

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: Morning, Nia. How are you?

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

J. Aughenbaugh: Well, I'm excellent because once again we get to talk about one of my favorite subjects in political science, the United States Supreme Court.

N. Rodgers: Yes, and their last term. Thank you.

J. Aughenbaugh: Yeah. Their 2020-2021 term, which concluded on July 1st. Listeners in our previous podcast episode, we did a wrap-up of the term and where we finished that podcast episode, I was just commencing a discussion of what I see in terms of trends and where the court's potentially going to be going in its next term which actually begins on the first Monday of October.

N. Rodgers: I appreciate you letting me rather rudely interrupt you.

J. Aughenbaugh: Well, let's face it, Nia. Because you, unfortunately, have encountered this with me previously, once I start talking about the Supreme Court.

N. Rodgers: You love the Supreme Court.

J. Aughenbaugh: You might as well sit back, grab your favorite beverage and get comfortable because I might go on for hours.

N. Rodgers: It's always interesting to me. That's what's great is I learn stuff and it's interesting to me. I do think that we need to get you one of those license plates that's like SCOTUS Number 1 Fan or whatever.

J. Aughenbaugh: Yeah. A vanity plate, yes.

N. Rodgers: One of those fingers that you could go to the court and wave like the football fans have. But where we have left it was this discussion of the.

J. Aughenbaugh: Well, the Supreme Court this past term belied or undercut.

N. Rodgers: The star is falling.

J. Aughenbaugh: Yeah, the accepted wisdom conservative slot that the court would now finally engage in a conservative counter-revolution.

N. Rodgers: Thank you. That's exactly what I was going to say is, I was talking about the liberal media, but the media on the other side, I was like, we are going to have all the power. They're going to fix everything that's wrong with the United States, hence your Texas versus.

J. Aughenbaugh: California decision.

N. Rodgers: Where you get the ACA. They thought, now we've got our people on, we can get rid of this dang thing, and the court was like, I don't even want to talk to you about this.

J. Aughenbaugh: Well, because the court dispensed with the case on standing grounds, the Supreme Court basically said to the political branches, if you want to get rid of the Affordable Care Act, you're going to have to do the dirty work.

N. Rodgers: We're not going to be your bad guy.

J. Aughenbaugh: You're going to have to go ahead and tell 30 million-plus Americans, who have grown to rely on the Affordable Care Act, "Oh yeah, by the way, it doesn't exist anymore."

N. Rodgers: They also, and I'm not trying to be ugly here, but they also said to Texas, "Sit down, you don't get to keep bringing cases about other places and other stuff when you can't show injury." See now I'm hearkening back to the previous Texas case that annoyed the crap out of me, which is Texas saying that other states were running their elections incorrectly. Sit down Texas, just sit down. [inaudible 00:03:54] you can talk to me about the Affordable Care Act.

J. Aughenbaugh: Well, and again, it's a federalism issue too. Because the court's basically going ahead and saying to States, if you're going to go ahead and sue the federal government, you're going to have to show injury. Our federal system requires cooperation among the levels of government. If you're going to go ahead and take the step of suing another level of government in federal courts, well, you better have your ducks in a row. If you can't check off some basic boxes like, "were you injured", we don't have time for this. Again, this demonstrates, if you will, I think a larger theme that may play out over the next couple of years, Nia, which is, we have a bunch of justices who are acutely aware that partisans on both sides of the political aisle think that the court is another political branch who just wears funny clothes.

N. Rodgers: Can be made to do their bidding, and the court's like, no.

J. Aughenbaugh: No. Another example of this in my students and constitutional law we're very interested in this case was the Mahanoy School District versus BL. This was the case, Nia, where a woman in high school who didn't make the varsity cheerleading squad.

N. Rodgers: She had some choice things to say, didn't she? It was really funny when they were talking about that case, and they had to bleep every other word because she used the F word to say F cheer, F school, F something else. I can't remember. But she was basically.

J. Aughenbaugh: Yeah, she went on a Snapchat.

N. Rodgers: Let her opinions fly.

J. Aughenbaugh: Yeah. But she wasn't on-campus. She was, I think at a shopping mall and it was on a Saturday. She went and posted on Snapchat, and then she deleted the post. Unfortunately, some of her classmates went ahead, took screenshots.

N. Rodgers: First of all, missing the entire point of Snapchat, which is that it's supposed to not be that kind of everlasting forum.

