be mayor of New York City." And so, that was my interest in politics, but a very different interest, of course, than the Constitution, about ice cream, and goods, and part of my point is there are politicians out there. There's a president frankly right now who was probably there that day, from Queens, who think that's what they want, is the ice cream. And the office of the presidency is so different than that. It's of course a constitutional office with an oath to preserve, protect, and defend the Constitution. A very different idea than that ice cream.

Lawrence: So, what was the route from Bayside, Queens, New York, out to Pomona College to study political science?

Brettschneider:

I had family in California and wanted to go to a small college. I knew that I was the kind of student that wasn't gonna do well in large lectures. I wanted as many seminars as I could and that combination of being wanting to be on the West Coast and caring about small classes and liberal arts, and that really was a blessing. One of the most amazing intellectual experiences I've had. I took a class while I was there in philosophy of law with a professor, Paul Hurley, my first semester, and we studied all of the themes really that I'm still interested in. The question of legitimate punishment. The what is law debate in jurisprudence. Did the Nazis, for instance, have law? And that really hooked me.

I thought maybe I wanted to be a lawyer, but I certainly had no idea about academic inquiries in law, but that was an amazing introduction and we're still good friends, and in fact, one of my Phi Beta Kappa lectures will be at Pomona, so I'm looking forward to reuniting with this great teacher then.

Lawrence: So, let's talk a little con law. In fact, let's talk a lot of con law. Before we get into some of the specifics you've written on, I want to share a thought that I've had. I wonder if you've had the same thought the last weeks, months, even the last few years. Having spent a lot of my career as you have, studying the structure of the Constitution, I have been really overwhelmed by how much of the system seems to rely on conventions and practices much more than I would have guessed, and that the whole system, which I really would have thought was quite rock solid, is far more fragile than I'd realized. I wonder if you've had a similar thought over the past months or years?

Brettschneider:

Absolutely. You know, the phrase "norms" I think is often referred to, and really the entire system if you think about it rests on foundations that are a lot weaker than we often talk about. For instance, I think previous to this administration I've assumed that we wouldn't have to worry about the question of whether or not courts would stop a president from postponing an election. We take it for granted that a president wouldn't even try that. And so, now we find ourselves really having to work through these issues. The other issue, of course, is emergency powers, that so much power's been delegated to the president with the kind of trust that that power wouldn't be abused, and more and more you see this president willing to use emergency powers to try at least to use power of Congress, for instance, in building the wall, or in the threat to send troops into domestic locations.

Unfortunately, I said this was gonna happen and now I can say in retrospect it did, that it's been a stress test on the Constitution by which I mean you have a president really testing these norms. And you know, so often the remedy is supposed to be impeachment, that the framers I think thought that was the ultimate remedy, which we tried of course and did not work. Another area to me too is I have a chapter in the book about what a president should say, about the role of presidential speech, and you know, that isn't enforceable by courts. The obligation for a president, for instance, to denounce racism when it appears. We have a free speech jurisprudence that protects all viewpoints from punishment, but a president is really supposed to defend the ideals of the United States Constitution. That's in the oath, against, for instance, Nazis or fascists would demean people based on race or ethnicity.

When a president fails to do that, what's the remedy? It's really hard to know. So again, the stress test is quite real.

Lawrence: Yeah. I think we've seen stress marks or stretch marks in that constitutional fabric that we're not even sure were ever there. I mean, I remember myself going to law school not long after Watergate, so the constitutional law class that I took, a lot of our discussion was about the aftermath of Watergate, and I remember one constitutional law lecture I

was privileged to study with the late Charles Black, one of the great figures in American constitutional theory. We had discussed U.S. against Nixon case, the case about the Watergate tapes having to be turned over, and after class a group of us stayed around and we thinking we were pretty bright were tormenting him with a question about what if the president hadn't turned over the tapes? What if he hadn't turned over the tapes?

And then he said, "My answer is twofold. Number one is I don't rightly know, but number two is I don't believe that's how it will go down in the United States of America." That story, of course, has come back to me in recent days, that when he said that, that was deemed to be a fully responsive answer. That's not how it's gonna happen. In other words, let's stop talking about it. You're pushing me on a question that's not realistic. Let's stop talking about it. And we did, and we moved on, and who would have guessed 40-plus years later it does not feel abstract at all, does it?

Brettschneider:

No, not at all. I think that the problem is that so often the sort of thoughts of the framers and the thoughts at the time about Nixon was it's not gonna go that far. We don't want to underestimate the criminality of what Nixon was doing, and the extent of his awareness of the criminality, but the fact that he was a lawyer, that he did know the norms I think also did protect us, and it shows that we sort of rely on somebody who knows the basics of the system and the idea that if the court issues an order to turn over the tapes, the Supreme Court, then we do it.

