Commerce Clause 2 Grandmas Growing Pot

Announcer: Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American government and offer context around the effects of government agencies in your everyday life. And now your hosts, Nia Rodgers, Public Affairs Librarian, and Dr. John Aughenbaugh, political science professor.

N Rodgers: Hey, Aughie.

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

N Rodgers: I am excellent because I have not fallen into a volcano. How are you?

J Aughenbaugh: Well, it's at the end of semester and my scotch consumption has been minimized.

N Rodgers: Yay. Yay, your liver is happy.


N Rodgers: So in the previous podcast, we talked about the commerce clause-

J Aughenbaugh: That's right.

N Rodgers: ... and about the case with the mudflaps. And for listeners, just go listen. There's no way that I can explain that to you quickly. It's rather involved and it's terribly amusing.

J Aughenbaugh: Yeah, but the larger point is, and again, this is a podcast about government documents, and in this case, the US Constitution, in a rather simple phrase-

N Rodgers: Right. I get to read it. This time in Article I, Section 8 of the US Constitution, and you can check me on this if you want to, but it really does say, quote, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." And this is what they call the commerce clause.

J Aughenbaugh: That's right.

N Rodgers: That's the shorthand, commerce clause. Whenever people want to threaten you with something, they say, "Commerce clause!" And you're supposed
to jump, which I'm learning is true, because it's the root of all things in our country, apparently. And it's about economic behavior and crossing state lines and that sort of thing, but there are other cases that don't seem like, at first blush, that they would be part of this, but they are. Right?

J Aughenbaugh: Sure.

N Rodgers: So can you talk to us about what grandmas growing weed-


N Rodgers: Okay.

J Aughenbaugh: Okay.

N Rodgers: Can you explain that to us so that we will understand what the heck this is about? Because I know that this is part of commerce, but I'm not sure I understand the case or how it relates to that.

J Aughenbaugh: Okay. What Nia's talking about is a pretty well-known case from this millennium and that is Gonzales v. Raich from 2005. And before we get there, as I'm wont to do, and Nia's about ready to roll her eyes, we might want to go back in time. So put on your seatbelts and get in your time machine, because we're going to go back in time a little bit.

N Rodgers: Get in your DeLorean.


N Rodgers: I'm just saying, if we had a DeLorean, we would be out of here.

J Aughenbaugh: Right.

N Rodgers: Sorry, folks. We love to make this podcast, but if we had a DeLorean like that-

J Aughenbaugh: Yeah. We're gone.

N Rodgers: ... we're going to be going back and fixing some stuff. I'm just saying.

J Aughenbaugh: Yes. The great Christopher Lloyd. And Michael J. Fox. You know what I watched the last week? Okay, this is wholly unrelated. Michael J. Fox in -
I can't believe this, because it's like a rom-com, it's a romantic comedy - Doc Hollywood.

N Rodgers: Yes.


N Rodgers: Yeah, that's a terrible movie. I love it.

J Aughenbaugh: Yes, I know. I feel-

N Rodgers: He was on Teen Wolf. That's a terrible movie and I love it, too.

J Aughenbaugh: I feel guilty every time I watch it, but there I am like two hours later and I'm like, "Okay, life ain't too bad."

N Rodgers: Oh, yeah, because he's Michael J. Fox.

J Aughenbaugh: J. Fox, that's right.

N Rodgers: If you don't like him, that's like saying, "I don't like puppies and kittens and other baby things."

J Aughenbaugh: Speaking of which, an animal plays an important role in that movie. "Nice pig, Doc." And those of you who've never watched the movie-

N Rodgers: Go see it.

J Aughenbaugh: Go see it, yeah. Pull it up, right?

N Rodgers: I was going to say surely you can get it now on Amazon for $1.99 or whatever.

J Aughenbaugh: So anyways, back to the commerce clause. We're going to go back in time. Before the 1930s, before the Great Depression, the commerce clause for basically about 80 years, well, probably closer to about 100 years, was interpreted by the Supreme Court to mean that any good or service that crossed state lines, the federal government could regulate, but if the good or service stayed within a state's jurisdiction, then only a particular state could regulate it.

N Rodgers: Which makes sense if you read the thing. It says among the states, implying-
J Aughenbaugh: Among the states, yes.

N Rodgers: ... crossing from one to another, not within the states.

J Aughenbaugh: So among constitutional law scholars, this is referred to as a very formal, strict approach of interpreting the commerce clause. We political scientists call this era, basically the late 1830s until about 1937, and we'll get to the importance of 1937 in just a moment, the era is known as dual federalism. The federal government could regulate those things that crossed state lines, states could regulate those things that stayed within intrastate, within the state. And that was fine when the nation's economy was predominantly agrarian. Because if you think about it, if you had a farm and you only sold to people within your state, why would the feds regulate your behavior? If, on the other hand, you grew cotton and you sold it to cotton mills in New England, well, then maybe the federal government might want to get interested. Or if you wanted to go in and sell your cotton to European nations. Well, you know, that might affect foreign trade. The federal-

N Rodgers: Right, and foreign relations [crosstalk 00:06:24].

