

Commerce Clause 3 Affordable Care Carrots and Sticks

Announcer: Welcome to Civil Discourse. This podcast will use government documents to eliminate the workings of the American government, and offer context around the effects of government agencies in your everyday life. And now your host, Nia Rogers public affairs librarian and Dr. John Aughenbaugh, political science professor.

N Rodgers: Hey Aughie.

J Aughenbaugh: Good morning.

N Rodgers: So the commerce clause, which controls our lives from start to finish, from moment of birth to moment of death or perhaps beyond. I know that we're not quite done, right? Because we still have one more thing to talk about. Well, no, that's not true. We have lots more to talk about, but there's one more case we're going to talk about in terms of the commerce clause and what it does and how it affects our lives.

J Aughenbaugh: That's right. In previous podcast episodes, we looked at what's the big deal about a rather simple clause in article one, section eight of the constitution. And this time we're going to go ahead and look at whether or not the commerce clause can regulate non behavior.

N Rodgers: Non behavior.

J Aughenbaugh: I think before we talked about grandma's growing pot, right?

N Rodgers: At least they were doing something.

J Aughenbaugh: Yeah. They were doing something. And the Supreme court said the federal government can regulate even economic activity in an illegal market.

N Rodgers: The pot and the weed thing?

J Aughenbaugh: Yes.

N Rodgers: The weed thing was regular market, right? And the pot was irregular market. So basically the commerce clause controls all the market.

J Aughenbaugh: Yeah. So the next question that arises is, what if people don't want to engage in an economic activity?

N Rodgers: Okay.

J Aughenbaugh: And this all comes to the four, if you will, when the United States Congress in 2010 passed the affordable care act known as the Obamacare. Though interestingly enough, after the 2016 presidential election, there was still a significant percentage of American voters who didn't know that the affordable care act was also Obamacare.

N Rodgers: Yeah. I think there was some messaging problems with that. And I think that people sometimes rejected it because they didn't care for the president as opposed to the act itself. And that's not unusual, right? Sometimes things are tied to presidents that people later say, that was a great thing, when they didn't like the person or that really sucked when they really liked the person. So it's not indicative of their feelings about the actual thing itself.

J Aughenbaugh: Yeah, the actual person.

N Rodgers: We're talking about the ACA, right? The thing that is called the ACA.

J Aughenbaugh: Yeah, the Affordable Care Act.

N Rodgers: This is the one that's a thousand pages and-

J Aughenbaugh: Oh yes.

N Rodgers: ... was put through Congress relatively quickly for something of its size and nature.

J Aughenbaugh: Yeah. I mean because it was pretty much the nation's most significant reform of healthcare, and as it relates to congressional power, there were two provisions in particular that were extremely problematic as it relates to whether or not Congress could, if you will, reform the healthcare, the provision of healthcare in the United States. One is known as the individual mandate and that's the requirement that all Americans must have health insurance, because the logic of the affordable care act was, if more Americans or all Americans, could pay for healthcare, then more Americans would actually access healthcare.

J Aughenbaugh: So when president Obama was elected, most estimates of the American population was that at least 30 million Americans didn't have health insurance. So for them, how do you pay for healthcare when you don't have insurance? Because in the United States, historically, you pay for healthcare through health insurance. And if you didn't have health insurance, if you were either poor enough or you were a senior citizen starting in the mid 1960s, either Medicaid or Medicare would help cover the costs of healthcare. So that's one provision.

J Aughenbaugh: The other provision and again Nia as you pointed out this was-

N Rodgers: [inaudible 00:04:57] thousand pages.

J Aughenbaugh: Pages, right?

N Rodgers: So the three minutes summary here on the podcast, we'll put a link to the ACA, if you want to go read it and we would suggest that you probably bring some strong coffee with you.

J Aughenbaugh: Yeah. And then we may also give you a couple of links to where basically nonpartisan groups [inaudible 00:05:19]

N Rodgers: Right. We'll do that too.

J Aughenbaugh: The other part of the law that was extremely if you will, troublesome, for particularly States, was the requirement that Medicaid coverage be expanded. And if States did not expand their Medicaid programs, they could potentially lose all their Medicaid funding.

N Rodgers: Wait, by expand Medicaid, do you mean they gave it to more people?

J Aughenbaugh: More people.

N Rodgers: So they lowered the amount of money you had to make in order to-

J Aughenbaugh: To qualify? They lowered if you will, the poverty threshold for Medicaid.

N Rodgers: So more people would have access to it.

J Aughenbaugh: That's right. And because this is United States-

N Rodgers: Somebody was grumping about it. Somebody's always grumpy about something.

J Aughenbaugh: This actually led to a pretty significant Supreme court decision, NFIB National Federation of Independent Businesses versus Sebelius. And Sebelius was the secretary of health and human services. HHS.

N Rodgers: Can I ask a question?

J Aughenbaugh: Yeah.

N Rodgers: Actually, can I make a mocking observation?

J Aughenbaugh: Sure.

N Rodgers: That's the Federation of Independent Businesses? Is there a Federation of dependent businesses?

J Aughenbaugh: No.

N Rodgers: Okay.

J Aughenbaugh: Yeah.

N Rodgers: So they just did that because they would give them fun letters to put in?

J Aughenbaugh: No, probably. I mean, let's face it, if you're talking about government or governance or interest groups or pretty much anything in 21st century world, you need a cool acronym. I mean, come on now.

N Rodgers: VCU.

J Aughenbaugh: Yeah. Right.

N Rodgers: How many people say Virginia Commonwealth university? Unless they're suing us or grumpy about something.

J Aughenbaugh: Yeah, I mean I got my masters and PhD from Virginia Polytechnic Institute in State university. Otherwise known as Virginia tech.

N Rodgers: Okay. Gotcha.

J Aughenbaugh: I mean because if you can't roll off the tongue. You belong to what? To who?

N Rodgers: Exactly. That's why everything is CIA and FBI and USPS.

J Aughenbaugh: By the way that last one is the United States Postal Service.

N Rodgers: I am not saying that they do the same kinds of things as the CIA and the FBI. I didn't mean to imply those were equal, they're all engaged in surveillance. Go listen to the podcast on post office you'll find that that's in fact not what they do. They complain about stamps. So I have questions.

J Aughenbaugh: Of course.

N Rodgers: The mandate on the health insurance, I know that that is what caused a ginormous cow among common everyday voter people. I know that the Medicaid thing caused a cow, um, to be had by governors in certain certain States because they didn't want to expand Medicaid. They were, they were

resistant to that because of budgetary issues and all that other kind of stuff. A lot of those I know were red States. I don't know that that's necessarily the case in all the cases, but it tended to be right?

J Aughenbaugh: Yeah nearly all those states who challenged the Medicaid expansion were Republican states.

N Rodgers: But the individual mandate thing, why did people freak out about it? What's the issue with that?

