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MIKE LIVERMORE: Welcome to the Free Range Podcast. I'm your host, Mike Livermore. This episode is sponsored by the Program on Law, Communities, and the Environment at the University of Virginia School of Law. With me today is Jed Purdy, a law professor at Duke and author of *After Nature-- A Politics for the Anthropocene*. As well as several other books, and the forthcoming *Two Cheers for Politics-- Why Democracy is Flawed, Frightening, and our Best Hope*. Jed, thanks for joining me today.

JED PURDY: Mike, thanks for having me on. It's good to talk with you.

MIKE LIVERMORE: So I thought we might get started just with the theme of your book and the theme of democracy and politics, and then maybe we could back our way into our shared interest in environmental law. So my first question for you is, what promoted or what prompted you to write this book focused on politics and democracy right now? What is it about our current political moment that inspired you to focus on these set of themes?

JED PURDY: An apt question. So like a lot of people, since 2016, 2015, I've had the feeling that in the decades I grew up in, late '80s, '90s, the aughts, Clinton and Obama years, we took democracy too much for granted. There was a standard political science view, that so-called consolidated democracies. Systems that had had several elections with peaceful transfers of power tended not to backslide that history was a little bit of a one-way ratchet.

And there was a larger view that if you had a society like ours-- high literacy rates, then seen as a secularizing-- I guess we are still seeming to secularize. Market's well ensconced. That you were more or less at the end of history, as the catchphrase went then. I think in the course of taking democracy for granted, we didn't think hard enough about what kinds of threats to it might be brewing. The ways that it could still be destabilized.

Or even whether we had really achieved it. There was also an assumption in those times that whatever exactly democracy was, and we probably didn't need to be too precise about it, it probably looked a lot like what we were doing around here, since we were the most consolidated of the consolidated democracies. All of that I think was the air and the water that we moved in when I was coming up. And I wanted to try to look behind those assumptions now that they seemed to be shaken.

I guess there were also super fast a couple of more specific scholarly trajectories. Wrote a couple of books on environmental politics. One more historical, the *After Nature*, the other more contemporary. And in both of them. I found myself, coming down in favor of what I called a democratic idea or principle and realized that I was also at the end, the edge of my ability to say what I thought that meant. And I felt I owed it to myself and anyone else who cared to think harder and further about it.

I'd say I came to exactly the same point with a scholarly network or community that I'm involved in, the law and political economy movement or project, which has been interested in trying to think about the relationship between state and the market politics and the economy by way of the law and has generally identified itself as pro-democracy but I think has not really said what we think that means. So I guess to wrap up super fast, the big general sense that things are in crisis and it might be good to think hard about them, which I think I share with a lot of people right now. And then a couple of more specific lines of work that pushed me to try to think harder about democracy.

**MIKE
LIVERMORE:**

Yeah. It all seems to be coming to a head at some level with respect to a lot of these themes. So one question that I have just, again, just bouncing off some of the ideas you just raised is, I remember when I was a little younger, when we were both a little younger, one of the big challenges if you cared about environmental policy or really a lot of different issues was apathy. Right, there was a lot of talk of apathy back in the 1990s. People weren't engaged. It was hard to get people involved.

You recall the Bush versus Gore election, there was this idea of, the parties are the same. It doesn't matter what happens with elections. All that kind of stuff. And that's definitely changed, right? There's a very clear distinction between the parties. People are really engaged in politics. I mean, for whatever his flaws, and they are many, Donald Trump has really activated a lot of people to be involved. Both his fans, many of whom were not particularly engaged, and people who are his opponents.

So I just wonder, it's interesting at some level that on the one hand during this period of time when there was a lot of faith in the end-of-history consolidated democracies market liberalism coupled with light-touch essentially regulation from a democratically accountable government, that that was the end state of human societies. It was also a time when people weren't paying that much attention to politics.

I think a lot of people are worried about the future of our democracy or about the future of the country. But they're also really, really, really engaged in politics. And I wonder if there's-- or at least more so than in the past-- I wonder if there's some relationship between these things where when we're feeling confident in democracy, we don't do democracy. And we're feeling less confident in democracy, we do more, we participate more in democratic life.

JED PURDY:

That's a great set of observations. I share in all of them. In terms of the last formulation, I guess maybe. I mean, here's something, a thought very close to that, I think. It may just be putting the same thought in different words. I see this time we're in right now as one where, on the one hand, left, right, and probably center-- actually center, definitely-- people have begun to ask much more of politics than in the long '90s-- maybe like 1989 through 2011, the financial crisis or something like that.