J Aughenbaugh: Foreign relations, okay. So that was easy to maintain, that kind of dichotomy. Where it gets really complex and confusing is when the nation's economy shifts to industrialization.

N Rodgers: Ooh, wait. Can I make a guess here?

J Aughenbaugh: Yeah.

N Rodgers: So 1937 is the first time that salad makes its way from California to New York?

J Aughenbaugh: No. No, no, no, no, no, no. Why the 1930s becomes really important is the federal government's response to the Great Depression.

N Rodgers: Ah.

J Aughenbaugh: President Franklin Delano Roosevelt comes into office and he promises a New Deal. Basically, his New Deal was, and we kind of sort of tangentially touch upon this in other podcasts, the New Deal was a paradigm shift in regards to which level of government would affect people's lives the most. Because prior to the New Deal, state, and to a certain extent, local governments were basically the level of government
that most Americans had contact with. But with the New Deal, the federal government basically took an affirmative obligation to address first the conditions of the Great Depression, but then two, to kind of sort of regulate, if you will, what economists refer to as the negative externalities of the marketplace. And the Great Depression was seen as a kind of sort of catastrophic, if you will, result of this new economy. Manufacturing, industrialization, wild speculation on Wall Street, in the stock market, and the federal government takes on this role.

J Aughenbaugh: However, at first, a narrow majority of the Supreme Court said no, that's not the appropriate way to interpret the commerce clause. You can't go ahead and regulate what farmers do and you can't regulate what banks do and you can't regulate et cetera, et cetera, et cetera. And this really upset Roosevelt.

N Rodgers: So these people who are in the government now who say, "We want to get rid of all regulation," want to turn the clock back not to the '50s or '60s, but to the early '30s.

J Aughenbaugh: Oh, yeah.

N Rodgers: They want to go back to a time when the federal government did not-

J Aughenbaugh: Well, and in fact, you could go back really to the late 1800s. That Supreme Court was just... The criticism of the Supreme Court in the late 1800s was, and this came actually in also another well-known Supreme Court case, Lochner v. New York. New York attempted to regulate the work conditions, the number of hours that bakers could work in bakeries because their concern was many of these workers, when they worked too long, got exposed to bakery dust. It affected their lungs and there was also a broader concern that if you worked long hours, this was bad for your health. Now, we now know this, but back then, this was a kind of sort of a novel conclusion.

J Aughenbaugh: Lochner, who owned a bakery, challenged those regulations and it went to the Supreme Court and the Supreme Court said the state of New York could not regulate those hours, that there is a liberty of contract that individuals have within the Fourteenth Amendment's due process clause. Those in the dissent in that case accused the majority of reading a particular version of capitalism, lassez-faire capitalism into the Constitution.
J Aughenbaugh: You're talking about a Supreme Court that struggled to adjust the commerce clause to a new economy, and when you get to the Great Depression, the effects of that new economy on workers, on basically the majority of the public, and this all comes to a head in 1937. Roosevelt wins reelection by a landslide in 1936 and the Supreme Court, again, five to four votes, typically, were ruling that major parts of his New Deal program were unconstitutional, that the government could not use its commerce clause authority to regulate things that, as far as the court was concerned, only occurred within states. And Roosevelt gets so upset, he comes up with his infamous court-packing plan.

N Rodgers: Which we are going to talk about in another episode.

J Aughenbaugh: Episode, yes.

N Rodgers: But didn't he want to put like 75 people on board or something?

J Aughenbaugh: Well, basically, what it said was for every Justice over the age of 70, a president gets to appoint a new Justice, because-

N Rodgers: Holy cow, that would be all of them. Well, that's not true.

J Aughenbaugh: No.

N Rodgers: Currently, they're not all over 70. I was being extreme, because several of them are, but several of them are. You'd have a bigger Court.

J Aughenbaugh: Yeah, you would have a bigger Court, and at that time, four of the Justices were over the age of 70 and all four of them were part of the narrow five Justice majority that were declaring the New Deal unconstitutional.

N Rodgers: That's not a little bit personal, is it?

J Aughenbaugh: You're right. Okay. Which-

N Rodgers: Why couldn't you just put a term limit on them and say you can't serve after 70?

J Aughenbaugh: Well, that's one of the things that is now being discussed, is to put term limits. But again, we will touch upon in that in the podcast episode about court-packing.