J Aughenbaugh: Well, in part it's a liberty issue. I mean, because basically the United States Congress passed a law that said, even if you didn't want health insurance, you had to get it.

N Rodgers: Or you could pay-

J Aughenbaugh: A fine.

N Rodgers: Was it a fine?

J Aughenbaugh: Yes. You could avoid it by paying a fine. Now if you were poor, either if your state expanded Medicaid, you could get health insurance through your state's Medicaid or you could go and get health insurance on a health insurance exchange, which the government were great. And by the way those who wrote the affordable care act assumed most States would create their own health insurance, if you will markets exchanges. Interestingly enough, over half did not. Because they just didn't like the law. And in part a lot of the opposition, some of it was this was the signature Obama administration, domestic policy achievement.

N Rodgers: And they didn't like him.

J Aughenbaugh: I don't like Obama and I don't like this, but a lot of the pushback was, okay, those who were like, what's the federal government doing, telling me that I have to engage in an economic activity? What if I don't want health insurance? And by the way, I happened to deal with a lot of people, young people who don't see the need for health insurance.

N Rodgers: Because they're young and they're healthy.

J Aughenbaugh: Yes.

N Rodgers: The theory with the exchanges was that young and healthy would help cover older and sicker. Right? Or older or sicker?

J Aughenbaugh: No, in fact the health insurance industry-

N Rodgers: Isn't that how it works?

J Aughenbaugh: Yeah. The health insurance industry basically told those who were crafting the affordable care act. If you don't want us to oppose your version of healthcare reform, like we opposed the Clinton administration effort in the early nineties, you're going to need to go ahead and mitigate all the costs we're going to have to assume, for people with preexisting conditions and a whole bunch of unhealthy people, and the health insurance industry said the population we want and they actually called them this, is young healthies. Young people who don't have, as many, if you will, chronic conditions, costly conditions, aren't engaging in life activities that cost a lot of money in regards to healthcare. That's what the health insurance industry said very clearly to those who were writing the affordable care act. So you had a lot of people who were like, I don't need health insurance. I've lived either a short life or somewhat long life with out very little healthcare. Why do I need to get this?

N Rodgers: Okay. But the government does that for other things. It mandates that you have a drivers license, which you have to pay for. It mandates that you have registration for your car, which you have to pay for.

J Aughenbaugh: But again, you can choose not to drive.

N Rodgers: But you have to have a valid state ID for a lot of kinds of things like travel and that sort of thing, which you have to pay for. So yes, I mean they could say, okay, well you can never travel. You can never go anywhere and you can't ever register for but if you ever registered, even for classes here, you have to have an ID.

J Aughenbaugh: But you're talking about the state.

N Rodgers: And a state issued ID costs money. But doesn't Medicaid come through the state?

J Aughenbaugh: It's a federal government program. A state could choose not to provide Medicaid.

N Rodgers: Really? like completely. They could just say we will not take care of any of the poor sick people in our state.

J Aughenbaugh: Sure. And in fact one of the reasons why States objected to Medicaid expansion was that when the Medicaid program was created in the 1960s the federal government covered 90% of all state costs. When the affordable care act

passed, the federal government's share of state Medicaid costs was 50%, many States felt as though they got sucked into providing a welfare program for their neediest citizens and the federal government began to back out. So part of the objection for some stage, usually conservative and definitely conservative in regards to budgets, was that how do we know if we do Medicaid expansion, the federal government won't go ahead and pull the rug out from under us like they did with Medicaid initially.

N Rodgers: And then say we'll only pay 10% or 50%.

J Aughenbaugh: Or 90% because the Medicaid expansion, 90% of the expansion cost would be covered by the federal government. And some States were just like, yeah, we've heard this before. And the difficulty for States is, well then how do you turn around and say, to a whole bunch of people-

N Rodgers: To your neediest citizens.

J Aughenbaugh: Who are now receiving Medicaid? Sorry, we're cutting that benefit, because those citizens don't care who's paying for it. They just know that they're receiving this necessary benefit from the government.

N Rodgers: And the government's sort of all or nothing proposal made them bonkers because?

J Aughenbaugh: Yes, they said that Congress doesn't have the authority to do that.

N Rodgers: To cut the program as it currently stands?

J Aughenbaugh: To remove all of their funding if they don't agree to do something that Congress wanted them to do. So Congress was essentially blackmailing the States.

N Rodgers: Sure.

J Aughenbaugh: But that happens a lot.

N Rodgers: Sure. I can tell from the look on you and the way you said. Sure. Like yeah, they do that all the time.

J Aughenbaugh: In a previous podcast episode we talked about ear-

N Rodgers: You just are out to destroy every bit of naivete. I have left and I don't have that much left. And you just had to kill it all.

J Aughenbaugh: By the end of us doing civil discourse, you'll be like-

N Rodgers: I don't believe in anything anymore.

J Aughenbaugh: I am this Holy, jaded, cynical.

N Rodgers: Sad, tragic human.

J Aughenbaugh: Okay. In a previous podcast episode, you and I talked about federalism, the relationship of the federal government to the States. And there are eras of federalism where state governments were either equal to or maybe had a little bit more power than the federal government in our country's history. But starting with the new deal in the 1930s, political scientists refer to the era of federalism that started then as cooperative federalism. And I joked, it's cooperative like when parents say to their kids, Oh, you want money to do X? Well, to get that you have to do Y, you cooperate because you want to the money.

N Rodgers: You don't have to take out the garbage, but you're not going to get a new game for your console.

J Aughenbaugh: You're not going to get those shoes that you've been dying for-

N Rodgers: No Beyonce concert for you.

J Aughenbaugh: Or you don't get to use the car. Or you don't get to go to that summer camp unless you do X, Y and Z right?

N Rodgers: Yes, often degrades.

J Aughenbaugh: We can-

N Rodgers: And professors do that sort of.

J Aughenbaugh: Sure.

N Rodgers: If you don't do these things, you're not going to get at least a C, which means I'll be seeing you again.

J Aughenbaugh: That's right. We refer to it as cooperative federalism. But States frequently believe that they were being extorted because-

N Rodgers: Coersive federalism.

J Aughenbaugh: Yeah coersive federal. We're going to come back to the word coercive in just a few moments. Right? So the affordable care act passed, and almost

immediately, because this is the United States, lawsuits were filed. And the two main, if you will, challenges to the affordable care act before it even got implemented, concerned two different congressional powers. One is the commerce clause. Could Congress regulate non-activity? And then the second was could Congress use its spending authority as a way to incentivize States to engage in Medicaid expansion and both get explored in NFIB versus Sebelius. So in regards to the commerce clause challenge, a narrow majority of the court went ahead and said Congress cannot use its commerce clause authority to force people to engage in an economic activity they don't want to. And by the way, when people don't buy health insurance but then they get sick, it has a huge impact on healthcare costs, because those costs usually end up being shared or redistributed to those with health insurance, because the insurance companies or the hospitals, want somebody to cover the costs of somebody without health insurance who needed healthcare.

