

Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American Government and offer contexts around the effects of government agencies in your everyday life. Now your hosts, Nia Rodgers, Public Affairs Librarian and Dr. John Aughenbaugh, Political Science Professor.

N. Rodgers: Hey, Aughie.

J. Aughenbaugh: Good morning, Nia. How are you?

N. Rodgers: I'm fine. How are you?

J. Aughenbaugh: I'm good.

N. Rodgers: So it occurs to me that I would really like to spend the summer not talking about COVID and COVID policies and that thing for the most part. So for listeners, I did ask Aughie this, and not just asking him cold now. But we talked about it and what we'd like to do is have the summer of SCOTUS. We'd like to talk about the Supreme Court in terms of the nuts and bolts of how it became important. That's what we're going to talk about today. Why you should care about the Supreme Court if you do, and if you don't, you should. Because it looks to me in the Constitution, so they're Article 3.

J. Aughenbaugh: Yes.

N. Rodgers: They're the article that got written right before everybody wanted to go home on a Friday. It feels like Friday at 3:30 in Philadelphia, it's 9,000 degrees in Independence Hall. Everybody's hot, everybody's tired, and Benjamin Franklin says, "Oh yeah, we probably ought to put in something about the courts." That's what it feels like to me.

J. Aughenbaugh: Yeah. I mean, in my classes, particularly the courts and politics class but also constitution law classes, we talk about how if you compare Article 3 of the Constitution to the preceding articles, Article 1 which deals with the legislative branch, Article 2, the executive, it really does look like the delegates at the Constitutional Convention treated the judicial branch as an afterthought.

N. Rodgers: Yeah, and those guys.

J. Aughenbaugh: Yeah. Even the notes that eventually got published that were written by James Madison, there wasn't very much discussion in those notes about the judicial branch.

N. Rodgers: Wait. There are notes about writing the Constitution?

J. Aughenbaugh: Yeah. Eventually, Madison made available the notes that he took during the Constitutional Convention. But they aren't extensive notes. It's not he was the secretary or it wasn't like he took minutes. These were his observations that when he had time, he went ahead and wrote about some of the conversation, some of the debate that went on during the constitutional convention.

N. Rodgers: That's fascinating.

J. Aughenbaugh: We'll try to get a link for you guys on a resources page for those. So what's fascinating is where we end up learning a lot about the judicial branch is once again in the Federalist papers. Those papers written by John Jay, James Madison, and Alexander Hamilton in defense of the proposed constitution. They had a pen name. They wrote as Publius. But we end up learning somewhat about the judicial branch in the Federalist Papers. But even after the Constitution was ratified, the judicial branch as an institution, it was not considered a co-equal branch, at least initially. So if you think about for instance, George Washington actually nominated people to serve on the Supreme Court and three or four of them rejected the nomination.

N. Rodgers: Can you imagine that now? Who would do that now?

J. Aughenbaugh: Yeah, right?

N. Rodgers: "Dr. Aughenbaugh, we'd like you to serve on the Supreme Court," and you're like, "Nah."

J. Aughenbaugh: No. Maybe in a couple of years.

N. Rodgers: I'm going fishing.

J. Aughenbaugh: Yeah. Get back to me in a couple of years when my daughter is a little bit older, I might be able to move to DC. But right now, I just can't pull it off. But thanks for the consideration. No, I mean, some people rejected it. The court, at least initially, had very little business. I try to remind students of this. Even after the Constitution got ratified and the United States Congress met for the first time, and we eventually built a White House so the President had someplace to live blah, blah, blah, the federal government was not the location of where government did work in the United States. At that point, most government work in the country was at the state and local level. There weren't a lot of legal disputes that were being appealed to the United States Supreme Court. The court had so little business that in its first few terms, they wrapped up business in less than a month. We had chief justices resign their position so they could go back home and run for governor.

N. Rodgers: One of the chief justices, wasn't he also the ambassador to France?

J. Aughenbaugh: Yes.

N. Rodgers: While he was being the chief justice.

J. Aughenbaugh: There wasn't any work to do. John Jay ended up becoming George Washington's go to person for negotiating with foreign countries, while he was chief justice.

N. Rodgers: Since you're not doing anything else, how about you pop over to France? Now, pop over to France at this time in history is what? A two week voyage?

J. Aughenbaugh: Oh, yeah.

N. Rodgers: Stay a month because hello, you're not going to just turn around and get back on the ship. Hangout with the French, do a bunch of stuff, then you come back. So you're talking a couple of months, at least, that you're gone and apparently that was not a problem.

J. Aughenbaugh: Please forgive me for belaboring the point. The Supreme Court had so very little work. The United States Congress required in the Judiciary Act of 1789 that the Supreme Court justices ride circuit. Meaning each one of the justices, when they were not hearing cases at the Supreme Court, had to go to one of the lower federal court circuits and hear cases. The practice was called riding circuit. The Justices hated it because they would actually have to go either by horseback or in carriage to these far flung locations where federal district courts were created to hear cases with lower federal court judges. They hated it. They were just like, "I'm a Supreme Court justice. I'd have to go where?"

N. Rodgers: Oh my gosh. Is this one of those instances where people thought that they were overpaid and they should work more?