N Rodgers: Because that's not the commerce clause, which we're talking about now.
Okay. But in 1937, the Supreme Court in part, according to historians and a fair number of scholars, at least one, if not two of the Justices began to change their votes about whether or not Congress could use the commerce clause to regulate this new economy. In particular, Justice Owen Roberts kind of sort of shifted his vote. It's the so-called switch in time that saved the nine Justices.

But what you ended up seeing was the Supreme Court all of a sudden kind of sort of finds the New Deal God, as I joke in class. They found religion and they started to read into the commerce clause a much more expansive definition. And it all comes to a head in a rather infamous case, and it's the foundation, I'm getting there. It's the foundation for the Gonzales v. Raich grandmas growing pot case.

The name of the case is Wickard v. Filburn from 1942. Roscoe Filburn was a wheat farmer in Ohio and he grew extra wheat on his farm for personal consumption. Now, not just him, but his livestock and his family. But this ran afoul of a federal law, the Agricultural Adjustment Act, the triple A, that basically put limits on the amount of wheat that wheat farmers could grow in the United States. And the reason for this was wheat farmers, like many farmers, when the Great Depression hit, they saw their prices for their goods fall.

So what many farmers did was they produced more of that good, but it had the effect of further declining the price. So the federal government stepped in and said we have to go ahead and control the supply, because if we don't, the prices will continue to fall and we need to stop this. In other words, the federal government was going to save wheat farmers from themselves. So the government put limits on what you could grow and if in a particular year, farmers with a particular foodstuff or particular agricultural item grew too much, that's when the federal government started to buy surplus food.

Oh, so that's what, okay. I see. Surplus wheat, surplus corn.


Although in fairness, I'm assuming that part of the reason for this in the 1940s as far as them wanting to grow more wheat is that wheat is a drier crop. You can grow it with less water and they were still coming off of the
Dust Bowl. They were still coming off of struggling with some of that with their land.

J Aughenbaugh: Well, that was some of it. The larger concern of the triple A, of the Agricultural Adjustment Act was the federal government needs to control the behavior in the market, because if they don't, it's going to effect the overall market for these goods in the United States.

N Rodgers: I don't know if they still do that, but they used to do that with dairy as well.

J Aughenbaugh: Oh, they do it with a large number of crops.

N Rodgers: They would buy up all the cheese, they would buy up-

J Aughenbaugh: Raisins, dairy-

N Rodgers: ... extra all kinds of stuff. Is that still going on?

J Aughenbaugh: Oh, yeah. They still have it.

N Rodgers: Okay. So do they still limit the amount that people can grow?

J Aughenbaugh: It depends. A lot of it now is tied to foreign relations, international trade. But they do to a certain extent. We haven't had this kind of situation. I mean, even with the Great Recession of 2007 and 2009. The Great Recession wasn't about agriculture. It was about banks, insurance companies, the housing market, et cetera.

J Aughenbaugh: So Filburn grows extra wheat. He gets-

N Rodgers: For himself and his crops-

J Aughenbaugh: And his family.

N Rodgers: ... not to sell on the side or anything like that. It's for his animals. It's to keep his animals alive. Okay. Which seems like that should be okay.

J Aughenbaugh: It should be okay, right? But he gets fined by the federal government. And one of his claims was this far exceeds Congress's commerce clause authority because he grew the extra wheat not to take it to the market, but to use on his own farm, his own home, et cetera.
N Rodgers: Right, so he's not upsetting the market.

J Aughenbaugh: No.

N Rodgers: I'm with him on this.

J Aughenbaugh: Yeah. It's not crossing state lines.

N Rodgers: Right. And it's not going into the market, so it's not hurting other farmers-

J Aughenbaugh: Farmers, that's right.

N Rodgers: It's not hurting the overall supply.

J Aughenbaugh: It goes to the Supreme Court and the Supreme Court, by a nine to zero vote, now, mind you, I want to keep in mind how quickly we went from early 1937, where a narrow-

N Rodgers: Where at five four.

J Aughenbaugh: Yeah, where a narrow majority of the Court says Congress can't use its commerce clause authority to do a lot of this stuff to the converse, nine to zero, they upheld the Agricultural Adjustment Act. And the Court in the majority opinion by Justice Robert Jackson said any economic behavior that could lead to a substantial impact on the nation's economy, Congress can regulate the behavior. So according to Jackson, if all wheat farmers did what Roscoe Filburn did, it would have a substantial impact on the supply and the demand in the wheat market and therefore Congress can regulate it.

N Rodgers: Oh, I'm completely against this. Just so you know. I'm sure you can see it in my face.

J Aughenbaugh: Oh, yeah.

N Rodgers: Because I'm sure I look irritated.

J Aughenbaugh: Listeners, you should see the look of shock-

N Rodgers: And anger.

J Aughenbaugh: Anger.
N Rodgers: Because that doesn't seem fair.

J Aughenbaugh: Like, "What is this BS?"

