

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, Aughe.

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

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

J. Aughenbaugh: I'm good. Thank you.

N. Rodgers: We are beginning the fall with our normal traditional episode. Well, actually, no, that's not true. It's a new traditional episode of what is this SCOTUS up to now?

J. Aughenbaugh: This would be like the second annual.

N. Rodgers: Because last year we did the whole summer, and then we got tired, and so this year we decided to sum up. It's like in Princess Bride when he said, "Let me explain. No, there is too much, let me sum up." It was a big year, and there were lots of big decisions dropped, and then there were some that weren't dropped.

J. Aughenbaugh: Yeah. This was a very strange Supreme Court term because Nia, you are correct. The term that just concluded, which actually wrapped up on Thursday, July 1st, it was a little way. Usually the Supremes like to be done with their work by the end of June. The fact that it bled into the first day of July, the supreme court watchers were, "What's going on here with the Supremes?"

N. Rodgers: Do you think part of that was zooming with the slow down of not physically being together in the second part building?

J. Aughenbaugh: That could possibly be it. The other thing is, the Supreme Court had a very large April sitting. Basically, a Supreme Court term is divided by March. The court stops hearing cases in April, so they have enough time to actually decide the cases and then write the opinions. The April sitting had a large number of cases which could lead to the fact that it actually bled into July.

N. Rodgers: Okay.

J. Aughenbaugh: But in terms of the number of cases, that the Supreme Court didn't hear very many cases.

N. Rodgers: How many do they hear?

J. Aughenbaugh: They heard 66.

N. Rodgers: Okay.

J. Aughenbaugh: This is the second case.

N. Rodgers: Two-thirds of the devil's number?

J. Aughenbaugh: Yeah. Thank you very much. Again, if you add another six, okay.

N. Rodgers: Which is commonly done. We call it apocalypse and just move on.

J. Aughenbaugh: Yeah. We are definitely on the highway to hell.

N. Rodgers: Yeah. If they took 666 cases in a year.

J. Aughenbaugh: Whoop.

N. Rodgers: Court watchers would fall over.

J. Aughenbaugh: Yeah.

N. Rodgers: How would you even keep up with all that?

J. Aughenbaugh: John Roberts would be petitioning the Congress.

N. Rodgers: For much more Judges.

J. Aughenbaugh: Many more Judges and many more clerks.

N. Rodgers: He'd say, "I'm going to need the Supreme Court to be about 60 people and I'm going to need actually 61 because that's an odd number, and we need [inaudible 00:03:20] clerks, we're going to need a couple hundred new clerks.

J. Aughenbaugh: We also need three new buildings.

N. Rodgers: Right, and a really big cafeteria.

J. Aughenbaugh: Yeah. Right.

N. Rodgers: Okay.

J. Aughenbaugh: So 66 cases, which actually is the second fewest since the Civil War.

N. Rodgers: Really?

J. Aughenbaugh: Yeah. The term with the fewest was actually last year when the pandemic hit, because the court actually delayed, you may recall, delayed 10 cases from the 2019 term to this year's term. The 2020 term.

N. Rodgers: Okay. Because everybody was having it tough at the beginning of the pandemic.

J. Aughenbaugh: Oh sure, no doubt about it.

N. Rodgers: Figuring out your workload, figuring out how to do that from home.

J. Aughenbaugh: Yeah.

N. Rodgers: Figuring out how not to flush the toilet while you're on the call so that everybody hears it.

J. Aughenbaugh: Yeah. The supreme court listeners did go virtual. They use teleconferencing. They did not do Zoom. They did teleconferencing.

N. Rodgers: Would have been nice if they'd done zoom because we could have seen their cats.

J. Aughenbaugh: That is true and for our younger listeners. Teleconferencing is an old school virtual medium.

N. Rodgers: Yeah, where you shout into a telephone on your desk.

J. Aughenbaugh: Yes. Or if you're in a conference room, they had that big units. It looked like a saucer, like a spacecraft in the middle of a conference table, and everybody would start off with can you hear me?

N. Rodgers: Yeah. Which I have to say half the time I start talking and then somebody says, "You are on mute." It's a year and a half in and I still haven't gotten out of that habit. I feel like they were close, but they probably weren't close votes, were they? I always feel like they were close votes, but I think that's because the ones that are close votes make the news.