J. Aughenbaugh: Oh yes.

N. Rodgers: Because you hear that all the time now about employees, federal government employees. Fat cat employees. They work next to no hours and they make good money and blah blah blah. So we've been saying that about federal employees.

J. Aughenbaugh: Since our country started.

N. Rodgers: For 250 years?

J. Aughenbaugh: Yes.

N. Rodgers: Awesome. It's good to know that we're progressive as a nation. So they were complaining about people's golf trips even back then.

J. Aughenbaugh: Yeah. Whatever the equivalent.

N. Rodgers: Whatever they were doing, it wasn't their job.

J. Aughenbaugh: That's right. Sure.

N. Rodgers: Okay. So the Twitter of their day, which would have been a newspaper, some of them were complaining, these guys are sitting around not doing anything and we're paying their salary. Blah-blah-blah.

J. Aughenbaugh: Yep.

N. Rodgers: They need to take a carriage out to Illinois and work on a case that they care nothing about with people they don't know and have no history with.

J. Aughenbaugh: Yeah. Some of the lower federal courts actually did not meet in courthouses.

N. Rodgers: So they were going to some guy's house.

J. Aughenbaugh: Usually places like churches.

N. Rodgers: Oh, please tell me bars.

J. Aughenbaugh: Yes, taverns.

N. Rodgers: I'm going down for my court case and then when I'm done, I'm going to have a beer or an ale or whatever.

J. Aughenbaugh: Yeah, I joke with my students.

N. Rodgers: In my case, pub fries and then come home.

J. Aughenbaugh: Yeah, I joke with my students. I'm like, "I don't know why the Supreme Court Justices hated this," because if I had the right circuit to a tavern, I mean, come on.

N. Rodgers: In cases, we do so much better if everybody could just have a little bit of beer during the case, right?

J. Aughenbaugh: That's what I'm thinking, right? You have a couple of adult refreshments. We're just like, "Okay, so what do you mean? You tell me you can't compromise here because I'm having drinks with you all, and you all seem to be pleasant individuals. Isn't there's some sort of middle ground here that we can achieve?" But nevertheless, as I tell students, if we think the Supreme Court, if we think the judicial branch is a coequal branch today, that was not the case for, basically, the first decade and a half of the country's existence. Where all of these changes, and this is where I know you want us to eventually get to.

N. Rodgers: Since I'm getting us here.

J. Aughenbaugh: Is the landmark case of Marbury versus Madison decided in 1803. Okay?

N. Rodgers: Okay.

J. Aughenbaugh: Now, most American school kids, college students are forced to learn that Marbury versus Madison was noteworthy because the Supreme Court asserted for itself the power of judicial review. We will get to the power of judicial review in just a moment. But what's fascinating about this case for both Nia and I is what led to the case in the first place.

N. Rodgers: Wait.

J. Aughenbaugh: Yeah.

N. Rodgers: My favorite thing that people forget because the modern system does not allow for this, is that back in the day you voted and whoever got the highest number of votes got the presidency, and then whoever got the second highest number of votes got the vice presidency.

J. Aughenbaugh: That's correct.

N. Rodgers: But now, we run them as a ticket so they're the same party. But back then, that's not the case, right? That's not how that works. So you could have a vice president who is diametrically opposed, and probably, often that happened because they would be running against each other as the Vice President versus the President of the United States. That's a big deal because it plays into a lot of this. Doesn't it play into a lot of this beginning hostility, as it were between the various presidents as they handed over presidencies from one to another? It's that sometimes you were handing it over to somebody who was wildly opposed to every single thing you ever did.

J. Aughenbaugh: Yeah. I mean, think about this. John Adams was our second President. His vice president was his main opponent in the presidential election.

N. Rodgers: How often did they have warm fireside chats?

J. Aughenbaugh: That vice president was Thomas Jefferson who runs against Adams. When Adams ran for reelection, Jefferson wins. So what we're talking about here is the presidential election of 1800. So I'm going to take a step back. The first thing to take note of here is, when Jefferson wins the presidential election, he represents a political party, the Democratic-Republican Party which eventually gets rid of the Republican Party; it just becomes the Democratic Party. It's the longest standing political party in the United States. It's always existed. Adams represented the Federalist Political Party. Not only did Jefferson win the presidential election in the fall of 1800, the Democrat-Republican Party swept both houses of Congress. But to your point, Nia, back then, before we get a future amendment to the United States Constitution, the President doesn't take office until March of the next year. So you had a lame duck President and a lame duck majority party in both houses of Congress who basically have roughly what, three-and-a-half months to do all kinds of cool things before they left office. That's what the Federalist Party did.

N. Rodgers: They took all of the Es out of all of the keyboards.

J. Aughenbaugh: This was before keyboard. Yes.

N. Rodgers: But I'm just saying, that's when you're like really? Okay.

J. Aughenbaugh: The Federalist Party basically went ahead and engaged in our nation's second court packing plan. The first one, by the way, was our first president. George Washington got to nominate every single judge in the judiciary because he was the first president.

N. Rodgers: But is that court packing? In court packing you're trying to shift it to a certain...

J. Aughenbaugh: But the standard definition of court packing is you as president are trying to go ahead and shape the work of the court through your nominations.

N. Rodgers: Did George Washington do that?

J. Aughenbaugh: No, Washington was in many ways remarkably either nonpartisan or bipartisan with his selection for Federal judges.