J. Aughenbaugh: Yeah, it's not supposed to be a permanent record.

N. Rodgers: What are you doing hanging around on Snapchat ratting people out? What's wrong with you? Get a life.

J. Aughenbaugh: As I tell my daughter, don't be the snitch.

N. Rodgers: Right. Come on. Really? You know what it was. It was somebody on my cheer squad.

J. Aughenbaugh: Well, probably.

N. Rodgers: It was somebody on my cheer squad and she was like, "She said nasty things about us." Because man, if there's a group of people more likely to snitch on each other than cheerleaders, I'd like to know who they are.

J. Aughenbaugh: Well, think about it, I mean, cheer-leading squads, sports teams, you have a lot of downtime and the Cardi behavior, good Lord.

N. Rodgers: Mean girls.

J. Aughenbaugh: The school suspended her from extracurricular activities for a year.

N. Rodgers: Not just the cheer squad.

J. Aughenbaugh: All extracurricular activities.

N. Rodgers: Which is not cool.

J. Aughenbaugh: The case goes to the Supreme court. In the court, in an eight to one ruling, ruled in favor of the young woman. But Justice Breyer's majority opinion was so vague and so case-specific, that, many of us who teach constitution were like, " Okay. So what can't schools regulate in regard to speech?" Because what Breyer said was, "Schools and courts have to take a look at specific case facts." If you're at school and you're trying to come up with a policy, you have some difficulty. If you're a student and you want to engage in speech, you're still probably not all that sure, "Well if I do this on campus, can I get into trouble? But if I do it off-campus, what about school policies in regards to bullying?" Because increasingly a lot of the bullying that goes on occurs on social media. But it was a rather fact specific ruling and eight of the justices signed off on this approach. Eight of them did.

N. Rodgers: In part because that is a huge can of worms to open.

J. Aughenbaugh: Yeah.

N. Rodgers: What right does the school have to monitor your social media and punish you if you say things about the school or about other individuals, but you're not doing it on school grounds. It's one thing back in the day love those many thousands of years ago when dinosaurs roamed the earth and you and I were in high school where the most contact you had with people was at school. If you got into a fight with somebody at school, if you said something terrible, it was on their grounds and they did have a legitimate reason to be involved in your free speech. But when you're at home or at the mall or wherever I'm surprised even people go to the mall anymore, but wherever, and you say something about your school, should they have the right to? It's a complicated question and I'm sure the Supremes, were like, "If we open this can of worms, this is going to be crazy."

J. Aughenbaugh: Yeah, because the court has held in a series of previous rulings that schools have a legitimate government interest in providing a safe educational, if you will, environment. That they haven't interests in minimizing disruption to that environment. But this school could not even demonstrate that it produced a disruption. Because again, the student in question almost immediately got rid of the posts. She deleted them.

N. Rodgers: It's not like she was matching outside the school anti cheer, whatever, saying things which would have been disruptive.

J. Aughenbaugh: What ended up being disruptive was the school's punishment.

N. Rodgers: Because then it divided people about whether that was fair or not.

J. Aughenbaugh: But they know Breyer's majority opinion, just drove constitutional law scholars bankers because we're like.

N. Rodgers: What does it mean?

J. Aughenbaugh: How does the First Amendment apply in school in this new context generated by social media? But it's a really good example of many of the rulings that we've seen on the Roberts court.

Normally this past Supreme Court term, but the last couple of years. Again, Nia, going back to the previous podcast episode, if you're liberals and you're afraid the sky was going to fall, well, if the sky is going to fall, it's going to happen in a very slow.

N. Rodgers: Incrementally. It's going to be the worst possible death because the sky is falling, but it's falling like a quarter inch at a time.

J. Aughenbaugh: You're going to be able to view it measurably.

N. Rodgers: Well, but if you're an arch conservative, you're also annoyed. Keep it going let's move, move, move and it's not happening, It's happening in incremental.

J. Aughenbaugh: Why are we engaged in a 50-year process to roll back the Warren Courts Liberal civil rights revolution when every time we get a solid majority of "conservatives on the court", they don't produce for us. They don't give us the broad change that we want. You can't say this about the Roberts court. If you believe in a robust First Amendment, this court is all about the First Amendment. Students speech in the case that we just mentioned, free exercise of religion.

N. Rodgers: That's the California can't tell you you can't go to church during a pandemic.

J. Aughenbaugh: Yeah, you had a series of a pandemic shadow docket case rule, but also the Fulton case Vs. Philadelphia.

N. Rodgers: What is the case?

J. Aughenbaugh: That was the case where the city Philadelphia had created a regulation that prohibited organizations to participate in their foster child program. If the organization discriminated against LGBTQ plus potential parents and Catholic child services were told by the city of Philadelphia that because you view marriage as between a man and a woman and will not place foster kids with same-sex couples, you can no longer participate in our foster child program. The case went to the Supreme Court and the court ruled against Philadelphia's prohibition. But again, Nia, Chief Justice Robert's majority opinion was so narrow that it basically put off the question of whether or not people can use free exercise of religion rights to avoid laws that don't allow you to discriminate against LGBTQ plus individuals.

