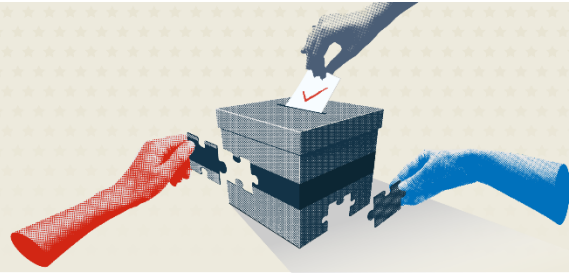


DEMOCRACY IN QUESTION

BROOKINGS



The Brookings Institution

***Democracy in Question* podcast**

“What role do courts and judges play in democracy?”

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Episode Summary:

Each year in late June, we impatiently await the Supreme Court’s decisions on cases with names like *Dobbs*, *Citizens United*, and even *Trump v. The United States*. The nine members of the nation’s highest court preside at the top of a pyramid that includes hundreds of federal appellate and district courts, with judges appointed for essentially life terms. Their decisions have an impact on nearly everything about modern American life from business to the environment to redefining American institutions themselves. In this episode, host Katie Dunn Tenpas explores the changing role courts and judges play in democracy with experts Russell Wheeler and Benjamin Wittes.

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TENPAS: Hi, I'm Katie Dunn Tenpas, a visiting fellow in Governance studies at the Brookings Institution and director of the Katzmman Initiative on Improving Inter Branch Relations and Government. And this is *Democracy in Question*, a podcast about contemporary American politics and the future of democracy. In each episode, I'm asking my guests a different question about democracy so that we can better understand the broader contours of our democratic system. You probably noticed that there's a lot happening in U.S. politics at the moment, including a highly contested presidential race. But in this podcast, I'm trying to get at the deeper questions of how democracy in this country and abroad works or is supposed to work.

On today's episode, the question is, what is the role of courts and judges in American democracy? Put differently, what is the role of the judicial branch in a democracy? In 1789, the U.S. Constitution established three branches of government executive, legislative and judicial--a separation of powers and a system of checks and balances. As James Madison explained in *Federalist Paper* number 47, "the accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

These days we impatiently wait for the Supreme Court decisions, especially the ones issued in late June in the final days of the Court's term. Cases with names like *Dobbs*, *Citizens United*, and, yes, *Trump versus the United States*. The nine members of the nation's highest court preside at the top of a pyramid that includes hundreds of federal appellate and district courts, with judges appointed for essentially life terms. The rulings these courts make impact nearly everything about modern American life, from business to the environment to redefining the American institutions themselves.

So, what is the role of courts and judges in American democracy? To help explore and answer this question. I've invited two of my colleagues to the show. Both have long experience thinking about the role the judiciary plays in American political life. First, Russ Wheeler, a nonresident senior fellow in Governance Studies at Brookings. From 1977 until 2005, he was with the Federal Judicial Center, the federal court's research and education agency, serving as deputy director since 1991. He has published articles in numerous academic journals on judicial selection and education, judges' extrajudicial activities, judicial independence and accountability, and judicial governance. In addition, he currently serves on the advisory board of the Katzmman Initiative.

And then I'll welcome Ben Wittes. He is editor-in-chief of *Lawfare* and senior fellow in Governance Studies at Brookings. He also hosts the podcast, *Lawfare Daily*.

Russ, welcome to *Democracy in Question*.

WHEELER: Good to be here, Katie.

TENPAS: So, let's just start, you know, off the top with you can sort of answer a broad question however you like in terms of what is the role of the judicial branch in democracy? What do courts and judges, what role do they play in our democracy?

[3:35]

WHEELER: Well, it's not an easy question to answer because in addition to the federal courts you mentioned there are there are many more state courts with which most citizens if they are gonna have contact with courts it will be state courts. And of course, because most of the state judges get their office through some sort of an elective system, have to stand for election, there's a different tension operating there between the the state courts and the federal courts.

Now, people would say the federal courts, because half of its judges, as you pointed out, basically have life tenure, are considered to be more anti-democratic. But even there, the process of appointment and confirmation of judges by popular elected presidents and the Senate give a democratic twist to even these so-called non-democratic federal courts. That puts on what Chief Justice Rehnquist called "a popular imprint" on the courts.

Now, if we look just at the Supreme Court, for example, for most of the United States' history, the appointments were fairly, fairly common. Justices were appointed maybe two every presidential term. And so, that kept the court more or less within the realm, the confines of a national public majority. Now, the justices serve much longer. And consequently, we see in decisions like the Dobbs decision that you mentioned, Citizens United, the presidential immunity decision that the Court rendered in June, relatively unpopular. But nevertheless, here we are. And I don't see any possibility that the Court is going to change much to to change those.

So, what was once a rather dynamic relationship of courts in a democracy, I think, is becoming somewhat more static because of the the lengthy terms the justices serve. That's the reason, I think that's one of the reasons that there's some push for term limits on justices. I think it's highly impractical to think that this Congress would ever or another Congress would enact them. But nevertheless, I think that's what's behind this view that the Supreme Court has has strayed a little too far from decision-making in a democracy.