J. Aughenbaugh: Yes.

N. Rodgers: It was a 6-3 decision, and I'm assuming that you're about to burst all my bubbles by saying, "Well, actually Nia, the vast majority of them were."

J. Aughenbaugh: Well, you are correct. I'm going to take a needle to your balloon.

N. Rodgers: Pop as per normal.

J. Aughenbaugh: Yes. Of the 66 has decided this term, 43 were either decided 9-0, 8-1 or 7-2.

N. Rodgers: So not even close.

J. Aughenbaugh: Not even close. In fact, almost half, 29 out of the 66 were decided 9 to 0. That's the most unanimous case decisions in seven years.

N. Rodgers: In a world that talks in immediate situation, that talks about how partisan and divided, nobody in regular media is saying, "About 50 percent of the time it was 9-0, like they agreed completely on whatever it was." Or 43 out of 66 is two-thirds, so that's two-thirds of these things were not even close.

J. Aughenbaugh: Not even close.

N. Rodgers: You don't hear that. What you hear in the media is the decisions that were close and angry or split in some way that made people grumpy. But for the most part, J. Rob is getting agreement.

J. Aughenbaugh: Yeah.

N. Rodgers: We don't know how. We don't know if he's using guns or chocolate or sex or whatever to get his way.

J. Aughenbaugh: Yeah, again, for listeners, Nia, his favorite acronym for Chief Justice John Roberts is J. Rob.

N. Rodgers: Sorry, it's J. Rob.

J. Aughenbaugh: Which I find very daring again. But let's go ahead and explain our terms.

N. Rodgers: We should call him Chief Justice John Roberts.

J. Aughenbaugh: No.

N. Rodgers: Then we should say parentheses J. Rob.

J. Aughenbaugh: Yes.

N. Rodgers: So that people know who we're talking to, you're right. Thank you.

J. Aughenbaugh: It's like the former Justice, Ruth Bader Ginsburg.

N. Rodgers: RBG

J. Aughenbaugh: Yeah, the Notorious RBG.

N. Rodgers: Notorious RBG.

J. Aughenbaugh: Well, again, recall Nia in our previous podcasts discussions. The dominant approach for understanding judges and the work that they do in the political science discipline is the attitudinal model, and the attitudinal model assumes that you can track a judge's, if you will, votes over time, and that most judges can be placed on an ideological spectrum as either liberal or conservative, and that they will follow, if you will, the broad ideological preferences of the presidents who nominated them to serve on a particular court. While on this particular court, six of them were appointed by Republican presidents, three were appointed by Democratic presidents. The assumption of political scientists and the media expects that, if you will explanation, is that we should see a lot of 6-3, 5-4 votes on the Supreme Court.

N. Rodgers: But two-thirds, we didn't see that.

J. Aughenbaugh: We didn't see that. Part of the reason why, at least according to many constitutional law scholars, is that the Supreme Court, even on the most controversial cases this term, issued really narrow decisions. Really narrow decision.

N. Rodgers: They're not waiting into politics.

J. Aughenbaugh: They're not waiting into politics, they're not issuing bright line rules that will cover an area of the law. In many of these cases Nia, they answered the specific question that was posed and did no more.

N. Rodgers: I actually like that.

J. Aughenbaugh: Oh, sure.

N. Rodgers: I think if you can be really super specific, then each part of a law can be questioned individually, and the chunks that are disagreeable can be gotten rid of, whereas the chunks that are relatively agreeable can be kept. Speaking of agreeability, who was the most agreeable Justice this year?

J. Aughenbaugh: Well, the Justice who was in the majority of the most, was Justice Brett Kavanaugh. In 97 percent of the cases, he was in the majority.

N. Rodgers: Either, he's marvelous at picking winners or he is following the lead of his fellow justices while he gets his feet and figures out.

J. Aughenbaugh: Yeah, because he's been on a court for, this was his second full term. He's been on the court for roughly about two-and-a-half years.

