

Democracy in Danger S1E15 Judicial Review

Will Hitchcock [00:00:03] Hello, I'm Will Hitchcock.

Siva Vaidhyanathan [00:00:05] And I'm Siva Vaidhyanathan.

Will Hitchcock [00:00:06] And from the University of Virginia's Deliberative Media Lab, this is Democracy in Danger.

Siva Vaidhyanathan [00:00:12] Will, representative democracies across the world work in a lot of different ways. But one of the core principles they all share is a belief in a trust in the rule of law. And in applying the rule of law, of course, we need an independent judiciary. Judges that are above partisan matters are able to interpret the law. Certainly they do so ideologically, but they're supposed to approach things with an open mind, a fluidity of intellectual engagement and a commitment to making sure that the institutions of democracy continue to work.

Will Hitchcock [00:00:46] Sure. And I think we can all agree it's not a partisan statement that in the fall of 2020, as we near a presidential election, that the appointment of judges, the makeup of courts that they serve in has become a hugely contested site of argument and debate in our democracy.

Siva Vaidhyanathan [00:01:04] Right. And the U.S. Senate has just confirmed the newest Supreme Court justice, Amy Coney Barrett. And there are all sorts of issues in play in the hearings and the conversations and the public debates where people were talking about voting rights and health care and women's rights, the protection of minority groups. A lot of the issues that we have been talking about on this show, of course. Which is why we wanted to find a great legal mind to join us this week to help us sort out what's going on, what the relationship is between the state of the American judiciary and the state of American democracy.

Will Hitchcock [00:01:39] Well, lucky for us, Siva, we have a great colleague, a brilliant mind right here in Charlottesville. She's a good friend and also the dean of the University of Virginia's Law School. I'm talking about Risa Goluboff, I might add. Risa is also the first woman to occupy the position of dean of the law school here. And she has taught and written widely on U.S. constitutional law, on civil rights and on the history of American jurisprudence. And not only that, she's also a fabulous co-host of her own podcast, Common Law. So check it out Risa a very warm welcome and thank you to you.

Risa Goluboff [00:02:14] Thank you. Will, thanks for that lovely introduction. It's great to be here with you and good to see you, Siva. I'm glad to be having this conversation.

Will Hitchcock [00:02:21] Well, recent let me just jump right in with the most recent news. Judge Amy Coney Barrett is President Trump's third appointment to the Supreme Court and of course, one of more than a couple hundred federal judges that he's appointed. If you could, just as we as we kind of kick things off, step back and give us a sense for what these appointments are likely to mean for the high court in particular and the federal judiciary more generally. Presidents often get a shot at appointing many judges there's nothing particularly unusual in that. But do you see any sort of trend lines or any any major takeaways about the direction that the courts have been going lately?

Risa Goluboff [00:03:00] Yeah. I do see some trend lines and they're trend lines that have been in place for a really long time, actually, since the late 1960s. The trend line has really been that Republican presidents have had many, many more appointments to the court than Democratic presidents. Just as a matter of when these things happen. They they don't happen on a schedule. Right. Appointments to the courts and the Supreme Court are lifetime appointments. So it all has to do with when people retire, when people die. And as it happens, it really has been a majority of Republican appointed justices since the Berger court. One caveat to this whole conversation is that, you know, we often talk about and I think a lot of our conversation today will be about the relationship between law and politics and the relationship between the court and the presidency and Congress. And in one way, to put this in a little better, larger context is that's not the only way to talk about the court. Right. Or the courts. And, you know, we have an ideal of the rule of law. We have an ideal that law is not politics, and that judges who are making decisions are not doing so on the basis of who appointed them or on the basis of some political commitments. But usually how we talk about it in popular discourse, and certainly if we are talking about the politics of the court and the nature of these political appointments, President Trump has really managed to make an enormous number of appointments that will change the complexion of not only the Supreme Court, but the lower federal courts and what those judges are likely to do. And when I say complexion, I mean, his appointments have been far less diverse than Obama. So, you know, who is being appointed to these courts as well as what their political or ideological appointments look like they've been until their moment of appointment, whatever they do with that afterwards, is certainly different than what Obama was looking at and looking for when he was appointing judges. But, you know, in legal discourse, I would say there are a lot of differences and some people talk about it that way and some don't. And people talk about it that way sometimes and not other times.