N Rodgers: So premiums go up?

J Aughenbaugh: Premiums go up.

N Rodgers: Overall.

J Aughenbaugh: Yes.

N Rodgers: In order to help cover some of that. And some of it's written off as pro bono sort of thing. But some of it is not and every year my premium goes up just a little, even though my medical care has not particularly changed year to year. And it's to help cover things like that.

J Aughenbaugh: But a narrow majority of the Supreme court said-

N Rodgers: By narrow you mean five, four?

J Aughenbaugh: Five, four. And these were the five-

N Rodgers: Our least favorite number when it comes to the Supreme court is five, four.

J Aughenbaugh: Yeah. Because the losers are always like, if we only had one more vote. And everybody rolled against us. They're all enemies of the state. They're being activists.

N Rodgers: They're grumpy and we're peeved. And it's much better when it's eight, one or seven, two, because it's a clear-

J Aughenbaugh: Or the best is nine, zero.

N Rodgers: Yeah but how often does that happen?

J Aughenbaugh: Well actually it happens more often than the media would suggest.

N Rodgers: Oh really?

J Aughenbaugh: Yeah.

N Rodgers: Because I was figuring that you couldn't get those folks to agree on a ham sandwich, let alone.

J Aughenbaugh: No, typically, over the last decade in most Supreme court terms, over a third of the cases are decided nine, zero. But those aren't the cases that get reported. Because these are like, tax cases or administrative law cases. Or-

N Rodgers: No offense to [inaudible 00:21:04] but what I think of as boring cases. And not the newsy-

J Aughenbaugh: And in fact, among the justices, typically those are the cases that are referred to as dogs.

N Rodgers: Dogs?

J Aughenbaugh: Yeah. None of the justices actually want to write the majority opinion, but they get shared among the justices.

N Rodgers: Oh really?

J Aughenbaugh: Yes. Because-

N Rodgers: Oh man, I don't want to write this and we all agreed on something.

J Aughenbaugh: Yeah. Right. That nobody will read.

N Rodgers: Did they like being feisty? Is that why they want to write-

J Aughenbaugh: They want to write the majority opinion in a landmark case. I mean come on, they got egos like the rest of us. Right?

N Rodgers: That's fair, if that's all you do in a year is hopefully be cantankerous enough to get to write your name on the landmark case. I'm not sure that's a good thing.

J Aughenbaugh: So the five conservatives. Chief justice John Roberts, Scalia, Anthony Kennedy, Clarence Thomas and Sam Alito all agreed that Congress could not use its

commerce clause authority to force individuals to buy health insurance. They said-

N Rodgers: Totally makes sense for that group of people.

J Aughenbaugh: And they were like, okay, we have never gone that far. The farthest we've gone is what we discussed in the previous podcast about the commerce clause. You can regulate individual economic activity if it was replicated in the aggregate, it would have a substantial impact on the nation's economy. But these are people who don't want to participate. And that is not commerce.

N Rodgers: That's uncommerce.

J Aughenbaugh: Yes. It's uncommercial right? Now the second argument the federal government made to support the individual mandate was the necessary and proper clause. Which is also known as the elastic clause.

N Rodgers: Elastic clause?

J Aughenbaugh: Yes. Okay. The necessary and proper clause-

N Rodgers: Let me guess it stretches to cover everything else?

J Aughenbaugh: Yes. Like a rubber band. That's the way I describe it in my classes. In fact, I got one on my wrist right now. It's too bad you guys can't see this because I'm actually pulling on it. So basically in article one, section eight of the constitution, the framers looked in this clause, the necessary and proper clause.

N Rodgers: Other duties as assigned.

J Aughenbaugh: In a job description.

N Rodgers: In a job description that the last line is, and other duties as assigned, which basically means we can make you mow the lawn, drive the truck, do whatever, like-

J Aughenbaugh: Make coffee for a whole bunch of people.

N Rodgers: And if you're a professor at the university like, yeah, I'm going to need you to mow the lawn. Not quite, but it's pretty close to that sort of thing.

J Aughenbaugh: I'm going to have to think about it. Anyway.

N Rodgers: Other duties as assigned is an incredibly powerful phrase. So apparently, what is it ness-

J Aughenbaugh: Necessary and proper.

N Rodgers: Necessary and proper is a similarly powerful phrase?

J Aughenbaugh: Yeah. Because it basically expands potentially all of Congress's listed powers in article one, section eight. The classic case example, arose in the early 1800 McCulloch versus Maryland. The federal government had created a national bank, actually it was the second national bank. And basically the purpose of the national bank, or at least the second version was, what do we do with the revenues the federal government collects? Do we want members of Congress to take that money home? No. Right? We need a-

N Rodgers: We'll never see that again if we do that.

J Aughenbaugh: Okay, we need a bank. The problem is all the colonies, which eventually became States, had already created their own state banking systems. So many of the States were like, hey, wait a minute here. If there is a national bank system that's competition for our own state bank systems. So many States, including Maryland, began to tax the branches of the national government bank within their state jurisdictions as a way to kind of discourage them from actually operating in the States. Well, the case goes to the Supreme court and the Supreme court in unanimous vote said, the bank was necessary and proper for Congress to enact or create to achieve other functions given it specifically in article one, section eight, taxing and spending. And Maryland was like, Oh man.

N Rodgers: As a state. Oh man. That would be awesome to hear. Okay, everybody all at once.

J Aughenbaugh: Oh man. That case is also known for the Supreme court reminding the state of Maryland and all the rest of the States that federal law is the Supreme law of the land. That if there was conflict between a federal and state law, as long as the United States Congress can point to one of its enumerated powers, that's the Supreme law. Okay. In Maryland it was like, okay, well we can tax it. And chief justice John Marshall writing for the majority's head, the power to tax is the power to destroy.

N Rodgers: That's something that should go on a cross stitch pillow.

J Aughenbaugh: Yeah. Right. Actually, I think the tea partiers used to say that at their rallies. So the federal government in the NFIB versus Sebelius case argues, well, the individual mandate is necessary and proper to improve the general welfare and

to regulate commerce. And again, a narrow majority, John Roberts and the other four conservatives said, okay. Necessary and proper has to refer to a specific power. The specific power that the federal government argued in this case was commerce. And we just said, you can't use the commerce clause to regulate non-activity. Nice try.

J Aughenbaugh: However, the third, if you will, argument that the solicitor general made in front of the Supreme court, was-

N Rodgers: Was that Mr. Holder?

J Aughenbaugh: No, that was a Donald Vertelly.

N Rodgers: Solicitor general. Different person?