N. Rodgers: Gorsuch is a one-year longer?

J. Aughenbaugh: Yes.

N. Rodgers: Coney Barrett is one-year shorter? She's the newest.

J. Aughenbaugh: Yeah, she's the newest. She was only on the court for roughly three-quarters of the term.

N. Rodgers: What are her numbers look like?

J. Aughenbaugh: She also was in the majority quite a bit of the time. Second-most.

N. Rodgers: [inaudible 00:11:40]

J. Aughenbaugh: Yes, the three justices that were in the majority the most, Kavanaugh at 97 percent, followed then by Chief Justice Roberts, and Justice Coney Barrett, 91 percent of the time.

N. Rodgers: Don't make waves. Figure things out before you start leaving out there with crazy opinions that are going to make you stand out and draw attention and all that other stuff.

J. Aughenbaugh: Listeners, if you go back to last summer, the summer of 2020 when Nia and I did an entire summer on the SCOTUS, in one of the podcast episodes, I made reference to a concept that scholars used for decades. It was called the freshman effect.

N. Rodgers: Yeah.

J. Aughenbaugh: Well into the 1970s and 1980s, most Supreme Court Justices, their first year, 2, 3 years on the court, they acted like freshmen in high school. They didn't want to be seen or heard while they got the lay of the land of their, if you will, new environment. Now, some of the more recent justices like Scalia, Sotomayor, Kagan, they got on the court and they were asked questions during oral arguments. They wrote these dissenting opinions that were like "Hey, the majority got it wrong." Neil Gorsuch was the same way.

N. Rodgers: I was going to say Neil Gorsuch has just started saying, "You know, Native Americans are people too and we should recognize their rights, dang it." He's been a real driver in part because he was a Western Judge. He came out of the west part of the United States.

J. Aughenbaugh: He came from Colorado.

N. Rodgers: He had heard a lot of those cases and was familiar with some of the injustices happening in the West.

J. Aughenbaugh: Gorsuch got on the court and in one of the first cases he participated in, he ended up writing a dissenting opinion that lectured the majority on separation of powers.

N. Rodgers: You got to admire that he just like, "Hey, y'all put me here for a reason. I've got work to do." Who is the least agreeable?

J. Aughenbaugh: The justice who was in the majority the least was Justice Sotomayor. She was in the majority only in 70 percent of the cases.

N. Rodgers: Okay. But still 70 percent?

J. Aughenbaugh: That's what I was going to say. Comparatively, in previous Supreme Court terms, you had some justices in the upper 50s. Again, this is a court that in most of the cases, you saw a lot of agreeability, a lot of agreement.

N. Rodgers: In part, is that because of what they choose to hear?

J. Aughenbaugh: Yes.

N. Rodgers: I mean, they can drive that by choosing to hear things where they all want to make a decision or they all want to see the lines clarified or drawn heavier or whatever.

J. Aughenbaugh: Let's face it, Nia. If the court takes non-controversial, politically, if you will, hot button cases, if they avoid those cases, they typically get more agreement. If you're taking cases about how to interpret a section of the federal government's tax code, there's not a lot of political divide.

N. Rodgers: There's not a lot of fighting. I really doubt that. That's never going to make the media,.

J. Aughenbaugh: Yeah, the media doesn't care.

N. Rodgers: The Economist probably wrote on it, and the Wall Street Journal probably wrote on it, and everybody else was like, who cares? It's tax law. It's not flashy. It's not something that's going to make the crawler on the bottom of CNN, it's not that stuff. Numbers-wise, who gave us the majority of opinions and the least number of opinions?

J. Aughenbaugh: The justice who wrote the majority opinions was Clarence Thomas. That is a little unusual but what is not unusual is of all the justices, Clarence Thomas wrote the most. I'm talking about majority concurring and dissenting opinions.

N. Rodgers: It's actually not surprising. He speaks the least and writes a lot quite often, doesn't he?

J. Aughenbaugh: Most Supreme Court terms, he is the justice who writes the most. Again, as I tell my students in my courts and politics class, you got to be careful with the way the media portray some of these justices because the media, historically, is like, "Clarence Thomas must not be very bright because he doesn't participate in oral arguments all that much." I said, "Well, he writes the most."