For a bunch of reasons. Basically because a bunch of things we rely on, it turns out, are not going to take care of themselves at all. Climate change is an obvious example. But economic inequality, financial markets and their crises and disruptions, the addiction epidemic and overdose epidemic, pandemics. We could go on. So whoever you are, wherever you are, you recognize that we need to-- more needs to be done of a kind that really needs a strong and directed state involvement.

On the other hand, our confidence to think we can get it done through politics and government is low. And maybe low for some good reasons, good reasons having to do with the constitutional barriers to legislation and getting anything done even before the Supreme Court gets involved. And also low because to be able to act on a big scale politically-- think about something like major climate policy-- you both need the institutions of government to be able to pass a law. And then you also need enough legitimacy and buy-in at a bunch of different levels that you can make it stick.

And the intensity of our, as they say, affective polarization, hating and fearing each other, is such that we may go further and further in this direction. That disloyalty to any institution that's run by the other side is a loyalty test for your side. And may be a way of capturing the paradox that we need more and we know we more from politics, but we have reason, a growing reason to doubt that we can get it, that we can do it.

Is in the last election, highest presidential election, highest turnout since 1900, about 90% of voters on both sides said they thought that if the other candidate won, there would be serious and lasting damage to the country. And so we can be mobilized in this very fiercely defensive kind of way. From both sides, it seems to look more like trying to stop disaster than trying to get something done in a more constructive sense.

MIKE LIVERMORE: Yeah. And one of the negative partisanship basically that you're describing that is really on overdrive conflicts with-- one of the themes that I think you draw in the book that is very important and probably underappreciated feature of democracy, and it's something that, again, I personally have just come-- I don't know if "to terms with" is the right idea, but it is this. That part of what democracy is all about or maybe the thing that democracy is all about is that we're going to disagree with each other.

And then a lot of times, you're not going to get what you want. Right? That there's this decision rule that we have in democracies, which is that majorities win. If you're in the majority, that's great. If you're not in the majority for a particular election or proposal, you're going to lose. And you're going to accept that you lose because you have a higher level commitment to democratic principles.

And there is something about that, I think, that conflicts with the idea, of the only reason I'm going to the polls is because I think if the other side wins, it's going to be a complete and utter disaster. I guess the question is, are people really willing to live with an outcome, even if they recognize that as a majority vote, if they really think that the country is-- it will be disastrous for the country, I mean, at some sense, should people accept the results of an election if they actually think it will be disastrous for the future of the nation?

JED PURDY: Right. Great way to put the issue. I'm inclined to, again, share your description and your sense that the issue, of course, is a very hard one. At some point, of course, there's a real question of political judgment about whether your loyalty lies to the institutions in place or to some higher principle if you genuinely believe that you're on a course to disaster.

I think we're in a situation where one of the most effective ways to raise a political movement, certainly to raise political money-- and the Trump campaign in a sense began as a marketing campaign and won its first election by accident and then became a vehicle for a bunch of different agendas, as it turned by mistake from a marketing campaign to a social movement that became a successful presidential run. That's parenthetical.

But I mention it because it is highlighted, because it's a paradigm of how you, in a sense, succeed in politics as a form of recruitment of people, energy, money, marketing, which is by persuading people that it's either you or the abyss that we've got to mobilize to stop a disaster. The famous Flight 92 election formulation on the Trumpist side about the 2016 election, that this was do or die then became the generalized sense all around in 2020, that this was do or die on both sides.

So in a way, yes, there's a real problem at the extreme of political judgment about what you do if you think the plane is going down. In some ways, all of our politics right now is about people thinking the plane is going down. Everyone thinking the plane is going down but disagreeing about which way is down.

And it's hard to go forward at that basis. To come back to your original point, I couldn't agree more. And it's one of the themes of the new book that, back when many of us halfway believed that there weren't really big questions in politics anymore, the big questions are pretty much settled.

And as you said, you just had to maintain electoral legitimacy for a light touch state that would regulate things in broadly the direction that history and reason indicated. So I think it became easy to think that, since democracy wasn't really about taking hard choices because we knew the answers to the big questions, it was like-- what was it? It was an ongoing conversation. It was a practice of shared exploration. There were a lot of conversational metaphors about what we were doing. The conversation that never ends.

One of the worst things you could say in some portions of the '90s about a certain kind of intervention was an argument stopper. You were like, don't do that. Don't stop the argument. Keep the argument going. That was the idea. And I think we're driven back now to seeing that, as you said, democracy really is a decision procedure. That is to say, it's really a mode of rule. It's a way of getting an answer to questions which are going to have to have an answer one way or another. And even not answering them is giving them an answer. Climate change is a paradigm again, but one of many.