N. Rodgers: It's a plus for religious,

J. Aughenbaugh: Okay.

N. Rodgers: Expression because the Catholics were saying, "We religiously do not believe that this is okay."

J. Aughenbaugh: Yeah. Because basically what the court said in this case was Philadelphia was.

N. Rodgers: We can't keep the Catholics from participating because they're Catholic.

J. Aughenbaugh: Yeah. Because it was generally open to all other foster organizations.

N. Rodgers: They were discriminating against the Catholic Church.

J. Aughenbaugh: Yes.

N. Rodgers: Because if it's religious and I assume any other religion that had similar religious qualms concerning the LGBTQIA community?

J. Aughenbaugh: Yes.

N. Rodgers: But it's not really upheld the LGBTQIA part though. Preventing the religious.

J. Aughenbaugh: Yeah. They didn't think through the bigger question. Okay?

N. Rodgers: Right. Which is should LGBTQIA people be allowed to foster children?

J. Aughenbaugh: No, no, no, no. The bigger question is, can religious groups or religious, for instance, own businesses.

N. Rodgers: Discriminate against.

J. Aughenbaugh: Avoid anti discrimination laws because of religious belief? The court basically punted on that question yet again.

N. Rodgers: Which is not surprising because that is a labyrinth question.

J. Aughenbaugh: Yeah, because and again, this follows a trend on the Roberts court because three years ago in the Masterpiece Cakeshop case, the court basically said Colorado mistreated or didn't give a fair hearing, to the guy who owned the cake shop, who was unwilling to go ahead and bake cakes for same-sex couples, for their marriages. Their wedding ceremony. The court twice has had the opportunity to address that constitutional conflict, right?

N. Rodgers: Right.

J. Aughenbaugh: The rights of certain groups versus rights of other groups. The court has gone ahead and walk that very narrow path. Very narrow path.

N. Rodgers: Do you think that in future they're going to have to answer that question?

J. Aughenbaugh: Yeah. I mean,

N. Rodgers: I mean, it seems to me that at some point that question is going to come up in a way that they're not going to be able to avoid saying you cannot discriminate against, based on people's sexual orientation like that. Or they're going to say, "yes you can there's a religious exception to discrimination laws".

J. Aughenbaugh: Basically, the courts got three choices with that conflict. You mentioned two of them. Either they go ahead and say, okay, generally applicable laws don't give religious groups a free pass. Or they say, the First Amendment does give these groups a free pass from complying with those laws. Or the third choice is they basically go ahead and say to the political branches, you come up with a compromise.

N. Rodgers: Right.

J. Aughenbaugh: Because if you don't, one of you or both of you is not going to like the rulings.

N. Rodgers: Right.

J. Aughenbaugh: Okay.

N. Rodgers: You all need to state what you mean.

J. Aughenbaugh: Yes.

N. Rodgers: Clearly so that laws can then be written accordingly. I'm intrigued by your other First Amendment positive trend thing that you brought up.

J. Aughenbaugh: Oh, obviously rights.

N. Rodgers: Yeah.

J. Aughenbaugh: Obviously rights of interest groups.

N. Rodgers: Because you would think that people who contextually read the constitution would say, "there's no right to privacy."

J. Aughenbaugh: While in this is where, for instance, the Politics of the Constitution has changed. Historically, liberals, what we're talking about is the Bonta case, which comes from the state of California. California had a requirement that non-profit interests groups had to report to the state of California's Secretary of State, who donated money to their groups. Now, that reporting was never made public. But a couple of conservative interest group said we got a problem with this. Because if we report this to the government, then some of our donors may be less willing to donate money because of that information ever leaks, and these interest groups are no longer seen as popular or acceptable etc. These individuals might get targeted.

N. Rodgers: Well, and in California being conservative might hurt your business.

J. Aughenbaugh: That's right.

N. Rodgers: Right.

J. Aughenbaugh: Historically Nia, those who protested such disclosure requirements were historically liberal. Because in the past, state governments targeted groups like the NAACP.

N. Rodgers: The ACLU.

J. Aughenbaugh: The ACLU, the Southern Christian Leadership Group, etc. Because if they got to donor list, then they could go ahead and focused on who their members were. It should be targeted for robust surveillance.