N. Rodgers: Sometimes they say he's not engaged. Clearly, he is. He's extremely opinionated and writes about it on a regular but he is engaged whatever else you may say about him.

J. Aughenbaugh: Also, if there was one Justice who really appreciated teleconference oral arguments, it was Clarence Thomas.

N. Rodgers: Right, he blossomed this year.

J. Aughenbaugh: Yeah and a lot of us are afraid that when the court goes back to in-person oral arguments, he's going to go back to not asking questions because he really liked the orderly process that Chief Justice Roberts imposed on the teleconference oral arguments.

N. Rodgers: Which they could impose in real life.

J. Aughenbaugh: They could, yeah.

N. Rodgers: Would be helpful, probably to more than just Justice Thomas. Who wrote the fewest?

J. Aughenbaugh: Justice Coney Barrett. She only wrote four majority opinions. In large part, that's because she did not begin to participate until after the election. She got confirmed by the Senate before the election but the Supreme Court had by and large already finished their October set of oral arguments. She missed an entire month of oral arguments and October is usually one of the heaviest months because the court returns the first Monday of October, and they typically hear at least two, if not three weeks of oral arguments in October.

N. Rodgers: Isn't that a name of a book, the First Monday in October?

J. Aughenbaugh: October, yeah.

N. Rodgers: I want to say that's the name of a book about the Supreme Court. Anyway, my favorite question stat of all; which lower court's butt did they kick the most?

J. Aughenbaugh: Once again, that honor goes to the Ninth Circuit Court of Appeals, which covers California, Arizona, Washington, Oregon, Alaska, and Hawaii. It's the largest federal court in the United States.

N. Rodgers: Honestly, it has something to do with the numbers. The bigger you are the more likely more of your cases are going to make it to the Supreme Court to be fought over.

J. Aughenbaugh: Yeah, just the sheer volume of appeals of Ninth Circuit Court rulings are presented to the Supreme Court. But the Supreme Court heard 16 appeals of Ninth Circuit Court rulings and they overturned 15 of the 16.

N. Rodgers: You have to admire that the Ninth Circuit keeps making rules, making law, keeps making judgments. Sorry, that's what I want, it keeps ruling even though they know they're going to get overturned if it gets to the Supreme Court. Also, we should keep in mind, and I'm not trying to be difficult about the Ninth Circuit, please, Ninth Circuit, I'm not making fun of you, but you are the most activist circuit in the nation. If some weird crap's going to go down, it's going to go down in the Ninth Circuit.

J. Aughenbaugh: That's the nature of the docket because you got to remember, California, just itself, is the largest state in the country.

N. Rodgers: Right. Most populous and the third largest, Alaska, Texas. It's either third or fourth after Montana.

J. Aughenbaugh: Right now, you have a state government in California that is very progressive. They do things out in California than in most of the states in the country.

N. Rodgers: Yeah, New York says, "We're liberal" and California says, "Hold my wine."

J. Aughenbaugh: Yeah.

N. Rodgers: Goes off to do a thing that you're like, "Oh, never mind. Okay, our bad. You're the most liberal. We were just kidding." It's also in part because of the nature of the West Coast, lots of individuals, lots of individualism.

J. Aughenbaugh: Yeah, you get a lot of political subcultures flourishing on the West Coast. I teach us in my public policy class. If you look at just the state of California, Nia, the far northern part of the state of California wants to secede from California and create the 51st state of Jefferson.

N. Rodgers: Which would be, by the way, a Republican stronghold.

J. Aughenbaugh: Yeah.

N. Rodgers: It's very conservative, which everybody's like, "Oh, there are no conservatives in California," but there are. They're all in one spot. There's a chunk of them.

J. Aughenbaugh: Then you've got parts of the state like San Francisco and Sacramento.

N. Rodgers: Ultra liberal.

J. Aughenbaugh: Then you got large chunks of LA that are like old-school democrat pluralism. Then you've got San Diego, which is moderate. But then if you go further east in California, where you get to the rural, agrarian parts of the State, it's like world conservative.

N. Rodgers: Right. Now you're back to conservative again. Northern is libertarian and Eastern is more traditional Republican conservative.

