

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 excellent. How are you?

J. Aughenbaugh: Not bad, and listeners, I do want to apologize if my voice sounds a little bit.

N. Rodgers: Kathleen Turner. You sound a little bit like Kathleen Turner. You know how she's got that low, smoky, sexy voice, or you've been chewing gravel?

J. Aughenbaugh: Yes. What some of my friends said, it sounds like one has been out at a bar smoking and drinking a lot of whiskey.

N. Rodgers: For days.

J. Aughenbaugh: Yes. I am coming off a bad cold. It is springtime enrichment, which means allergies. When we are recording this episode, allergy season has kicked in the Richmond area.

N. Rodgers: I would like to say that there is a season for allergies for Richmond for me, but in fact, I'm allergic to Richmond all the time. Whenever blooms here, it's just a cycle of things that bloom that make me.

J. Aughenbaugh: From pollen to grasp to molds.

N. Rodgers: To whatever it is in the winter. I should buy tissue stock because I feel super good. I keep those companies in business.

J. Aughenbaugh: This is probably more information than our listeners want. But I'm one of those allergy sufferers to where it affects my vocal cords. At some point here in the next couple of days, I fully expect to have a full-blown case of laryngitis where I sound like Don Corleone in The Godfather.

N. Rodgers: I want to make him an offer he can't refuse.

J. Aughenbaugh: Look what I have done to my boy.

N. Rodgers: I'm telling you one of best films ever, although it was violent, so we will offer a trigger warning to people who don't like violent movies, The Godfather is rather violent.

J. Aughenbaugh: It is rather violent. But Nia, it dawn on you that this year, in fact, just a couple of weeks ago, it was the 50th anniversary of the release of The Godfather.

N. Rodgers: I did not know that.

J. Aughenbaugh: Yes. That movie's been around for 50 years.

N. Rodgers: That doesn't make me feel old.

J. Aughenbaugh: But anyways, listeners, today's episode is not about our allergy suffering or for that matter, movies.

N. Rodgers: No, I need you to explain something to me today.

J. Aughenbaugh: Okay.

N. Rodgers: I will, by the way, let everybody know that I was so excited a couple of weeks ago, I know I was watching C-SPAN and lawyer was like, "The time, place, and manner of holding elections." I was like, "Aughie," because it made me think of you because you say that phrase a lot. We should probably put that as part of our merch, Aughie's time, place, and manner, which I think would be really cool and also be a cool name for a band. But voting is decided by the legislature of a state, says that in the constitution. But in Virginia, everything that passes through the legislature in Virginia has to go to the governor to get signed.

J. Aughenbaugh: Yes. Any bill.

N. Rodgers: Did the founders not think that there would be governors? Or I think that's unlikely. A lot of them had been governors. But how does that work with what the constitution says and then what in actual practice happens?

J. Aughenbaugh: There are two historical or contextual points. Listeners, our general topic today is a doctrine that has been receiving quite a bit of press. That doctrine is known as the independent state legislature doctrine. But before we get to the doctrine, Nia, your question touches upon first, two clauses in the US Constitution. One is the electors clause, which is Article 2, Section 1. It reads, "Each state shall appoint in such manner as the legislature thereof may direct a number of electors equal to the whole number of senators and representatives to which the State may be entitled to in Congress."

N. Rodgers: That sets up your electors, actually do the College of.

J. Aughenbaugh: The Electoral College.

N. Rodgers: The Electoral College in which they vote for the states in order to complete the elections.

J. Aughenbaugh: For president elections.

N. Rodgers: In November. Well, actually they do it in December, but anyway. It's after the November election.

J. Aughenbaugh: After the November election.

N. Rodgers: They say, you know what?

J. Aughenbaugh: Most of us Nia, focus on the part, the whole numbers of senators and representatives.

N. Rodgers: How many electors you get.

J. Aughenbaugh: Do we get in the Electoral College?

N. Rodgers: Because the Electoral College is what actually elects people not us.

J. Aughenbaugh: That's right, okay.

N. Rodgers: The vote is to make us feel good.

J. Aughenbaugh: We talked about this in a previous podcast episode. The framers didn't really trust us. You guys could possibly pick poorly. We will have an auxiliary check on your preference.

N. Rodgers: Which is not the worst thing in the world and we've talked about the pros and cons of that. We could debate that again later if we wanted.

J. Aughenbaugh: But there's a second clause.

N. Rodgers: Well, but wait, you said there though as the legislature thereof may direct.

J. Aughenbaugh: May direct, and I want you to keep that in mind listeners. Hold on. The second clause is the elections clause and Nia, your sharing of your CNN experience of recent vintage touches upon this clause. This is an Article 1 Section 4 of the Constitution. "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof." Now, Nia, we've talked about the times, places, and manner. That's what many people focus on because that's where you get differences among states.

N. Rodgers: When people are talking about having the show identification or whatever, that's the manner, when they're talking about where polling places are located, that's places, and when they're talking about how long the polls are open, that's time. That's usually what we focus on in an election.

