**Civics 101**

**Episode 9: OVERTURNING A SUPREME COURT RULING**

**Virginia Prescott:** [00:00:18] Hello I'm Virginia Prescott and this is Civics 101. A refresher course on how American democracy was designed and how it is practiced in the real world. We are so gratified by the response to the podcast so far and for all the questions that we've received many of you have asked about the function and powers of the Supreme Court that is the judicial branch. One of the three pillars of government. It's going to take a few episodes to really dig into the court and its decisions. But did they were specifically trying to answer whether and how Supreme Court decisions can be overturned. How did they get a challenge. Does any person organization or branch of government have the authority to change the established law of the land. Our guide to the nation's highest court is Linda Monk. She's a constitutional scholar a journalist and author of Users guides to the Constitution and to the Bill of Rights. She advised the PBS series constitutional USA with Peter Sagal and consulted on the Newseum in Washington D.C, Among other distinctions. Linda, so glad to have you with us on Civics 101.

**Linda Monk:** [00:01:21] Well thanks for inviting me and Civics 101. We can always use a refresher course all of us.

**Virginia Prescott:** [00:01:27] With that in mind we're starting with some basics. How is the Supreme Court laid out in the Constitution?

**Linda Monk:** [00:01:33] Well it's laid out in Article 3. There are seven articles in the original Constitution Article 3 is the judiciary and maybe no surprise it's the shortest article meaning the least words are given to them. In fact Alexander Hamilton, everybody's favorite Broadway musical star now, said that the judiciary was the least dangerous branch because they had neither force nor will but only judgment. So of all the branches of government they're the most dependent on We the people giving them the support that they need for the role of an independent judiciary.

**Virginia Prescott:** [00:02:12] Very short explanation of the Supreme Court how about required number of justices.

**Linda Monk:** [00:02:17] That too has changed throughout history, it's been as little as five as many as well close to 9 to 11 sometimes 10. It's varied by statute a court in Congress has the power under Article 3 to designate the number of justices it's not set forth in the constitution directly. And as you probably remember FDR during the New Deal had a very famous court packing plan and the people were in favor of his policies which the Supreme Court was striking down. But when he actually tried to change the number of courts the people rallied in favor of the court which was very surprising at the time. So it's a great example of where even when the president pushes back even a popular president if the president pushes too hard the people like this notion of an independent judiciary that is set up in the Constitution.

**Virginia Prescott:** [00:03:11] We do have these three branches of government the executive the legislative the judicial. Is it fair to say that the Supreme Court gets the final word for all of those three branches.

**Linda Monk:** [00:03:23] Well there is another avenue to that which is we the people. We may not be a specific branch of government but we are the first three words in the Constitution, we the people the United States, we have the ultimate power in the determination of what the Constitution means through constitutional amendment. So even the Supreme Court doesn't have the final word and we the people have in fact enacted constitutional amendments that overturned Supreme Court decisions. The Dredd Scott decision being the most notable which said that no African-American free or slave could ever be a citizen of the United States and in the 14th Amendment about ten years later we the people say all persons born or naturalized in the United States are citizens of the United States and the state in which they live.

**Virginia Prescott:** [00:04:16] A Supreme Court decision can be overturned by a constitutional amendment.

**Linda Monk:** [00:04:20] Yes.

**Virginia Prescott:** [00:04:20] how about just a new law? a legislature?

**Linda Monk:** [00:04:23] No. A legislature cannot overturn a Supreme Court decision that's based on the constitution. The Supreme Court also makes decisions that are based on statutes. That's the lower level of law that Congress passes. For instance the most recent one or one of the more recent ones had to do with equal pay a woman named Lilly Ledbetter was trying to get back pay for 20 years in which she was paid less than male cohorts. The Supreme Court ruled that under the law as it existed at the time she couldn't get all that back pay. Then Congress passed a new law. Guess what it was called the Lilly Ledbetter Act that enabled women going forward to be able to get all that backpay, so that was a Supreme Court decision that was based on an underlying statute that then Congress changed the statute to countermand how the Supreme Court had ruled about the interpretation of that statute. But once we get into the Constitution where we're talking about search and seizure or rights to gun control or a woman's privacy in her body any of those constitutional rights, the Supreme Court cites that in its decision. Congress can't override that because it's based on the constitution. The only thing that can override it is a constitutional amendment.