N. Rodgers: Okay.

J. Aughenbaugh: He frequently relied upon did he know or did somebody in his cabinet know the person he was considering.

N. Rodgers: Are they a decent person?

J. Aughenbaugh: If they'd done government service, did they have a prominent role in the American Revolution, etc?

N. Rodgers: Will they take the dang job? Which apparently also had to weigh in on President Washington's decisions. There's four months of we're going to go wild.

J. Aughenbaugh: Yeah. What the Federalists decided to do was, if we can't control the legislative or the executive branches, we're going to control the judicial branch.

N. Rodgers: Wait. So they're Federalists, and Jefferson is?

J. Aughenbaugh: A Democratic Republican.

N. Rodgers: So he's more states?

J. Aughenbaugh: Yes.

N. Rodgers: A weird thing now because that's not.

J. Aughenbaugh: That's correct.

N. Rodgers: That's a reversal of the current way that the big D, Democratic Party and the big R Republican Party, they've now reversed those positions.

J. Aughenbaugh: That's right.

N. Rodgers: The Jefferson would have been essentially a Republican.

J. Aughenbaugh: That's right.

N. Rodgers: Because he's more about states' rights.

J. Aughenbaugh: Yes.

N. Rodgers: Adams is basically saying no, government should be at the Federal or the Federal should be stronger.

J. Aughenbaugh: Yeah. Because most Federalists, whether it be John Adams, John Marshall, Alexander Hamilton believed that one of the deficiencies of the Articles of Confederation was it gave too much authority and sovereignty to states, and the states were hyper-competitive and that was hurting the country. So you needed to have a Federal government that could pass laws, pass regulations, create various policies that would unify the country.

N. Rodgers: Okay.

J. Aughenbaugh: But what they wanted to do in regards to the judiciary, what the Federals wanted to do with the judiciary wasn't about nation-building. It was power politics 101, which is we're no longer in control of the Congress, we're no longer in control the Presidency. Is there a branch of the Federal government that we could still be in control of after we lose our positions?

N. Rodgers: Look, there's this third article we stuck in the constant a few years ago, why don't we go with that one?

J. Aughenbaugh: Yes. So with the Judiciary Act of 1801, the outgoing Federalists in the Congress and in the White House created a whole bunch of new Federal judgeship positions and they nominated Federalists to fill them.

N. Rodgers: So they created positions.

J. Aughenbaugh: Yes.

N. Rodgers: What they did was just filling. Now, that to me is what I think of his court packing. Not only are you taking the empty spots.

J. Aughenbaugh: Yeah, the vacancy.

N. Rodgers: But you're making empty spots so that you can add more.

J. Aughenbaugh: That's right.

N. Rodgers: That's my thought about traditional court packing. I don't know whether it's going to be discussed in a later episode. Roosevelt wanted to do that.

J. Aughenbaugh: Yeah. He wanted to add new justices to the Supreme Court.

N. Rodgers: Supreme Court, 84 people and basically Congress said, "You can't do that or whatever." At this point, there's no one to tell them they can't do that.

J. Aughenbaugh: Yes, you are correct because in the constitution, in Article 1 the United States Congress gets to decide the number of Federal judges. The Supreme Court doesn't. There's no number associated with the number of justices that have to be on the Supreme Court. Congress gets to decide that.

N. Rodgers: As long as it's odd, they can have as many as they want.

J. Aughenbaugh: They don't even have to happen to be odd.

N. Rodgers: Well, except that then you get into the drama.

J. Aughenbaugh: Of tied votes. But nevertheless, the United States Congress tomorrow could go ahead and say, "We got a problem with the number 9. We're going to add a justice to the Supreme Court because we think 10 is a really cool number, and the Congress could."

N. Rodgers: It's very binary. We like the roundness of the zero and the straightness of the one.

J. Aughenbaugh: Yes.

N. Rodgers: We're going to have 10 because that's the kind of argument the Congress is making these days.

J. Aughenbaugh: Congress could draw upon numerology, the study of numbers. The number 9 isn't a good number. We want to go with 18.

N. Rodgers: Or if knock on wood, a couple of justice is passed away, they could say, "Well, we're down to seven. We're okay with seven. Seven is a good number."

J. Aughenbaugh: That's right.

N. Rodgers: We'll just leave it at seven and we won't appoint anybody else.

J. Aughenbaugh: That's right. Congress could do that.

N. Rodgers: I'm surprised that Congress hasn't done that to presidents if they don't like or it's choices they don't like.

J. Aughenbaugh: Occasionally, the Congress has played with the numbers to send a message to the court.

N. Rodgers: Don't be thinking you have a permanent job there buddy. Because we can make that number 7, and two of you all have to go someplace else. So if they're going to pack, does that mean that the legislature changed the number and gave them more spaces?

J. Aughenbaugh: Well, they didn't change the number of justices on the Supreme Court, they just created a whole bunch of new lower federal court judgeships and appointed federalists to fill them.

N. Rodgers: So Congress did that.

J. Aughenbaugh: Yes.

N. Rodgers: Over the influence of Adams.

J. Aughenbaugh: Yes, and John Adams happily signed the Judiciary Act of 1801.

N. Rodgers: I'm signing this because I'm going to be appointing a bunch of people.

J. Aughenbaugh: Well, also at this time, there was a vacancy on the Supreme Court. The vacancy was for a chief justice.

N. Rodgers: As we've discussed in other podcasts, nobody moves up, that's not how that works. It's not a seniority thing. You don't [inaudible] like, you've been around forever, you go be chief and then we'll appoint another justice. You get appointed as the chief even if there's a bunch of people who have been there for 100 years. As our current Supreme Court has been there for hundreds of years.