J Aughenbaugh: That's right. So the solicitor general's main job in the justice department, is to coordinate and to argue most of the federal governments Supreme court cases.

N Rodgers: Oh, okay.

J Aughenbaugh: Yes. So in fact scholars have referred to the solicitor general as the 10th justice. Because they argue so frequently in front of the Supreme court because the federal government is frequently a party in the case.

N Rodgers: Yes, United States versus fill in the blank.

J Aughenbaugh: Or fill in the blank versus the United States. But also the Supreme court, when they're trying to decide to take a case, will sometimes ask the solicitor general, is this case important enough to the federal government that we should take it?

N Rodgers: When does the solicitor or general ever say no?

J Aughenbaugh: When the solicitor general, I.e the justice department is afraid that if the Supreme court takes the case, they may issue a ruling against the federal government.

N Rodgers: So they'll say, nah, we're good. We're just going to pop out for a burger and beer and we'll see you guys next time.

J Aughenbaugh: This case really isn't important. It doesn't raise important matters of law, or you all might want to wait until the lower courts work on this a little bit more and clarify the issues.

N Rodgers: Hence the 10th justice?

J Aughenbaugh: Yeah.

N Rodgers: But also, I assume that that person knows them really well because they're around them all the time?

J Aughenbaugh: Oh yeah. In fact, one of the current Supreme court justices was the solicitor general, for part of the Obama administration. Elena Kagan. Thurgood Marshall was a solicitor general. Robert Jackson during the forties and 50s, he was on the Supreme court, before that, part of the time he was a solicitor general. In fact, he was so good at arguing cases that a couple of the justices are remarked that he should be made solicitor general for life. And by the way, even if you don't go from being solicitor general to the Supreme court, you can end up arguing so many cases in private practice after being solicitor general to where you are the go to person or persons for any party that wants to appeal to the Supreme court.

N Rodgers: The gay marriage case, those two guys were known for being-

J Aughenbaugh: Ted Olson and David Boies.

N Rodgers: Weren't they known for being very familiar with arguing in front of the Supreme court to the point where-

J Aughenbaugh: It's called the elite Supreme court bar.

N Rodgers: Where they were picked for that purpose, like they were brought in for that purpose.

J Aughenbaugh: Ted Olson-

N Rodgers: On both sides, right? One on each side.

J Aughenbaugh: Yeah. So you have former solicitor general's who are Democrats and Republicans who are the go to people. Bush two's solicitor general for part of his two terms was a guy by the name of Paul Clement. He's basically the go to guy for conservative groups who want to appeal to the US Supreme court. In fact, NFIB employed him to be their legal counsel. It's an important position. It's recognized as one of the most important legal advocacy positions in the United States.

N Rodgers: So you've got to have chops to be doing this?

J Aughenbaugh: Yes.

N Rodgers: And not anybody can argue in front of the Supreme court, right? You have to have a certain-

J Aughenbaugh: You have to be admitted to the Supreme court bar.

N Rodgers: So there's not that many people to start with and then you become one of these people-

J Aughenbaugh: Yeah. And in fact there was a criticism that was arisen that the elite Supreme court bar is so known to the Supreme court that the Supreme court prefers to have those lawyers argue cases because they know they're going to get quality written briefs and quality oral arguments. But that means a whole bunch of attorneys around the United States.

N Rodgers: Can't argue in front of the Supreme court.

J Aughenbaugh: Because the Supreme court is like, okay, you've got an hour. Now NFIB versus Sebelius actually stretched out over three days. I kid you not.

N Rodgers: Well, and I know that when you go before the Supreme court as an attorney, the only thing I know about it, because I've yet to go to one. I would like to at some point, but I've not yet sat in on an argument, is that you get about like 15 seconds and then they can start asking you questions? So you also have to-

J Aughenbaugh: [crosstalk 00:33:27] would have to be 15 seconds. There have been some attorneys that-

N Rodgers: Stood up and said good morning and it was.

J Aughenbaugh: Each attorney, starts their 30 minutes. They get 30 minutes each. Each starts with, may it please the court. There are some advocates that barely get out of their mouth. May it please and the justices start firing questions at them.

N Rodgers: So you really have to be good under pressure because they are not playing, and they're going to rake you over the callus as hard as they can because these are big decisions. Right? Because most of the cases that get requested don't they turn them away? They only take a very small percentage relatively speaking, right?

J Aughenbaugh: Over the last decade, per year, the Supreme court typically gets between eight to 9000 appeals. The Supreme court, over roughly the last 20 years has only been taking 70 to 80 cases. Now, I'm not a math major-

N Rodgers: But your odds are not good.

J Aughenbaugh: But I'm kind of sort of thinking-

N Rodgers: If we were playing the stock market on that, we would be living in a box on the side of the road.

J Aughenbaugh: That's less than one percent. However-

N Rodgers: So your chances of being heard by the Supreme court are-

J Aughenbaugh: Are not good. Not good.

N Rodgers: Tiny, tiny, tiny, tiny.

J Aughenbaugh: Yeah. So when you hear somebody who loses a case in state or federal-

N Rodgers: I'm going to take this all the way to the Supreme court.

J Aughenbaugh: You can basically go ahead and say-

N Rodgers: Good luck buddy.

J Aughenbaugh: BS.

N Rodgers: No, you can say, all right. I'll see you at the Supreme court.

J Aughenbaugh: Start laughing.

N Rodgers: Because nothing happened. So anyway what's the third part?

J Aughenbaugh: So the third justification that the federal government raised, to defend the individual mandate, was that they could do this through congress's taxing authority. It was problematic to make that argument because the affordable care act never uses the word tax. If you didn't purchase health insurance, you weren't taxed, the law said you got fined.

N Rodgers: But isn't a fine a tax?

J Aughenbaugh: Well more so because the federal government agency that would be monitoring and collecting the funds-

N Rodgers: Was the IRS.

J Aughenbaugh: Was the Internal Revenue Service.

N Rodgers: That's right. Because you had to put on your tax return whether you had purchased in the previous year and if you hadn't, then the little thing kicked in with the fine.

J Aughenbaugh: That's right. In fact, employers who offer their employees health insurance had to send you a tax form to attach to your tax return to document that you had health insurance.

N Rodgers: Yes.

J Aughenbaugh: Now the reason-

N Rodgers: And now it's just a number that you can attach? But it is still on your W2 from your from the state and all that I think.

J Aughenbaugh: From your employer. So, the reason why the law that had-

N Rodgers: That was dashed clever of the people who wrote the law.

J Aughenbaugh: Yeah. Well, and they did it for wholly political reasons. There were members of Congress, Democrats who won elections in generally conservative States, red States, who basically said to those writing the affordable care act, if you put tax in this law, not only is there opposition in my state to the individual mandate. But if you put tax in this law, you make it really difficult for me to run for reelection because in my state they don't like taxes, they don't like any tax. So you would make it really difficult for me to win reelection. So they didn't say tax, they said it was a fine. F-I-N-E. And I know sometimes with the way I speak, the last consonant doesn't get pronounced. We're talking about fine. Not fined. Okay? It's a fine, it's a penalty. But it would be collected by the IRS.