And I'm just not confident that this president at this moment can be relied on to know what the norms are. You know, I talk to members of the military in confidence about this, and then we've seen too the letter that was written in the Washington Post by former military officials. They're quite serious in being concerned about whether or not what was a hypo and a challenging one from sort of sharp students at the time might become reality, and let's think of other areas where that's already happened. I mean, the framers were very concerned as I argue in a recent piece in The Atlantic about co-conspirator pardons, about using the pardon power by a president to get out of... to make himself immune from being accountable to the criminal law.

Now, that sounds like a wild, paranoid hypo, and I think before the Trump presidency, people would have said, "That's not gonna happen," basically. And you know, when you see that pardon of Stone, that does look like exactly the kind of pardon that they were deeply concerned about.

Lawrence: Let's talk a little bit about presidential powers, which you've written about extensively. How has it changed over time? And I don't just mean now with respect to this administration, but in terms of how it was conceived in the original Constitution, and how it developed through dramatic periods in our history, like the Civil War and the Second World War, up to our time.

Brettschneider:

I think of there being certainly one major transition. I mean, I begin with my... a new book that I'm doing, and also *The Oath and the Office* focuses on it, as well. It's such an important speech, George Washington's second inaugural, which was by far the shortest ever given. Just a few words, really. He sums up what I think of as the 18th century idea of the presidency and what he says is, "Look, I've just taken the oath of office, and if I fail to live up to it, I want the people who are assembled here before me to do two things. One is upbraid me, criticize me, and if I really disobey the oath of office, I want you to subject me to constitutional punishment," which at minimum certainly he means impeachment and removal.

And that idea that when you take the oath of office, to preserve, protect, and defend the Constitution, those are words that are required by Article II, they took oaths very seriously, specified as the only oath, specified word for word. It's an idea of constraint, that the office of the presidency has certain purposes and certain limits. Now, at some point, and I would put it probably at Woodrow Wilson's presidency, that just starts to erode, and people, and the presidents themselves start to think of the presidency as a sort of first among equals beyond the normal scope of limited power by the Constitution. And I think that's where the danger starts to come in.

Now, when you have decent presidents, or presidents who aren't doing the kinds of things that we're talking about, it's not as much of a worry. But when we're in this presidency, I think we see that we've lost that central idea that we have to recover, of constraints on the presidency, of the president as obligated to respect the rule of law, free speech, for instance. I'm hoping we can recover it. Now that we've had a second president who really is that dangerous and more so, I think, who thinks the lesson of Nixon was that he wasn't lawless enough, I think we've gotta really go back to the drawing board and start to bring back those constraints on the system much more than we thought necessary before this presidency.

Lawrence: So, how do we do that? How do we bring back constraints on the most powerful office in the land?

Brettschneider:

I'll begin by saying realistically that's not gonna happen if we have this Congress and this president, because he has an idea of the presidency as all powerful, I think, and that's not an exaggeration. The president has said that repeatedly, that he thinks that Article II, to the extent that he understands it, which is not at all, gives him the power to do anything he wants. Now, if we have a new president, and we have a new Congress, my view is that we should look to exactly what happened after Nixon, that there really was a recovery and the thought was in that committee, the Watergate Committee, not just that it was important to stop that president, but that it was important to start to think about the presidency.

And there were a slew of proposals that were suggested that give us a guide, I think, to what to do. One was an emergencies act that would limit the power of the president when it comes to emergencies. Now, that act itself has subsequently been amended to

aggrandize rather than limit the president's power, but I think we have to start to think about statutory ways of Congress reclaiming the ability to stop an emergency.

To my mind, the most important proposed legislation, which doesn't get through until the Carter Administration, is the independent counsel law. And this was a law that said look, because the Saturday Night Massacre involved the President of the United States saying to the Attorney General, "You have to fire the special prosecutor, Archibald Cox," the equivalent of Mr. Mueller, "who's looking into me." That vulnerability led that Congress eventually, during the Carter Administration, to say the person investigating the President of the United States shouldn't be fireable by the President of the United States at will. There has to be an independence to that office. And I think it's desperate that we bring back that law.

So, you know, I think that we've gotta start to think about reform of the office. So, we've really gotta start to think about saving our democracy in the long term through legislation, and to me there really is one lesson, and that's that you don't trust the president. You know, you hope for the best when it comes to the president, for a president who will be virtuous, who will respect norms, but we have to also be aware that presidents can be lawless, and there has to be a way to reign them in.

Lawrence: If you could change one or a couple of provisions in the Constitution right now, which ones would they be?