J. Aughenbaugh: Yeah. Technically, a president could pick a sitting justice to become chief justice. So for instance, Reagan picked William Rehnquist to replace Warren Burger as chief justice in the mid 1980s, but that's unusual. Because as we've discussed in a previous podcast, typically, presidents avoid picking a sitting justice to become the next chief justice because it tends to upset the other justices who got passed over.

N. Rodgers: Right. What am I? Chopped liver? I see you over there being favoritist.

J. Aughenbaugh: So Adams picks, to be the next chief justice, his Secretary of State, John Marshall. Now, where this becomes really important in the case of Marbury versus Madison is that in the Judiciary Act of 1801, once a person was nominated and confirmed by the United States Senate for a federal judgeship, the president had to sign the new judges commission, seal it, and then have the secretary of

state deliver the commission. For those of you who don't understand, basically, a commission is the job offer. But until you get the signed and sealed commission, you couldn't take your job as a federal judge.

N. Rodgers: Which, by the way, that's how jobs still work.

J. Aughenbaugh: That's right.

N. Rodgers: In the real world, you get the letter of offer, it's called an offer letter. You get the offer letter, you sign it, you send it back, they submit it, and then you can show up to work.

J. Aughenbaugh: That's right. Just because you had a phone call or just because you got an email saying, "Hey, we would like to offer you a job," until the actual offer is signed and sealed and sent back, you don't get to come to work.

N. Rodgers: So don't, and don't quit your previous job.

J. Aughenbaugh: Yeah, that's right.

N. Rodgers: Don't go in and do the mike drop thing on your boss that you've been wanting to do forever. Don't do that for a lot of reasons, but mainly don't do that until you absolutely have signed and gotten a contract back from your new employer. Because otherwise, you may find yourself sadly unemployed.

J. Aughenbaugh: Yes.

N. Rodgers: So commission in this day, and in this day and time, commission is on paper and written by somebody of the secretary's office, and then the president signs it, seals it, hands it to a dude who comes and finds you.

J. Aughenbaugh: In this case, the federal government is so small, it was actually the secretary of state.

N. Rodgers: I guess they're not doing anything else, so you might as well be a courier.

J. Aughenbaugh: But a lot of students get confused by this, they are like, "Wait a minute. The secretary of state, isn't that person that typically one of the nation's foreign policy experts?" I'm like, whoa, whoa, whoa, historically, the secretary of state was in charge of administration. Think about it here in the Commonwealth of Virginia, we actually have a commonwealth secretary of state whose significant responsibilities is administration, administration of the state of Virginia. That's the foundation of the position.

N. Rodgers: That's surprising to me. I didn't realize that. Because I was thinking in terms of, they're not off negotiating with North Korea about their nuclear weapons, so they can just take these commissions and run them off to somebody's house out in Virginia or whatever. But no, that person's job is to do that. Wait, who is the secretary of state right now? Adams'?

J. Aughenbaugh: Adams' secretary of state was John Marshall.

N. Rodgers: Who he had just appointed as the Supreme Court Chief Justice. So now Marshall has two jobs?

J. Aughenbaugh: He can't have two jobs. According to the US Constitution, once he gets nominated and confirmed by the Senate, he had to do what? Resign as secretary of state, and when he resigned as secretary of state, there were still a few commissions that had already been signed and sealed by President Adams, but had not been delivered.

N. Rodgers: That's what that is about. That makes sense. Because I was like, was he doing something else? So the answer is, yes, he was doing something else. He was off being the Supreme Court Chief Justice. What did he do? Did he just leave them on his desk and say, "Hey, somebody needs to get to that at some point?"

J. Aughenbaugh: He actually left them for the next presidential administration.

N. Rodgers: That seems naive, that he thought they would actually carry those out.

J. Aughenbaugh: We have 200 plus years of, shall we say, accumulated cynicism.

N. Rodgers: That's true. He would have expected that if the president's will had been, then somebody would do it and everything would be okay. That's true. Back then, they were a little more pollyanna than we are now.

J. Aughenbaugh: Maybe because they had fewer years of experience of where political parties would want to stick it to one another.

N. Rodgers: Lesser machinations.

J. Aughenbaugh: So the next presidential administration comes into office, the Jefferson administration. Jefferson appoints his good friend James Madison to be secretary of state.

N. Rodgers: Hence the Madison and Marbury?

J. Aughenbaugh: Yes. Madison says to President Jefferson, "Hey, what do you want me to do with these outstanding judicial commissions?"

N. Rodgers: I got a bunch of files on my desk and I'm not sure what.

J. Aughenbaugh: Jefferson, like any good democratic republican, was just like, "Wait a minute, the federalists tried to court pack. I'm not going to go ahead and help them do that. I'm ordering you to not deliver the commissions." One of the commissions that did not get delivered was?