And for that to work, people have to be willing to, just as you said, stand still for the result. And what we've just been saying about the way that our politics is specializing and giving people reasons to think that we're in an existential moment of partisan conflict all the time is that it's always generating reasons for people to think that they shouldn't stand still for the answer. And that is actually a self-immolating dynamic in a democracy, I think, if people are being mobilized on the view that the system itself might not be legitimate.

**MIKE
LIVERMORE:** Yeah, it is. And there's an element of a self-fulfilling prophecy, because if both sides feel like the other side won't give back power after the next election, then they have to preemptively hold on to power, right? It's like a first strike problem there. Which is really dangerous, actually. It's really dangerous.

Just on the, yeah, the conversation stopper point. So that's another theme that I found interesting. And I, again, I share some of the instincts. But I wanted to probe on this a little bit more, was that you referred to it in the book a couple of times as the politics as talk. And one thing I wasn't sure about to what extent you were referencing deliberative democracy as a model for democratic decision-making and a normative model for what democracy should be as opposed to the one that you're offering, which is more of a-- in a sense, it's an older style of thinking about what democracies are about.

That either it's majoritarian, or maybe if we're thinking mid-20th century is that you've got various groups in society, small interest groups. Big groups like labor or workers or whatever. And that we have a pluralistic society. We form coalitions amongst each other, and then we try to get a majority and then we use the organs of government to pursue our interests. And that was, in some sense, that view was, in some sense, supplanted or challenged by the deliberative democracy view.

Again, this is a normative vision that part of what we're trying to do is reason collectively together, arrive at joint decisions, listen to each other, be open-minded and amenable to changing our views and that kind of thing. Which there is a strong contrast between that deliberative model versus one that's really about interest group or interest negotiation, bargaining, coalition forming, and power. And so one, I guess that was just a question is, is that how you see yourself fitting into that other conversation that's been happening about democracy over the last several decades?

JED PURDY: That's great. So yes, I like the way you put it. Let's work backward from the deliberate democracy stuff. So I think, like most reasonable people, I think that the civic virtues of open-mindedness and the ability to listen and engage in good faith and give reasons are really important. And they're endangered right now.

And that some of the experiments in sustained large scale but human scale deliberation, that people like Jim Fishkin and a bunch of others have done the political scientist most recently at Stanford. So that's all awesome. However, there was always an equivocation in that world, especially in some of the more abstract political theorists, I think. Between saying that the practice of deliberation was a good one and tending to say that deliberation was actually the point and that would you get to the right answer if we deliberated together. That a certain form of deliberation could basically replace the crudeness of decisions.

Deliberations stood for a reason, and decision-making, mere voting, stood for what some philosophical traditions, including a long history of German thought, really going back to content earlier, would call the arbitrary will. Not reasoned, but simply deciding. So I think there was a tendency to talk down and want to get away from the aspect of democracy that is decision-making.

To come back to the argument stopping point, stopping the argument is actually the point. It doesn't succeed if it doesn't stop the argument. And then of course, you pick the argument up again. But it does at some point, stop. So I do think it's absolutely right to say the deliberative view supplanted the pluralist interest group view associated with among others the early work of the great and long lived Robert Dahl.

And I actually am sympathetic and I am sympathetic to an even earlier view that is more majoritarian. Persisted in the thought of E.E. Schneider, who was a great theorist of the political party. A couple of terrific books. *Party Government* is well known and has had a little bit of a revival. *The Semi-Sovereign People* is less well known and is a terrific little book. He made the point that interest group pluralism has a very strong class structure. That basically people with resources are the ones who are able to organize interest groups effectively.

And it's not only the public choice argument about highly focused interest groups and concentrated industries and so on. Being able to engage in capture politics effectively, which of course, is true. It's a broader skew of-- you could say it's more of the Thomas Piketty lens. Very broadly, those in society who have will have a lot more capacity to work interest group politics than those who have only their votes.

I think the vote is a great equalizer. And the majority decision is a great expression of political equality. And that there's a lot to be said for putting that image first in our thinking about democracy rather than being a little embarrassed by it as something crude, which I think has been the tendency and was the implication of some of the deliberate-- some tendencies in the deliberative democracy mood.

MIKE LIVERMORE: And just following on with that. I think one of the critiques that you hear of the deliberative democracy theory, say, as a normative theory of what democracy should look like, is that it has class implications as well, right? Who has the resources to participate as a deliberator in a, quote, unquote, "neutral forum" by virtue of education or talent or inclination? Some people are going to naturally have influence there at the expense of others. It has an elite of element to it, which might explain part of why elites found it attractive as a model of democracy.