J. Aughenbaugh: Because on election nights, we will hear commentators on the various..

N. Rodgers: The polls closed in California at 7:00 PM, which is 10:00 PM Eastern Time and too late for me, I go to bed.

J. Aughenbaugh: But in other states, the polls open at 6:00 and then close at 6:00, which usually leaves a whole bunch of people to go ahead and say, on that one day, every two or four years, it's not uniform across the country. No. It's not uniform across states.

N. Rodgers: Because 50 states make the choice.

J. Aughenbaugh: Yeah. But the most important clause for this podcast episode is the language in both of those clauses. The most important language in both of those clauses is the legislature thereof may direct or shall be prescribed in each state by the legislature. Where this has become an issue is because there are those who argue that when coming up with voting districts or House of Representative members, and for other kinds of elections and voting laws, that language, if read by the plain meaning of those words, the only part of states who have any kind of role would be the legislature. Thus the doctrine, independent state legislature doctrine.

N. Rodgers: But in Virginia, we have a commission to work on redistricting. That's not the legislature, that's a separate commission.

J. Aughenbaugh: Nia, as you mentioned a few moments ago, in all 50 states, bills don't become laws until who signs them?

N. Rodgers: The governor, the president, and the federal Congress. These are mirrors of each other.

J. Aughenbaugh: In all 50 states, if there are disputes about state laws.

N. Rodgers: The courts settle them.

J. Aughenbaugh: The courts settle them.

N. Rodgers: State court or federal court, depending on.

J. Aughenbaugh: This is known as checks and balances.

N. Rodgers: Which is a good thing. We like it.

J. Aughenbaugh: Yes. This is a fundamental part of the American form of democracy.

N. Rodgers: Because it keeps people from going bananas and just doing stuff.

J. Aughenbaugh: Yeah, it's what I tell students all the time. The American form of democracy is not efficient because if you think about it, you've got to convince two houses of Congress or in 49 out of the

50 states, two houses of the state legislature doing something. Do you know which state only is unicameral?

N. Rodgers: I don't. Which one is?

J. Aughenbaugh: It's Nebraska.

N. Rodgers: Nebraska? What? They just have one group and they're like, "We just can't be bothered to have a second group?"

J. Aughenbaugh: Nebraska. There's nothing that requires.

N. Rodgers: There's nothing wrong with that necessarily.

J. Aughenbaugh: Yeah.

N. Rodgers: I'm laughing because I'm sure my face looks a little surprised because I honestly did not know there was a unicameral.

J. Aughenbaugh: Unicameral state legislature yes.

N. Rodgers: I might have to move to Nebraska, just see how that works. Anything work.

J. Aughenbaugh: Then you've got to convince the President, or the state level, a governor decide to sign a bill.

N. Rodgers: Then it's got you've got to make sure that it doesn't interfere with any other bill or it's going to go to the courts and then it's going to have to be fought out and dealt with it there.

J. Aughenbaugh: Or if it violates a state constitutional provision or if it violates a federal law or federal constitutional provision, checks and balances, right?

N. Rodgers: Yeah.

J. Aughenbaugh: Not very efficient. But it's designed to avoid and this would be another slogan on our merchandise. Avoid government tyranny.

N. Rodgers: Avoid government tyranny.

J. Aughenbaugh: Yes, right?

N. Rodgers: Yes.

J. Aughenbaugh: Sounds so ominous, right?

N. Rodgers: I like it though, government tyranny is terrifying.

J. Aughenbaugh: Now the reason why listeners were talking about this is that there were two cases at the state level that recently were appealed to the Supreme Court and the Supremes rejected the cases, and both of them concerned the redrawing of congressional districts.

N. Rodgers: Meaning they didn't hear the cases or they said, no one appear.

J. Aughenbaugh: They did not hear the case, they did not grant cert.

N. Rodgers: Okay.

J. Aughenbaugh: Again, listeners, I direct you to one of our previous episodes.

N. Rodgers: Where we have a thing called cert to explain what all that is.

J. Aughenbaugh: Yeah. Writs of Social Worry, the cert read. The court denied cert. However, in denying one of the cases, well, in fact, denying both appeals. Four of the justices indicated that in the future, the Supreme Court should actually consider the merits of the independent state legislature doctrine.

N. Rodgers: Can I summarize both cases by saying they were arguments about destructing?

J. Aughenbaugh: Yes.

N. Rodgers: That's not surprising because this is the time of the decade when we do that.

J. Aughenbaugh: Yeah.

N. Rodgers: After the census comes in and we say, Hey, all the numbers have changed and we should change the districts. Whoever's in charge tries to build the map to give them a favor and that happens on both sides of the political spectrum, actually on all sides of the political spectrum. Because if there were third parties, they would do it too.

J. Aughenbaugh: Yeah.

N. Rodgers: I mean that's just the natural, we should hoard power while we can thing that people do. But anyway, so they were saying, we're not even taking on the district in question, but what they are saying is but we should at some point take on the question of the state, the legislature making those decisions.