N. Rodgers: Mr. Marbury.

J. Aughenbaugh: William Marbury.

N. Rodgers: Wait, let me ask a question about the commissions.

J. Aughenbaugh: Yes.

N. Rodgers: So the commissions, they knew they were getting that. There had already been a communication, obviously not by telephone, but there had been a communication with that individual saying, "Do you want this job? Will you accept this job at this pay? And the other person said, "Sure, I will do that."

J. Aughenbaugh: Well, think about it. That was going to occur when the Adams' administration reached out to William Marbury and everybody else and said, "Hey, do you want to be a federal judge? By the way, the pay is this, and the hiring committee, if you will, is the United States Senate. If the senate confirms you, will you take the job?" William Marbury is like, "Heck, yeah. I want to be a federal judge."

N. Rodgers: So he knew it was coming.

J. Aughenbaugh: Sure. Yes. The position that Marbury was supposed to receive was as a justice of the peace. Again, just like the secretary of state position, today, the justice of the peace is, shall we say, not as, how can I say it?

N. Rodgers: They marry people.

J. Aughenbaugh: Yeah.

N. Rodgers: I mean, they're not doing huge judicial decisions that are going to affect thousands of people, right? I mean, they are administrators.

J. Aughenbaugh: You've got the key word. The position of justice of the peace in the late 1700s, early 1800s, was more prestigious than it is today. Back then, the justice of the peace frequently ran a courthouse. Picked the staff at the courts docket.

N. Rodgers: They brought in lunch, so they got to decide what we were all eating.

J. Aughenbaugh: Okay.

N. Rodgers: I'm kidding.

J. Aughenbaugh: Like with any other federal judgeship position, it was tenured meaning you can only get removed three ways as a federal judge, you get impeached, you resign, or you die.

N. Rodgers: So basically, if I'm hearing what you're saying correctly, he would be in a position then to grant favors of jobs of like, "Oh, the courthouse needs to be painted, let me hire my favorite painter to come in and paint things." That kind of thing and he would have it forever barring doing something truly horrific.

J. Aughenbaugh: Justice [inaudible] you're correct, Nia. It was a huge patronage position. A lot of people would be, excuse the expression, sucking up to you because you were the justice of the peace.

N. Rodgers: Well, and locally you'd be that die. So if you stood up in a town meeting and you said, I believe, blah, blah, blah, blah, blah. It would carry at least some weight in terms of your influence in the community.

J. Aughenbaugh: Huge, huge. Now you can understand why William Marbury was so upset when the Jefferson administration said, "Hey, thanks for your interest, but we're not delivering the commission."

N. Rodgers: I would be hot. Listeners, I'm going to admit something terrible about myself so just bear with me. I count chickens before they're hatched. I would be dreaming of the things I could do, people I could influence, you know what I mean? I'm terrible about that sort of thing. With the stimulus check, I have the stimulus check spent way before I got that thing. I didn't spend it physically, but I had it mentally spent because I'm that kind of person. So if I was Marbury, I would already have plans in my head for the [inaudible] that I would try to make. Good or bad, that's just how some people are and then if he said to me, "Oh yeah psych." I'd be like, "oh no, you didn't. What on earth?" So basically he said, "Oh, no, you didn't," and he had a court case. I've never understood why he was so aggravated by that.

J. Aughenbaugh: Beyond it being a federal judgeship position-

N. Rodgers: Stature in the community. They took away his chance for stature in the community.

J. Aughenbaugh: Huge, huge. When students in my classes read the case facts, they're like, "Why was he all bent out of shape by becoming justice of the peace?" I'm like wow, wow, wow guys. It's not like the justice of the peace today who goes ahead and marries people on a Friday afternoon at the local courthouse. Justice of the peace back then was basically the head honcho of a court system.

N. Rodgers: Well, and also he was promised something. It's not his fault that Adams was trying to pack the court. He didn't say, "Oh yes pick me to help pack the courts." He was in good faith offered a job that he took and that he was expecting a certain salary and a certain prestige, and then was denied that because Jefferson wanted to be a big [inaudible] head and not do what the previous president had promised. That would not fly today. If Donald Trump tomorrow signed a whole bunch of offers, letters, well not tomorrow, because it would be closer to November. But you know what I mean. Like he [inaudible] all bunch people hires them in December and then the incoming president says, "Yes, psych, we're not having you to a bunch of middle-management." That would be that would be a reason to be peeved. I would think.

J. Aughenbaugh: Yeah.

N. Rodgers: You have personally embarrassment because he told people, you know that he said, "I got this offer and it's going to be fabulous. It's going to be great. I'm going to kick back and take names. You know he did that because hardly anybody is like, "Oh, I shall be secretive about my incredible awesome offer from whatever company." You know what I mean? If NASA call me tomorrow and said, "Would you like to be our librarian?" About 20 minutes later, every single person I know would know I'm going to be the space librarian even though they have librarians. But you know what I mean. Like the space-