TENPAS: And and just curious about, this notion that now Supreme Court justices serve much longer. Is it just a function of a longer health span?

[5:42]

WHEELER: Yeah I think that's probably true more than anything else. Appointed at a younger age but people are living longer and the justices hang on longer. Most federal judges, especially district judges, once they become eligible to retire on salary, they do pretty quickly after they reach eligibility at the age of 65. A little less so for court of appeals judges. But the Supreme Court justices just basically, to put it in the vernacular, hang on seems to me as long as they can.

TENPAS: Yeah. If you could initiate any kind of congressional reform, would you recommend that there would be sort of an age point at which they needed to step down or anything along those lines?

[6:16]

WHEELER: I think that's a reasonable that's a reasonable policy to put in place. And it wouldn't necessarily have to interfere with the life tenure the Constitution provides, because the justices could still serve by assignment on the court of appeals and the district courts. But it seems to me there's enough concern that the justices are out of touch with popular preferences that some way to control that might be a good idea.

Now, obviously, the purpose of the court's in some way is to be contrary to popular preferences. The purpose of courts is to protect rights that the popular majorities might want to override. So, we can never forget about that. On the other hand, in the long run, a court that is unmoored from major popular sentiment for a long time is going to run into trouble.

The reason the Supreme Court in the 1930s got into so much difficulty was, was because Roosevelt had no chance to make any appointments his first term. And so, he had a Supreme Court that was pushing back against very popular New Deal measures. The dam finally broke when Roosevelt proposed increasing the size of the court so he could so he could put on more sympathetic justices. Whether that caused it or not, it was coterminous with the series of decisions of the Court which broke this anti-New Deal series of decisions, and the Court reverted back to, to a more typical role.

TENPAS: And, you know, obviously at this moment in American history, it seems that the courts are really under siege in terms of public sentiment, is skeptical about their legitimacy. Were there other points in American history besides the New Deal era where citizens were skeptical of the courts?

[7:45]

WHEELER: I think it's a very hard question to answer. I mean, we don't we don't have Gallup polls about what people thought of the Dred Scott decision. We know it was a very unpopular decision for newspaper writers. It was certainly very unpopular by politicians in the North. But the fact is, public knowledge of the Supreme Court even now is rather sketchy. The Marquette Law School Poll, which is one of the more reliable sources of information about attitudes towards the Court, asked a question, they said, how much attention do you pay about to news about the Court? A lot: 27%, a little: 52%, nothing at all: 21%. So, it's a little hard to derive from that a view that every John Q and Jane Q citizen is thinking all the time about the Supreme Court. They're just not.

And today we have pretty good ways of finding out what the public thinks. We have no idea, I think, what most people thought about the Court back in 1857 and the Dred Scott decision, or even during the New Deal period. I mean, we know the New Deal was very popular. We know that Roosevelt was reelected handsomely in 1936. But then he went to change the size of the Court and the Court retained what political science called "diffuse support." You don't necessarily support the policies,

but you support the institution. And whether that was a popular sentiment or just a sentiment of elites, we don't know. But people pushed back against that very strongly.

TENPAS: That's interesting. And can you think of other periods in American history where judicial decisions have affected election outcomes? So, for instance, Bush v Gore, in 2000 and then maybe the Dobbs decision as being influential in a subsequent election.

[9:20]

WHEELER: Well, of course, those are two different things, aren't they? Bush v Gore was a ratification, a judicial ratification of one view of who won the election in 2000. The Dobbs decision, Citizens United, Brown versus Board series of decisions, in national security, these were all highly contentious. But for the reasons I mentioned earlier, I'm a little bit reluctant to say that there was a direct link between public attitudes to the degree they existed about those particular decisions and, and elections. Eisenhower appointed Earl Warren to the Supreme Court. Earl Warren led the Supreme Court in the unanimous Brown versus Board decision. And the Brown decision was very popular in some parts of the country, very unpopular in other parts of the country. But Eisenhower won reelection overwhelmingly. If there were a direct link, you'd see people hold those appointments against Eisenhower, but obviously that didn't happen.

That's a pretty superficial view of it.

TENPAS: Right. But maybe more recently—

WHEELER: —Well, let me rephrase that. We know something about what people know and don't know about the Court and judicial decisions, but it's very hard, it seems to me, to draw straight lines between our knowledge of public attitudes towards the Court and other variables, like voting in presidential elections.

TENPAS: All right, well, let me just push you a bit, though. What about the Dobbs decision? Subsequently, there was a midterm election where the Republicans were favored. Could it be the case that the Dobbs decision raised the saliency of an issue that was favorable to Democrats? And so, it's not sort of a direct causal relationship, but it raised the issue to the point where it motivated people to show up at the polls and vote a certain way?

[10:56]

WHEELER: I don't think there's any doubt about that. You're obviously right. On the other hand, how often does that occur? I mean, here you have a highly controversial issue: abortion, however you want to phrase it, a Supreme Court decision which runs counter to the views of many United States citizens and, and others. And a direct reaction to that. I can't think of an awful lot of instances, other instances of Supreme Court decisions that have provoked that kind of immediate electoral outcome. Was Lincoln elected because of the Dred Scott decision? I think it'd be hard to make that argument. Was Dred Scott part of the whole controversy that led to the merger of the Republican Party and Lincoln's election? Yes, it was.