N. Rodgers: Auditing.

J. Aughenbaugh: Auditing, arrests etc. It's pretty fascinating because when the court looked at those requirements in the 1950s and 60s, they said that such requirements were unconstitutional because it violated the First Amendments freedom of association. Conservatives on the court didn't give a shit, excuse of the expression, they just didn't care. Now the worm is turned. In the Bonta case, the three justices who didn't have a problem with the California requirement, were the three liberals and all six other conservative.

N. Rodgers: "You should have transparency in money," the liberals said.

J. Aughenbaugh: Yes. Whereas the six conservatives were like, no, no, where is the first amendment's freedom of association. I'm like, you can get whiplash if you study constitutional law enough. The other example is the Roberts court is definitely interested in protecting property rights. We saw this again. This is a case, the Parkdale case, which actually comes from the city of San Francisco. The way many states got around the Takings Clause of the Fifth Amendment was. The Takings Clause of the Fifth Amendment says

N. Rodgers: Thank you. You can tell from my face, can't you?

J. Aughenbaugh: Yeah.

N. Rodgers: When you say the name of a clause, you can tell from my face, I'm going to say what does that clause say?

J. Aughenbaugh: Yeah. Well, I mean, by the way Nia, the look on your face is like the look of on the faces of many students. When I get to that Clause of the Fifth Amendment. Because most Americans know the Fifth Amendment as I plead the fifth. The privilege against self-incrimination.

N. Rodgers: Oh, [inaudible 00:24:31] posted on because when you're done in explaining the Takings Clause, I would like for you to remind listeners what the fifth clause, with the taking of the fifth, you have to actually be in jeopardy in order to do that.

J. Aughenbaugh: Okay.

N. Rodgers: Unlike what they have you in the movies doing it just.

J. Aughenbaugh: Yeah. Okay. That's right.

N. Rodgers: But anyway, Takings Clause first.

J. Aughenbaugh: Yeah, the Takings Clause is the last clause of the Fifth Amendment. It basically says, the government can take private property for public use as long as the government gives you just compensation for taking your property.

N. Rodgers: Is that what brings about eminent domain?

J. Aughenbaugh: Yes. Okay.

N. Rodgers: Like if they want to say, I want to, build a wall on the Southern border. You own a farm on the Southern border, they could actually buy your property for market value and put up a wall on it because, but they don't have to buy, they only have to buy that which they need. What some people on the Southern border are finding is that some of their property is still on the other side in Mexico that they own, and then some own on this side. Then there's a wall that goes through the middle that's owned by the federal government.

J. Aughenbaugh: Yeah.

N. Rodgers: That's what the Takings Clause means. They can take your stuff. Is that also what allows them to seize things during, like when they do a drug bust, and they take your car.

J. Aughenbaugh: No. That touches upon the Fourth Amendment.

N. Rodgers: Okay.

J. Aughenbaugh: Where the government can engage in reasonable searches and seizures. If they are arresting you because you're selling drugs, they want to go ahead and seize your property or your assets because you may use that property and assets to avoid prosecution.

N. Rodgers: Okay.

J. Aughenbaugh: Okay.

N. Rodgers: Okay.

J. Aughenbaugh: But the common use of the Takings Clause is actually at the local government level. Okay?

N. Rodgers: Okay.

J. Aughenbaugh: Because you're talking about, for instance, local governments will want to build a park. Or state local government wants to build a new road.

N. Rodgers: Oh, widen the road, then they can take the edge of your property.

J. Aughenbaugh: The edge of your property. But in this case, the Pakdel case is the follow up to the next township case from a couple of Supreme Court terms ago. It dealt with the fact that many state local governments avoided having to respond to the Takings Clause because state local governments would say, "Our administrative hearing process is not final." Until it is final, there has not been an official picking. The way state local governments got around ever having to comply with or fend off challenges too, them possibly taking one's private property was to say, well, we're not done yet with the hearing on whether or not it was actually a taking or we're not yet done figuring out what was just compensation. You have property owners that were figuratively in a catch-22.

N. Rodgers: Right. It's dragged out forever and you can't do anything about it.

J. Aughenbaugh: Yeah. You couldn't make a Takings Clause challenge in federal court because the government in question, state local governments were saying, we've not officially taken anything yet because the administrative hearing process where you are appealing is not yet concluded. Federal court judges were like, "Sorry, we can't entertain your constitutional challenge," and state local governments would just drag this stuff out for years.