JED PURDY: It's true. Because I'm sympathetic, to that I want to at least entertain the counterargument. As you know, there's a lot of effort to engineer procedures in deliberative democratic settings that will counteract charisma and the ways that charisma and rhetorical ability can track other kinds of social status. And I think it's worth observing that even at the limit, there's a view associated with this unfortunate term, "lottocracy," as in government by lottery.

That you can achieve a superior, indeed a more democratic form of political representation than through elections if you just get a random, literally random, but demographically representative random set of the population into a room with the right procedures, the decisions they come to will be more representative and almost a snapshot, a photographic sense, a mimetic sense, than an election will be. In part, because it's supposed to correct for all the systemic ways that we're not in the same position as out there in the real world citizens.

I'm skeptical of that for a bunch of different reasons, including, who watches the watchers? Who creates the systems that put everyone on the same footing? But also just because it is literally a departure from voting as the key thing in favor of the forms of representation that actually don't go through majority formation at all. I mention this because it's been very fashionable in political science and a certain very thinky, very abstract policy reform space. And I think it is as much as anything else, while it is interesting, it's an emblem of our continuing desire to get away from having to form majorities.

MIKE LIVERMORE: All right. I'm glad you brought it up. I actually had put that on my list of questions for you, because I was curious what you thought of the lottocracy idea. So it's interesting the who's going to watch the watchers point, right? I think in some sense what I see as a conflict potentially there is-- one can accept this or not, but I might be inclined to say it. Let's abstract away from [INAUDIBLE] so that the technical details, right?

And just to say, let's imagine we could come up with a representative sample and they voted. And it really would. I think there's a way to say that it really would very much more likely to reflect the preferences, right, of the entire political community, right, if they voted on a proposition. Should be whatever the proposition is. Should be passive. Should borrow money and spend it on schools or whatever it is. And that it's an up or down thing.

If what we mean by democracy is that we want that decision to reflect the aggregated preferences of all of the people in the political community, then there's an argument to me that the lottery representative sample would do a better job with that than voting, because there's always going to be a selected group of people who are going to vote. Not every single person's going to vote. And as a consequence of that, it's just going to distort the outcome. And will be less likely to reflect the aggregation of the preferences.

What's different about it, for me, is that it doesn't involve the act of voting by nearly anybody. Right, just a tiny little group of people. Rather than we all get in queues and we line up and we engage in this act of voting. So I was curious, just your thoughts on the relative importance of those two things. Actually reflecting the aggregated preferences versus the active voting. And I guess part of this, too, is-- and this is where the deliberative democracy people would come in-- is they would say when the regular-- when everybody is at least allowed to vote, there's going to be an inclination to at least go out and convince everybody rather than convince the smaller representative sample.

JED PURDY:

Yeah. Great. That's great. First, I'll start with I think the most distinctive thing to say in response to that. I really agree with you that the fact that most people don't vote and the strong lottocracy system, that it's not-- most people voting is not part of the pure form of the system actually matters a lot. I think the act of voting is important.

Yeah, I'm very sympathetic to a series of arguments that the historian of political thought Richard Tuck has made most recently in a set of Tanner Lectures a couple years ago. That we significantly undervalue voting in our "sophisticated," quote, unquote, ways of talking about it. In part because we're too beholden to the view that it's only the decisive vote that counts and that since most of us know rationally that we're not likely to cast the decisive vote, most of us are just throwing away time when we go to vote and it's a puzzle why people vote at all.

His view is that actually it's just as rational and historically the predominant view and pretty intuitive. Probably the intuition that a lot of people have. That if your vote is part of the set of votes that add up to the sufficient number that forms a majority, then you, in a sense, made the election happen. Not all by yourself. It's not the nature of an election if you would do it all by yourself.

But let's say there's a million vote difference and 30 million votes are cast. Now most of the people who voted in the majority are going to be in that efficacious set. And they did something. It's not just this one impossible to find needle in the haystack decisive voter who did something. So I actually think that's real, and it's not empty. I think it's the intuition a lot of people have. I think a lot of people do think that if they voted in Georgia for Joe Biden last time, they helped elect Joe Biden. It wasn't just one of them.

I think on the flip side, one of the most sympathetic-- the importance of translating aggregate preferences, I think one of the reasons that the lottocracy idea is sympathetic and attractive right now is that, politics and other respects, lawmaking is so stuck. And part of what's appealing about it is just the thought that you could get things on the agenda and even make things happen, depending how much power you're giving your citizen jury, your random legislature.

That can't go through in our broken lawmaking systems. I mean, that's absolutely real. A stronger majoritarian system that relied on voting would be a lot closer to getting something done than our-- being able to get things done than our Madisonian Rube Goldberg blocked-up system as well. So I think lottocracy and stronger democracy are two ways to a goal that almost any thoughtful person shares looking at this system right now.