N Rodgers: During tax season.

J Aughenbaugh: That's right.

N Rodgers: Or taken out of your return. There are various ways that could work.

J Aughenbaugh: So John Roberts-

N Rodgers: Can I just side note something?

J Aughenbaugh: Yeah.

N Rodgers: I don't think anybody likes taxes. I think there are some States where people are more willing than other States to pay taxes, because they perceive a benefit to themselves for whatever that-

J Aughenbaugh: Yeah, I mean, generally-

N Rodgers: But I'm not sure that anybody's like, oh, I shall embrace this tax because it makes me happy.

J Aughenbaugh: The accepted wisdom is Republicans are less likely to want to pay taxes than Democrats. On the other hand a whole bunch of blue States didn't like the tax reform enacted during the Trump administration, because they don't get to write off the state taxes that they pay in their States. States that have higher tax rates than red States.

N Rodgers: New York and California.

J Aughenbaugh: Yeah, New York and California.

N Rodgers: Versus Mississippi and Alabama.

J Aughenbaugh: Or Texas and Florida that don't have income taxes. The Democrats in those States are just like, hey, wait a minute here, Whoa, Whoa, Whoa, Whoa, Whoa, Whoa, Whoa, Whoa, Whoa. I don't like our state taxes anymore. Because I don't get to deduct them off of my federal tax return. Oops. So yeah, you're right. Nobody likes taxes.

N Rodgers: And I don't think they give anybody a big warm fuzzy feeling.

J Aughenbaugh: Yeah. There's just some people who to their core are like-

N Rodgers: You say the word tax and they're like, I am moving to an Island off the coast of Greenland. And you're like, okay, well that seems extreme, but do you.

J Aughenbaugh: So John Roberts is the key to all of this, because he agreed with the federal government's argument. It saved the individual mandate, because according to John Roberts, yes the law says no taxes. But basically he said, if it walks like a duck, talks like a duck, it's a duck. So he said-

N Rodgers: If it looks like a tax and it acts like a tax and the IRS takes it from you.

J Aughenbaugh: It's a tax. And he said and oh yeah. By the way, Congress-

N Rodgers: [inaudible 00:40:26]

J Aughenbaugh: Yes because Congress uses the tax code all the time to incentivize behavior.

N Rodgers: Like when the tax code gives you benefits on buying a house, right? Like the first amount of interest in stuff is to encourage home ownership.

J Aughenbaugh: Yeah. Because members of Congress think that you will act more responsibly if you buy a house and you become all nice and stable and you won't be going off doing crazy things because you have a mortgage.

N Rodgers: You have a mortgage, and you're likely to be more careful about your neighborhood because you live there. So there's the kind of thing they do. They're like, here's a carrot, now go do the thing we want you to do.

J Aughenbaugh: There's earn tax credits if you have kids, there's tax credits if you adopt kids.

N Rodgers: Higher education if you go back to school.

J Aughenbaugh: If you go back to school, as I tell students. All of whom are borrowing a whole bunch of money, hey, when you graduate, you get to write off the interest on your student loans that you're repaying. They're like, Oh boy.

N Rodgers: Oh, goody. Thanks.

J Aughenbaugh: Right?

N Rodgers: Yeah.

J Aughenbaugh: But I mean, think about how at the state level, there are all kinds of taxes designed to go ahead and get us to stop doing stuff. They're called excise taxes. Sin taxes.

N Rodgers: Tobacco tax and-

J Aughenbaugh: Tobacco or-

N Rodgers: Gasoline tax.

J Aughenbaugh: Gasoline or alcohol or on gambling. Yes, we want gambling revenue, but we also don't want you to become an addict.

N Rodgers: I know on the back of the lottery tickets it says, if you need help, part of the money from this lottery ticket goes to helping people who have gambling concerns as an interesting way to go about it. So anyway he agrees with the four in the minority?

J Aughenbaugh: Yeah, the liberals. So he-

N Rodgers: Which must have been shocking for everyone?

J Aughenbaugh: Well, in fact, if you read the dissenting opinion in the case, it actually reads like a majority opinion that they had to basically at the last moment say, oh, this is a descent, because Roberts basically was part of a group of five that was going to say the individual mandate was unconstitutional. But Roberts changed his mind apparently in regards to the taxing argument. And it saved the individual mandate. Saved it. So we still have it today. Of course interestingly enough, it doesn't get implemented because the IRS's funding the last two years from Congress, has no money to check on whether or not people have health insurance.

N Rodgers: So instead of repealing it, President Trump has sort of negated it by you don't check. So you just trust people when they say yes or no or whatever?

J Aughenbaugh: Yeah. And most of us now have been inculcated into, we need health insurance. Our employers give it to us. Many people are now on expanded Medicaid within their States. So they're on it. Others have found low cost options on those health insurance exchanges, so they have it. I think the last estimate that I saw is that, the affordable care act has led to nearly 21 million Americans getting health insurance that didn't previously have it before the law was passed. So we don't have universal compliance. But that's a significant number of people who can now pay for healthcare. It's a significant number.

N Rodgers: So in the end, it held up?

J Aughenbaugh: Yes. But then there was the second challenge and that was the Medicaid expansion. And that touches upon federalism, state's rights, and whether or not Congress can use its spending authority to coerce you to do something you don't want to do. So the argument against Medicaid expansion was basically, the federal government was infringing upon state's ability to decide whether or not they wanted to provide expanded healthcare for their poorest citizens. And this all came down to a precedent that was decided in 1984.

N Rodgers: We can't even go there with the irony of that.

J Aughenbaugh: Yes. George Orwell. It's been actually a couple of podcasts where we haven't mentioned Orwell in 1984, we apologize to our listeners.

N Rodgers: That's right, we'll try to fit that in each time from now on.

J Aughenbaugh: Yes.

N Rodgers: Or end game, one or the other.

J Aughenbaugh: What do they call that when on video games and on TV shows, what is it, the rabbit? The thing that the producers or the directors, they throw something in just so longtime viewers are just like, haha.

N Rodgers: Easter egg [crosstalk 00:45:57]

J Aughenbaugh: Yeah. Rabbits. Thank you. Nia. Rabbits. Bunnies. So in South Dakota versus Doyle, what was that issue was Congress had passed a law that basically said if States wanted to receive their full allotment of federal highway money, they had to raise the drinking age to 21. Because there had been studies in the late seventies early 1980s that said, if you raise the drinking age to 21, you would reduce highway fatalities by a certain percentage, because many highway fatalities were a result of young people drinking and then getting behind the wheel. And many States in the late seventies, early 1980s had drinking ages of 18, not 21. So South Dakota was like, yeah, we don't want to raise our drinking age, but the law said, if you didn't raise your drinking age, you lost the equivalent of 10% of your annual allotment of federal highway dollars.