Brettschneider:

You know, I think that the principles of the Constitution are pretty great, but a lot of the mechanisms that the framers thought would work don't work. One of them, of course, is the way that we elect a president in the first place. The electoral college. I think seeing the possibility more and more not just as a hypothetical but a real possibility of presidents elected with a minority of the national vote being elected president, I'm very concerned about that, so I think that they did get wrong. I have an argument for why accepting cases of impeachment doesn't mean what people traditionally think it means. The usual thought is that it means that a president can't stop or undo an impeachment. I think it also means that the pardon power can't be used to pardon co-conspirators related to cases of impeachment.

You know, that's a quirky interpretation, so I'd like to see that rewritten as a constitutional matter to make it very clear that the president can't pardon a co-conspirator. I think that pardon power turns out to be pretty dangerous. I guess I'd urge rather than constitutional rewriting, kind of constitutional clarification would maybe be a way to put it.

Lawrence: It's extraordinary how much focus over the last couple of years there has been on the basic articles of the Constitution. For big blocks of time over the last half century, the focus has been on the First Amendment, or Fourteenth Amendment rights, or right of privacy, equal protection, and then every now and then, like the 1970s and again now,

these structure of government questions and Articles I, II, and III of the Constitution all of a sudden come back.

Brettschneider:

You know, the traditional divide that there is between the powers granted by the Constitution, meaning the powers granted to Congress, or the powers granted to the president, or the powers granted to the courts, and civil liberties issues or civil rights issues, like free speech or religious freedom, and equal protection, to my mind the reason why this moment is so important is that we see what the framers saw, which is that these are really deeply connected questions, that questions of free speech are connected to democracy, as of course are the powers question.

So, yes, the whole logic of constitutional law is coming into relief in a way that I think it was there for the framers, but maybe we've often forgotten in these interim periods.

Lawrence: Let's talk a little bit about free speech. You've written about what you like to call value democracy and its role in the free speech debate. We might say that the choice between repressing speech and celebrating, or praising speech, is actually an impoverished choice. There's another role for government to play in your value democracy system. Why don't you tell us a little bit about that?

Brettschneider:

Thank you for asking that and of course this is an issue that right now in particularly the question of hate speech is on the rise, and so my book, which was written well before the Trump era is about the idea that there is really usually two ways that we think about free speech, and one is the kind of way that we think about it in the United States, which centers around the idea of viewpoint and content neutrality, and viewpoint neutrality in particular being the core idea that when it comes to opinions, the state at minimum certainly can't criminalize your opinions.

Now, there are some exceptions to that, for instance true threats can be criminalized in our system.

Lawrence: Right. Conspiracy.

Brettschneider:

Conspiracy can be criminalized. Imminent lawless action, speech directed at imminent lawless action. But aside from that, really opinion is protected from criminalization in our system, and there's good reason for that, of course. We have a history of prosecuting communists, for instance, for their ideas, and over time the court came to think, "Let's not do that." In the rest of the world, they have a very different approach besides viewpoint neutrality. I think of it as militant democracy. We have the most protective democratic jurisprudence of free speech in the world. The rest of the world says, "You know what? We're gonna protect speech, yes, but when it comes to attacks on democracy itself, we're gonna limit those attacks," so the Nazi Party is banned in

Germany. Holocaust denial is banned in Germany. Certain forms of hate speech, anti-Muslim speech for instance, has been prosecuted in France.

Now, my approach is a third way of thinking about it, and I think both of these are wanting. I think that the worry with our jurisprudence alone is that we leave out the possibility that we might, through that jurisprudence, protect a culture that we're seeing increasingly of hate, what I call the hateful society. The problem with militant democracy of course is that it is too aggressive in its willingness to shut down opinion and its risk that it will drive it underground. So, my third approach is one of protect and condemn. So, I think that all speech, all opinion has to be protected from criminalization, but there's a role for the government when it's exercising what I call its expressive capacities to criticize, and an obligation to condemn even hate speech.

So, that starts with what we were talking about in the very beginning of this discussion, a president's obligation to use the bully pulpit to condemn hate speech, but it also includes the ability of government to create public monuments that have a viewpoint, to have educational systems and curricula that advance a certain viewpoint against hate. And then most controversially what I say is that when government is using its own funding capacities, it should be obligated and it should be constitutionally permissible for it to fund the idea of anti-hate and to withdraw funding from hate groups. Certain churches, like the Westboro church that preach hate, I think shouldn't be nonprofits.

When the Boy Scouts were engaged in discrimination, I thought that was a reasonable way to go about it, to allow them to engage in what they regarded as not just their speech, but their association rights to discriminate, but that they shouldn't be nonprofits in continuing that practice.

Lawrence: Similar approach taken to Bob Jones University some years ago on their policy about whites and Blacks not being allowed to date on another back in those days.