J. Aughenbaugh: Unilaterally, because in both of these cases, one case came from North Carolina and the other case came from Pennsylvania. Republican control legislatures drew congressional district maps, and they were challenged as violating state constitutional provisions about be in two partisan. In

both of those cases, state Supreme Courts redrew the map. Though the state legislatures filed an appeal with the US Supreme Court saying, Well, according to these two clauses in the US Constitution, only state legislatures can draw the maps. The Supreme Court didn't take the cases, but you can have four Justices on the Supreme Court who are like, we might want to visit this in the future. Which again, if you don't study the Supreme Court, when you have Justices of the Supreme Court issue an opinion, when the court has denied a case that basically says, but we should look at this issue in the future. That's basically some of the justices of the Supreme Court telling lawyers-

N. Rodgers: Inviting a case.

J. Aughenbaugh: Yeah, they are basically sending a queue. This is known as queue theory. This is where the court is basically saying, ding, ding, ding, ding, for those of you who do this kind of law, we might be willing.

N. Rodgers: If you bring us the right case.

J. Aughenbaugh: We might be willing to take it.

N. Rodgers: In part, I suspect that they would need to bring a case that is less hot button issue?

J. Aughenbaugh: Yes.

N. Rodgers: Either three or four years from now when it's less an issue, although I don't know that that would be the case three or four years from now or something else, but some other angle of this question of desk the legislature have so proprietorship over lectures.

J. Aughenbaugh: Because what the Pennsylvania in North Carolina State Supreme Courts did was not all that egregious. I mean, the maps that they redrew, because what the state legislatures did was obvious cases of parties are just made, right?

N. Rodgers: Right.

J. Aughenbaugh: Listeners if you don't know this, both Pennsylvania in North Carolina are considered battleground states. They are closely divided in terms of the two main political parties; Democrats and Republicans. It just so happens that both of the participants in this podcast are from those states. We can go ahead and tell you how closely divided each of our home states actually are in regards to Democrat versus Republican, right?

N. Rodgers: Very purple.

J. Aughenbaugh: Yeah. Presidential election years, candidates of both parties spend a lot of quality time in both Pennsylvania and North Carolina. If you're a voter in those states, you get to qualify.

N. Rodgers: Oh my gosh, you get exhausted with all the political robocalls you get and all the visits from people in the city that they're visiting and it's snarls up the traffic and you're just like, go away, oh my goodness.

J. Aughenbaugh: Key tone on the radio or watch TV without an advertisement for either of both candidates. You're just like.

N. Rodgers: All their proxies. That's also bad, so it's just like wall to wall. For the entire year-and-a-half before an election, it's exhausting.

J. Aughenbaugh: Now, Nia, can you guess which of the four justices who sent out this queue that they might be willing to look at the independent state legislature doctrine?

N. Rodgers: Well, as far as like the constructionists on the court?

J. Aughenbaugh: Yes.

N. Rodgers: I get that confused in my brain. The only one I could say for absolute certain is Justice Thomas. Justice Thomas is a constructionist, has learned and he's not playing. He is like, if you want the constitution to say something different, amend the dang thing. You have that power.

J. Aughenbaugh: Learn what the words mean.

N. Rodgers: You have that power, go do your job legislators and if you don't, don't expect us to be carrying to you because we're going to read it straight up where the words say. But I'm not sure who the others, who are leaders maybe?

J. Aughenbaugh: You're basically talking about Justice Clarence Thomas, Sam Alito, Neil Gorsuch, and Brett Kavanaugh.

N. Rodgers: Kavanaugh constructions.

J. Aughenbaugh: He generally is a strict constructionist.

N. Rodgers: J. Rob is not.

J. Aughenbaugh: J. Rob is indicated in previous Supreme Court cases that he doesn't believe those two clauses prohibit governors state courts, or in the case of redistricting commissions. He thinks that if the voters of a state change the state constitution, so that redistricting is done by independent or bi-partisan commissions, he doesn't believe the US Constitution has been violated.

N. Rodgers: Well, I'm with him because if the legislature sets that up, that's them saying there are proxy for us.

J. Aughenbaugh: Sure, right.

N. Rodgers: We know the liberals are not strict constructionists because they wouldn't be liberals on the court if they were like that's.

J. Aughenbaugh: Yeah. At least in modern times.

N. Rodgers: Say, that's Sonya said to my art Atlanta Kagan.

J. Aughenbaugh: Currently Steven Brayer.

N. Rodgers: Steven Brayer.

J. Aughenbaugh: Because they have not retired yet. Who does that leave as the young men?

N. Rodgers: What happens with Cony Buret?

J. Aughenbaugh: We don't know because she didn't sign off on the descending opinion that was coauthored by Alito Gorsuch and Thomas and Kavanaugh wrote separately.

N. Rodgers: They can deny cert and then they can have dissenting opinions of dying Sarah?

J. Aughenbaugh: Yes.

N. Rodgers: Okay, that's funny. I'm sorry. That's just funny to me that we are can hear you, but even if we did hear you, we want to hear it this way, like, wow. I guess that's what you're talking about. It's a roadmap like they've led out a roadmap of.