N Rodgers: So what they're basically doing is they're saying to him, you can only grow a certain amount, so if you want to feed your animals and your family, you have to take less to market. You have to make less money than you would've made-

J Aughenbaugh: Yeah. In other words, Roscoe had to go to the market to buy whatever he needed for his family when he could grow it on his own farm.

N Rodgers: That's bonkers.

J Aughenbaugh: This is known as the substantial impact test. If Congress can justify a law dealing with economic behavior on the grounds that it can demonstrate that an individual behavior, if replicated or in the aggregate, could have a substantial impact on the nation's economy, Congress can use its commerce clause authority. And by the way, Congress, by the time we get to the 1960s, began to use this with civil rights legislation.

N Rodgers: So done absolutely not out of any moral or ethical obligation to treat people equally or with respect or, I mean, that doesn't enter into it. What enters into it is it's going to affect the commerce of the nation.

J Aughenbaugh: You're talking about morality.
N Rodgers: Which the Court doesn't rule. Okay.

J Aughenbaugh: In the Constitution, as has often been discussed, is not all that much about morality. It's about process and behavioral norms. Right?

N Rodgers: And hugely about property.

J Aughenbaugh: Oh, sure.

N Rodgers: The whole life, liberty, and the pursuit of happiness-


N Rodgers: ... was pursuit of property, right, for a long time in a couple of the drafts.

J Aughenbaugh: Okay, the pursuit of happiness is in the Declaration of Independence, and in the-

N Rodgers: Right, but in a couple drafts, wasn't it-

J Aughenbaugh: In the Constitution, it's life, liberty, and property. Right?

N Rodgers: Right.

J Aughenbaugh: John Locke right now is so happy in whatever grave or whatever remains of his bones, because Locke never discussed happiness in the Second Treatise of Government. He talked about life, liberty, and property, and for Locke, the most important of those three was property. And when I say that one in my classes, my students were like, "But I don't own any property and I don't care about property." They were like, "Where's the happiness part?" I said, "Yeah, that was Thomas Jefferson getting a little creative in the Declaration of Independence." They were like, "Really?" And I said, "Yeah, and oh yeah, by the way, he plagiarized big time in the Declaration of Independence." They were like, "Only an academic would say that about the Declaration of Independence." And I'm like, "Well, he did. He borrowed from people and he didn't cite them. But I digress."

N Rodgers: I would love to see a Declaration of Independence with citations.

J Aughenbaugh: Citations!

N Rodgers: That would be awesome. And you know who we would have check them? Bill Newman.

N Rodgers: Because Newman loves citations. He is really good at it. Can you see him having an argument with Jefferson? "No, no, no. That is not how that is supposed to be-"

J Aughenbaugh: Supposed to be cited. That's right.

N Rodgers: Oh my gosh, that would be awesome.

J Aughenbaugh: "Now did you get this from Montesquieu or did you get this from Locke? Do we need to put both down?"

N Rodgers: Oh my goodness.

J Aughenbaugh: Okay. So that's 1942. Okay?

N Rodgers: Okay. And Filburn loses and he goes home and he sells his wheat farm because this is crazy.

J Aughenbaugh: Well, by the way, the little community in Ohio where he lived, I think they got either a monument or a street named for Roscoe Filburn. I want to take my colleague Chris [Alladeno 00:24:35] with me on one of our baseball stadium jaunts. Next time we're in Ohio, I want us to go there just so I can do that. He would be like, "Really, dude?"

N Rodgers: I can stand under the street sign.

J Aughenbaugh: Yeah, right.

N Rodgers: Other people want to go to the Rock and Roll Hall of Fame and you want to stand under the street sign that says this guy's name.

J Aughenbaugh: The sign that says Filburn, yes.

N Rodgers: Okay. Bringing whole new meaning to the word goob.

J Aughenbaugh: Yes. Okay, so let's-

N Rodgers: Okay, so-

J Aughenbaugh: So let's move forward.
N Rodgers: Okay. So we get back in the DeLorean. Now we're forward to when?

J Aughenbaugh: Okay. The early '90s.

N Rodgers: Okay.

J Aughenbaugh: By the early '90s-

N Rodgers: Lots of big hair in the early '90s.

J Aughenbaugh: Yes. Okay. We get to the late 1980s, early 1990s. The Supreme Court is led by Chief Justice William Rehnquist. Rehnquist was a huge advocate for federalism and the Tenth Amendment. A series of presidents, Reagan in particular and Bush 41, appointed fellow Justices to the Supreme Court who also by and large were supporters of federalism. The Supreme Court begins to push back on the rather expansive reading of the commerce clause that you see in Wickard v. Filburn and the Court begins to issue some rulings that at least would suggest that there is an outer limit to Congress's commerce clause authority. They don't clearly state what the outer limit is-

N Rodgers: Of course not. Because we love vague.