J. Aughenbaugh: Yeah. Where that you see in many rural parts of the United States, right?

N. Rodgers: Right.

J. Aughenbaugh: That's just one state.

N. Rodgers: Right.

J. Aughenbaugh: Think about, for instance, Oregon. The common perception of those of us in the East Coast of the United States is the state of Oregon is just filled with liberal tree hugger [inaudible 00:24:05]

N. Rodgers: [inaudible 00:24:11]

J. Aughenbaugh: Again, you get outside of Portland and the state of Oregon is very rural.

N. Rodgers: Right. If there's a 10 mile ring around Portland and there's a 10 mile ring around Salem and everything else.

J. Aughenbaugh: Again, it's very conservative.

N. Rodgers: Yeah.

J. Aughenbaugh: Then you've got Alaska.

N. Rodgers: Highly conservative.

J. Aughenbaugh: Highly conservative. Hawaii, on the other hand, is extremely democratic.

N. Rodgers: Right.

J. Aughenbaugh: Then you've got a state like Arizona that in the last couple of presidential elections, increasingly people are like, " Oh, is it a purple state now? Is it still Republican?"

N. Rodgers: Right. There's a ninth cover, Nevada?

J. Aughenbaugh: Yes.

N. Rodgers: Which is made up of 90 percent desert.

J. Aughenbaugh: Yeah.

N. Rodgers: Ninety percent desert, 10 percent city.

J. Aughenbaugh: Yes. According to political scientists, has a very individualistic political culture where the primary role of government is to help individuals, not the collective.

N. Rodgers: Right.

J. Aughenbaugh: Not the collective.

N. Rodgers: It's very not surprising that when that stuff comes to the Supremes, first of all, they have to untangle it all and then they have to figure out how it applies to the rest of us. It's not surprising to me that they would find in many cases that it does not apply to the rest of us and that they're trying to call down the Ninth Circuit and say could be in [inaudible 00:25:51] . Some of it too is slow down. It's not that they're saying this will never be a thing. It's that they're saying it's not a thing right now. There's the Supremes I think, have to balance that. They want to do the right thing, but they also don't want to be out ahead of American culture. Because when you do get out ahead of American culture, then you get fights that just never seem to get settled. I'm pointing to Roe v. Wade for that argument that was way ahead of where a lot of the United States was ready to be.

J. Aughenbaugh: Yeah, because when the Supreme Court issued Roe v. Wade in 1973, 10 states had already rolled back their prohibitions on abortion so that meant 40 out of 50 States had not. Even, for instance, an advocate for women's rights, like former Justice Ruth Bader Ginsburg had acknowledged in a number of public speeches. That the Supreme Court issuing Roe v. Wade was maybe a self-inflicted injury. Because the court issued a decision and then basically the rest of the country fell into two camps. Either pro-choice or pro-life. That's the thing about a court ruling. I mean, Nia, you and I have talked about this during recordings, but even when we haven't been recording. That's the thing about court rulings. There are winners and losers. There's very little incentive after the fact for those two parties to then want to achieve compromise.

N. Rodgers: Right.

J. Aughenbaugh: Winners have already won so they can basically go ahead and say to the losers, "na-na-na-na-na." Yeah, right? As far as the losers are concerned they can't let go. The judicial system screw them.

N. Rodgers: Right. People think that the current controversies over President Trump and theoretically stolen elections, by the way, the election was not stolen, it was perfectly fine. But those conspiracy theories are, it's that kind of thing. If they're imposed from the outside, then you never get complete agreement that it was a legitimate and fair and free elections, especially if somebody keeps complaining.

J. Aughenbaugh: In to your point about complaints about an election being stolen, this past week in the city of New York, they held the Democratic primary for the mayor's position.

N. Rodgers: Sorry, we're recording this in July.

J. Aughenbaugh: Yes.

N. Rodgers: You're not hearing it till late August.

J. Aughenbaugh: Late August, early September.

N. Rodgers: This happened a month ago, but bear with us.

J. Aughenbaugh: But to your point, Nia. The city of New York is going with a rank choice voting system now. So when voters in the city of New York go to vote, they pick their favorite, but then they can pick up to four additional candidates who they also like.