N. Rodgers: Which there should be some effect in the you have a right to a speedy trial.

J. Aughenbaugh: But that's for criminal cases.

N. Rodgers: Okay. It shows you why I can't be a lawyer, but anyway.

J. Aughenbaugh: A couple of years ago, the Supreme Court in the mixed township case went ahead and said, property owners can bring Fifth Amendment Takings Clause challenges if they can demonstrate in a federal court that even if the local governments administrative process has not yet concluded, their property has been effectively taken. And the court in the Pakdel case this term went ahead and emphasized that is the case. They applied it to the City of San Francisco because the City of San Francisco has some of the most, according to opponents, burn some zoning ordinances in the country. Where they limit what you can do with your property, when you can do it with your property, etc. Many property owners in San Francisco are like effectively, you have taken my property. But San Francisco refuses to go ahead and say they've taken their property.

N. Rodgers: They don't have to pay for it yet.

J. Aughenbaugh: Yeah. They don't have to give them any compensation.

N. Rodgers: Right now, essentially, no one's in charge of the property. But if it were a greenway and you let it grow to 80 foot tall grass, they would come out and give you a citation for it?

J. Aughenbaugh: Yeah.

N. Rodgers: Wow. Okay. That's annoying.

J. Aughenbaugh: Okay.

N. Rodgers: Whatever else may be said about this court, what you're telling me is that J. Rob has a lot of attachment to, sorry, that was last episode. Sorry. Chief Justice John Roberts, parentheses, also known as J. Rob parentheses. Because we're supposed to introduce him before I call him J. Rob. A lot of these things that have come up have been about individual rights, and he's very much pro the individual.

J. Aughenbaugh: Yeah, Chief Justice, John Roberts, I think it's safe to say he is not a big advocate of identity politics. He doesn't believe that people are members of groups.

N. Rodgers: Okay.

J. Aughenbaugh: Well, to give you an example, in the voting rights context, the Supreme Court, this term heard a case from the State of Arizona. Arizona basically passed a law that prohibited two practices. Ballot harvesting and that's where basically a group will go ahead and collect the ballots of individuals who can't make it to the polls and then submit those votes. Arizona passed a regulation that said that practice has to end because we can't guarantee that you won't have voter fraud take place. The second practice that Arizona passed a regulation prohibiting or basically said, if you vote at the wrong precinct, your vote doesn't count.

N. Rodgers: That's harsh. Not provisionally, just it doesn't count at all.

J. Aughenbaugh: Doesn't count at all.

N. Rodgers: Wow. I believe in Virginia it's provisional, isn't it? If you vote in the wrong precinct they can decide whether it'll count or not, but it's not an automatic no.

J. Aughenbaugh: No, not automatic no. In most states there is that flexibility.

N. Rodgers: I think it's because they have to transfer your ballot to the proper precinct. They're basically saying, if we have time, we will do that. But if we don't have time, then you're a twerp and you should have voted somewhere else.

J. Aughenbaugh: Both provisions were challenged for violating Section 2 of the 1965 Voter Rights Act.

N. Rodgers: Okay.

J. Aughenbaugh: Now, Section 2 of the 65 Voting Rights Act prohibits a state voting laws or regulations that have a disparate, if you will, impact on people previously discriminated against in exercising their franchise.

N. Rodgers: Okay. So generally speaking, communities of color and poor communities.

J. Aughenbaugh: The question for the court was, the section 2 of the Voting Rights Act prohibits disparate treatment or does it also include disparate impact? Because the way the Arizona regulations were written, it applies to everybody.

N. Rodgers: Right.

J. Aughenbaugh: It doesn't matter if you're Caucasian, African-American, Latino. Rich, poor. If you're educated, not educated. If you have somebody else harvest your ballot and submitted for you, your vote doesn't count.

N. Rodgers: Got you.

J. Aughenbaugh: If you vote at the wrong precinct, you're out of luck. But if it prohibits disparate impact.

N. Rodgers: Right.

J. Aughenbaugh: Then if the challengers can show that it impacts, for instance, voters of chiller.

N. Rodgers: Like churches gathering votes and sending them in. We have souls to the polls in Virginia where bus rides to the polls.

J. Aughenbaugh: But that's actually allowed in Arizona. What Arizona prohibited was organizations going to people's houses or their churches or other community settings, getting their votes, and then taking them to the polls [inaudible 00:36:05].

N. Rodgers: Got you.

J. Aughenbaugh: The Supreme Court went ahead and said their reading of section 2 of the Voting Rights Act, it prohibits disparate treatment. Not disparate impact. Yes. Yes, yes, yes.