J. Aughenbaugh: It's a roadmap and Nia, you and I talked about this when we did the podcast episode on qualified immunity. We know that two of the justices would like to Supreme Court to revisit qualified immunity, because Justices Sotomayor and Thomas wrote dissents to the court denying cases challenging qualified immunity.

N. Rodgers: They wanted to talk about the issue.

J. Aughenbaugh: We know that two of the current justices, Thomas and Gorsuch, would like the Supreme Court to revisit its landmark freedom of the press ruling, New York times versus Sullivan.

J. Aughenbaugh: Why do we know this? Because they both have written descends to the court denying cases that have asked the court to revisit that precedent, so we know this. But this is really fascinating because Nia, you, and I've talked about this in the past. What did the framers have in mind? It's not like the framers didn't know that states operated much like the federal government does.

N. Rodgers: That they had governors, that they had courts, that there would be judicial review. There was judicial review in their time, it's not a shocking concept.

J. Aughenbaugh: Scholars who have looked at this doctrine, they have not been very positive about it. First of all, many scholars have gone ahead and said that Supreme Court precedent seems to be very clear. The other branches of state governments can participate. If the Supreme Court did endorse the independent state legislature doctrine, they would basically be overturning, at least in my research, three, possibly four, Supreme Court precedence. Now again, this would not upset Clarence Thomas at all.

N. Rodgers: He doesn't care. He thinks previous courts got it all wrong most of the time.

J. Aughenbaugh: If they did, according to Clarence Thomas, it doesn't matter if the country has relied on those precedence for 20 years, 100 years, 200 years, let's get it right. That's Clarence Thomas's view.

N. Rodgers: That's what his t-shirt says.

J. Aughenbaugh: Yeah, let's get it right. But as you've pointed out, Chief Justice John Roberts, he's more of an incrementalist. He would have some issues and quite obviously, the liberals on the court would have some issues because as far as they're concerned, state legislatures can't be trusted with boding to be fair.

N. Rodgers: In past, that has been a problem, especially in the South. Especially with denying people of color the right to vote.

J. Aughenbaugh: In the North political machines.

N. Rodgers: That's right. Sorry, Tamron Hall.

J. Aughenbaugh: Basically rigging the system so that one political party could continue to dominate for decades.

N. Rodgers: Daily, in Chicago. Dictator for life.

J. Aughenbaugh: Think about these listeners. It's not just Republican controlled state legislatures who have been enacting partisan gerrymandering districts for house elections. According to some election law experts, what the state of Illinois did this year, rivals what the Republican legislatures in Pennsylvania and North Carolina attempted.

N. Rodgers: Well, and New York.

J. Aughenbaugh: New York.

N. Rodgers: There's been some pretty serious, let's cut out any Republican voting whatsoever in these states, which is not good either. It is not good when anyone does it.

J. Aughenbaugh: Yes.

N. Rodgers: It's not fair, it's not ethical. It is not good when any either side does it, so whichever side you're on, you're wrong if you believe it's okay to do it. What I'm interested in is when the court has said that the legislature has a broader meaning than the General Assembly or whatever it is you call it in your state, in Virginia, we call it the General Assembly.

J. Aughenbaugh: Assembly.

N. Rodgers: It's called different things in different states, but the legislative body, they mean other things. Legislature in that sense, in the founder sense probably meant and governors, and state officials.

J. Aughenbaugh: Because what the previous Supreme Court rulings have suggested and a number of constitutional law scholars have pointed out, is that the framers probably meant the legislative process. Not just the legislature, but the law making process.

N. Rodgers: Madison just made legislature as a shorthand.

J. Aughenbaugh: That's right.

N. Rodgers: He's like don't know what we mean.

J. Aughenbaugh: Yeah.

N. Rodgers: Silly him.

J. Aughenbaugh: Well, and by the way, could you theoretically have a state that does not require a governor to sign bills into law?

N. Rodgers: Sure.

J. Aughenbaugh: Sure, you could. Could you have a state to where the judiciary is a committee of the state legislature? Sure.

N. Rodgers: Weird but Europe.

J. Aughenbaugh: Hey, that was one of the proposals for the federal government that was considered at the Constitutional Convention.

N. Rodgers: Thank goodness, that didn't go through.

J. Aughenbaugh: But the framers experience with the British Crown was, if you don't have an independent judiciary, the judiciary is basically just going to go ahead and ratify whatever the king or queen wants. That ain't good.

N. Rodgers: Well, or that would be tri-cameral government.

J. Aughenbaugh: Yeah.

N. Rodgers: Oh my gosh, C-spam would have a group heart attack. We have another set of cameras up, we have to have another fee, we have to have another set of analysts. Oh my goodness. But also how is that affected by executive orders within a governor's office?

J. Aughenbaugh: Wow, hey, and this is one of the complaints by the way, of some of the lawyers who advised Donald Trump post 2020 presidential election because we saw a lot of changes in states for the voting in the 2020 presidential elections that occurred because governors said, we have a pandemic. The state legislature can't or won't act quickly so I'm issuing an executive order that makes it easier, for instance, to vote by mail, or to have individuals collect a whole bunch of absentee ballots and take it to the post office even though our state laws or our state constitution don't cover that contingency. Almost all of those were upheld by federal courts, including the Supreme Court.