Will Hitchcock [00:04:58] You know, if I could just follow up with one question. You know, this has been a much on the minds of a lot of people just in the last few weeks. During the hearings following the announcement that President Trump wanted to nominate Judge Barrett for a position on the Supreme Court. You know she went through the hearings and there was this kind of, to people like me who don't really understand the history and the and the rules behind this, it looked a little bit like political theater. The Democrats ask critical questions that the judge didn't really answer and the Republicans threw her softballs. That didn't really seem like they were relevant at all. I mean, one senator asked her, who does the laundry in your household? Is this typical or is it reasonable for citizens to expect that the Senate play a substantive role in the advise and consent, you know, with respect to nominees and that the judges who are being considered for the court, that they answer those questions? Is that a reasonable expectation or look, is it just naive for us to expect that?

Risa Goluboff [00:05:56] Yes, I would say yes to that "or" question. All right. Yes, it's reasonable for there to be an expectation that the Senate's confirmation process is a real one, that the vetting that is done is substantive, that the Senate is not expected to be a rubber stamp. Right. It's meant to be a check and it's meant to play an important role. And, you know, yes, candidates for judicial appointments should be answering questions to the extent that they can. At the same time it is not new that this is a form of political theater. I don't think that's a departure from where we've been for quite some time. And, you know, the court, it does not have the power of the purse, right? It can't... There are times when in the course of its decisions, it orders people to pay things, but it can't enforce those on its own. And it doesn't have the power of any enforcement that's outside of, you know, the executive branch or Congress. So where the court's authority comes from is its legitimacy. And its legitimacy is based in its not being a political branch and it's not being a political

actor. And so all of the activity around the nomination process, around the way we talk about Republican appointed judges and Democratic appointees, judges around the confirmation process highlights the extent to which the court still is implicated by, part of, larger political processes. And so, you know, I think the appointee. Right. So Amy Coney Barrett - her goal is to seem judicial. Her goal is to, you know, articulate her approach to aside in cases that doesn't get into cases that might come before her. And that is not new. Right. That has been something that prior appointees have also tried to do. But it's always the case that the politics is creeping in all around and that the senators are often talking politics. And I think that what's new here is the politics are even more salient. And they're being made even more salient than they often are.

Siva Vaidhyanathan [00:07:53] I mean, to me, it seems like we're at a really fraught moment in terms of the legitimacy of the federal judiciary and the role and relationship between the legislative branch and the judicial branch. I mean, given the games that the Senate has played with confirmation over the past six years, seven, eight years, not just in terms of two Supreme Court vacancies, but multiple lower court positions also that were held open for a long time, delayed for a long time. And so it seems to me like we're at a point when we really have to think hard about what we want the role of our court to be and what we want the relationship to be between the legislative branch and the judicial branch. Right. It seems to me like the habits that we established long ago are no longer really working for us. It reminds me of the 1930s when you had this series of interlocking national emergencies, economic and political. You had an activist executive branch. You had an activist legislative branch trying to solve problems. And you had a very conservative judiciary knocking down many of the most bold and urgent legislative efforts to address problems. And it took 10, 20, 30, almost 40 years for the courts to change, to accept the level of governmental engagement that we saw in the 1960s. And, of course, for the past 30 years is a deep reaction to that. Do you think that we are at one of these inflection moments, a moment like the 1930s, where people might be in the mood to consider some pretty substantial changes?