N. Rodgers: Right. They do it as a series. It drops the lowest two or three of the lowest, whatever until you get down to, okay, now it's between these two people, which one do you prefer?

J. Aughenbaugh: The problem is, the city of New York released the results, but they screwed up and they included test votes. That feeds a narrative that I would argue goes as far back as the 2000 presidential election, Bush versus Gore.

N. Rodgers: The system is rigged. It doesn't matter what I do, it doesn't matter whether I vote or not because my vote's not going to count because the system is rigged against the will of the people.

J. Aughenbaugh: That's right. Elites, if somehow got ahead and rig this, and we're seeing this. The difficulty for the Supreme Court is, on one hand they want to issue rulings so that people across the country know what is or is not constitutional, or what is or is not the meaning of a law passed by Congress. On the other hand, if they get too far out in front of the public, the court hurts its legitimacy. Right now, if there's one thing you can say about the Supreme Court led by John Roberts, Roberts wants the court to be viewed as legitimate.

N. Rodgers: It's his main goal? His main goal is to stay out of the fray, to stay above the fray?

J. Aughenbaugh: Yes.

N. Rodgers: In terms of the political machinations that happened in Washington or are perceived to happen in Washington, he does not want to be part of any of that.

J. Aughenbaugh: Yeah. He doesn't want the court to be viewed as yet another political institution. By the way, right now the court is the federal government institution with the highest public approval ratings. It's not even closely.

N. Rodgers: Yeah, but in fairness, Congress's rating is usually just above Ebola. Congress never has a high rating which I can't say that I disagree with in some instances.

J. Aughenbaugh: But if members of Congress were concerned about that.

N. Rodgers: You think they'd fix it?

J. Aughenbaugh: They could change their behavior.

N. Rodgers: Right.

J. Aughenbaugh: If Presidents were actually concerned about their approval ratings among the public, they could engage in behavior to change that.

N. Rodgers: Right.

J. Aughenbaugh: They know what that behavior typically should be. The court seems to be a good chunk of it at least. Please bear with me listeners. On the current Supreme Court, the perception was that it was going to be 6-3 Conservatives versus Liberals.

N. Rodgers: Right. That's what all the media told me.

J. Aughenbaugh: Republicans engaged in various tactics to make sure that Donald Trump got three nominees to the Supreme Court were basically.

N. Rodgers: Mitch McConnell.

J. Aughenbaugh: Mitch McConnell

N. Rodgers: I'm looking at you. But how's that working out for you Mitch because you said something to me not too long ago about it not actually being that.

J. Aughenbaugh: No. In fact, I and other constitutional law scholars at least just based on this most recent Supreme Court term, you could possibly argue that the court can be broken up into three camps or groups. You've got the solid Liberals, and when I say solid Liberal, you've heard me say this before, the ideological block on the court that in the last 20 years that has voted the most consistent has been the Liberals, and we saw it again this term.

N. Rodgers: That's?

J. Aughenbaugh: Breyer, Sotomayor, and Kagan. Those three were in agreement over 90 percent of the time.

N. Rodgers: Prior to Coney Barrett, RBG was in that category?

J. Aughenbaugh: Yes, and even with her, even with the number being four.

N. Rodgers: They stuck together. There's real much glue.

J. Aughenbaugh: Yes. Upper 80s, low 90s.

N. Rodgers: Okay. Are the other two kinds divided equally?

J. Aughenbaugh: Pretty much.

N. Rodgers: Okay.

J. Aughenbaugh: You've got the three hardcore conservatives, strict constructionist, originalist, textualists. You want to guess who they are?

N. Rodgers: Thomas?

J. Aughenbaugh: Yes.

N. Rodgers: Alito.

J. Aughenbaugh: Yes. Gorsuch.

N. Rodgers: Gorsuch. Really? Well that makes sense. Didn't he give back Oklahoma to one of the tribal nation because of his strict reading?

J. Aughenbaugh: For Gorsuch, it doesn't matter how the case comes out. The method in which the court settles a case is extremely important. In many ways he is like the way Scalia was.

N. Rodgers: I don't care what the answer is, I care what the method is.

J. Aughenbaugh: Yeah. The method is.

N. Rodgers: If either [inaudible 00:35:51] happens to agree with Sotomayor, that's fine with me. It's not about that, it's about how we arrive at making that decision.