J Aughenbaugh: Right?

N Rodgers: We love vague whenever we're coming to the Constitution.

J Aughenbaugh: Right? Again, listeners, you got to give a listen to the podcast episode we did about mudflaps, because it's-

N Rodgers: It's so hard. It's so hard for me when it's so vague and random in parts and then it's so very specific-

J Aughenbaugh: Specific.

N Rodgers: ... in other parts. We're going to not deal with this commerce thing, but we're going to deal with pirates. Like, really? We have our priorities slightly out of whack is what I'm saying. Although it was pointed out to me by Professor [Artello 00:26:56] that one of the reasons that they leave that vague is to let it be a living document. It's because they understood that if you want a document to grow with people and to grow with philosophical and moral changes in society-
J Aughenbaugh: Well, that's one perspective.

N Rodgers: ... then you have to do that.

J Aughenbaugh: Another perspective as to why we sometimes get vague rulings is that some of the Justices believe that it should be the people's representatives and the political branches that implement the Court's rulings. So there are a couple of different justifications for why, at times, the Court will come really close to the edge of issuing a definitive ruling, but then they pull back. They'll pull their punches. Justice O'Connor, who actually served on the Court during the 1980s, 90s, she was the first female Justice on the Supreme Court, that was her approach. She didn't necessarily believe that the Constitution was a living document. Her approach was we should answer narrow constitutional or legal questions and leave the rest to the people's elected representatives, because in her view, the Court had a rather specific job and in a democracy, who should make most of the decisions?

N Rodgers: The people.

J Aughenbaugh: The people. And they do that with who they choose to run the political branches, the Congress and the presidency.

J Aughenbaugh: So the expectation was, with the Rehnquist Court, that they would start reigning in some of the federal government's extensive use of the commerce clause. And there are some rulings that did that, but then we get to Gonzales v. Raich. The issue in Gonzales v. Raich is that we have a federal law which hopefully many of you listeners know for various and sundry reasons. It's the Controlled Substances Act. It was passed in 1970 during the Nixon administration and it-

N Rodgers: It's part of his war on drugs, isn't it?

J Aughenbaugh: Yes. Part of the war on drugs. A war on drugs is-

N Rodgers: Because war on ideas, that's excellent. And war on things like drugs-

J Aughenbaugh: And poverty.

N Rodgers: Right, and terrorism. All these sort of things that are very hard to put your arms around means that you can do a whole lot under that umbrella.
J Aughenbaugh: Sure. The Controlled Substances Act has a number of categories of drugs, one of which are Schedule I drugs. Schedule I drugs are prohibited by federal law and you could be prosecuted for possessing those drugs, transporting them, selling them, et cetera. Marijuana is a Schedule I drug.

N Rodgers: And so is cocaine-

J Aughenbaugh: Cocaine, heroin-

N Rodgers: Methamphetamine. There's several things on that list, but marijuana sort of seems to be the most innocuous of them.

J Aughenbaugh: Speaking of which-

N Rodgers: No, no, but speaking of me as a non-medical professional, do let me say that, listeners, I'm only saying that because-

J Aughenbaugh: Yeah, neither one of us is-

N Rodgers: I'm kind of assuming that from what I know from public knowledge of marijuana, not because I'm a doctor.

J Aughenbaugh: When we get into the new millennium, there was a small number of states, California being the most prominent, that allowed for the medicinal use of marijuana. So you have this-

N Rodgers: Like for pain management, right?

J Aughenbaugh: Yeah. Pain management. From what I know, there are certain other kinds of conditions.

N Rodgers: Oh, epilepsy.

J Aughenbaugh: Yeah.

N Rodgers: There are other things that are affected. Brain-

J Aughenbaugh: Neurons, yeah.

N Rodgers: ... issues that are affected. Okay.

J Aughenbaugh: But the Bush II administration, particularly Attorney General John Ashcroft, were not fans of states doing this. And in particular, the concern
with California, at least according to the Bush II administration, was that California wasn't doing all that much to provide effective oversight to just make sure that people with medical conditions were getting approval to either operate dispensaries or to actually get permission to be able to purchase small amounts, grow small amounts, and then use that for various medical conditions.

N Rodgers: In fairness to John Ashcroft, and I can't believe those words just came out of my mouth, the abuse of prescriptions is a very real thing in the medical field, as we know during the current opioid crisis.

J Aughenbaugh: Right. Yes.

N Rodgers: So that is not without some foundation-

J Aughenbaugh: Foundation, yes.

N Rodgers: He didn't just make that up out of whole cloth.

J Aughenbaugh: No.

N Rodgers: I know he made other things up out of whole cloth, but not that particular thing. He did have a reason for believing that that might be a cause for concern. And one could also remember that California is huge.

J Aughenbaugh: Sure.