Risa Goluboff [00:09:43] Well, so I guess I would describe the 30 through the 60s a little differently than you did. I think certainly it was a moment where the political branches were in deep conflict with the court. Right. As you say, during the New Deal, the president and Congress are passing all kinds of New Deal legislation to be responsive to the depression. And the court was striking down a fair bit of that legislation, at least through 1937, when then the justices themselves evolved in the way they were approaching these cases. And so then they started to uphold the New Deal legislation in the later years. And Roosevelt did get to appoint some new justices. But the way I would describe the relationship between that and the 60s, a little more complicated, I think. Right. So during the New Deal era, the justices were protecting a certain kind of individual rights when they were striking down this New Deal legislation. Among other things, they were also protecting the states. But they were protecting individual economic rights to contract and to be free of government regulation. And so one of the things that happens in the 30s is this kind of new approach that says, well, the legislature and the president should have a freer rein to do economic legislation, to intervene in the market and to provide social safety nets and all that kind of New Deal regulation that came out of the depression. But the individual rights that we associate with, say, the Warren Court and with what I would call it, the mid century liberal settlement - right the New Deal, Warren Court settlement - they don't come for a little bit longer after that. And they're a very different kind of individual rights than the court had been protecting earlier, the rights to racial equality, gender equality, privacy of various kinds. And and so, you know, it takes a while for this New Deal settlement, the idea that the government should stay out of economic issues but should intervene really to protect a

set of liberal individual rights. That that takes a while to get created. But then we end up back at the end of your question. Right. So by the late 1960s, the Warren Court has established these new, more liberal constitutional individual rights. And then right after that, right. Berger becomes the chief justice. And we're in a new era. And the Berger court is certainly more conservative than the Warren Court, but it continues to expand rights in a number of ways, especially when it comes to abortion. And when it comes to gender. So it's really the Berger court, not the Warren Court, that expands those kinds of rights. You know, the court, starting in the late 1960s, Nixon gets three appointments between 68 and 71. And the court moves further to the right. But I would say that since then, for the 60 years or so, since then, every time there are new appointees, with the exception of the two Clinton appointees and the two Obama appointees, every time there've been new appointees, it looks like the court is going to get more conservative. And it looks like those New Deal and Warren Court precedents are going to be overturned and somehow they haven't been. Now, one could say we're now at the moment where they will be. But just to give a little historical context, I do think we're we're at a new moment and I think things do look different. But liberals have been saying the sky is falling since the late 1960s and even into the last couple of terms of the Roberts court with Chief Justice Roberts for the last 15 years, we have seen, you know, Roe has not been overturned. Affirmative action has not been declared wholesale unconstitutional. The Affordable Care Act was upheld. LGBT rights have expanded. So there are a number of pieces that one would have expected to have changed already that haven't. And I think there are important questions to ask about, you know, why, given all of the Republican presidential appointees and the clear goals, jurisprudential goals of many of the justices, have we ended up in a place where much of the core of the mid century settlement is still intact.

Will Hitchcock [00:13:37] Well, as a liberal, I can say the sky is always falling. Things are always getting worse. No, that's but it's true that we always have a sense of hand-wringing and anxiety, sometimes justified. Perhaps not. But there is one area in which you have really marked out a lot of expertise in your written work, and that's in the area of civil rights and in particular vagrancy laws in the 60s. And I just wondered if you, thinking through your own work and then looking forward, do you have a sense for how, you know, recent appointments to the federal courts are likely to change protections for various minority groups? Do you anticipate change? Do you anticipate continuity? Where do you see sort of possible ruptures ahead and what's on your radar screen and in those areas?

Risa Goluboff [00:14:26] Yeah, I mean, I think there is likely to be change. And, you know, I think there are any number of areas both on the administrative law side and on the on the individual rights side, where we're likely to see more conservative outcomes. I think that's true in affirmative action. I think it's likely true in abortion. I think it's likely true in cases that are going to follow up on the LGBTQ rights cases that have been in the court lately. There's one coming up about adoptions and where there's a conflict between religion and sexual orientation rights. I think we're likely to see the court move more conservative in those cases, too. With my historian's hat on, I will say, you know, given where we are technologically, I think the world is just moving much more quickly. Social change is happening faster. Legal changes happening faster. So even separate and apart from who these particular justices are or what their political commitments are, you know, the speed at which the LGBTQ rights and marriage rights and also, you know, the Title seven ruling from last term, the speed at which the popular culture has changed. Survey data has changed the racial justice movement this summer. I mean, we're just in a place where change is happening much more quickly across the board, outside the courts. But, you know, one of the things that has always struck me about the court, if you ever go there, maybe post pandemic, if you haven't been before, built into the court's architecture