So I wouldn't want to give that card exclusively to lottocracy. If you come down to a competition between lottocracy and a majoritarian system that works better, then I really do think the key thing becomes the fact that when you have parties and candidates and movements trying to persuade a majority of everybody, you get a different kind of mobilization, a different kind of argument. New issues may come on the table.

Without wanting to romanticize mass politics. It does have a creativity and a capacity for surprise that you will never get if you're just essentially refining your polling technology to find out where people are in a certain pre-political or pre-mobilized way. So lottocracy in a strong form tends to accurate representation of a polity that is in some ways also depoliticized, and that seems like it gives up with one hand a certain amount of what it gets with the other hand.

MIKE Yeah, that's really interesting. And just the surprise, the capacity for surprise, is very interesting. And so one way
LIVERMORE: to restate that maybe a little bit is that there's something creative about the act of politics. The lottocracy in some ways takes people's preferences essentially as fixed. And then maybe there's a little deliberation, but it's not as creative a process as-- and certainly it's not as collectively participatory as a process as a mass campaign.

And of course surprises can be good and bad.

[LAUGHS]

JED PURDY: They sure can. They sure can.

MIKE As we see in our politics. It's quite a ride, no matter no matter what. So maybe we can think of there's three
LIVERMORE: things that are the table, right, in terms of people's commitments. There's commitments to democracy. As you were mentioning, our Rube Goldberg Madisonian checks and balances separation of powers system. We could call that, say, US constitutional governance.

What amounts to the content of our Constitution is, of course, a controversial question. But there are certain things. Like there are two houses of the legislature, senates apportioned according to states. Various things that we all agree are part of our Constitution and do inhibit lawmaking. Or the translation of majoritarian preferences into law.

And then there's people's substantive commitments, right, to environmental quality or equal equality, criminal justice reform, women's rights. And these things can come in conflict. Right, democracy and our Constitution come into conflict. Our Constitution and our substantive commitments can come into conflict. Democracy and our substantive commitments can come into conflict.

And so, I think maybe, since we are both interested in environmental law, there do seem to be some pretty serious conflicts here on important issues like, say, climate change or protection of endangered species or ocean-- protecting the oceans, plastics. The wide range of issues that are really serious from an environmental perspective. And there's two ways to think about this. The inability or the difficulty that we've had in addressing a lot of these issues. Some even mundane things, like improving water quality from farm runoff.

One possibility, and I think this is what I get a little bit in that you don't really discuss these necessarily straightforwardly in the book, but one possibility, let's say, is that it's the constitutional governance. At least the way our Constitution is set up or the way that we interpret our Constitution now that's inhibiting our ability to deal with some of these things. And if we were to have more majoritarian institutions that were more democratic, we would be dealing with these things in a more straightforward fashion.

There is another possibility, which is that given people's preferences and beliefs, that actually-- say I have a substantive commitment to seriously address climate change, and that just conflicts with what a majority of people want. And I guess I'm curious just how you think about how to manage these different types of conflict. Because as we were talking earlier, part of what it means to believe in democracy is to accept that you're going to lose on some or many of your substantive things that you care about.

JED PURDY:

Yeah, totally. Again, that's really good. So we know what the Madisonian system plus our Supreme Court is now constituted looks like on this front, which is basically D-minus. And we don't what a system would look like in which elections had policy consequences and policy consequences had electoral consequences in a more direct and legible kind of feedback system, which I think is generally a good thing for politics. It's a good thing for giving people a sense of responsibility and capacity.

I think the fecklessness and irresponsibility of a lot of our politics and at least one of our parties, maybe 1 and 1/2 of our parties, around these issues and others is enabled at least in part by how poorly our system translates elections into results such that it can seem sensible to be nihilistic about the whole thing and actually assume on some level that, on the one hand, the election is there-- is about saving the country from the forces of evil, and on the other hand, nothing's going to really be different afterward, because nothing is going to get done. And people just have a bifocal sense that both are true.

So this is to say, when we look at the public we have, we have a public that's informed by an ongoing engagement not only with deep problems like the social media commodification of resentment and fear and all the kinds of systemic inequality that we've touched on, but also by engagement with the politics that constantly teaches the lesson that politics doesn't matter or doesn't work in a constructive way.

You'll know better than I do, Mike, and I unfortunately was on the phone with our benefits office this morning instead of looking at the latest polling information. But I think that the trend has been that people at least say that they want to do something about climate change, right? I mean, people are doing better in that nominal public opinion sense than our system is adding up to doing.