TENPAS: Okay. That's a really good clarification. If the Supreme Court decisions are not necessarily directly affecting elections, how do you think the judiciary, and in this case will say the Supreme Court, we'll limit it to that, but we could also talk about appellate courts and federal district courts. How might they affect overall trust in government? Is there a relationship between trust in government and the courts?

[11:55]

WHEELER: I haven't I haven't seen any. There's a thriving academic study of the legitimacy of the Court and the Court's diffuse support, and its specific support. I haven't seen anything that necessarily links attitudes towards courts, towards trust in government.

I will though, if we can get off the Supreme Court for a second, there's a fascinating quotation by you mentioned the *Federalist* 47. This is Hamilton writing in *Federalist* 17. He referred to the "ordinary administration of civil and criminal justice," and he called it "the most powerful, most universal, and most attractive source of popular obedience and attachment." He said, "having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake"—pardon the 18th century prose here, but nevertheless there's a point—"contributes, more than any other circumstance, to [impressing] upon the minds of the people affection, esteem, and reverence towards the government."

Now, Hamilton is drawing a direct link right there. Now, I don't know anybody who's operationalized that statement and tested it empirically. And of course, Hamilton was writing before we had large bureaucracies or people who are affected more by the Social Security Administration than their local state court. But still, there's something there, that attitudes towards not the Supreme Court sitting off in Washington, but the local circuit or district court right down the street, having the vast lion's share of litigation in the United States by any, by any matter of means, and whether or not how those courts function affects attitudes towards government.

That's a that's a different question. And perhaps just as important as these occasional Supreme Court bombshells. And in that regard, the National Center for State Courts' latest survey found that state court systems were second in public confidence only to local police departments. People expressed confidence in local police departments 76% and state courts 61%. U.S. Supreme Court down to 54%.

TENPAS: Wow. And what would you say contributes to the 54% for the Supreme Court or the lower, much lower level?

[14:03]

WHEELER: You know, it hops around. If you ask those questions in late June or early July when the controversial decisions are there, especially a Court whose decisions are in many ways so inconsistent with basic public attitudes, you're going to find a fairly high level of opposition. It will edge up then at least slightly over the course of the summer. I think that's typically been the pattern.

But it's obviously much lower now than it used to be. And whether that's because there's more public visibility of the Court or whether or not it's just hitting more hot button issues, I think it's very difficult to say, but it's certainly not doing well in terms of public attitudes.

TENPAS: Can you talk a little bit about how recent ethics breaches on the Supreme Court might be affecting their overall reputation?

[14:47]

WHEELER: I think this is another area in which if you look at the surveys, I think you'll find a lot of people are totally unaware of those things. We here in Washington, we're all aware of Justice Thomas's trips and Justice Alito's flags, and similar activity by the other justices. I think that registers very little elsewhere. In fact, Marquette did some other polls in which about a third of the public was totally unaware of the Thomas controversy. So, I think it's a very serious problem, but I don't think it's one that's contributing to attitudes among the general public towards the Court. I think it's the decisions they see that flash across their newsfeeds in late June when those decisions are announced.

TENPAS: And can you talk a little bit about the disparity between sort of an ethics code for the Supreme Court justices as compared to other federally life tenured judges?

[15:34]

WHEELER: Well, keep in mind that the ethics code for all federal judges except the Supreme Court is non-binding. It's a non-binding advisory code. That's the same thing as the code that the Supreme Court adopted. There's a lot of things about the Supreme Court ethics code which I think could be improved. But I think it's a bad rap to say it has no enforcement mechanism, because many of its provisions are very broad. You know, a judge should be courteous at all times. Well, that's true, but it's hardly an enforceable code.

The big difference is this: anyone can file a complaint of judicial misconduct about any federal judge except a Supreme Court justice and have it investigated under the Judicial Conduct Act of 1980. There's no such similar mechanism to file complaints against the Supreme Court. I for a long time thought such a thing would be a cure worse than the disease. But I'm coming around to the view that a bill like the one that Senator Whitehouse has introduced—we can go into the details of that if you want to, people can find it—I think might be a might serve laudatory purpose if for no other reason than just curtailing this view that the Supreme Court gets special treatment that other judges don't.

I mean, this was a big debate when when this 1980 bill was being debated. And the Judicial Conference, the the policymaking body for the federal courts, said it would be inappropriate for lower court judges to pass on the actions of a Supreme Court justice. I don't know why that's true. In the states, every state has a judicial discipline mechanism. People can complain about the Supreme Court. The judicial complaint agency is made up of lower court judges and non-judges, and they pass on the

extrajudicial activities of Supreme Court justices. So, I think there's a bit of a fake argument there. But on the other hand, I don't see anything changing.