J Aughenbaugh: And again, this is cooperative federalism, right? States want-

N Rodgers: Coercive federalism.

J Aughenbaugh: States want the highway dollars, right? That's where you get interstates within States getting repaved. You get new lanes, new exchanges, et cetera, et cetera.

N Rodgers: Cities want them because the more exits you have the more likely people will get off and buy stuff.

J Aughenbaugh: That's right. States were in a jam, they want their federal highway dollars. Construction businesses, firms within those States are like, yes, you want-

N Rodgers: Heck yeah you want that. Because how else are we going to get contracts?

J Aughenbaugh: That's right. Okay. And those of us who drive basically from like Memorial day to Labor day are like, yes, because we love those highway construction projects to delay our travel times. But nevertheless, right?

N Rodgers: Yeah. Pennsylvania turnpike, I'm looking at you for hours. Anyway, I love that.

J Aughenbaugh: So South Dakota basically made two arguments. They said, 10th amendment, state's rates. But a more specific argument they made was based on the 21st

amendment. The 21st amendment is basically known by many of us as the amendment that repealed prohibition.

N Rodgers: That's why I made that face.

J Aughenbaugh: Yes because Nia was just like 21st [crosstalk 00:48:40]

N Rodgers: That's repeal. Wait, what are we talking about? What does that have to do with highways?

J Aughenbaugh: But there are provisions in the 21st amendment that basically said, States get to control the sale distribution in marketing of alcohol within their jurisdictions. That's why you have different state laws concerning the sale of liquor, wine, beer-

N Rodgers: Pick me, pick me, like blue laws.

J Aughenbaugh: Sure.

N Rodgers: Blue law refers to you can't buy liquor before a certain time on Sunday, and you can only buy it in certain stores. North Carolina used to have a lot I don't know if they still do. But you couldn't just buy beer and wine in the grocery store. You had to go to a special store to do that and there were certain hours that you can do that.

J Aughenbaugh: Yeah, that's right.

N Rodgers: So that was them by the state of North Carolina versus a federal.

J Aughenbaugh: Yeah, for instance-

N Rodgers: And in some States you can drive through like a barn. We did this in Pennsylvania one time where your drive through-

J Aughenbaugh: Beer distributorship.

N Rodgers: Yeah, beer distributor, you just pull your car in and say put it in the back. And that's amazing to me.

J Aughenbaugh: By the way, beer distributorships in Pennsylvania could not sell mass quantities of beer on Sundays.

N Rodgers: Oh, okay, I'll try to buy one on a Monday.

J Aughenbaugh: So that's why in Pennsylvania, my home state, on Saturday mornings, you would see these long line of cars lined up to go ahead and get their kegs and mass quantities of beer because they basically knew that for all their cookouts on Sunday.

N Rodgers: No beer.

J Aughenbaugh: That's right. That's why for instance there's a difference between Maryland and Pennsylvania and Virginia in regards to the sale of liquor. Maryland basically sells franchises to businesses to sell liquor in Maryland. But in Pennsylvania and Virginia we have ABC.

N Rodgers: ABC store.

J Aughenbaugh: That's right. There are some States that allow local governments to be dry.

N Rodgers: That would be Utah.

J Aughenbaugh: Utah, Pennsylvania-

N Rodgers: I live there.

J Aughenbaugh: Virginia. Tennessee.

N Rodgers: There are counties where there's no alcohol sold in the County.

J Aughenbaugh: You see this in States with heavy if you will religious populations and strong religious organizations. So in like in my home state of Pennsylvania, you had counties, very, very religious counties where we don't want to sell any alcohol, beer, wine, whatever.

N Rodgers: Same in Utah obviously.

J Aughenbaugh: Yeah. Utah, Tennessee still has a couple of dry counties. So South Dakota's basic argument was, the federal government is usurping our authority in the 21st amendment. Now in South Dakota versus Dole-

N Rodgers: That's a pretty good argument.

J Aughenbaugh: Yeah. Well, you would think.

N Rodgers: They lost clearly.

J Aughenbaugh: But in South Dakota versus Dole by a seven and two votes, and the majority opinion was written by then associate justice Rehnquist, who was a huge proponent of federalism of States rights. Rehnquist went ahead and said, Congress didn't violate either the 21st or the 10th amendment, because he said, South Dakota still had a choice. And he said, the penalty losing 10% of their federal highways moneys was not coercive because they could still receive 90%

N Rodgers: Okay wait. So if I knock you down and I only take 10% of your lunch money, I'm not really a bully. Is that his argument? Because I left you with 90% of your lunch money?

J Aughenbaugh: Yeah.

N Rodgers: You can still get most of the lunch you were going to get.

J Aughenbaugh: Anyways. That's right.

N Rodgers: I'm pretty sure I'd still be a bully. I'm just saying, even if I only took 10% of your lunch money, but okay.

J Aughenbaugh: So the argument made by the opponents of Medicaid expansion was, when the affordable care act said if you don't expand your Medicaid program, you lose all of your existing monies-

N Rodgers: 100% is coercive.

J Aughenbaugh: That is coercive. And again, a narrow majority, Roberts plus the other four conservatives said, yeah, that's pretty much the definition of coercion.

N Rodgers: I'm surprised the others didn't agree with that.

J Aughenbaugh: The four liberals. No, they didn't sign off on that. No.

N Rodgers: Because it does seem pretty coercive, I'm a fan of the federal government, most of the time. But I'm going to take everything from you if you don't do this. Seems pretty coercive. Like I'm not going to leave you anything, that's very Grinch. The Grinch who stole your entire Christmas. I can't believe I'm going to say that I'm with Scalia on something, but I was Scalia on that. I'm sorry. Justice Scalia, one of the most brilliant minds we've ever had on the court. I recognize that. But there were times when his decisions hurt my heart. So I have mixed feelings about justice Scalia.

J Aughenbaugh: Yeah. Listeners, Nia, would actually like to use one of Scalia's favor descending opinion phrases. Some ideas deserve a clunking on the head.

N Rodgers: Yeah. He's a pretty good scholar. Anybody who's best friends with Ruth Bader Ginsburg, how can you not have respected him at least.

J Aughenbaugh: And I tell my students when I teach courts and politics, and we focus on the Supreme court, I say, do you know guys, you can be friends with somebody who doesn't think like you. And I said, and if you want a really good example, all you had to do was take a look at the longterm friendship that Ruth Bader Ginsburg had with Antonin Scalia.

N Rodgers: They went to the opera.