So this is all a way of saying that there are reasons to think that we'd at least get a better test of what people will stand still for or even mobilize for by way of the kind of climate transition that we need under a more robustly democratic system than either under the Madisonian system now or under a democratic system where-- what I'm trying to say is you just take a public that's been formed with all of the Madisonian dysfunctions and then immediately transfer it. That's I tend to think a worse public than a public that has some experience with a politics that's more functional at decision-making and generating results and generating useful feedback loops about policy and elections.

I think if one doesn't think that that's true, then we really are in a very bad spot. As you know, environmental thought has always had intermittent flirtations with the idea that these questions are so important and so hard to manage through politics. That we really need or it would be better to have them addressed through less accountable, in some formulations, even openly authoritarian systems. I think there's just no reason to think that that path is really-- it would really be open to us, even if there were reason to think that it could work on its own terms.

The very famous Learned Hand phrase about how a country that doesn't believe in liberty and the rule of law can't be saved by any constitution. I think a public that's really, really indifferent to the fate of future generations and the planet is one that no technocratic engineering will be able to save from itself. But I don't think we're there. And I think we would do better unleashing the public we have than going on in the crooked and high guardrails that we're working in.

MIKE

Well it's a little hard to imagine us doing worse at this point than the current system, to be honest.

LIVERMORE:

JED PURDY: Yeah, no, I mean, that's a better nutshell than I gave.

**MIKE
LIVERMORE:** It's an interesting thought. I mean, in some ways, if what we think is happening here is a technocratic approach or an insider elite approach, it's not working. And at the very least, perhaps worth giving more democratic institutions to try. I was curious to get your thoughts. Now that this is the most consequential Supreme Court term in our lifetimes-- I think that's probably fair to say, right? There's been a couple of important decisions, well, to say the least.

And I was curious to your thoughts on them in the vein of what we're talking about. The two maybe that I thought we might mention are that Dobbs decision. Obviously hugely consequential, overruling Roe v. Wade. And then the West Virginia v. EPA decision, which also received a fair amount of public attention, although not in the same magnitude. And that was a decision that made it much more difficult for EPA to regulate greenhouse gas emissions from stationary sources-- power plants, coal-fired power plants, and the like.

And really more generally endorsed a doctrine of much more skeptical review, let's say, towards actions by administrative agencies to address issues like climate change, but also in other venues. So the court, in both of those decisions, offers an argument essentially that, look, let's get these decisions out of elite institutions. And Dobbs says, look, the court never should have institutionalized this matter. It's better left to political bodies-- state legislatures in that case. And then West Virginia is the court is saying, we can't imagine that Congress intended to delegate such an important decision to an administrative agency. And so we think that this is really appropriately decided by the legislature.

And so I think the course formulation would be that these are going to be politics enhancing decisions. We're deconstitutionalizing, and we're de-administrative-- whatever the word is for administratizing these decisions where we're putting them back into more political bodies. Now of course, we can argue about how democratic those bodies are. But at least they're not the same kind of elite semi-insulated institutions as we see with courts and administrative agencies.

So I was curious to your take on that specific feature of these decisions. Do you buy that? Is there a way in which these decisions are politics enhancing? Because in the book, you are critical of the tendency amongst progressives to want to-- at least some progressives or folks in general-- to move decisions into elite institutions like courts and administrative agencies.

JED PURDY: Totally. That's a great set of questions because it's a hard set of questions. And Dobbs is a difficult decision for me to sit with for lots of reasons as it is for lots of people. But for me in particular, both have always been not only nominally, but in an activated, way strongly pro-choice in terms of what my family and I actually do out there in our small civic way. And also I think that the court should generally have a smaller footprint in the country's politics.

I tend to think they're in the ideal with a better-- well, actually, let me say the more general thing. I think all of the court's appeals to democracy and its transfer, nominal or actual, over to the political process are somewhat in bad faith because of the dysfunctions and misrepresentation and skewed representation in the institutions it's handing them off to. And to talk specifically about Dobbs first, to come back to it, I do think this is an issue where it would be appropriate and I would like to see the majority view at the national level as for other questions of basic rights. That is, I think that's the right scale on which to decide questions of basic rights prevail.

I would support the explicit institutionalization of an abortion right. And in the view I advance in the book, under a more democratic relation to the Constitution, we would actually have regular opportunities to consider adding to the fundamental law something like an explicit right to reproductive autonomy. So everyone recognizes, and liberal jurists have in many ways internalized, that there are problems with free-wheeling judicial interpretation of the concept of liberty. In fact, we came up with that idea in attacking the Lochner era, which is why anti-abortion justices have so often-- anti-Roe justices have so often invoked the progressive critiques of the Lochner court in attacking Roe.