N. Rodgers: Renaming the word legislature, what they mean is anyone who is elected by the people.

J. Aughenbaugh: Or has legislative functions as part of their job.

N. Rodgers: Got you.

J. Aughenbaugh: Because a lot of state constitutions, and a lot of state legislatures, much like the United States Congress, has delegated legislative power to whom? Which branch of the government?

N. Rodgers: The executive.

J. Aughenbaugh: The executive.

N. Rodgers: Well, just like the federal legislature has handed over enormous powers to the president or to the executive.

J. Aughenbaugh: Executive branch.

N. Rodgers: It's happening at all levels of government. Again, I don't like it, by the way, at any level of government. We don't think it's a good idea. You can't just hand over your responsibility. That's not how accountability works.

J. Aughenbaugh: It also creates perverse incentives for chief executives of government because after a while, many presidents, many governors, many mayors, begin to think that there are no effective limits on what they can do.

N. Rodgers: Exactly.

J. Aughenbaugh: Again, this brings us back to government tyranny.

N. Rodgers: The executive privilege clause does not actually cover your private business dealings, or things you said after you left office, or like calm down there bubble.

J. Aughenbaugh: Even if we're not talking about executive privilege, if I'm a governor and I've looked at what previous governors have done in a time of crisis, and the state legislature and the state courts have not checked my predecessors, do you actually think I'm going to go ahead and say, I'm not going to exercise all of those emergency powers? Again, we've talked about this in a previous podcast episode. When you run to be a governor, when you run to be president, you're not running to go ahead and say, I'm going to go ahead and reign in the office.

N. Rodgers: Yeah, how can I share power? Almost nobody runs on the platform of I'm going to share power across. I'm going to push through my ideas.

J. Aughenbaugh: I'm going to be diplomatic here and I'm going to say these are people with very healthy egos.

N. Rodgers: Yes. Who believe they have a mandate.

J. Aughenbaugh: Yes. Election should matter.

N. Rodgers: Is there a case where they specifically said that the governor's veto is legitimate?

J. Aughenbaugh: Yeah.

J. Aughenbaugh: What case? Okay. Oh, you're talking about Smiley versus Holm in 1932?

N. Rodgers: Am I? Is that what I'm talking about?

J. Aughenbaugh: Yeah. That is the case where a state governor vetoed a bill that would impact the times, places, and manner of federal elections. This is a case in 1932, the Supreme Court said, state election laws should be enacted the same way as any other state law is enacted.

N. Rodgers: So election laws aren't special?

J. Aughenbaugh: That's right.

N. Rodgers: They're just like every other law. They have to go through the process, including veto and then override if you really, really want it or it comes back to you and you rewrite it.

J. Aughenbaugh: In the most recent case, *Nia* is when Arizona the voters in a referendum created an independent redistricting commission. The state legislature didn't like that because it basically took the power to redistrict away from the legislature. The state legislature appealed the whole way to the US Supreme Court. The Supreme Court said that our precedence clearly established that redistricting is a legislative function and must comply with state constitutional provisions whether it be referendum or how state laws are passed. If the voters of Arizona wanted an independent redistricting commission, so be it.

N. Rodgers: Did they amend their state constitution to have a redistrict?

J. Aughenbaugh: Yes.

N. Rodgers: Sorry, this is part of the state.

J. Aughenbaugh: This becomes part of the state constitution, yes.

N. Rodgers: Let me ask then, if I'm understanding this correctly, that basically, the question here has been, what is the will of the voters?

J. Aughenbaugh: Yes.

N. Rodgers: Then the Supremes are falling onto the side of the will of the voter.

J. Aughenbaugh: The voters.

N. Rodgers: They're saying, "If your state constitution says that the governor has a veto than the governor has a veto. If your state constitution says that there's a commission, then there's a commission." Because you had to get a referendum or you had to agree as a group that that was going to be the Constitution. If you don't like the Constitution of your state, you can move. Or you can try to change the constitution of your state.

J. Aughenbaugh: For me, as somebody who teaches the structure of government in the United States, the third critique, so we've already mentioned two. One is Supreme Court precedent would suggest that the independent state legislature doctrine is not going to fly. That's Court precedent. Second, if you look at the practices of the states at the time these clauses of the US Constitution were written, pretty much every state required any bill to go through a two-step process. The legislature approves it, and then the governor has to sign. But for me, particularly because, listeners, truth be told, I am a fan of checks and balances. The third criticism really resonates with me, *Nia*, which is, if the court endorsed the independent state legislature doctrine, the courts would be completely cut out of reviewing whatever legislatures do and I got a problem with that. Because I think state courts, much like federal courts, act as a really good oversight mechanism. They act as a check.

N. Rodgers: You like Judicial review.

J. Aughenbaugh: I do like Judicial review. I like it. I think there should be an institution in government that basically goes ahead and says, "This complies with the Federal Constitution or this complies with the state constitution." Again, it acts as a brake on perhaps the people and the people's elected representatives from acting too fast.