J Aughenbaugh: Not only did their families celebrate a lot of holidays together. Scalia respected her enough to where if she was writing a majority opinion and he was going to write a dissent, he would give her his dissent early enough to where she could modify her majority opinion to respond to his dissent. He didn't have to do that.

N Rodgers: But he respected her?

J Aughenbaugh: Yeah.

N Rodgers: And she respected him?

J Aughenbaugh: Yeah. And if you wanted to see how much she respected him, take a look at the YouTube clip of his funeral service held in the Nation's Capitol, when she got up to speak because it was pretty obvious, and again, this is not justice Ginsburg, she's not noted for emotional displays.

N Rodgers: No, that's not her thing.

J Aughenbaugh: But she was pretty broken up. And again, diametrically opposed. His method of constitutional interpretation was like 180 degrees different, whereas she was careful with her writing Scalia would go for the rhetorical flourish.

N Rodgers: He's the one who said with Gore Bush, get over it. And he said it to the 60 minutes interview, I can't remember which one he was interviewing. It was like, get over it and move on. Okay-

J Aughenbaugh: Leslie Stall [crosstalk 00:56:38]

N Rodgers: Ruth Bader Ginsburg would not be quite so I think-

J Aughenbaugh: And like said, hey, I'm Bronx. Ruth Bader Ginsburg grew up in a different borough of New York. I'm trying to think, was she Manhattan or was she Brooklyn? But I mean, he's Bronx, all Bronx. But it didn't matter because... And

Ginsburg had said for years in numerous interviews, the one person other than her husband who could make her laugh the most was Scalia. She said, he was the funniest person other than her husband that she ever encountered in her life. And of course, as somebody who studies in the Supreme court, I'm like, I'm trying to picture Ruth Bader Ginsburg actually laughing. The fact that he could-

N Rodgers: She's in her eighties and she goes to the gym every day. She's a person of determination. And I like the fact that she goes to sleep sometimes during the presidential-

J Aughenbaugh: The state of the union.

N Rodgers: The state of the union. She does what a lot of people wish they could do, which is just go to sleep. Like, dude, I don't want to hear it. But you know what she said one time, is that she has a glass of wine at dinner. What do they expect? And I'm like see, I want to be her when I grow up because she's just awesome.

J Aughenbaugh: You want to be in a position to where you can basically go ahead and tell people where you have been captured on national TV falling asleep. Hey, I had a glass of wine for dinner. And it goes on forever, and this is past my bedtime. What do you expect? And everybody's just like, Oh yeah, those are good points. Whereas the rest of us, if we fall asleep during any lecture or speech, what's wrong with you?

N Rodgers: Why are you asleep.

J Aughenbaugh: Anyways, do you have any more questions about the commerce clause?

N Rodgers: I have way, way more questions about the commerce clause, but I think they're going to have to be things that we're going to have to touch on as we go. But it sounds to me like the crux of the commerce clause is everything. Everything, all actions by all humans that live on this planet are controlled by our commerce clause in one way or another. It touches every part of your life.

J Aughenbaugh: And in part, you are correct simply because the economy today is not as simple as what it was when the framers wrote the constitution.

N Rodgers: Oh, I have questions for you about tariffs, which I'm not going to ask you during this podcast because I can see you wiping your eye, like, no. Do not ask me about tariffs. But that's that part of that push pull of, it's an international-

J Aughenbaugh: Economy.

N Rodgers: So whenever the commerce clause comes up with the States, it's interesting to need to see who wins and who loses, because sometimes the States wins, but a lot of times they don't. Because that sort of... Isn't in the 10th amendment that says everything not enumerated in the constitution is under the States?

J Aughenbaugh: Yeah, it's reserved to the States and to the people.

N Rodgers: So what they fall back on is yeah, no, that's a numerator. That's part of the commerce clause.

J Aughenbaugh: Yeah. And what you're just mentioning right now is an argument that Clarence Thomas makes on the Supreme court with some regularity.

N Rodgers: Excuse me, not on the Supreme court, perhaps in writing. But he doesn't speak when he's at the court.

J Aughenbaugh: Yeah.

N Rodgers: He went like four years without saying anything.

J Aughenbaugh: He went over a decade.

N Rodgers: He's quite a listener.

J Aughenbaugh: Yeah. He went over a decade without speaking.

N Rodgers: I'm impressed by that, because I would not be able to resist the urge to say, are you kidding? To about three quarters of the cases that [inaudible 01:00:28] to one side or the other.

J Aughenbaugh: And his silence generated a lot of criticism. There were plenty of people who still don't like the fact that he's on the court. They don't like many of his rulings and the approach that he uses to interpreting the law. But his response was, I actually want to hear from the parties attorneys, in a not too subtle dig at his colleagues. And he has said in some of my colleagues like to talk.

N Rodgers: Well, and some of it is showboating in the sense of I'm going to look like I'm doing my job.

J Aughenbaugh: To me, I'm not a huge fan of Clarence Thomas' jurisprudence, but one of the reasons why I'm fascinated by him is that he asks questions that force us to at least think about how the law developed the way it did. So he has openly challenged the notion that the commerce clause should be read as broadly as it

was in Gonzales versus Raich, or even a Wickard versus Filburn the wheat farmer guy.

N Rodgers: A wheat guy.

J Aughenbaugh: He says, if we want Congress to be able to regulate the economy, to the extent that the Supreme court has allowed it, then perhaps we ought to amend the constitution to reflect that.

N Rodgers: It's worst statement in the world to make. I mean, if we think that's what Congress should be doing, or if Congress thinks that's what Congress should be doing, then we should find out from the people if that's what the people think Congress should be doing.

J Aughenbaugh: And I don't know the correct answer. I do know that the commerce clause we started off the first of these three episodes about the commerce clause with this is a rather simple clause, right?

N Rodgers: Yeah. It's very short, relatively speaking. And it covers everything.

J Aughenbaugh: But it covers everything in a national economy, an economy is as big as the United States. Where the United States economy is part of the global economy is significantly important. And when we talk about-

N Rodgers: If we go down, we take the world with us.

J Aughenbaugh: In a future podcast episode, when we talk about tariffs, one of the things that we will explore is when the United States in acts terrorists, and it forces another country or other countries to respond, there is a ripple effect on the international economy. And that's part of the difficulty with the commerce clause. What did the framers have in mind versus what's the economy we have today? We talked about this with Grandmas growing pot, right? Gonzalez versus Raish.

J Aughenbaugh: And I went and talked about how the most recent semester I taught the case, a lot of my students were like, so if I grow tomatoes in my backyard, theoretically if everybody in the United States did this, then there would be no demand for tomatoes in the national tomato market and therefore the federal government could go ahead and regulate my behavior. I said, well, if there was ever a time where the price for tomatoes falls dramatically, and it hurts, tomato farmers? May be, and they're like, but that ain't right. And I said, but how many small local organic farmers end up selling their food items to other people in the state or a nearby state?