Brettschneider:

Yes. And in fact, that's my crucial case that I talk about in the book, of course, that Bob Jones University allows African Americans into the school, but once they're there, they're not allowed to engage in interracial dating, they're not allowed to be members of the NAACP, and they're not allowed to advocate for the right even of interracial marriage. If these students did any of those things, they were subject to being kicked out. My point there is that if they have that expression right to do that, certainly we shouldn't be funding them, and that the right response is to defund them.

Lawrence: Your value democracy argument, which is a very provocative one and a very thoughtful one, is the answer to a footnote in a piece of mine, where I said, "This doesn't have to apply to the government. I'm not sure about the government." Yet you're arguing it does. What I have described as the right approach for universities to take is actually very similar to what you described as the government doing, that a university president ought not to punish students for certain kinds of hateful speech, nor should she be silent on the matter, but actually has an obligation to speak out.

But I've always been a little more worried about the governor or the president doing it than you are, but you're giving me something to think about.

Brettschneider:

Right. Of course, you were a university president, so that... Maybe that's the reason.

Lawrence: Where you stand depends on where you sit, absolutely.

Brettschneider:

I think it does. I've thought a lot and have drafts of several pieces that I've never published but I have shared with some university presidents, and I'm of course very interested in this issue given where we are at this moment, and I was visiting at Chicago Law School and they were drafting the Chicago Principles on Free Speech, and my suggestion then, and I still hold to it although they didn't use it, was that in that earlier Kalven Report there was a section of that that said, you know, when the university's values are under threat, the university might take its own side.

I could never find the quote where Robert Frost said this. It's often attributed to him that a liberal is a person who can't take his own side in an argument or her own side in an argument, and you know, my point of course is that liberals have to take their own side. The university has to take its own side. So, that is a kind of way to think about it. Free speech is a value of a university, but it's got other values too. Science. Historical fact. And when it finds itself under attack, either from a community, or even within a classroom, when values of a university are under attack, I don't think the right response is punishment. I don't think you kick a student out for even denying the Holocaust. I think the student shouldn't, as heinous and evil as that is a thing to do, I don't think they should be thrown out of the school.

But I certainly do think that if there was a Holocaust-denying club on campus that the university president, speaking on behalf of the university, has an obligation to do just that.

Lawrence: It's interesting you raise the great Harry Kalven, because some of his work... In fact, in some ways some of his longest-lasting work was understanding the role of First Amendment and free expression in the Civil Rights Movement, and he might very well have had that in mind that on issues of segregation, on issues of equal treatment of people, the university and the country is not going to be agnostic, is not going to be even handed. It is going to take a position in that, and it's not gonna outlaw advocating contrary views, but it is gonna weigh in on that argument.

One of the most remarkable pieces of the last couple of years, whatever one's politics, whatever one's views of the current administration, is it certainly has been a major national educative moment on the Constitution, so I'm gonna give you a chance to give us a small syllabus with a presidential election around the corner. What do you think that a informed citizen should or might want to read about constitutional law before the

election to inform her or him about the kind of issues that will be at stake in this and future elections?

Brettschneider:

I think I'd begin with the Constitution itself. The document is not that long. It's got some specifics in it, some general principles, and I think every American should really take a moment to reread it, and I think when you start to see what's happened in the last four years, you'll see just right there on the page things that have become eroded.

And then I think we have to think about the wider issues that the Constitution over time has grown to, wider values that it's grown to protect, and certainly one of those main values is democracy. And so, I think *How Democracies Die* by my classmate at Pomona, Dan Ziblatt, is a great read. Another book that I highly recommend are my friends Aziz Huq and Tom Ginsburg. Their book is called *How to Save a Constitutional Democracy*, and of course that's relevant. In addition to *The Oath and the Office*, you can look for my new series with Penguin Press called *Penguin Liberty*. We're publishing six books, so we have Alexander Meiklejohn for instance on free speech, paired with John Stuart Mill, and paired with classics about free speech that people don't know, like Frederick Douglass on free speech talking about his own censorship in Boston, or Ida B. Wells on her publication being shut down, which ironically was called *The Free Speech*.

Lawrence: Well, that gives us plenty to look at and plenty to think about, and not just between now and election day, but for the months and years to come. There is no question but that the absolute central ingredient for a functioning democracy is an informed and engaged citizenry, and I believe your work has played an important role in that and I'm delighted to have had you with us today on *Key Conversations*.

Brettschneider:

Thanks so much. It was really just such a pleasure and I really enjoyed it.

Lawrence: This podcast is produced by Lantigua Williams & Co. Cedric Wilson is lead producer. Virginia Lora is our managing producer and Hadley Kelly is the Phi Beta Kappa producer on the show. Our theme song is *Back to Back* by Yan Perchuk. To learn more about the work of the Phi Beta Kappa Society and our Visiting Scholar program, please visit pbk.org. Thanks for listening. I'm Fred Lawrence. Until next time.

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