J. Aughenbaugh: Yeah. I taught this case this past summer. Scalia was known as a huge free speech advocate. In the case of Texas versus Johnson from 1989, dealing with Johnson burning an American flag outside the Republican National Convention in 1984.

N. Rodgers: Because that's not inflammatory. I didn't mean that is it?

J. Aughenbaugh: Yeah, no pun intended. Thank you very much. But Scalia voted with a bunch of Liberals on the court and held that, that was protected speech. The state of Texas could not regulate the content of speech. Could not say, "This speech is cool, this speech is not cool."

N. Rodgers: This speech is defensive and so we're going to stop it. All those feature speech.

J. Aughenbaugh: Yes. As far as Scalia's concern, once the court determined that flag burning was expressive symbolic speech, then the first amendment kicks in, and Gorsuch is a lot like that.

N. Rodgers: That crowd basically believes in a textual reading of the constitution. The text says, blah, and that's what the text means. The text means blah. They don't interpret the text.

J. Aughenbaugh: No, they don't read into it. They don't go ahead and try to change the meaning, their thought is, "Okay, this is what was meant when the law or the constitution was written."

N. Rodgers: Okay. So that leaves us J Rob and the new kid.

J. Aughenbaugh: The two new kids, that's right. Again listeners, when we say kids.

N. Rodgers: We mean it kindly.

J. Aughenbaugh: Both Coney Barrett and Kavanaugh are in their 50s.

N. Rodgers: They are our age. We're just calling each other kids and we do mean it fondly by the way, we're not trying to be mean or nasty about that.

J. Aughenbaugh: But they're the new kids at the Supreme Court.

N. Rodgers: Right.

J. Aughenbaugh: But those three, they tend to sign onto opinions that are very minimalistic.

N. Rodgers: Don't mess with the law.

J. Aughenbaugh: You answer a specific question, and you move on.

N. Rodgers: You're not trying to change whole entire chunks of law, you're just trying to answer this question as best as possible.

J. Aughenbaugh: If a president needs to be changed, you don't overturn the whole previous ruling, you modify it.

N. Rodgers: That's interesting because one of the arguments that Liberals had with the last couple of justices was that they were going to say, they're going to overturn reverie way completely, and they're going to turn back time and blah, and what you're saying is those three people are unlikely to say, "We're going to throw out that entire ruling. " They're more likely to adjust or home the ruling?

J. Aughenbaugh: Yes.

N. Rodgers: Okay.

J. Aughenbaugh: Those three are frustrating both liberals and conservatives.

N. Rodgers: I'm sure because the conservatives are like, "Why aren't you more conservative and the liberals are like, "Why are you not more liberal?"

J. Aughenbaugh: For the liberals, they understand that if John Roberts is going to change constitutional law, he's going to do it slowly, piecemeal, incrementally. After this last Supreme Court term, it looks like he's got two other justices who are willing to sign onto his project, his approach. For the Liberals, they're like, this is going to be death by a thousand cuts.

N. Rodgers: It's excruciating.

J. Aughenbaugh: Whereas the conservatives, Justices, Thomas, Alito, and Gorsuch are like, "No, we answered the question correctly. We don't make small changes. If a precedent is wrong, we throw it out. If Congress wrote a poorly drafted law that is ambiguous, we just go ahead and say, Congress you wrote a poor law and this is our interpretation." Neither liberals or conservatives are all that happy with the Roberts three. In fact, you actually have some constitutional law scholars now. Again, this is tentative listeners because this is one term.

N. Rodgers: This is the beginning. Could be that next year they bust out a move and try to do something completely crazed. Well, J Rob won't, but he might lose history to the arch conservatives. He's probably not going to lose him to the arch liberals.

J. Aughenbaugh: Yeah, you're correct there. But I mean, if you think about it psychologically, Brett Kavanaugh, a lot of people didn't want him on the court and he's come on the court and he's not been nearly as bad as the liberals feared.