J Aughenbaugh: Because today markets are connected in ways that the framers could not have envisioned. I ended up buying my daughter a hand woven a bracelet last year, that was made by a crafts person in West Virginia, and I saw it on the internet. I'm not entirely sure she envisioned demand coming from other States when she started her business. Right. In fact, I know she didn't because I emailed her to go ahead and thank her for how well it was put together and my daughter loves it, yada, yada, yada. And she goes, yeah, I didn't really have that in mind when I started making these for my own grandkids. But again, okay, the economy today broadly conceived is so interconnected. Who and how do we regulate it?

N Rodgers: And some of that is done by market forces, but if you don't have the government intervene, people say, I don't think the government should intervene in the market. I'm like, Oh, I bet you do. I bet you do think it should.

J Aughenbaugh: And that's why we're,-

N Rodgers: Because there are certain things that we want to be a certain way. And the only way we get that is through government regulation.

J Aughenbaugh: That's how we started getting regulations of the then new economy of industrialization in the mid, late 18 hundreds. That's why we go ahead and get even more regulations when the industrial economies of the 1920s and thirties crashed. That's why we get more regulations of the now post-industrial service economies of many of the developed Western democracies. How do you go ahead and regulate this stuff?

N Rodgers: I want to tell you something that listeners, I have not told Aughe this, but I asked my mom about this. I told my mom we were doing the followup third commerce clause, I spoke to her this week. And the first thing she said was, Oh Lord. Because my mom is hilarious. But anyway, she also said, you should tell, she does not call him Aughe. She calls him John. Because my mother would never use a nickname like that. But she said, you should tell John, my mother is 82. She grew up on a rural farm in North Carolina and she said, we didn't buy things. And I said, I'm sorry. She said, we didn't buy things. Yeah. We grew our food. We went to school, we came home, we had our school books, but she said you got those at the beginning of the year when you got your set of clothes, your new sets of clothes, and she said you got two or three new sets of clothes and then you just didn't buy things.

N Rodgers: She said you buy stuff all the time. She said, and I buy stuff all the time. Like now they want to go out to dinner. So they go out to dinner, and she said nobody went out to dinner when I was a kid. She said, when I was born in 1939 [inaudible 01:08:01]. She said even after the war, that was not a thing people

did. You ate at home, you bought things out of a Sears catalog, once in a great while because you had to slaughter a hog or you had to sell a crop or you had to do something. And even she said, even people in cities who had industrial jobs didn't buy things every day. They didn't have money that way. They got money once a week. They paid all their bills, they went to the place where they did business, she called it trade, where they did trade, and they paid off whatever they had bought that week in flour and sugar and whatever.

N Rodgers: And she said, and maybe you had a little bit of money, you could send your kid to the movies or you could go to whatever. But she said that was not a thing you did every day. And she said, now you can't go four hours without buying something because of the way the world is set up, the world is set up, is completely economic. Your interactions with other people are enormously economic.

J Aughenbaugh: Yeah. I mean, think about, how much Goodwill you and gender with your friends and colleagues, because you go ahead and buy them a cup of coffee or buy them a meal.

N Rodgers: Or bring in donuts.

J Aughenbaugh: Yeah. And you're talking about mom sharing her experience. I went ahead and told my grandmother once that, one of the ways that I sometimes try doing gender Goodwill among colleagues, is when we have a faculty meeting or a staff meeting, I would bring in coffee and donuts and my grandmother was this like, you did what? She in my generation we would bring things from our farm. We wouldn't go out and buy. Okay? She said we would bring in things we were bringing a ham, because we slaughtered a pig.

N Rodgers: Right. Or biscuits.

J Aughenbaugh: Or biscuits. My grandmother, she was 94. She still makes pies for people. She goes, you made it yourself, cheers. You go ahead and buy donuts from a store. She goes, and people like this, they think better of you. And I said, well then I don't know if they think better of me. But-

N Rodgers: Let's not go that far.

J Aughenbaugh: But they're more willing to tolerate. Right? But it's a difference. My grandmother said, they made their own clothes. She's a child of the great depression. So they went years without buying clothes. Ordering from the Sears and Roebuck catalog was a big deal. Oh yeah. Okay. And you did it maybe once or twice a year. Yep. And you saved up for it. They had accounts at the local trade store. Okay. Right. And if they got-

N Rodgers: Where you got coffee and sugar and flour , the stuff you didn't grow?

J Aughenbaugh: That's right. And if you couldn't pay it off, maybe you raised something on your farm that the trade store could then sell. Okay. So then you bartered the value of whatever you could bring in to go ahead and pay off whatever credit or whatever debt you had incurred and she goes, you guys with credit cards, my grandmother has never had a credit card. Never had a credit card.

N Rodgers: My mom doesn't use them. She's incredibly suspicious. She's like it's made up money. Made up money on a card. And that's not real and nobody should do that. So which is just a different, it's just a different world. I mean, my stepfather carries cash with him all the time because that's how you pay for things.

J Aughenbaugh: Yeah that's what my mum does.

N Rodgers: You buy them with money, which we're going to talk about. By the way, in another podcast we're going to talk about Fiat money and deficits and all that sort of thing.

J Aughenbaugh: But anyways, the larger point here that Nia and I wanted to get across in regards to the commerce clause is, there are clauses in the constitution, there are laws, there are government documents that on the surface are incredibly simple and straightforward.

N Rodgers: This is not one of them.

J Aughenbaugh: But then you have to apply it, you have to make it work in reality. And the difficulty, whether it's a well written constitution, a poorly written constitution, the American version is incredibly short compared to other democracies, doesn't matter. The hard stuff is making it work in reality, because conditions change, people change, people's demands change. I mean we get all these regulations of the economy in part because people are like, we're being harmed by the economy. Somebody needs to go ahead and mitigate the damage, lessen the damage. We get the affordable care act in part because whole bunch of Americans couldn't pay for healthcare. Right. Whether you like what we came up with or not.

N Rodgers: 10% of Americans couldn't.

J Aughenbaugh: Okay. And if you think about the healthcare industry, it's like one of the top five industries in the United States. A significant portion of the nation's, if you will, economy is devoted to healthcare. I mean, you're not making stuff with that industry. You're taking care of people so they can do stuff with their own lives.

N Rodgers: Hopefully you're helping them live longer and healthier lives?

J Aughenbaugh: Yeah.

N Rodgers: But we're going to find the summaries to it because it is a thousand pages, not the case, but the ACA itself, the case I'm sure is not quite a thousand pages.

J Aughenbaugh: Oh no, no, no, no, no. But it's long.

N Rodgers: But it's long, and we're going to also link to that so that you can take a look, and if you have any questions, you can email Aughie because I don't know anything about that. And we're glad you listened. Thank you so much.

J Aughenbaugh: Thank you guys.

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