N. Rodgers: Or with malice.

J. Aughenbaugh: Yeah. I like it when I get into my car and I test out my breaks and they work because I know at times when I get on the road, I am not a safe driver. I might drive too quickly and I like knowing that my brakes work. I know that that may not be a really accurate metaphor, but hopefully, it makes sense.

N. Rodgers: Is the argument on the other side of that about judicial activism?

J. Aughenbaugh: Yes.

N. Rodgers: Is the argument on the other side then justices will take us where we are not ready to go or where the legislature did not intend for us to go?

J. Aughenbaugh: Or as Scalia once said, if the Constitution doesn't prohibit a practice, then State should be able to engage in it. If state legislatures want to craft a very partisan gerrymandered map of congressional districts, why is it that a bunch of lawyers who became judges should say no?

N. Rodgers: Well, and I would argue about fairness in that instance. There is the question in fairness there.

J. Aughenbaugh: I'm not a particular fan, Nia of gerrymandering. Where we have elected officials basically deciding who their voters will be.

N. Rodgers: Right, which is a whole entire separate issue in a different podcast, but I think that seems to be the strongest argument to me of all of it, is the idea that it falls apart without someone to say whether, it comes down to dispute. We as Americans are some of the most argumentative people on the face of the planet. Molecules are moving in the air. No, they're not. Yes, they are. No, they're not. Then you need a scientist to say yes, molecules are moving in the air. The scientist acts as your judge. That person who is knowledgeable, that person is an expert in their field. That's why we believe, well, most of us believe in experts in their fields. Some of us are chuckleheads and don't believe in things because we don't believe in science, but we're not talking to those people because we can't help those people. But if you believe that there will be disputes and that they must be settled, then you have to have a system that builds that in and I promise you we have to have that in our system because we are the most disputing people. We're seriously the most litigious country in the world. It's not just because we graduate a plethora of law students every year. It's because Americans firmly and fundamentally

believe they have rights, whether those rights really exist or not. You can see other episodes in this series.

J. Aughenbaugh: It's hard-wired into American political culture. It has been for most of our country's history. Think about this.

N. Rodgers: Marbury V. Madison was 1803

J. Aughenbaugh: 1803.

N. Rodgers: 1803. That's pretty much when we need an adult in the room.

J. Aughenbaugh: Well, even think about the Declaration of Independence. We basically went ahead and wrote a document, a case of, to the British crown, where we basically went ahead and said, you're violating our rights.

N. Rodgers: We have these grievances.

J. Aughenbaugh: Yeah, we have these grievances.

N. Rodgers: Then we enumerated them.

J. Aughenbaugh: Yeah. Then we listed them.

N. Rodgers: Because Americans have nothing if not thorough about being willing to enumerate their grievances.

J. Aughenbaugh: I mean, it's what Harvard Law Professor Mary Ann Glendon talks about the American culture of rights talk. I have a right to do X.

N. Rodgers: Correct.

J. Aughenbaugh: If you infringe upon that right, well by God, I'm going to court.

N. Rodgers: That's correct. I'm going to sue and somebody gets to settle it.

J. Aughenbaugh: Yes.

N. Rodgers: Usually, the good thing about this country is that, I was talking to a student yesterday about this, about the peaceful transition of power. Usually, when a judge makes a judgment, we accept the judgment. Even if we appeal it up to the Supreme Court, once the Supreme say careful novel, we say, okay, careful novel and we all go home. We now believe that that's the rule. We all then live by the rule until somebody brings up a different lawsuit that changes it. But whatever the final court of appeal says,

we tend to say, okay, well, that's that. I don't know. I can't conceive of a system where we don't have that.

J. Aughenbaugh: Somebody to go ahead and say, you've crossed the line.

N. Rodgers: This is the final answer.

J. Aughenbaugh: Yes. You went too far.

N. Rodgers: Maybe I just don't have enough imagination, but I'm with you. I think that the whole thing falls apart if you cannot appeal something to the supreme or to the state Supreme Court and say, they're stomping on my rights. The state Supreme Court says, indeed they are and they have to stop.

J. Aughenbaugh: Yes.

N. Rodgers: Then the agency has to stop, they have to stop stomping on your rights. Or if the court says, your rights are not being stomped on, sit down, then you have to sit down. Like you have to say, okay, well, I just have to deal with my hurt feelings. But I'm with you. I think that by saying legislature and meaning a very specific body, you are empowering the snot out of that one group of people to almost an extreme.

J. Aughenbaugh: We know they have, again, I'm not being critical of them when I say this, they have a lot of self-interest to redraw maps that are going to benefit either them or their party.