So that would be a better world. I'm hoping now that the world we'll get to will be one in which despite the distortions of the Senate in particular and gerrymandering in Red states like North Carolina-- Purple states like North Wisconsin, et cetera, we may actually see national legislation in the next five years securing an abortion right in the same way that national legislation does most of the work in securing other important civil rights like anti-discrimination law. Much more important and constructive than the courts.

Having said all of that, I think in a system like ours where you're working in a third best rather than any of these first bests, I think with a precedent on the books like Roe and Casey, it's clearly with a strong substantive commitment to that. Right, you want the court to uphold it, and you want a court that will uphold it. And of course, that's what progressives have been fighting for and have lost in. And I think it's now both time to take that fight to politics and insist that actually it might well be decided on the national scale and not on the state scale.

And also to be thinking about what a constitutional politics would look like in which we wouldn't leave so many of these questions to the courts and we could actually take on even the content of the basic law ourselves and be talking not just about wanting to restore Roe through justices, but to restore Roe through majoritarian constitutional action. So that's one-- West Virginia. Man, I mean, it's in some ways a simpler version of the same point.

The court is of course plausible, and this is what they're trading on in the lead opinion, in saying that the natural vehicle for a grid transition would be a major act of legislation. And this is why for decades now, we've had major climate bills trying to drive an energy transition among other measures. But of course, in our whatever we're calling it, third best, it's very clear that saying that EPA can't act in the absence of that kind of legislation is to say that the status quo is going to stick around. Because it's precisely our Madisonian dysfunctions that are keeping the legislature from translating majority sentiment into action.

And so if the court is invoking democracy but pretending that a broken 18th century system amounts to democracy, with all the distortions of federalism and all the distortions of bicameralism, I just think it doesn't wash, especially when the issues they're choosing are the most vividly partisan conservative issues. If they want to get the court out of the business of protecting money in politics on a theory that's symmetrical with their view that Roe belongs to the people, then I'll be interested in the thought that they have at least have some sort of consistent, principled idea.

And a postscript on that. The major questions doctrine that they explicitly embrace in West Virginia is so subjective-- of course, what is and is not so big that Congress has to do it explicitly. But I think in some ways, it's subjective in a way that's endogenous to the kind of partisan polarization that we're already talking about. I mean, if climate change were such a hot button partisan question, hadn't been made into that by decades of political marketing on the right, it might be much more straightforward to say that-- to imagine, to accept that this is just a kind of natural extension of a rational management of the grid in light of new circumstances.

So the political consequences of the choice, the political majorness of it, so to speak, that's part of the major questions doctrine, the verbal formula for it, seems like it doesn't only permit, but positively invites and may even rely on kinds of motivated partisan reasoning. So yeah, it seems like a mess to me.

MIKE Yeah, no, that's a really interesting point about the endogenous nature of what constitutes a major question.

LIVERMORE: Even if we can imagine the court was-- the judges were doing this in some kind of neutral way. It's of course what we consider to be major or controversial is a social fact that is going to arise out of decisions that people make in politics. So that's a really interesting point.

So yeah. So one question that comes I think out of your responses there, which are very-- in a way, there's a lot of practicality to that, right? Which, given the current setup of the various legislatures and the way our political system works and campaign contributions and the like, the Court of course, is thinking about all of that in light of what decisions it decides to keep for itself and what decisions it decides to hand over to institutions that it has a pretty good idea of what those institutions are going to do or not do.

One just question more generally is, for folks who are lovers of democracy and who believe in politics and believe that politics can be a positive and creative generative force, what do we do given the reality of our fairly, as you say, broken 18th century system-- bicameral system, the Senate structure the way it is, various federalist institutions in place that really get in the way?

And as mentioned, part of the story is the extraordinary difficulty of changing the Constitution, right? And I think there are two tracks that one can think here is, well, I think most folks who are engaged in practical politics say, look, these are the institutions that we're stuck with, and we just have to work with them as best we can. So if that means moving decisions into agencies because that's where it's most likely to happen, that's what we have to do.

That's still political. That's still democratic in a sense. There's elections and so on, but maybe it's not our ideal. But we'll live with it, because that's what we have. Or we'll get this decision at the national level. Let's protect the states that are trying two good things in some other way. And it's just a matter of, yeah, there's democracy there, but it's filtered through these institutions that we just have to live with.

The other thought is, of course, big scale constitutional reform. Which, to be honest, I do have a very difficult time imagining as a practical matter. Although I do like to say nothing lasts forever. And I also have a very hard time imagining that we will not have had major change. 200, 500 years from now, of course things are going to be different. And so in any case, I just wanted to get your thoughts on, as a practical matter, as a lover of democracy and politics, what do you do given the fallen nature of our real institutions in the real world?