N Rodgers: It's huge economically. There's a lot of people who live there. It's just a huge behemoth type of state.

J Aughenbaugh: Yeah. So this is before the current time where we have 33 states and the District of Columbia that allow for medical marijuana usage and we have 10 states plus the District of Columbia that allow for the recreational marijuana. So this is a different time. And again, this is only 13, 14 years ago.

J Aughenbaugh: In Gonzales v. Raich, Alberto Gonzales, who was Ashcroft's successor as Attorney General, brings a case where the DEA, the Drug Enforcement Agency, had arrested Raich who was growing marijuana. She was a grandmother, thus the grandmas growing pot. She grew small amounts of marijuana for medicinal usage and from what I recall, it was for pain management. And Raich, with the support of the state of California, pushed back and argued that her arrest and conviction exceeded
Congress's commerce clause authority. In other words, the enforcement of the Controlled Substances Act as applied to her violated the commerce clause, because, as she pointed out, she wasn't growing it so she could sell it. She didn't go across state lines to purchase it and then bring it back to California. She grew it at her house for her own personal, medical use. Does this sound familiar to Roscoe Filburn?

J Aughenbaugh: When the case goes to the Supreme Court and the Court agreed to hear the case, constitutional law scholars in particular are like, okay, so how are the conservatives, this newfound majority of the Court that is saying there are limits to Congress's commerce clause authority, how are they going to rule on this? And in a vote, it was six to three, the Supreme Court upheld the application of the Controlled Substances Act to Raich. And the majority opinion was written by John Paul Stevens. Now, he wasn't part of the kind of sort of new federalism crowd on the Supreme Court, but Stevens relied extensively on Wickard v. Filburn, and he said this. "If marijuana users all began to do what Raich did, it would affect both the supply and the demand in this market, and therefore, the federal government has the authority to be concerned about how that would effect the nation-wide marijuana market."

N Rodgers: Which was illegal and shouldn't have been in existence in the first place.

J Aughenbaugh: Okay, but again-

N Rodgers: Right?

J Aughenbaugh: ... we have black markets all the time.

N Rodgers: Right, but I mean, they can regulate black markets as well as-

J Aughenbaugh: Legal markets.

N Rodgers: Okay. I mean regulate in the sense of not just shutting them down, but of having a commerce clause regulation of them.

J Aughenbaugh: Okay, but remember, that's the whole war on drugs, right? The idea is-

N Rodgers: Right, is to shut it down.

J Aughenbaugh: ... is to make it so difficult to either satisfy your demand or produce supply that eventually, drugs will no longer be attractive either to suppliers or consumers.
N Rodgers: But that's insane and doesn't work.

J Aughenbaugh: Okay. Well, whether or not a policy works, the question is-

N Rodgers: The smile on your face is awesome.

J Aughenbaugh: Oh, I love this.

N Rodgers: Because you're like, "Yes, Nia. It's insane. And yes, here we are."

J Aughenbaugh: Okay. Whether or not a policy works is unrelated to whether or not the government can create the policy.

N Rodgers: But it, okay.

J Aughenbaugh: Okay.

N Rodgers: So the Justices should have just said, "This is stupid. Y'all need to stop."

J Aughenbaugh: Now, one of the more fascinating things is when I teach this class, my students, and again, I am not with whole cloth besmirching an entire generation of college students, but a fair number of my students typically will one way or the other self-identify that they may be participants in this particular market.

N Rodgers: Or have tried it.

J Aughenbaugh: So they're really upset with this. And in particular, they're like, "One, she grew it for her own personal consumption."

N Rodgers: Right. She's not out there selling on the street to small children or-


N Rodgers: Right. She's not addicting people. She may be addicting herself-

J Aughenbaugh: Still.

N Rodgers: ... but we tend to, in this country, believe that, for instance, alcohol. It's perfectly legal for me to consume enough alcohol to destroy my liver and to do other things to myself that eventually lead to my death and there is no regulation about that. I can't, however, force something down your
throat the way they do with hazing. That's illegal. It's illegal for me to harm you with alcohol.

J Aughenbaugh: Yeah, it's an individual liberty argument.

N Rodgers: Right. So I'm-

J Aughenbaugh: I mean, what you decide-

N Rodgers: So I'm with your students and I'm not a person who, generally speaking, I mean, I've tried it once, but I'm not a person who uses marijuana. And I don't particularly have an opinion about it itself, but I have a strong opinion about this. I mean, come on. First of all, she's a grandma. Hello. You're going to arrest somebody's grandmother? Like, really? For pot? Like, really? And the other thing is if it's for personal use, I don't understand why anybody should end up in jail. And that's anybody who ends up with, I don't know. I don't understand it.