N. Rodgers: Do we really want that group? I mean, consider civil rights again, do we really want a southern white legislature in Mississippi in 1950 making the only rules about who can vote and when and how? If there's no way to take that to a court, if there's no way to have an argument about whether they're doing it fairly or equitably, then there's no recourse for the minority. Again, it becomes a majority rule and there's no recourse for the minority, something that you've talked about on multiple episodes that the court is there to protect the minority, that's why the court says on a regular basis, neo-Nazis can march in Greensboro, North Carolina. They can have a license or a permit and they can go march, because it's wrong to suppress their speech, because then we get into deciding whose speech we're going to suppress. Then it becomes what we're talking about here, which is how is the legislature feeling today? Are they feeling like they're going to suppress the rights of college professors and college librarians to have a podcast? We want to have recourse about that.

J. Aughenbaugh: Remember listeners, this doctrine concerns two clauses in the US Constitution about voting.

N. Rodgers: Right. Correct.

J. Aughenbaugh: One of the most essential acts of a democracy.

N. Rodgers: I would argue the essential act.

J. Aughenbaugh: The ability to go ahead and hold accountable government officials. I mean, you can't get to area.

N. Rodgers: To area or grumpiness in public.

J. Aughenbaugh: Yeah. You can't get any more important and voting in a democracy.

N. Rodgers: You really can't. I mean, brass tacks. That's what separates us from other forms of government.

J. Aughenbaugh: Whether or not, some government body says, university librarians in college, university professors can't have a podcast. Well, hey, I'm not entirely sure that that is an essential right found in the Constitution. It's not going to go ahead and call into question the republic. But if they went ahead and said, sorry, you can't vote, and the folks who get to decide this are supposed to be representing you in government, I don't know. That just sounds really problematic.

N. Rodgers: Yeah, I'm with you on that. By the way, it would be a violation of our free speech and I would fight. Well, but I agree that the court has had the correct interpretation of the word legislation. I think probably the scholars are right that the founders meant the legislative process, they meant that there should be a legislative process that fairly and legitimately decides how many electors there are going to be, how elections are going to be run, that sort of thing, and then there ought to be a way to have grievance if it's not done properly.

J. Aughenbaugh: I always thought that those two clauses in particular, and I've said this to my students in my constitutional law classes. I always thought that those two clauses were the framers, making sure that states had a role.

N. Rodgers: Instead of it being the federal.

J. Aughenbaugh: That it was not going to be imposed by the national government a completely uniform system on states. That this was more of a recognition of federalism, and less about giving just state legislatures the ultimate afford. Because it forces, if you will near discussion and negotiation between the federal government and state government. Because if state governments enact time, place, and manner restrictions on voting that violate civil liberties in the US Constitution, the federal government can override them.

N. Rodgers: As part of the Civil Rights Act when you can't discriminate at the poll against people.

J. Aughenbaugh: That's the Voting Rights Act.

N. Rodgers: Sorry, the Voting Rights Act on the variety of issues you cannot discriminate.

J. Aughenbaugh: But think about the 15th Amendment. You can't deny the vote to those who were previously enslaved. That's the Fed saying to the states, you can't do that. That's part of a negotiation.

N. Rodgers: Free actually means free. It doesn't mean free up to the point where you don't want it to be free anymore, that's not.

J. Aughenbaugh: When we passed an amendment to the US Constitution in the 1960s, to get rid of the poll tax, again, that was an interaction between the federal government and state governments where the Fed said, yeah, you can't force only wealth, you cannot allow just wealthy people the right to vote. What your bank account says should not be a requirement for you to vote.

N. Rodgers: Is it not what the idea of democracy and

J. Aughenbaugh: Issue is about, yeah.

N. Rodgers: Democracy is not for the wealthy and tyranny for the poor. You've miss the point of democracy if that's what you believe.

J. Aughenbaugh: When you get the 19th Amendment, it was designed to go ahead and be a direct, if you will, response to those states that did not allow women to vote.

J. Aughenbaugh: Again, that's how I always viewed those clauses. When I saw this argument being made, increasingly, I was just like, Wow, this is a completely different spin on these two clauses concerning voting and elections.

N. Rodgers: I want to wrap up by saying that you've taught me something very important in the lead up to this episode. I was reading notes and I was reading other things that you've sent me. I thought the constructionists.

J. Aughenbaugh: Strict constructionists.

N. Rodgers: Strict constructionists, were not in jobs and I didn't want to have anything to do with them. I had a crisis of faith earlier this week because all of a sudden I was like, wait, they have a point. No. Now what do I do? Because it made me think about the fact that what we talked about here is civil discourse and part of what we talk about here is understanding the other side.

J. Aughenbaugh: Yes.

N. Rodgers: Stopping and listening and one of the things in your notes, it made me stop and think was, it is not that Justice Thomas and I'm picking on him, but it's not just him. It's been lots of Justice. Scalia comes to mind, Alito, lots of others. It's not that Justice Thomas believes that there is inherent perfection in the Constitution. He does not think it is. He's not treating it like the Bible, where some people say it is the inerrant word of God. He is not saying it is the inerrant word of the founders. What

he's saying is, this is what the text says and if you don't think that's what it should mean, Congress, side eye go fix it.

J. Aughenbaugh: Yes.

N. Rodgers: So even, it says what you think it should say, he's actually wanting, a strict constructionist actually wants the document to be edited and updated, to say what we mean or to live by what it says. If we believe what it says is what we mean.