are turtles. There are pedestals with turtles in them. And at the gift shop, I don't know if this is still the case, but it used to be and I still own these mugs. They sell mugs with turtles on them and other items with turtles. And the mugs that I own say slow and steady. The pace of justice is slow and steady. Right. What the justices do is not follow the political winds, whether those be their own or those out in the country. You know what the justices do as law and the law evolves in an iterative, slow fashion. Case by case over time. And it is built into their architecture. Right. That that is how we think about what they do. That is how they think about what they do. And I think that's part of what we've seen. But I do think that this could be a moment for all the reasons that we've been talking about, where that might speed up and we might see more dramatic change more quickly.

Siva Vaidhyanathan [00:16:41] Well, Risa, I used to believe in the turtles. I used to have great faith in the turtle nature of American law and specifically of the federal courts. And I used to when I was much younger, look at the courts and see these very different people, although they all seem to be white men, with the exception of Sandra Day O'Connor for the longest time, and Justice Marshall, of course, but they seemed to have a commitment to incremental change, traditions of analysis. They seemed very unwilling to step out and make radical decisions or big break decisions. Now, of course, I'm talking about when I was most aware, the 1980s and 90s, but I have to say things changed for me and I lost a lot of faith in that process. I stopped believing in turtles in late 2000 with Bush versus Gore. And now we're looking at another presidential election that I guarantee you there are going to be 20, 50, 100 lawsuits about how late the polls were able to stay open or how votes will be counted or whose votes will not be counted. And when I look back on 2000, when I look back on Bush versus Gore, I see a radical break with any of that commitment to incrementalism and tradition. Again, am I wrong or am I am I reading Bush versus Gore differently, because ever since then, I've found it really hard to have faith in this system's own belief in itself.

Risa Goluboff [00:18:19] I think this goes back, Siva, to what you were saying about the New Deal. And so the scholarly and lawyerly movement that comes out of the New Deal is called legal realism. And the folks in that movement are making the argument that law is politics by other means and that we should pull the mask off the idea that the law is neutral, unbiased, turtle like, and gains its legitimacy from that place. So if that's the case, then you shouldn't be surprised by Bush v. Gore. Right. If that's what the court does is politics by other means. You know, I do when I teach by constitutional law students. And a lot of them are jaded like you and they say all the court is doing is politics. Why should we learn these doctrines? You know, I point out to them, and I think this is true, that in Bush versus Gore, there is an opinion and the justices don't say in that opinion, we're five Republicans and we choose the Republican guy. Right. They have to make arguments about the equal protection clause. Those arguments about the protection clause are then open for other cases in the future at the Supreme Court and at other levels of courts. And so, you know, I do think that there is independent value and constraint to what the justices actually write and what they commit themselves to. And it may not be that what the justices do completely aligns with your image of what a neutral, totally unbiased, legitimate court would do. But I think it's still the case that they are constrained by legal norms. They are constrained by having to offer reasoned decisions and decide and write down their reasoning in opinions that they are going to have to read again later. And obviously, they have different views. We've been talking a lot about precedent. They have different views toward precedent. But I think they do feel that what they say and those opinions has meaning and matters and matters not only to other people, but to themselves.

Siva Vaidhyathan [00:20:17] You know, as we look at the sheer number of judges that President Trump has been able to appoint in his four years in office. And we look at how different their view of the role of government should be in society compared to the people who are getting elected to office. We're going to see more and more of these conflicts going forth between the things that Congress wants to do to solve problems, to address climate change, to address the basic economic and health needs of society and the ideological commitments of so many of these new judges. So there's been a movement about how perhaps Congress should reassert its power and limit the jurisdiction of federal courts and actually proscribe the courts from executing their will in certain areas and therefore letting the legislature do what it has been elected to do. And this would, of course, strike a pretty strong blow at the tradition of judicial review, something that was never written into the Constitution in the first place. But everybody just sort of went along with, you know, 20 years after the after the republic started. So what do you think of this idea? What do you think of other similar movements to try to politically adjust to this flurry of judicial appointments?