TENPAS: Yeah. Earlier in the conversation, you mentioned that hearing about, Justice Thomas' ethical lapses and Justice Alito's flags is kind of sort of inside baseball that if you live in D.C., you're very aware of all of these things and you're concerned by them, and people are writing op eds about them. But do you think the fact that it doesn't resonate with the public at large is maybe why Chief Justice Roberts didn't really feel the need to implement a stricter code?

[17:40]

WHEELER: No, I don't think so. And I want to correct. It's not just in Washington. I would say that small group of people who give a lot of attention about the court, that 27% or so, it resonates with them. It resonates in Congress. I, I don't know, but my guess is John Roberts is pulling his hair out over the activities of Thomas and Alito. But, you know, you can't pick your colleagues. Not so much because somebody out in some far reach of the country is upset about it. But he's getting an awful lot of flak from Congress, editorial boards.

I think Roberts, despite some recent action, I think Roberts is very concerned about the legitimacy of the Court and its underlying public support. And I think he realizes that although, as I said, it's not a matter of intense public scrutiny by everyone, it's certainly a sore thumb in the part of Congress and others who think that the Court is just out of control.

TENPAS: And are there other points in American history where the legitimacy seemed to be at stake, like it is now?

[18:34]

WHEELER: Yeah, I think so. After the, after the Civil War, despite all I said about who knew, you know, how far knowledge of the Dred Scott decision went, it was quite clear that the Court was in retreat. And then some of the Civil War decisions that the justices made on the Court and acting as circuit judges, as trial judges, in the matter of Lincoln's habeas corpus suspensions and other such matters, that led the Congress to curtail the jurisdiction of the Court, and the Court went along with it. That was in the 1860s and 1870s. So, that was clearly a period when the Court was laying low to a degree.

And then, of course, the famous what they call switch in time that saved nine, the reversal of the court in 1937 from opposition to these New Deal measures to basically surrendering and allowing the New Deal, the federal New Deal and also similar state statutes. They survived constitutional scrutiny starting in 1937. That was another time in which I think specific attitudes towards the Court were quite, quite low, although diffuse support for the Court, underlying support for the institution remained strong as seen by the resistance to the Court packing plan.

And I would say also during the 1950s, obviously, all these billboards saying, "Impeach Earl Warren," imagine half the people who saw them didn't know who Earl

Warren was, but nevertheless, that's a sign of underlying discontent with the Court. And led to Richard Nixon, helped lead to Richard Nixon's election, I think.

TENPAS: And I wanted to ask you, in regards to sort of popular culture and the Court's depiction. The recent edition of *The New Yorker* magazine has a picture of the nine justices, and six of the nine heads have the head of Trump. And then the other ones are Justice Jackson and the liberal justices. Is that a depiction that you thought you would see in your lifetime, or is that a depiction that is healthy for the institution of the courts, or can you just talk about your reaction to it?

WHEELER: No, exactly. This is the this is the same *New Yorker*, by the way that quotes your data on presidential administration turnovers. I can't imagine, you know, 30 or 40 years ago when I was studying this stuff more intently to imagine seeing a cover like that. I guess some people thought it, but it was really quite ... it was quite stark. And it's like a lot of *New Yorker* covers, it hardly pretends to be to reflect anything more than the creativity of the of the cartoonist who who drew it. But the fact they could do such a thing tells you something about the attitudes towards the Court. Not again, not among the great mass of the population, but at among influence makers who who have who do have an impact.

TENPAS: And do you think that, sort of, maybe popular concern with the Court or maybe sort of reactionary views about today's courts and judges more broadly is a function of people's lack of education and understanding about judicial branch? Do you think that there's room for improvement for citizens' understanding of the courts?

[21:17]

WHEELER: Well, yeah, I think people understand more about the courts now than they did. Public understanding is not great, but I think it's probably much greater than it was 100 years ago. There's no doubt in my mind about that. You know, literacy is higher; people can't read, they can't spend too much time reading about the Supreme Court, for example. I certainly think civic education is important, but I don't think it's what's going to turn around public attitudes towards the current or discontent with court decisions.

I mean, in fact, sometimes I've wondered, people say people don't understand the Court enough, so we're going to teach them that here's a bunch of people who were appointed for life. They can do whatever they want. They can't be removed from office even for outrageous decisions. There's very little ethical controls on them. You really want people to to learn all of that and expect them to turn around and say, boy, I'm all in favor of that? I think not.

TENPAS: Right. You may not want to draw attention to those kinds of details. Well, I think that recent Supreme Court decisions coupled with vestiges of the Trump administration and how he sort of ran the government at that time have made a lot of people nervous about the future of democracy. And I was just wondering if you could talk, you know, on a scale of 1 to 10, how nervous are you about the future of American democracy?

[22:23]

WHEELER: I think American democracy is fairly resilient. We survived four years of the Trump presidency. I mean, that's a partisan statement. But I mean, I think we'll survive another four years should that be the outcome of the Electoral College vote in November.

But I am concerned that, to go back what we were talking about earlier, that presidential elections have served as a check upon this non-democratic institution. I think, highly ideological appointments to the courts and Trump's appointments to the Supreme Court and the courts of appeals—were highly ideological, his supporters boast about that—by a president and a Congress who have no electoral mandate to do any such thing is likely to produce a judiciary whose, a judiciary whose decisions are going to be more and more out of touch with basic governing majorities. And I think that's a bit of a danger for the courts.