J. Aughenbaugh: Yeah.

N. Rodgers: I had that sudden mind-blowing thing this week and I was like, oh man, now I don't know how I feel about any of the justices ever. Thanks Aughie. I appreciate you ruining my life. Take school house rock for me, you've just taken all things from me over the years.

J. Aughenbaugh: Yeah.

J. Aughenbaugh: I'm kidding. I just assumed it was evil and negative intent. Now I'm like, no, it's a whole different.

J. Aughenbaugh: It's a different conception of democracy. Because for many strict constructionists they are fundamentally skeptical of the one branch of the Federal government that is unelected, actually updating the meaning of the permanent governing document in a democracy.

N. Rodgers: Which they are right to be. I had not even grasped that concept until this week. That's what they're saying is no really we think it should be a living document. We think you should.

J. Aughenbaugh: If the will of the people these two clauses should be changed. Then amend the Constitution.

N. Rodgers: Hey congress. Here's the red pen sit down in the archives with that big piece of parchment paper and start marking through things. Let's not actually do that.

J. Aughenbaugh: You convince both houses of Congress that there should be a change and then convince a whole bunch of states to ratify the change. Then the constitution will read the way you want it to.

N. Rodgers: Right and the way that people want it to.

J. Aughenbaugh: But having a bunch of unelected federal judges.

N. Rodgers: Interpret each clause of the Constitution which as we know, the entire thing is just one clause after another. It's one giant run on clause.

J. Aughenbaugh: Yeah. We've discussed that before.

N. Rodgers: Yes. My bitterness about the language.

J. Aughenbaugh: If you're an English major, reading the US Constitution is an exercise in wanting you to just go ahead and end your life.

N. Rodgers: You don't, because it's just going to make you cry and sad and probably drink. But I wanted to thank you because I have never thought about them in that way before. I had just dismissed them as they're zealots. They are zealots but they're zealots that I'm starting to say, well, they may have a point about that. They may say well, if we could clear up the language, then there wouldn't be these lawsuits and these questions and these questionable activities that go on in the states that have to be adjudicated. We could take care of all of that if we could clean up.

J. Aughenbaugh: Likewise Nia, I often times say to individuals who are strict constructionist. Some of these words, some of these phrases, some of these clauses are so vague and ambiguous. Can you not understand where loose constructionists are coming from. Was that part of what the framers had in mind? Of course, they just look at me like I have five heads. But I said, did the framers actually mean just the state legislature with these two clauses?

N. Rodgers: Right.

J. Aughenbaugh: Or is the Supreme Court then correct in this precedence that more than likely the framers met the legislative process?

N. Rodgers: Right.

J. Aughenbaugh: Because lawmaking in almost every democratic constitution that I'm aware of Nia, lawmaking is a process.

N. Rodgers: It's intended to be a process because it's intended to be slow and thoughtful and adversarial.

J. Aughenbaugh: Yeah, we want them to think about stuff, right?

N. Rodgers: We want it to be adversarial. We want there to be as many voices. One of the great things about democracy is that it's adversarial. There's points on both sides and I think it was a good reminder for me because I had a huge block in my vision about these people just thinking that they were, you can't just worship the words. But they're like no words have meaning.

J. Aughenbaugh: Yeah.

N. Rodgers: If you want the words to have the right meaning, you need to fix it so that it says what we all think it should say. That may mean that we end up with 287 amendments because we've got to fix

a bunch of stuff. Then you know what, 40 years after that we may have to do it again because it may be that meaning changes again over time depending on society.

J. Aughenbaugh: You and I have talked about this Nia. The US Constitution compared to many other democratic nation state constitutions. Comparatively has been amended very few times.

N. Rodgers: Right.

J. Aughenbaugh: I always go back to the example of how the French. The French have had five constitutions going roughly the same period as the United States having one, right? They just don't amend their Constitution.

N. Rodgers: They scrap it and start over.

J. Aughenbaugh: I go like Good Lord people, how do you do that?

N. Rodgers: Yet France survives and thrives.

J. Aughenbaugh: Yes.

N. Rodgers: There are other ways of doing it.

J. Aughenbaugh: The Brits didn't have a written constitution for all intents and purposes until the 1970s. How do you run a government without a constitution?

N. Rodgers: How do you run an entire empire without a constitution? You get the magna Carta. But anyway, thank you Aughie.

J. Aughenbaugh: Yeah. This has been a great discussion.

N. Rodgers: This has been good for me and thank you for helping me understand where they're coming from and why we may see another case that comes out where they actually do take on this question. I'm assuming what they will do is side eye congress and say, you all, we should fix that.

J. Aughenbaugh: Yeah. You should fix this. The justices who support the doctrine they may not win. But if the vote is like five to four, it could send a pretty clear message that Congress or state governments should give some thought to having very clear redistricting processes in place. What do you really mean? What do you mean?

N. Rodgers: Yeah, that'll be fun. We'll talk again soon.

J. Aughenbaugh: Sounds good Nia.

N. Rodgers: Bye.

J. Aughenbaugh: Bye.

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