J. Aughenbaugh: Oh yeah, I would be getting a text from you.

N. Rodgers: I'm joining the space forces their librarian. You'd be like, "What are you talking about?" Yeah, anyway.

J. Aughenbaugh: But then the case gets complicated in regards to the law and the constitution. Because the difficulty for Marbury is he was promised this job and under the Judiciary Act of 1801, because his commission had been signed and sealed, the last part was the Secretary of State should deliver it. But Madison was told by Jefferson not to. So Marbury, relying upon a different Judiciary Act, the Judiciary Act of 1789, files a request with the United States Supreme Court to give him relief. This gets a little technical, so please forgive me, but basically he filed a writ of mandamus. A writ of mandamus is basically a legal request that an individual makes of a court that would have the court force the government to do its job. Now, the reason why he submitted this writ to the United States Supreme Court was the Judiciary Act of 1789 said that, "Writs of mandamus should be served directly to the Supreme Court." Ie, the Supreme Court had original jurisdiction. So a good way to think about original jurisdiction, Nia, is it's like a trial court. It's the court that hears a case first. No other court need hear that case first. That's what original jurisdiction is. You have the authority as a court to hear the case first, ie original. So the Supreme Court gets this writ of mandamus. Now, as numerous constitutional scholars have pointed out, the court could have very easily said the following, "We don't have original jurisdiction to receive writs of mandamus so we're dismissing the case." But that's not what the Supreme Court did. The Supreme Court led by their new Chief Justice, John Marshall, says, "Yeah, let's take Marbury's writ of mandamus. Let's find out what's going on. Why didn't he get his commission to become a federal judge?"

N. Rodgers: That I was supposed to deliver but left for the next guy to deliver.

J. Aughenbaugh: Yes. So by today-

N. Rodgers: Why didn't you deliver this thing that I left on my desk with a note, "Please deliver?"

J. Aughenbaugh: By today's standards, Nia, John Marshall would have had to recuse himself.

N. Rodgers: I was going to say he should have recused himself, because theoretically he is part of the problem.

J. Aughenbaugh: Yes, he's the reason why the case starts in the first instance. Many of my students are just like, "Yeah, what was going on with Secretary of State John Marshall?" I said wow, wow, wow think about it guys. You just got nominated to become the Chief Justice and even though the Supreme Court wasn't considered all that important back then, you're John Marshall. You've been a lawyer most of your adult life. He may have had other things going on, ie as you just described, "Hey, guess what? I get to be the Chief Justice." You're going to worry about all those things on your desk at your previous job. No, you're already doing what? You're thinking about your next job. So he's already moved on.

N. Rodgers: He has a dog in the fight of he's a close friend of Adams, which would, I assume make him not a huge fan of TJ.

J. Aughenbaugh: Oh, John Marshall and Thomas Jefferson despised one another.

N. Rodgers: So I'm sure that another part of that was like, "Oh, no, no, no, no. Let me see how I can stick it to teach President TJ." I'm sure that that was part of it, was one you don't get to undo a previous presidents because that's a huge step to decide that you're going to disregard the clear decisions of a previous president.

J. Aughenbaugh: Yes.

N. Rodgers: That's huge, that's part of it. But part of it too, I'm sure was personal of, "Oh, really? You know what, I'm Supreme Court Justice. You can't do anything about that. So let's hear this case." That's what I would do. I'm so petty. I'd write a note personally to Thomas Jefferson saying, "We've decided to hear this case. [inaudible] xo, xo your sworn enemy. You know like [inaudible]."

J. Aughenbaugh: Well, but Nia, it gets even better. So the court takes the case and basically goes ahead and says to Marbury, "First, you do have a legal right to the commission."

N. Rodgers: That you were promised.

J. Aughenbaugh: You were promised. Second, the laws of the country give you a remedy. Third, sorry okay, that remedy is unconstitutional cause we don't have original jurisdiction in the constitution to accept your writ of mandamus. Sorry, William Marbury, you don't get your commission. That's judicial review because in two different instances in the case, the Supreme Court quite clearly said the courts have the authority to tell the political branches when they have violated the constitution, and that's basically what judicial review is. The Courts ability to go ahead and say to the political branches of government, you have violated the Constitution.

N. Rodgers: Right.

J. Aughenbaugh: Now, the first instance of judicial review in this case is when the court went ahead and said to Madison, just because your boss, the President, tells you to do something, you have to follow the

law because Article 2 of the Constitution says the executive branch has to take care to faithfully execute the law, and you did not.

N. Rodgers: Tell me that they had a buzzer and they [inaudible].

J. Aughenbaugh: No, they didn't, but it would have been so cool.

N. Rodgers: It wasn't [inaudible] Oh my God.

J. Aughenbaugh: But then the Supreme Court turns around and says, notwithstanding the fact that Marbury should have received the commission, and notwithstanding the fact that James Madison should have done his job per the law, we can't force the executive branch to give Marbury his commission because our jurisdiction in the Constitution does not include writs of mandamus. So sorry William Marbury. Now, you might be thinking, hey, Jefferson and Madison win the case. Well, they won the case, but look at what Marshall and the Supreme Court did, they declare for itself the authority to say to the political branches, you guys have crossed the line, we have the final word on the Constitution. Jefferson immediately figured out he got played by John Marshall in the Supreme Court.

N. Rodgers: Oh my God. Because in the long-term, it is significantly better to have judicial review than it is for Marbury to get his little commission. No offense to Marbury who is dead now, but I'm sure was a lovely man or not, but it was so much bigger than him because if Jefferson had protested and said, No, you do wait.

J. Aughenbaugh: If Jefferson went ahead and complained publicly that the Supreme Court declared for itself the power of judicial review, Jefferson would have been considered a sore winner. Think about it, he won the case. Nobody likes a sore winner, I mean, we really don't like sore losers, but Marshall.