**Virginia Prescott:** [00:05:44] Can the Supreme Court overturn congressional legislation.

**Linda Monk:** [00:05:50] Oh absolutely that's their job one. If it conflicts with the Constitution, when that's what was really established in Marbury vs. Madison was that the court had the power to say what the law is and what they did in that decision was to strike down the Judiciary Act which had allowed a lot of these judges to be appointed and said that if you had a problem with that you could appeal directly to the Supreme Court. Whereas the Supreme Court is supposed to be an appellate court and only Congress can change the jurisdiction but still within what the Constitution did. And so the Supreme Court struck down that Judiciary Act because it expanded the court's jurisdiction contrary to what the Constitution said.

**Virginia Prescott:** [00:06:38] So can the Supreme Court overturn a previous Supreme Court's decision?

**Linda Monk:** [00:06:43] If it's based on the Constitution and not a statutory law.

**Virginia Prescott:** [00:06:47] OK. So what would an example be of that.

**Linda Monk:** [00:06:49] That's happened quite recently. Bowers versus Hardwick had established that state laws that outlawed sodomy and depending on your view, the listening audience you can find that on your Web site. But it was a law that applied to sexual conduct. Michael Hardwick had a criminal conviction because of that and the Supreme Court upheld that criminal law. Then later in Lawrence versus Texas Justice Kennedy on the court led the majority again 5 to 4 saying that such laws were unconstitutional. So and that happened within a period of about 10 to 15 years.

**Virginia Prescott:** [00:07:31] OK so how bout with the case of Dred Scott since the Dred Scott case was overturned by constitutional amendment.

**Linda Monk:** [00:07:37] And a Civil War. We can get that little part in there too.

**Virginia Prescott:** [00:07:40] There was that there was that that scuffle. So that ruling has never been officially overturned by the Supreme Court itself.

**Linda Monk:** [00:07:50] No it didn't have to be because a constitutional amendment came along. That's the highest form of authority is the Constitution. The Supreme Court supposed to interpret the Constitution. So when we the people pass a constitutional amendment that countermands a Supreme Court decision they have to obey that amendment. They have to obey the Constitution.

**Virginia Prescott:** [00:08:13] OK. So I really do admire your faith and we the people. But let's just dig into this idea that increasingly we the people's legislators are not necessarily acting on laws and many things are getting kicked up to the Supreme Court and therefore politicizing this judicial body that is supposed to be independent. Do you think that's a fair assessment.

**Linda Monk:** [00:08:35] Let me make a clarify about the people. I'm not saying we the people are always right. I'm saying that We The People always have the ultimate authority. Now in terms of the politicization of the court some people would say it's always been political and you can look back through it's history there. Usually people who disagree with what the court's are saying the court's political, people who agree with it saying they're following the Constitution. So you have to be careful about those terms too. But I would say this is the heart of your question, Congress doesn't want to take responsibility. That has always been true from the beginning of the republic. Congress in Article 1 has the most words given it. The framers thought that Congress was going to be the dominant branch of the U.S. government fully intended. By the framers vision the president has way too much power today. The people, their closest connection to government is through their elected leaders whether it's the House the Senate now or the president. And that's the most direct avenue that the people have is through their elected leaders and participating in nominations for Supreme Court justices.

**Virginia Prescott:** [00:09:48] If this is based on We the People's Voice and constitutional law and not politics then why did the appointees why did those nominated to the Supreme Court matter so much and divide so politically.

**Linda Monk:** [00:10:03] Well that's a good point and there are plenty of constitutional scholars who believe that that law is politics that it's just politics in a different realm and if you like me I don't think politics is a dirty word. Politics is our values. The problem is is that we disagree about those values and what the Constitution ultimately tries to do is say OK here are some core values. Most of them in our bill of rights that we don't think should be subject to a majority vote. And there are also structural guarantees in the Constitution that are not subject to a majority vote. For instance like the Emoluments Clause that people are upset about with President Trump that's in the Constitution it's not supposed to be up to what the majority thinks. So in terms of politicization of the court I think the people who are the most ideological who really care the most about their values understand that a Supreme Court appointment is really critical because they have life tenure. Now in 1787 that might be 10 or 15 years today it could be 30-35 years. That's a long time to have that kind of power. And in fact one of the leading constitutional amendments that proposes to limit the term of the Supreme Court to 15 years period and then perhaps there wouldn't be quite so much ideological debate about who gets the court see.

**Virginia Prescott:** [00:11:31] Linda Monk thank you so much for speaking with us.

**Linda Monk:** [00:11:33] Thank you.

**Virginia Prescott:** [00:11:35] Linda Monk she's a constitutional scholar, journalist, and author of The Words we live by: Your annotated guide to the Constitution and the Bill of Rights a user's guide. She was also series adviser on constitution USA with Peter Sagal. There's more on her at word of mouth radio org.