J Aughenbaugh: Yeah. The-

N Rodgers: I understand dealers. I understand trying to put dealers away, but-

J Aughenbaugh: Well, they register both of those complaints, and then those with economics backgrounds are just like, "So, if the government's going to go ahead and regulate a black market, why don't we just go ahead and legalize it and make money on it?"

N Rodgers: And tax it. Right. That's the other thing, is-

J Aughenbaugh: Which, as I pointed out, the majority in this case doesn't preclude that as the policy, because they basically have said Congress has the authority per the commerce clause to regulate this, if you will, market. They could. Of course, all of a sudden, their gears really start grinding. To me, what's most fascinating is how most of my students find a lot of support with the dissents. From O'Connor, Clarence Thomas, folks they usually don't go ahead and say, "Yeah, I'm a big fan of."

J Aughenbaugh: Because for Sandra Day O'Connor, this is an issue of the state's police power, and again, making reference to our previous podcast, whether or not states can go ahead and regulate mudflaps on 18-wheelers, Sandra Day O'Connor says if California decides for its citizens that a particular substance can be used, this falls within the state of California's police powers, because they've made a regulatory choice for public health and
safety. Do the other 49 states have to join California? No. According to O'Connor, they can be more restrictive or less restrictive. But she says it's a state issue, not a federal government issue.

J Aughenbaugh: Now, Clarence Thomas does not like the Supreme Court's case law about the commerce clause since basically Wickard v. Filburn. He's just like, "Basically our case law since 1937's been wrong. We should declare all of those rulings as bad precedent and we need to go back to pre-1937." Now, he doesn't get any supporters. But nevertheless, it's a fascinating argument, because he makes it all the time with these commerce clause cases. And usually by the time we get to Gonzales v. Raich, my students are rolling their eyes. "Oh, that's Justice Thomas." But in this instance, they're like, "Well, maybe he's onto something."

J Aughenbaugh: But the larger point here is if you think about today, we have another dichotomous condition. According to the federal law, the Justice Department, and in particular, the DEA could be targeting all those people in all of those states where it is legal to either use it for medicinal or recreational purposes. But we've had back-to-back presidential administrations, one with Obama, I mean, the Obama administration was quite clear, and I think his exact quote when he was asked about it in a press conference why they were not enforcing the Controlled Substances Act as it relates to marijuana usage, I think the president said, "We have bigger fish to fry."

N Rodgers: Which I can't say that I disagree with.

J Aughenbaugh: Disagree, I mean, we've got an opioid crisis, for goodness sakes.

N Rodgers: Right. Right. We have other things that are-

J Aughenbaugh: Things that we could target in regards to drugs. The Trump administration-

N Rodgers: Well, we have a heroin crisis.

J Aughenbaugh: Yes.

N Rodgers: So I'm-

J Aughenbaugh: I mean, folks, talk to doctors and nurses in emergency rooms in big cities, urban areas-
N Rodgers: Oh my goodness.

J Aughenbaugh: ... in regards to fentanyl overdoses, because that's scary stuff. That's completely synthetic and from what I've read, from what users have reported, it's heroin times, like, a hundred.

N Rodgers: Yeah, and apparently the first time you take it, you become addicted to it. It's extremely addictive and then it doesn't take very long before it kills you. It's very, very unfortunate. My heart goes out to the families because that's awful.

J Aughenbaugh: Yes. And then you also have Congress, in the last four or five budgets, have refused to give the Justice Department money to target marijuana usage and suppliers. So they refuse to go ahead and rewrite the Controlled Substances Act, but they send a very clear message in regards to the enforcement of the law. You can't target marijuana folks.

N Rodgers: Do they think that if they rewrite the Act, they will lose-

J Aughenbaugh: Yes.

N Rodgers: ... elections? Is that-

J Aughenbaugh: Yeah. Because public opinion polls for, what is it, the last three or four years, a majority of Americans believe that marijuana should be decriminalized, however, if you break it down by age group, the two, what is it, the two or three oldest age groups still believe marijuana is a dangerous substance and should be criminalized. And as we, again, talked about in a previous podcast-

N Rodgers: They vote.

J Aughenbaugh: They vote.

N Rodgers: They vote with money and they vote with voting. They vote both ways.

J Aughenbaugh: Yes.

N Rodgers: Because they do a lot of giving to candidates.

J Aughenbaugh: And the majority of the support for decriminalizing marijuana is from the two youngest age groups and typically, historically, they vote the least.
N Rodgers: Yeah. And they give the least money.

J Aughenbaugh: Yeah.

N Rodgers: I mean to PACs and things like that. They do those $5 things as opposed to the people who pay $5,000 for a dinner to raise money. Not that that's always fair, but it is, in fact, the way it is.

J Aughenbaugh: Yeah. So-

N Rodgers: I tell you, that film Reefer Madness, man. That sticks with you. That's what's happened to the older generations. They're like, "I saw it in a movie. It was terrible."