Risa Goluboff [00:21:51] The central problem of constitutional democracy with judicial review is what gives the justices the legitimacy to strike down laws that have been democratically passed. Right. That's - we call it the counter majoritarian difficulty. Right. The judges are not elected. They are appointed. They have lifetime tenure. And so that creates what could be called the counter majoritarian difficulty. That they act in counter majoritarian ways when they strike down laws. And what justifies that? And there are a number of different answers to that question. So one answer is, that's what we like about them. Right? We want them not to be part of regular politics. We want them to be able to go back to Brown, to be able to stand up to political majorities in defense of political minorities or other kinds of minorities and defend them on constitutional grounds. Now, you may think we don't know which minorities get the defense. We don't know how to interpret the Constitution to provide that defense. Or you may think pragmatically they get it wrong more than they get it right so we don't want them to have that power. So that's one answer. Another answer is to say, well, actually, they're not so insulated from politics and that's part of what the appointment and nomination and confirmation process is all about, is that they should be politically accountable. And so when the president and the Senate are appointing them, they should be thinking about politics because they are ultimately accountable to the Democratic majority. And so that's actually appropriate. What you're seeing in the politics of their nominations, and you could say the same about the powers that the Constitution gives Congress to adjust the size of the court or the jurisdiction of the court or the compensation of the court. Right. That those are meant to be political checks on what the court does. Now, I think that given that they haven't been exercised in quite some time. There's always a question of constitutional norms versus constitutional power and authority. And I think that's the question that a lot of people are trying to wrestle with now. Right. What is the state of our constitutional norms? Which constitutional norm do we think are still in place? Have they been eroded? You know, would it be within the bounds of constitutional norms? And who gets to decide what constitutional norms are and who gets to call foul when they get eroded? Unlike constitutional law, constitutional norms are political. They're part of the public discourse. And so who gets to decide when they've been violated? I think is a really challenging question.

Siva Vaidhyathan [00:24:13] So, Risa, I've noticed something very interesting among by undergraduate's in just the past three years. A week doesn't go by without a very concerned student coming up to me and saying, I'm really interested in law school. What should I be looking at? What should I be reading? What classes should I be taking? Do

you think that right now, looking forward, 20, 30 years from now, law school offers students an avenue to make a difference in a way that perhaps it didn't seem so clear just a decade ago?

Risa Goluboff [00:24:48] Yes, of course, Siva! I mean, it's always seemed clear to me that that law school is the place to go to make a difference. But certainly law school enrollment and applications have been picking back up again in the last several years. And, you know, anecdotally - I don't know this to be true, I'm not sure, maybe one day there'll be some kind of longitudinal study that will show it to be true - but anecdotally, the year that it really picked up, and it sounds like this matches the timing you're describing, was the the year when the president limited immigration. And the lawyers were seen really on the front lines of protecting people and at the airports and really seen as heroes in a way that lawyers aren't often seen that way. Certainly, we are talking a lot and not just in this moment about this confirmation, but we are talking a lot all the time about the role of the courts and what law does in ways that I think are always true but that seemed to be more salient right now in bringing more students to law school. So I welcome their applications and I hope they'll choose UVA.

Will Hitchcock [00:25:49] They'd be very lucky to to come in to us to learn from you. Well, Risa Goluboff, thank you so much for joining us today on Democracy in Danger.

Risa Goluboff [00:25:57] Thanks so much for having me. Good to talk to you, Will. Good talk to you, Siva.