But on the other hand, it takes major crises to make fundamental changes in the courts. We know that. There's been no major change in the federal courts in the last hundred years or more. And so, I don't expect there's going to be any major changes even now, even though some people say the courts are in crisis. I don't think we've reached the point where there's going to be any major changes.

TENPAS: And where are you on the 1 to 10 scale? What's your score?

[23:49]

WHEELER: Oh, I'd be about a 7, I think so. but don't quote me on that. Even though I said it on a public podcast. Because public knowledge and attitudes of the courts, even the Supreme Court all the way down to local courts are so, are so unpredictable and unpredictable and really unknowable, I think you have to be very careful in in, in in conclusions we draw about courts and democracy.

[music]

TENPAS: Right. Well, thank you so much for being a guest on *Democracy in Question*. I learned a lot today. And really appreciate your time.

WHEELER: Good chatting with you, Katie.

TENPAS: And now Ben Wittes, who, in addition to his leadership of Lawfare, has written extensively on the nexus of law, national security, and democracy. Ben, welcome to *Democracy in Question*.

WITTES: Thanks for having me. Pleasure to be here.

TENPAS: So, let's kick it off with just a really broad question. You can narrow it however you like. Tell me, what is the role of the judicial branch in democracy? Courts and judges, what role do they play?

[24:52]

WITTES: So, let's start with the role of courts in government, irrespective of whether it's a democracy or not. Right? Courts are a dispute resolution mechanism. And disputes can range—whether you're a democracy or not, right? your neighbor does something that affects your property, you have a dispute with your neighbor, there has to be a mechanism to resolve those disputes. And so, countries for long times, long before they were democratic, would set up judicial mechanisms to resolve disputes.

And at that level, it has actually very little to do with democracy. Right? Although it does have everything to do with fairness and with whether the state in question is providing the essential service of resolving disputes between citizens.

Where democracy comes in is that sometimes, of course, your dispute is with the state, which either means that you think that Congress, or whatever legislative mechanism you have, has passed a law that is inconsistent with the constitution or some other principle. Or that you believe that the executive branch is behaving in a fashion that it's not allowed to under the law. Right? Which is to say that the citizen has, or sometimes the Congress, right, or the executive branch has a problem with some other actor, a citizen or a different actor of government, and courts resolve those too.

Now, that's an essentially democratic function, because in a non-democratic society, you say, well, the courts don't actually provide a limit on the behavior of the authority. They're an expression of the authority. But in a democracy, particularly one where there is separated power, as you quoted *Federalist 47* about, somebody has to resolve disputes between citizens and government. And a lot of those disputes are, in a democracy you can't behave this way. And the courts have an essential role in by adjudicating those disputes, answering the question of are you allowed to behave this way in a democracy?

TENPAS: And tell me a little bit about the arc of history that has led us to this point where there seems to be kind of a crisis of legitimacy with the judiciary. How do we get here?

WITTES: Yeah. So, I think, that is the subject of, first of all, an enormous literature and a lot of dispute. So, I'm going to try to answer it in a fashion that's politically neutral.

TENPAS: Great.

[27:34]

WITTES: It is fair to say that over the last half century, the courts have amassed a great deal of power to themselves. Some of this power has offended conservatives. For example, the authority to decide who's allowed to use birth control and get an abortion, right? is something that conservatives regarded as a gross arrogation of power to the courts.

More recently, a lot of these arrogations of power or these accumulations of power have offended liberals. For example, the overturning of that previous amalgamation of power, or this term the decision that presidents are immune from criminal liability for matters related to their official acts, and that it is the courts that determine the parameters of that immunity, which can't be found in the text of the Constitution.

And so, if you accumulate more and more power in the judiciary, who's ever right about which decisions are appropriate and which are not, one thing that happens is that more and more political power becomes contested through the behavior of the courts, through litigations and through appointments to the courts. And therefore, more and more elections become decided in the context of thinking about the direction that the courts are going to go.

And that means that when Democrats win over a long period of time and appoint a lot of justices, Republicans are going to think of the courts as less legitimate. Or to use an example that's closer to the current reality, when Republicans win and get a chance to appoint a bunch of judges, a lot of Democrats are going to look at the rulings of the courts under those circumstances and have serious questions about their legitimacy.

So, I think the best way to understand it is just that the courts over a very long period of time have amalgamated a lot of power. And so, the fight is about the deployment of that power.

TENPAS: And how do you think the recent case, the recent Loper Bright case fits into that equation?

[29:55]

WITTES: Yeah, so very complicatedly. So, Chevron, which is the 1984 case that it overturned, was at the time understood as something of a conservative victory in that it said the courts are not going to generally be in the position of substituting their judgment for agency—and these are administrative agencies' interpretations of their authorizing statutes. Only if those interpretations are unreasonable is the court going to come in and say, no, you can't interpret it that way.