N. Rodgers: Well, I have many feelings about that.

J. Aughenbaugh: Hey, I mean, again, this is part of the larger debate about voting in the United States.

N. Rodgers: I don't understand why we, well, no I do understand. I do understand politically why it is advantageous for certain groups for there to be fewer voters but we shouldn't call ourselves a democracy at that point. If what we want to do is suppress the vote of certain voters, then we should just not call ourselves a democracy.

J. Aughenbaugh: Or how about this? When will we have a conversation about what is minimally required to vote in the United States? Where is the middle ground? I mean, because Nia, you, and I have talked about this. Some of the laws that had been passed since the fall of 2020 elections have been labeled as voter suppression laws. On the other hand, many of those provisions are already in place in other states that don't have the reputation of suppressing votes.

N. Rodgers: We need standards that are national standards. In order to vote, this is the national standard. Because it is the national standard, the state is obligated to make certain that you can do those things like if you have to have a state ID in order to vote, then the state ID has to be free because that's a poll tax otherwise. If we had a set of standards that everybody lived by the United States, then it would be a lot harder to mess with the vote. It would be a lot harder to-

J. Aughenbaugh: Sure because again, if you have agreed upon universal standards, then at the end of an election night or the morning after an election night, all bunch of us will have confidence that only those people who were allowed to vote actually voted. That also includes, and I know you've heard me rant about this so please forgive me for ranting about it again, states actually setting aside the resources and the personnel to count votes.

N. Rodgers: Exactly.

J. Aughenbaugh: I mean, because you have [inaudible 00:39:08]

N. Rodgers: If you're going to do it by mailing, clearly it can be done because Oregon has been doing it since God was a boy. Isn't it Oregon? It's either Oregon or Washington. All mail in vote and they seem to manage it just fine but states that are not devoting resources, that's a state problem.

J. Aughenbaugh: Moreover and I'm looking at you, State of New York. You can't have people running voter registrar's offices that are politically appointed. Stop that right now. Come up with what are the knowledge, skills, and abilities that you need a people to go ahead and run your voting process into count votes and then hire them but you can't be using these as patronage positions. Let's get out of that practice. Because you're basically going ahead and giving the opposition, whoever loses in an election the grounds to go ahead and say, well, of course, our votes weren't counted because there were appointed by the supporters of x political party.

N. Rodgers: Exactly.

J. Aughenbaugh: Let's just stop this. If the vote is that important, let's just go ahead and stop that agreed upon, if you will, principles for managing the suffrage, but no.

N. Rodgers: If it's the most important thing we do in a democracy, how about we do it right? I'm just saying.

J. Aughenbaugh: No, hey I agree with you.

N. Rodgers: If we can't get this right, we are hopeless for getting anything else right. It shouldn't be this hard and yet every time, anyway. That's a frustration but I'm want to ask you about next term.

J. Aughenbaugh: Next term, so far the Supreme Court has agreed to hear only 20 cases.

N. Rodgers: Is this from their regular docket or on their shadow docket?

J. Aughenbaugh: Regular docket.

N. Rodgers: She asked with some bitterness.

J. Aughenbaugh: Well, hey again, you and I have talked about this before. I mean the Supreme Court-

N. Rodgers: Y'all will be hearing an episode on that.

J. Aughenbaugh: About the shadow docket.

N. Rodgers: About the shadow docket.

J. Aughenbaugh: As we were recording earlier this week, the court shadow docket is allowing the eviction moratorium issued by the CDC to last until the end of July even though five of the justices quite clearly think it's unconstitutional.

N. Rodgers: But they are allowing it to expire at the end of July.

J. Aughenbaugh: Well, they've basically gone ahead and Brett Kavanaugh's concurrence in allowing the eviction moratorium to continue. Brett Kavanaugh made it very clear since it's going to end in July, wink, wink, nudge, nudge political branches.

N. Rodgers: It's 30 days and we're not going to worry about it.

J. Aughenbaugh: We're not going to worry about it but if this lasts beyond July 31st.

N. Rodgers: Somebody should bring another case to us.

J. Aughenbaugh: Because we're ready to go ahead and say the CDC does not have the legal authority to do this.

N. Rodgers: Which by the way, I hate to say because I don't want to see people evicted, but I'm not sure that I agree that CDC has the right to do that either. I understand the public health issue, but we are now in a part of the public health concern where we have significantly better control than we've had. We need to figure out a different way to stop people from being thrown out of their homes. We need to have a more permanent way of dealing with evictions fairly. Then we have-

J. Aughenbaugh: I've had this conversation with a number of people in the public health realm. I'm willing to go ahead and concede that the federal government having the authority to suspend evictions of people from their homes is important during a public health crisis. The problem is that the authorizing legislation for the CDC, I don't believe can be read interpreted as giving the Centers for Disease Control that authority.