J Aughenbaugh: "What will it do to our young people's minds? Oh." But-

N Rodgers: Yeah, but they'll give kids Adderall. Hmm, okay. Sorry. That's just a personal, I think that it's weird with drug policies because we're trying to make a huge policy when many, many drugs affect individuals differently. And so there are some people who can drink alcohol like fish and function quite well, relatively speaking. They can't drive cars, but they can function in other ways. And there are people who smoke one joint and they're messed up. So it really is a lot to do with your individual chemistry.

J Aughenbaugh: And again, there are so many conflicting imperatives with this type of case. You're talking about individual effect and that touches upon individual liberty, but remember, this all starts with an interpretation of the commerce clause that allows Congress to regulate individual behavior that in the aggregate could have a substantial impact. And so much of federal government policy is not necessarily concerned about a single person. It's how do we go ahead and deal with the aggregate. So that's one competing-

N Rodgers: Right.

J Aughenbaugh: Okay. You also have the competition or the balancing of federal government interests versus state interests. And again, in the previous podcast, when we were talking about why have a commerce clause, it addressed a deficiency in the Articles of Confederation. The decision of the Framers was we couldn't have 13 states competing with one another because it would wreck the young nation's economy.

N Rodgers: And if we let California compete with the rest of the nation, we would lose.
J Aughenbaugh: Sure.

N Rodgers: We in Virginia would lose.

J Aughenbaugh: Sure. So-

N Rodgers: Many, many states would lose.

J Aughenbaugh: So historically, you have a balancing of how do we create a national economy while at the same time allow states to exercise authority that they've had pre-Revolutionary War when they were colonies, which was the police power? So if you don't like, for instance, recreational use of marijuana, the thought is, well, then move to a state that criminalizes it. You can vote with your feet. But if you got a national-

N Rodgers: Well, you can vote within your state to try to overturn.

J Aughenbaugh: Yeah, sure. But if you make a determination, let's say-

N Rodgers: You're living in Colorado.

J Aughenbaugh: Okay. Well, I mean, whether it be Colorado, Washington, or any of the other 10 states plus DC that have decriminalized marijuana. If you don't like it, you can try to make the policy change, or if you've come to the conclusion hey, I'm in a distinct minority, well, guess what? In the United States, you can vote with your feet. Move to another state.

N Rodgers: Yeah. And if you like the temperatures in Colorado, just move to Utah.

J Aughenbaugh: Yeah.

N Rodgers: Very similar temperatures. Very similar, you know. In some ways.

J Aughenbaugh: So you have a lot of balancing of competing interests. That's why, for instance, and these are probably my concluding remarks for at least this podcast, democracy's called an experiment in self-governance. Because we're trying to go ahead and figure out how to we balance things like individual liberty versus the interests of the collective, of the aggregate. How do we balance one level of government, the national, versus states? How do we go ahead and balance what now know in regards to drug usage versus what was the assumption in 1970?

N Rodgers: Right.
J Aughenbaugh: How do we go ahead and target the behaviors of the young, they may not know any better, versus outdated ideas and notions held by the elderly? That's the thing about a democracy. At some point-

N Rodgers: And the bigger we get, I mean, 336 million of us, that's a lot. I'm just saying.

J Aughenbaugh: Yeah. So how do you go ahead and balance that? I hear my students, the infamous millennials, "You guys left this." Okay, fine, we did. So what are you going to do about it? "Well, I don't know." Okay. So let's try to figure that out. Versus I talk to my grandmother who's 94 and she says, "I can't believe young people your age," I'm like, "Young people my age?" "Do x." And I'm like, "Oh, grandma, you don't know the half of it."

N Rodgers: "You think I'm bad."

J Aughenbaugh: Yeah. So how do you go ahead and accommodate those interests of 330 plus million Americans and its self-governance? We're trying to govern ourselves here. And then you take a sterile clause, a very simple, sterile clause, "Congress can regulate." Doesn't mean they have to, but they have the authority to. So what is that authority? Well, in this particular case, the Supreme Court said it's the authority to go ahead and target a grandma growing pot. And with that...

N Rodgers: Yes. With that, we are going to say thank you for listening and we will link to this clause again. We will also link to the cases that have all been mentioned here so that you can read up on this and of course you can find Auggie's email on the guide if you want to send him email questions about the, he's not going to be able to act as a lawyer if you're having legal concerns in Virginia about perhaps using or being found with marijuana. You would want to get an actual lawyer for that, please.

J Aughenbaugh: And by the way, I do not have any advice, though I oftentimes get asked by my students, on whether or not your grandparents should grow and use marijuana. Please do not ask me that.

N Rodgers: We are going to take up, I think, one more thing about the commerce clause, so you'll hear from us in one more episode about that, so stay tuned. Thank you.

J Aughenbaugh: Thank you, Nia.
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