N. Rodgers: We really don't like sore winners, we don't like them more than we don't like sore losers.

J. Aughenbaugh: That's right.

N. Rodgers: Losers have a reason to be pissed, but if you win Aughenbaugh, you just look like a double jerk. Come on, what more do you want the court to do? So if Marshall had given it to Marbury, he couldn't.

J. Aughenbaugh: Jefferson would have been able to say No judicial review. I mean, because it would allow Jefferson to go ahead and say the courts were being political. They were favoring the Federalist party, they were not ruling on principle. But because the Supreme Court went ahead and said, I mean, the Supreme Court basically took away from itself an authority, we can't hear in our original jurisdiction writs of mandamus. We are sacrificing for the good of the country. Oh yeah by the way, our sacrifices, we're also declaring the authority to say what the Constitution means, but don't focus on that. What Jefferson did because Jefferson went ahead and recognized immediately, he got played. He got played by his enemy John Marshall because Marshall went ahead and said, you guys can go off and do

whatever you do on a daily basis in the political branches, but if you do anything that violates the constitution, we get to slap you down. How do you like us now, right?

N. Rodgers: Yeah, you lose the battle to win the war, Marshall had the long view of that.

J. Aughenbaugh: Yes. Jefferson hated it [inaudible].

N. Rodgers: But do you think he knew at the beginning of the case?

J. Aughenbaugh: No.

N. Rodgers: Okay.

J. Aughenbaugh: No, the Jefferson administration view this as a straight up political battle. They were not going to go ahead and finish the dirty work of the party that they just kick their butts in the previous election.

N. Rodgers: So Marshall, I'm not trying to rile up people in Virginia who love T.J, but Marshall was a better lawyer.

J. Aughenbaugh: Oh, sure.

N. Rodgers: I mean, wasn't Thomas Jefferson also a lawyer?

J. Aughenbaugh: They were all lawyers.

N. Rodgers: Yeah that's true, they were all lawyers. What did this person do if they were a lawyer? I mean, you could just guess that 90 percent of the time and be right. They were a lawyer, a farmer, or a silver smith?

J. Aughenbaugh: Well, I mean, for many of them they consider themselves gentlemen lawyers, as in they occasionally practice law, but they were independently wealthy.

N. Rodgers: Wow gentlemen farmers as well. So what does Jefferson do? Is there anything he can do? Or is that now, I mean, he just accept oh, okay [inaudible]

J. Aughenbaugh: What Jefferson did.

N. Rodgers: Sorry go ahead.

J. Aughenbaugh: So the ruling gets handed down, Marbury and a handful of other Federalists who's commissions had been signed and sealed but not delivered, never got their Federal judgeships. Well, what then Jefferson did was have the Democratic Republican Congress, pass subsequent legislation that

would remove the Federal judgeships that were filled by Federalist, once those Federalists either retired or died.

N. Rodgers: So he basically took the four-year-old route of, I'm going to take my ball and go home.

J. Aughenbaugh: Yes.

N. Rodgers: So Thomas Jefferson was a little bit petty is what I'm hearing?

J. Aughenbaugh: Oh, hey.

N. Rodgers: I'm hearing that Marshall was incredibly devious.

J. Aughenbaugh: Oh, good Lord, yes.

N. Rodgers: You know what, that's actually incredibly brilliant though to look at the entire chess board and say, all right you can have my queen, but it's going to cost you, because from now on, you're going to be running. For the rest of your life, you're going to be running. Because the country now, everybody, when there is a law that people don't like, the first thing they say is there's going to be a lawsuit, and that the Supreme Court's going to judge on whether that's constitutional or not. We talk about the long arm of the law, more than 50 years later that's still the case.

J. Aughenbaugh: Yes. I'm glad you brought this around to why we are discussing Marbury versus Madison for this podcast episode. In John Marshall's majority opinion in Marbury versus Madison, he established, if you will, the logic that we still hear today, and so many of our legal, political disputes, which is the Supreme Court is in that folk warm position of saying whether or not something is, or not in violation of the Constitution. The Constitution ends up becoming or in the language of Marshall's majority opinion, he said, courts need to have traditional review or otherwise is a constitution the supreme law, or the supreme governing document of a nation?

N. Rodgers: Also, he's the supreme law of the land guy?

J. Aughenbaugh: Yes, he is.

N. Rodgers: Here is where we get that phrase.

J. Aughenbaugh: Yes because as he pointed out. By the way, Jefferson and the anti-Federalists and the Democratic Republican Party believed that the people's representatives should be able to determine whether or not the law is a manifestation of the people, or have the people already spoken in a governing document? Marshall comes down and says, well, if the Constitution isn't the supreme law, then it's no better, it should have no more weight, it shouldn't be given any more consideration than any law passed by a legislative body.

N. Rodgers: That's a terrible idea.

J. Aughenbaugh: Well see, that is his point.

N. Rodgers: Because laws are passed in the moment. They are passed in response usually to specific stimuli or a series of stimuli as opposed to an overarching document that upon which you hang your framework. Now, see, I love the Constitution more than I did a few minutes ago. Because even though I don't believe that we can suss out every thought that the founders had, which aggravates me when I hear constitutionalists, some of them say, "That's not what the founders would want." You don't know what the founders would want. If the founders existed right now, let's just make one example, we don't know what they would say about the president and Twitter, right?