N. Rodgers: Well, the liberal media basically portrayed this as the sky is falling. It's the end of the court where we're going to see a huge turn in the court. For listeners, this is my view of how the courts work. Aughie will, I'm sure correct me if I'm wrong. But I think that some of the courts have just gone along. They've just gone along and done their business. Then some of the courts have been known for huge changes in like you get the courts in the '60s, which is the Warren Court, right?

J. Aughenbaugh: Yes.

N. Rodgers: Where you get enormous social change. You get the civil rights legislator rulings. You get all those kinds of things that actually change society, they make an enormous change in the movement of the ship. But a lot of courts don't do that. You get courts where you'll have certain court under a certain person and it just rolls along, making gentle changes to American culture and society without making big, enormous changes. I think that people in the media, at least it was portrayed as far as I recall as this

being an enormous swerve like the Warren Court, but in a conservative direction because this is going to go cut bluey. Everything that had been done up to now would be wiped out, and we would see regressive things going backwards as far as civil rights and social issues and those kinds of things. That just does not seem to have happened. Maybe it's because they haven't geared up. Maybe those two people are going to make a huge difference because they'll move but I don't know.

J. Aughenbaugh: You're right. Nia, we've had some periods in the history of the court where the court's rulings have transformed American society. The Warren Court of the 1950s and '60s is a good example. The Supreme Court at the turn of the 20th century that basically went ahead and said that federal regulations of the economy were unconstitutional. Those were big changes.

N. Rodgers: If the court of the '20s and '30s did, it did the reverse of the civil rights stuff.

J. Aughenbaugh: They really delayed, if you will, government getting involved in all parts of people's lives, general societal trends, etc. Again, political science research bears this out, Nia. Most of the time the Supreme Court is more congruent with public opinion than our elected officials in the political branches. It's because most of the justices, not just John Roberts, who seems to be acutely aware of the courts institutional, if you will, reputation and legitimacy but most of the justices are aware that the court's main power is the power of it being perceived as legitimate.

N. Rodgers: If we don't accept the court's rulings, that's the step right before a coup. That's the step where you have anarchy of, "Oh, there's nobody in charge." There's nobody who's decision is the final say in a thing. Once you've decided that's the case, that's right before the fall of your government. I would assume that that's a huge once your courts become illegitimate.

J. Aughenbaugh: To give you really good example of this; this past term in the case of California versus Texas. Texas and a number of other states filed a lawsuit arguing that the Affordable Care Act was no longer constitutional because the United States Congress had passed a law getting rid of the penalty for those Americans who did not have health insurance. This was another attempt to take down Obamacare and the court never even got to the constitutional question. Instead, the court said, Texas, the other states, and a couple individuals did not have standing. They could not show how they were injured, so therefore, we're not even looking at the constitutional question.

N. Rodgers: That's a deft way to manage not being involved in the political question of Obamacare.

J. Aughenbaugh: Yeah, because as public opinion polls have showed, even though many Americans don't like the Affordable Care Act, most Americans like parts of the Affordable Care Act. They've grown to rely on the wall on the policy.

N. Rodgers: Many Americans hate Obamacare and are okay with the Affordable Care Act?

J. Aughenbaugh: Yes, even though they are one and the same, they don't understand it.

N. Rodgers: Exactly, and that's pure politics. The court's reading that absolutely right in the sense of, "You know what? You're trying to force us into a political position and we're just not going to be forced."

J. Aughenbaugh: Or take for example, the Mahano case.

N. Rodgers: I hate to interrupt you, but I was wondering if we could visit trends in our second wrap up of the episode. I'm sorry to interrupt you but I know you have several trends that you want to talk about that have come out through the court.

J. Aughenbaugh: Yeah.

N. Rodgers: I think we'll go over time if we do that. If you don't mind terribly, and if listeners don't mind terribly will make this a two parter as we are known to do. We will come back and talk about trends because I also have questions about where you think it's going in the next couple of years as we see what's coming up before the court in the next docket. Is that okay with you, Aughie?

J. Aughenbaugh: Yeah, that sounds fun. Yeah, sound great.

N. Rodgers: Listeners will see you next episode for the trends for this court and wrap up our wrap up of the of the Supreme Court 2021 docket. Thanks.

J. Aughenbaugh: Thank you, Nia.

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