N. Rodgers: That probably shouldn't have been an executive order.

J. Aughenbaugh: But even then, the executive order as our good friend and colleague Bill Newman has shared with us in a previous podcast episode, executive orders that are based on constitutional authority withstand scrutiny in courts better than those of well, I just think it should be a policy and a I'm a president.

N. Rodgers: That's true.

J. Aughenbaugh: Remember his infamous example down with, I think it was you, down with broccoli

N. Rodgers: Down with broccoli. That's right.

J. Aughenbaugh: Again, this is one of those times to where-

N. Rodgers: But I, I have a clever advisor named Dogen Ball and I would say to you, figure out a way for me to declare war on this pandemic so that I have war powers. You would say, yes, ma'am, let me hit another cup of coffee and start flipping through the constitution and I'll find something for you.

J. Aughenbaugh: For the next term, the Supreme Court has agreed to hear 20 cases. Well, they only hear 20 now because the bulk of a Supreme Court's term docket is usually filled up with case appeals that are submitted during the summer. Though the Supreme Court returns from there three months furlough.

N. Rodgers: Their flocks say ta da and hand them a bunch of things to consider

J. Aughenbaugh: The last week of September, the court will have just this massively long conference where they go through all of the appeals submitted during the summer and they will basically fill it up with 30-35 more cases. Then they usually leave room for 15- 20 appeals that are submitted in the fall

that they then can schedule for next February, March, and April. To date, there are only two that have generated a lot of attention. One is the Dobbs case. This is a Mississippi [inaudible 00:46:33] appealing a lower federal court, declaring their abortion law unconstitutional. Mississippi passed a law that said, all abortions, with the exception of those to protect a woman's health, are prohibited after 15 weeks. By the way, for those of you who wonder where the 15 week threshold how it was generated, I've done a little bit of reading and research on this. Mississippi lawmakers focused on a number of studies from OB-GYNs, that have indicated that many fetuses are viable after 15 weeks and some Mississippi lawmakers actually borrowed language from laws commonplace in Europe, where abortions are prohibited after 16 weeks. The court will have to look at whether or not it's precedent in Planned Parenthood versus Casey. Will allow states like Mississippi to prohibit all abortions. Again, Mississippi paid attention to other supreme court rulings by giving an exception for abortions to protect a woman's health. That's one of the big ones. Abortion is skewed up. If I had to venture a guess, chief justice John Roberts did not vote to hear this case.

N. Rodgers: I'm sure. He's like now landlines, landlines. But you know what, at some point the pressure to hear a case, anyway.

J. Aughenbaugh: Hey Nia, we're talking about easily a dozen states have passed similar laws.

N. Rodgers: This quiz is going to come up because women's access is starting to be wildly uneven depending on what state you live in which was going to eventually drive that before the court. Because it can't be that if you have enough money, you can pop over to another state. That's an unequal access in a way.

J. Aughenbaugh: But what's interesting Nia is no lower federal court has upheld any of these state laws. So there's not conflict among the lower federal courts. The second deals with the second Amendment.

N. Rodgers: They're taking a gun's case.

J. Aughenbaugh: Yeah, they've got a gun case. The state of New York has a law that allows local governments to deny, conceal, carry licenses for self-defense. Not surprisingly, most local governments in the state of New York deny them in mass, okay?

N. Rodgers: Okay.

J. Aughenbaugh: They hardly ever grant, conceal carry weapons licenses for any individual.

N. Rodgers: That doesn't seem fair. If your criterion is, we don't think people should be able to carry concealed weapons, then make that the law. Don't say you're going to give a license, but they never give any. Because that implies a discrimination. I can't believe I'm about to say and I'm on their side of the rights. Well, that's not true. I have lots of mixed feelings and mixed beliefs about gun ownership. But I do believe that the way to solve that, and I'm sure what the supreme court is going to say is New York, if you think it ought to be illegal to have concealed carry, then freak and make it illegal. Don't say it's legal, but we never give it to anybody. That's not legal at that point.

J. Aughenbaugh: Well, because if you're going to give local government officials discretion, then they never use that discretion.

N. Rodgers: Then why have discretion?

J. Aughenbaugh: Then why do you have discretion? This goes back to the Fulton versus Philadelphia case about foster care, right?