And that was at the time understood as, you know, the court saying, all right, we're going to defer to other branches of government under normal circumstances in these situations. And, you know, where Congress isn't clear, it's in the first instance up to the agency to decide what its statute means. That was seen as a judicial step back from a more aggressive kind of, at the time, thought of as liberal interventionism in the administrative law space.

But over time, conservatives got antsy about it, because one thing that Chevron meant was that instead of having a very powerful judiciary deciding what administrative actions, administrative interpretations were appropriate, you had something that they hate almost as much, or maybe now more, which is the dreaded administrative state defining its own parameters of legality and behavior.

And so, there has been for some time a what was understood originally as a kind of conservative opinion that was a step back from liberal interventionism by the courts,

has come to be understood over time as deference to administrative agencies, which has become a bit of a conservative bugaboo.

And so, I would say this formally defers a great deal to Congress and says, you know, Congress needs to be clear. But in fact, what it's really doing, given that Congress is unlikely to come in and write crystal clear statutes for all circumstances, is it removes power from the agencies and puts them in the courts thereby, I think, augmenting the sense that the courts are wielding a great deal of power in our system right now.

TENPAS: And so, if you're thinking about the balance of power, you think that decision in and of itself shifts it even further towards the court's direction.

[32:37]

WITTES: At least if Congress doesn't get involved. Right? So, this interaction is complicated because it presumes a set of statutes that are sort of vague and subject to a million different interpretations. But I think it is reasonable to expect, given how Congress is not the most fluid organization in terms of, you know, passing laws to address specific situations—it tends to pass broadly worded statutes and then leave it to others to figure out that the power to do that, given a broadly worded statute, just migrated toward the courts.

TENPAS: And it's really a moment for them to think about capacity building and if they want to do that. But I think getting that institution to think collectively instead of individually is a Herculean challenge.

WITTES: Yes. And and it's really not designed for that. You know, it's 535 people plus, and it's not designed for swift action. And that's not to say it can't under certain circumstances do quick action, but it can't habitually be expected to and particularly in the regulatory and administrative space the traditional answer to that has been the broadly worded statute with an expert agency. And what the Court is saying is for a lot of purposes, that may not be good enough anymore.

TENPAS: Right. Let's talk a little bit about how major Supreme Court decisions can affect election outcomes. And can you give some examples?

[34:12]

WITTES: Well, okay. So, there are a lot of ways to think about this. But let's let's sweep off the table the most overt category that is least common, which is that you have an election dispute that reaches the Supreme Court, a la *Bush v Gore*, 2000, and the Supreme Court issues a decision that effectively decides the outcome of the election. Yes, that has happened once in our history. And it could happen at any time again. It is most unlikely in any given election to happen again. Though never say never. But I think that's in some way it's the most dramatic and the least important way.

The least dramatic, and the most important way is by conditioning the rules under which elections happen. And so, the most important examples of this are things like the Court's decision not to get involved in redistricting. And the Court basically says

we're not we're not getting involved in redistricting questions. That's a political question left up to the political branches. And so, you know, races in congressional districts that might involve egregious gerrymandering, the Court is not going to do anything about.

Conversely, think about the Voting Rights Act, where the court has both a storied history of enforcement and also more recently a significant rollback in terms of what it's willing to do, under what circumstances it's willing to get involved. And also, dating back a few years now, has, you know, struck down a certain provision, the pre-clearance provision of the Voting Rights Act.

[36:06]

And so, these are rules that affect how voting takes place. Right? And the complicated feature of this is that you almost never get to look at the election outcome and say, wow, this would have been different if the Supreme Court had not issued this ruling in this case. You almost never can do that because, you know, you can't tell when candidate X beats candidate Y how that same race would have looked had a given rule been nudged a little bit differently.

And so, you never get to say, or you almost never get to say, the Supreme Court affected the outcome of this election. And yet, I think if you ask most political scientists and lawyers who study this sort of thing, this is the tectonic plates of a lot of close elections, and they matter. And that's why these issues are so fiercely contested in the courts and in the political space.

And then finally, there's the whole field of campaign finance, which is an area in which the Supreme Court has vacillated to some degree but has an increasingly libertarian bent. And depending on how important you think that is, either from the purposes of limiting the amount of money in politics or for purposes of allowing unbridled free expression, and free expression being enabled by the expenditure of money, the Court is the chief architect of the rules in that regard. Congress also plays a role, of course, but the Supreme Court has written a set of what you might think of as meta rules that make it very hard to regulate the collection and expenditure of money in the campaign finance space.

TENPAS: And then maybe we could add a fourth category, which would be cases that touch on burning social issues that then affect an outcome.

[38:12]

WITTES: Well, so yeah, that's even more remote, but probably more important than—so, you know, the Supreme Court has given this incredible electoral gift to Democrats over the last few years, which is the overturning of Roe in Dobbs. And and the irony of that, of course, is that the electoral gift operates in the form of having so infuriated voters, who don't don't experience that as a gift, they experience that as an assault on their reproductive rights, but the result of that is that they are dramatically more animated to vote. They are dramatically more animated to give money to political campaigns. And they have won. Pro-choice candidates have won a series of elections and a series of ballot referendums. And Democrats have overperformed.