JED PURDY:

Yeah, great. So in some ways, I feel that if the book gets people posing the question in that way, it's already succeeded in a sense. If we can take seriously that we are in a system that isn't the apex of something called democracy at all but is profoundly and even dangerously limited in that way. And that we need to think in those terms, in terms of an alternative between second best institutional work and more basic kinds of constitutional politics.

Then I think moving on from that, of course in any moment or in any one person's thinking or commitments, it may be that those two are mutually exclusive. But they also needn't be. To some extent, parties and movements and so on can aim at both concurrently. You could actually think of the New Deal court packing crisis as one in which although it was this less radical institutional reform, in some ways, that won out. Because the court bent and allowed the Second New Deal wave of legislation to go through. It was because more basic, although not yet constitutionally textual change, was on the table.

So you can pursue multiple kinds of reform in parallel. And if you have a consistent picture of where you're trying to get and why, I think those are not necessarily in contradiction even though for any particular undertaking, they may be alternative strategies or tactics. So I think this has moved to the toughest nut.

It would be good to have a more serious engagement among people who broadly want to see government do more, who broadly think of themselves as some kind of progressive or pragmatic, progressive or pragmatic liberal, about the question whether we ought to be fighting over Article V, that is whether we ought to be fighting over the feature of the Constitution that makes it all but impossible to change, and whether explicit constitutional reform should be an aspect of reformist politics now. And if so, what that would even begin to look like.

I do think that as long as we don't think it's possible, it clearly won't happen. I think we would do well to know more than we do, more than I do actually about the nuts and bolts of how extraordinary kinds of explicit textual reform have happened before. Like taking the appointment of senators away from state legislatures, which was a change they actually had to get through state legislatures. And I do know that a lot of mobilization and a lot of voting people out was part of getting that amendment through. People thought it was possible to change the Constitution. They mobilized around it, and they got it done.

And I agree, it's hard to imagine in 100 years or 500 years, if we're lucky enough that this country is still an ongoing concern, and that is partly up to us now, it's hard to imagine there won't have been basic constitutional change. I think we don't begin the opening to that until people are willing to think of that as one of the directions in which we want to push. I want that alternative not to be something that belongs to the cranky right, not something that is seen as completely pie in the sky, but is something that progressives are actually-- reformists are actually actively working on.

And I think that looks both like trying genuinely to imagine what a strategy would look like that would change Article V through the terms of Article V itself, hard as that is to do. The Constitution has been amended that way before. In some ways, we don't quite know how hard it is to do now, because we stopped trying a long time ago and started looking to the courts again almost exclusively. But we do know it would be hard. We know it would be very hard.

Then there's the other question. Just to note the historical parallel. Basic changes in the Constitution have not always complied fully with the formal terms of the Constitution. The Constitution of 1787 and 1789 itself did not. And neither did the Reconstruction amendments, arguably-- arguably in some respects, because of the status of the former Confederate states basically under occupation at the time of ratification.

So if you agree with the founders like James Wilson and even with Madison in certain moments of the Federalist Papers, that for a national charter of fundamental law, it is national majorities that have the right to change it. Madison actually says this is clearly true. It's not true of our system because it's federal. Whether ours is as profoundly federal now as he presented it as being, especially after the Reconstruction amendments. Real open question.

Then you might say that there is actually a path forward to think about trying to build majorities for the idea that we're going to try to find a majoritarian path to a more majoritarian Constitution and hold something like a binding national vote on the question whether to amend Article V. I mean, what would that look like? It's a direct appeal to democracy. Principled, orderly, explicit, public.

But it says one of these rules is too archaic, too much in the way, and too out of whack with our current commitments. And we're going to try in the way that's most consistent with those commitments to change it. Again, openly, publicly. No leisure domain by an appeal to majorities. I think it's worth reformists thinking about the dangers and the benefits of a path like that, a democratic path to more democracy.

So this is all a long way of saying I think the questions are really hard. I certainly don't mean to say that the last thing I said would necessarily be a good idea. But I want people to be thinking in these terms. Saying we haven't really got democracy here yet, and we need to think in terms of trying to move toward a more democratic horizon, including in our relation to the Constitution itself.

MIKE
LIVERMORE: Well it's a fascinating idea. It's a fascinating thought experiment at the very least, and it's a wonderful book that you've written. A really important set of ideas that you're exploring here. So thanks so much for the book, and thanks so much for joining me today. It's been a really wonderful, fascinating conversation.

JED PURDY: Mike, what a pleasure to talk with you. Thanks so much for doing it.

[MUSIC PLAYING]