N. Rodgers: Right.

J. Aughenbaugh: If you give the administrator of the foster care system discretion and they only apply it to a particular religion. That's not discretion, that's discrimination. Here's the thing. Because of the way the law is written, I could see chief justice Roberts and Kavanaugh and Barrett, plus a couple of the liberals going ahead and say, okay, if you've never used the discretion to grant a concealed carry license, that violates the second amendment. But if it's applied to everybody-

N. Rodgers: Then it doesn't because it's not discrimination, it's just-

J. Aughenbaugh: A generally applicable law.

N. Rodgers: Coming back to the Arizona thing of, if it hurts everybody equally then it's okay with us.

J. Aughenbaugh: The way they wrote the question, I could see chief justice John Roberts saying to his colleagues, okay, fine, you want to take a second amendment case, but this is the question.

N. Rodgers: This is the one we are going to take.

J. Aughenbaugh: But because you've got gun rights advocates who are like, finally, the court's going to come out and clearly say, okay, any regulations of the second amendment deserves strict scrutiny. I'm looking at how that question is worded and I'm like, this gives John Roberts an opportunity to pull together a majority that consists of Kavanaugh, Barrett, Bryer, and Kagan.

N. Rodgers: Wouldn't that be something?

J. Aughenbaugh: You might have soon to my word saying, no, any state can go ahead and regulate the second amendment because we got it wrong in DC versus Heller. I could see Gorsuch, Thomas and Alito say, this doesn't go far enough.

N. Rodgers: As we wrap up, I wanted to ask you, hey, is anybody going to retire? They leave him alone about this. God, Lee days. If you asked me every day if I was going to retire, I wouldn't retire just because of that.

J. Aughenbaugh: Well, you know that that would be my attitude.

N. Rodgers: Right. Digging in. We're talking about justice Brewer.

J. Aughenbaugh: Yeah, Justice Brewer is in his 80s. He's been on the supreme court since the Clinton administration. A lot of liberal interests groups want him to retire. Well, the senate is still controlled by the democrats because of vice president Kamala Harris's tie-breaking vote.

N. Rodgers: I'm worried about the 2022 election and losing, as presidents often do.

J. Aughenbaugh: Yes, in the midterm elections. Presidents frequently lose seats in both houses of congress. But in particular, they're concerned about the senate. They have a democratic president. They called up memories of Ruth Bader Ginsburg not retiring when the president was the democrat Barack Obama.

N. Rodgers: For first two years they had control and many got [inaudible 00:55:29] -

J. Aughenbaugh: In the midterms, right.

N. Rodgers: Right.

J. Aughenbaugh: They don't want a repeat of that. They've been very braising. They had one of those a speaker [inaudible 00:55:43] in front of the supreme court.

N. Rodgers: You go now. Retire Daniel.

J. Aughenbaugh: They have taken out adds space in newspapers.

N. Rodgers: It's too far. If you want limits on the supreme court, put limits on the supreme court. It's not that hard to do. Supreme court justices will serve for 20 years and then they will retire with our great thanks or whatever. Instead of like once you've decided you're going to have lifetime appointment, he gets to decide when he goes. If you don't like that system, change the system.

J. Aughenbaugh: You know, hey, you've heard me say this before. As long as we keep Steven Bryer away from bicycles, because he's had a couple maladies riding bikes and falling, otherwise his health is fine. Again, if you take a look at his work on the court this term, he was engaged.

N. Rodgers: His mind is fine.

J. Aughenbaugh: He wrote the majority opinion in the first amendment student's speech case. By the way listeners, pull up that case and read his description of Snapchat. It is hilarious to read a mid '80s supreme court justice describing Snapchat. Hilarious. I don't think he's going to retire.

N. Rodgers: I hope not. In part, well, no. I hope he doesn't retire due to pressure. If he wants to retire because he just doesn't want to hear it anymore, I could understand that. But I hope that he is not

pushed into retirement in the sense of, you have to go now. No, you all made the rules and the rules are lifetime. We'll see what happens with them. Who knows? It might be that, one of the younger justices gets run over by a bus, you never know. Like it's not always age that drives these things. But anyway, thank you so much for the wrap up.

J. Aughenbaugh: You're welcome.

N. Rodgers: I appreciate it.

J. Aughenbaugh: I quite obviously enjoyed it.

N. Rodgers: We will come back and talk more about the supreme court. Because I'm sure they're going to do some crazy stuff.

J. Aughenbaugh: Hopes for his literal.

N. Rodgers: Thanks, Aughe.

J. Aughenbaugh: Thank you, Nia.

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