Again, in the view of most political scientists who I who I've followed on this, you know, there's just no doubt that it's been a significant contributor to Democratic performance over the last couple election cycles.

And, you know, that was true in the other direction for ... on abortion for a lot of years while Roe was in place, that it, you know, energized Republican voters. It now seems to be energizing Democratic voters.

And the important dimension of this is that the opinion has nothing to do with elections whatsoever. Right? It has to do with a major issue that people vote on in elections. And, and so, yeah, that's probably a more important affect than any election law related question.

And it plays out over other areas as well. So, abortion is a particularly dramatic example of that. But there are, you know, other areas where there are significant voting blocs. Right? So, for example, there are a lot of people—and I shouldn't make a secret of it, I'm one of them—who take very seriously the question of criminal accountability for the former president and maybe future president. Right? Does a Supreme Court opinion saying that he is immunized against a great deal of criminal charges against him, does that animate certain people to vote in a way that they might not otherwise be animated to vote? We don't have data on that at this point, and I don't expect it to be in the Dobbs category of impact, but I don't expect it to be in the no impact category either.

TENPAS: And do you expect that the Dobbs decision will play a role in the 2024 election turnout or results?

[41:01]

WITTES: Well, let's just say if it doesn't, then Donald Trump is much more likely to win than if it does. I think the Democratic coalition that would be required to beat Donald Trump requires a certain amount of energy and enthusiasm among female voters, and young voters, irrespective of their gender. And there are relatively few things that predictably excite both of those demographics. One of them is reproductive freedoms. And I think, the Democrats actually need a certain degree of energy associated with a backlash against the Supreme Court opinion in order for those voting groups to be activated at the level that they need in order to win.

TENPAS: Interesting. Do you think that the current Supreme Court is suffering sort of a crisis of legitimacy? And the answer, it doesn't matter what your answer is per se, but can you think historically, maybe just go to the 20th century, were there other periods, say post New Deal, where people sort of questioned their legitimacy?

[42:11]

WITTES: And so, I, I want to first meditate a little bit about the meaning of the word legitimacy. Right? And so, people use legitimacy to mean many different things. It doesn't have a tight meaning. So, some people use it to mean popularity. Right? The military and the Supreme Court historically have had high approval ratings in polls. Military still does, the Court no longer does. Some people mean that when they say there's a legitimacy problem.

From a legal point of view, that's just nonsense. You know, the legitimacy of a Court is measured by the question of whether the Court's rulings are followed. Right? And who cares if it's popular? The Court issues an order that somebody could simply defy, and we rely on the apparatus of courts following other courts' rulings and, and the executive branch following directives of the Court and Congress respecting the rulings of the Court. That's the definition of legitimacy.

And then there's some, I don't know, third way to think about it, which is prestige as distinct from popularity. Right? Like, okay, I don't like this ruling, but the Court is at the Court, right? I have respect for the Court.

So, if you are defining legitimacy in terms of I think the strictest definition—does the system still work? Is the Court's orders being followed? Do people, follow rulings that, you know, they may really disagree with?—the answer is the Court does not have a legitimacy problem.

TENPAS: Right. And if you can just pause for a moment, *Brown v Board of Education* and the aftermath would be an example?

[44:07]

WITTES: So, that would be an example of a whole bunch of states not following, right? at the height of the Court's prestige. It had a legitimacy problem in that massive resistance, in fact, took place, and it took more than 10 years for the legitimacy of the Court to trickle down into executive and congressional action to make its rulings, effectuate its rulings, and make them a reality.

If the definition is popularity, approval ratings by people, it is fair to say that the Court has a legitimacy crisis. Its total popularity has plummeted. Whereas it used to have high approval ratings among Democrats and independents and not among Republicans, largely, I think, because of abortion and other contested social issues, now it has high approval essentially only among Republicans.

How big a problem that is? I'm honestly not sure. I would describe it more in terms of, less in terms of legitimacy and more in terms of approval rating. We don't say the president lacks legitimacy when the president has low approval. We say the president's unpopular. Right?

And the third one, which is I think the right way to understand legitimacy and the Court is this idea of prestige. And the problem with that is I don't know how to measure it. It's some function of our sense that the institution is not like Congress, not one we have contempt for. Everybody loves to hate Congress, you know. And it is not simply a function of whether the Court's opinions are respected. But I don't really know how to measure it. My sense is it has come down. And because I don't know how to measure it, I don't know how to think about whether it's at the level of crisis yet.

[46:07]

I do think that over time, when we've had these periods before—the New Deal being a famous example of one, but the the other one that we don't like to talk about in,

you know, center and center left circles is the end of the Warren Court, right? where remember Richard Nixon ran in 1968 against the Warren Court. He won partly on that basis, and he proceeded to nominate four justices who very significantly altered the direction of the Court and began the project of the conservative judicial revolution that then ripened over the course of the next 40 years.

And I think in both of those cases, you can say the Court had gone out on some limbs, and the electoral system in the Roosevelt era in a liberal direction and in the Nixon era in a conservative direction, has a way of rolling it back. And the Court is a little bit less counter-majoritarian in the long term than we think it is.