Will Hitchcock [00:26:09] Siva, one of the challenges that I think we all have as educators is that we want to model civil discourse. We want to embrace multiple perspectives, multiple voices. And look, I mean, we just as teachers in the classroom have to figure out the right vocabulary, the right methods to be inclusive, to invite multiple perspectives, to invite contradiction, but also to show that we're not just, you know, a sort of blank slate, that we, too, have views. And I think for judges who are put on the spot in hearings, this is a really difficult balance to strike. And the problem is that if you strike the balance too well, you can come off as evasive or inauthentic. It's a hard challenge.

Siva Vaidhyanathan [00:26:56] Well, look, you know, in order for our republic to work, we are going to have to find - maybe rediscover - ways to deliberate. And the legal world, the courtroom and the legal academy, they offer us models for deliberation. And that's what's really interesting about the culture of the law to me. Because in the rest of society, all of that seems to have fallen apart. You know, we just don't seem to be able to attach enough dignity to the opposition to take someone's position seriously and sincerely. So I'm really you know, I'm energized by our discussion with Risa because she still truly believes that she and her colleagues and her students and the judges she has worked with in the past offer a model forward for working through some of our most thorny problems. I would like to share her belief. I'm just not there right now.

Will Hitchcock [00:27:52] Well, so much of what we've looked at in this show over the course of the last of four months has highlighted the challenges to many of the central achievements of the law that now some of us feel are in jeopardy. On inequality, on the value of science in the public good, in voting rights we have taken a significant step backwards. In minority protections we have made great progress, and suddenly one has the sense of losing ground that you've already gained. But I agree with you about being fascinated by the legal mentality, the legal temperament that believes fundamentally the tools are there. We just have to figure out a way to work them together.

Siva Vaidhyanathan [00:28:30] Well, look, we've never before faced global climate change, global infectious diseases, the global flow of human beings and the frenetic nature of our media system. All of these things are happening at once. And I just don't know if our judicial traditions are up to what it's going to take for us to face this. I mean, if the next administration decides that there should be a national mandate for wearing facial coverings in public. How is that going to go down? That's going to be a really fascinating question. And lives are going to be at stake. Right? Things could get that extreme that our federal government might have to take actions that it has never seriously pondered before. And then we're going to have to see whether this tradition of judicial deliberation is up to the task.

Will Hitchcock [00:29:27] Yeah, if you're living in a world in which change happens at lightspeed, maybe the tortoise is not the model that you want.

Siva Vaidhyanathan [00:29:33] Yeah.

Siva Vaidhyanathan [00:29:40] That does it for this episode of Democracy in Danger. Next week, we're sticking with legal questions. We'll be joined by political scientist Elizabeth Cohen, and she will have a lot to say about America's brutal immigration system.

Elizabeth Cohen [00:29:54] The information that we've been given about the families that have been separated and not reunited suggests that those folks come mostly from the pilot program where records just really were not being kept.

Will Hitchcock [00:30:09] It's hard to believe it, folks, but we're getting close to the end of the season. If you're new to the show, make sure to go back and hear some of the great episodes on Trump's rhetoric on mass incarceration, voter suppression, fascist politics and much more.

Siva Vaidhyanathan [00:30:22] Or you can subscribe to the show or ever you get your podcasts, leave us some stars and drop us a review. There is no better way to get the word out.

Will Hitchcock [00:30:32] Democracy in Danger is produced by Robert Armengol with help from Jennifer Ludovici. Our interns are Kara Peters and Denzel Mitchell.

Siva Vaidhyanathan [00:30:40] Support comes from the University of Virginia's Democracy Initiative and from the College of Arts and Sciences. This show is a project of UVA's Deliberative Media Lab we're distributed by the Virginia Audio Collective. The podcast Network of WTJU Radio in Charlottesville. I'm Siva Vaidhyanathan.

Will Hitchcock [00:30:57] I just wanted to say I know it's been a long road for you as you recover from Covid, but it's great to hear that you're doing better.

Siva Vaidhyanathan [00:31:03] Thank you very much.

Will Hitchcock [00:31:04] I'm Will Hitchcock and we'll see you here next time.