J. Aughenbaugh: Yeah.

N. Rodgers: [inaudible] on all sides about that. We have no idea what they would say, but we do know what they thought was important, and we do know what they thought was important to enshrine in a particular document. I'm serious when I say that just makes me love the constitution more, because it is to me philosophically higher than what comes out of any legislative session, any one legislative session. Taken in [inaudible], it really is the supreme law of the land. It should be, because it should be a guide for generations.

J. Aughenbaugh: What are the overarching foundational principles that we're going to follow no matter what time we're living in, no matter what problems or issues we are dealing with? Not only was Marshall strategically thinking long-term, but he was also laying the foundation for why even today. I have people ask me this, I have students ask me this, "Why are we always saying let's wait for the Supreme Court to decide? I'm like, "Well, in part because we've created a system where an independent judiciary that isn't held accountable in elections or by the people get to set off to the side, if you will, and say, "Okay, wait a minute, if what we're doing right now, is it constitutional or not?"" It's like that person who's in a business meeting or an organizational meeting that goes ahead and says, "Okay, wait a minute here, before we get caught up in a particular response or in the moment, is this a good thing?" If nothing else, judicial review forces the people's elected representatives, they have to explain to nine people is this a good thing? Does this complying with our principles or values, etc? It was John Marshall in the Supreme Court that went ahead and said, "Yes. That's the job or the role of the courts."

N. Rodgers: Not to tell you what to write, but to tell you whether what you wrote was appropriate or not.

J. Aughenbaugh: That's right.

N. Rodgers: Then they don't tell you what to go fix. They're the worst possible editor because they mark through with red lines, but they don't tell you what's actually wrong with it. We know that's not true. They do tell you what's wrong with it in their opinions, but they don't tell you how to change it.

J. Aughenbaugh: That's right, and when the court has occasionally strayed into telling the political branches how to fix things, that's usually when the court gets severely criticized, right?

N. Rodgers: It should.

J. Aughenbaugh: Yeah. So for instance, right now in my Courts and Politics class, they are reading a book, David O'Brien's book about the Supreme Court called Storm Center, and he starts off the book, Nia, by talking about the Supreme Court's abortion jurisprudence, where the Supreme Court, starting with Roe v. Wade, declared that women have a right to choose, and it's founded on a privacy right. But one of the criticisms of the Roe v. Wade ruling, and in particular the majority opinion, is the majority opinion says, "Okay. There is a sliding scale to a woman's right to choose." That as a woman gets closer to the end of her pregnancy, a state government has more authority to regulate the right to choose. It's known as the trimester framework.

N. Rodgers: There's a [inaudible] scale, which they came up with out of whole cloth. It wasn't based on much knowledge.

J. Aughenbaugh: It reads like a law. It reads like a regulation, and even supporters of a woman's right to choose have historically said, "Yeah. That part of Justice Blackmun's majority opinion is extremely problematic because it reads like something a legislature would do."

N. Rodgers: Right, and it also reads with theoretical medical knowledge which he did not have. He was not a doctor, he is an attorney. It doesn't make him knowledgeable about everything, despite the way that most attorneys believe themselves to be knowledgeable about everything, because you know we weren't going to get out of this without at least one lawyer slam. But I agree with you, that when you read that, that's one of the problems I have with that particular ruling, is that it strays far beyond the right of privacy and the right of the things that they were trying to get at. I am so sorry.

J. Aughenbaugh: No, you make a really good point, Nia. So as we conclude this podcast episode, for those listeners who have often wondered what is the big deal or why should we pay attention to the United States Supreme Court? Well, most historians and most scholars will go back to Marbury versus Madison. If you've often wondered why you're forced to learn the case in a number of government classes or you hear people make reference to it all the time, well, before Marbury versus Madison, the Supreme Court institutionally was not considered a co-equal to the President or to the Congress. But after Marbury versus Madison ruling, all of a sudden the Supreme Court was just like, "Yes. We have a right to be at the adult table for holiday meals and this is what we bring to the table."

N. Rodgers: Yeah. You can keep the cranberry sauce, but in the long distance, I'm going to get all the mashed potatoes. TJ did not come out on the high end of that deal.

J. Aughenbaugh: No, he didn't. No.

N. Rodgers: It just goes to show that being the Supreme Court Chief is an extraordinarily important position, because 220 years later, that's still the accepted way that we do business. Which is why Supreme Court appointments are so important, and I know we're going to talk about that during the summer. But anyway, thank you so much for getting us started on our summer of SCOTUS. There were a

lot of details I didn't understand about why Marbury would've cared, and now I'm mad on his behalf and he's been dead for 200 years.

J. Aughenbaugh: Yeah.

N. Rodgers: I am feeling bad for him. I need to go put a candle at his grave site or something, because I feel really bad that he got shafted and then he got shafted again. But he also gave his position for a greater purpose. He probably didn't feel that way in his lifetime, but he also earned the infamy that he probably in some ways hoped he would get, because Marbury is the name that every law student, every person who studies poli-sci, they can all name him. Even when they can't name 10 other cases, they can name his.

J. Aughenbaugh: Yeah.

N. Rodgers: So thank you so much.

J. Aughenbaugh: Sure. No problem. Bye.

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