And so, I would say there may be a legitimacy problem now. And I would look to the electoral system to address that, maybe not immediately, but certainly over time. The combination of the actuarial tables and the appointments process and elections are a really good way of reorienting the court. And I think you can look for the Democratic nominee in this election cycle to spend a lot of time hammering on how the Court is out of touch with, you know, with the American people on any number of issues.

TENPAS: And can you explain a little bit what you mean by actuarial tables in regard to this?

[47:56]

WITTES: Justices die. And we have a sense we always have the sense of the Court as a kind of fixed institution that doesn't change very much. And what we actually mean by that is that it changes relatively slowly and not on a fixed schedule. And so, the House of Representatives changes completely every two years. The Senate, up to a third of it can change every two years. The presidency can change every four years. The Court changes when people die.

And the thing about having nine people is that, actually, they die pretty frequently. And in any group of nine, you know, because nobody gets nominated when they're under 40. So, if you take a group of nine people, in any given few year period you're actually going to have some of them die particularly if they've had distinguished careers as professors or as ... And so, we think of the court as, you know, as a slow changing organization. And that's true, but that's different from a non-changing organization.

TENPAS: And it's interesting you point that out because, in the interview with Russ Wheeler he also pointed out that in the early years there was much more turnover, but now they really stay in for a much longer period of time because quality of life and lifespan is, is increased so much.

[49:15]

WITTES: Yeah. So, Russ's point is very it's very correct. And the other aspect to it is that the job of a Supreme Court justice was dramatically more grueling then than it was now, because in addition to being justices of the Supreme Court, they would ride by horseback to be trial judges in different jurisdictions. This is called riding circuit. And riding circuit was a grueling task, and they all hated it.

And so, first of all, they died relatively quickly because, you know, 18th century. But secondly, they all hated their jobs, and they didn't have a lot of power. And so, it wasn't that rewarding. You had to spend all your time riding around hearing uninteresting cases in podunk towns. And then you would come back and be the Supreme Court for a few days. Right?

TENPAS: And it was also a swamp here.

WITTES: And it was a swamp. It sucked here, too.

Even, you know, the first chief justice of the United States, John Jay, who, of course, is also famous for having written some of the *Federalist Papers*, he retired from the Supreme Court in order to run for governor of New York. And that gives you an idea of what the relative prestige was in the 1790s—people didn't really want to be Supreme Court justices. They wanted to, you know, be a governor or something.

And now, not only are people living longer, but they're much, much, much more apt to want to be on the Supreme Court, as Ruth Bader Ginsburg did, as Antonin Scalia did until literally their dying day. So, you're going to live longer and you're more likely to stay until until you get put in the ground.

TENPAS: Yeah. So, I really appreciate your, nuanced discussion and definitions of legitimacy. I think that really helps think it through. So, thank you for being so careful about that.

I have one last question, which is sort of more of a personal reflection of yours, and that is given sort of the status of courts and Congress and the presidency how nervous are you about the overall future of American democracy on a scale of 1 to 10?

[51:21]

WITTES: Oh, gosh. So, I would say in the long-term, I am bullish on American democracy. In the medium- and short-term, I'm quite worried. But the reason has very little to do with courts. The reason has to do with the lack, the much broader lack of guardrails against authoritarian populist movements and the fact that a lot of organizations, entities, including the courts, but not limited to the courts, don't seem to me to be worried enough about authoritarian abuses of both executive and legislative powers. And so, I, I, I do think the courts are a part of that. But they're not the central place where I think we have a problem. And I don't really rely on them very much for that function anyway.

My concern is that whatever the courts say and do in a democracy, that people tend to get what they want. And what a very large number of Americans want is a kind of authoritarianism right now that is not consistent with, say, subsequent elections or subsequent fair elections. And I don't see any evidence that the courts are likely to do anything about that. And I also don't know that I believe there's much they could do, because at the end of the day elections are really powerful things. And if people want authoritarian populists, they're going to find a way to get it.

And so, I do think this is a problem that has a bit of a self-correcting quality in that it's a problem of voters of my age and above, principally, I'm 54. And if you look at the demographics of it, this is not a problem among people in their 30s. Right? And so, I do think it's a problem that will take care of itself with time. The challenge is to preserve the vitality of the democratic institutions in the meantime so that my generation and everybody older than me has a chance to die off.

TENPAS: And tell me if I can push you for a number what where are you on the scale of 1 to 10, even for that short term? Not the long term bullish, but the short term?

[music]

WITTES: I would say I am a 6. I'm not panicked. But I'm anxious, and I do think we're we're in a very dangerous place.

TENPAS: Well, Ben, thank you so much for your time this afternoon. It was a fascinating discussion for me. So, thank you.

WITTES: Thanks for having me. It was great conversation.

TENPAS: *Democracy in Question* is a production of the Brookings Podcast Network. Thank you for listening. And thank you to my guests for sharing their time and expertise on this podcast.

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I'm Katie Dunn Tenpas. Thank you for listening.