

## Commerce Clause

**Roman Mars:** You might not know Roscoe Filburn, but he is very famous in constitutional law.

**Elizabeth Joh:** Filburn was a fifth-generation farmer from Montgomery County, Ohio. He raised dairy cattle, chickens, and wheat. And in 1941, he harvested 462 bushels. His story is just not that exciting.

**Roman Mars:** But it gets better. We're even going to talk about drugs in a few minutes.

**Elizabeth Joh:** The problem for Filburn was that he was one of the farmers who objected to the Agricultural Adjustment Act of 1938. That was an act signed by FDR, and it was part of the Roosevelt administration's efforts to provide price and income supports for American farmers.

**Roman Mars:** The country was in the middle of the Great Depression, and it was especially tough on farmers.

**Elizabeth Joh:** The 1938 act helped do things like stabilize prices for the national market and things like wheat and corn. And it taught farmers how much they could grow and how much they couldn't. And the reason was simple. If farmers produced too much, prices would crater. So, the act worked this way. It wasn't just gentle encouragement. Under the federal law, farmers were supposed to grow only a certain amount of wheat. No more at all. What would happen if they grew more than they were allowed to? They'd be subjected to a penalty.

**Roman Mars:** That's exactly what happened to Roscoe Filburn.

**Elizabeth Joh:** The 1938 act said he could plant 11 acres of wheat, and that was about 20 bushels an acre. He planted 23 acres instead and grew 462 bushels of wheat.

**Roman Mars:** Roscoe was such a baller.

**Elizabeth Joh:** And so, for growing more than he was allowed to, Filburn faced a fine: \$117.11. Now, Filburn didn't deny that he'd violated the act, and nor did he think that Congress wasn't allowed to regulate the wheat market. He had a different kind of argument. He said, "Well, I'm just little old Roscoe Filburn. I don't affect the national wheat market. And in fact, I was never going to sell my wheat at all. I was going to keep it for myself. I'm only one farmer. So, because it was for myself, it was never going to enter the market. That's not the kind of thing the Congress has the power to regulate."

**Roman Mars:** But in 1942, the Supreme Court disagreed.

**Elizabeth Joh:** And they ruled that the fine could be applied to Filburn and his wheat. "Sure," they said, "Roscoe Filburn is just one farmer. But hold on a second. If there are hundreds or thousands of people like Roscoe Filburn doing just what he did--ignoring the federal law and growing whatever they wanted and as much as they wanted--that would have a huge effect on the wheat market and prices would collapse. That's exactly the kind of national problem that Congress wanted to avoid with this very federal law. The Supreme Court decided in this case--it's called "Wickard versus Filburn"--that Congress properly used what's called the "commerce power." The 1942 decision is one of the most famous

cases in constitutional law. It tells us today how much power Congress actually has. And it turns out that that case--that case about wheat--has a lot to do with pot.

**Roman Mars:** I told you we'd be talking about drugs.

**Elizabeth Joh:** With Trump's attorney general, Jeff Sessions, announcing a new crackdown on illegal drugs, including marijuana, it's a good time to examine the scope of what the Constitution says about the commerce power.

**Roman Mars:** This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the things Trump says literally and seriously and channel that bluster into learning our Constitution like we never have before. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. We're going to use our commerce power right now. And then Trump Con Law will continue.

**Elizabeth Joh:** All of the states have something called the "police power." That's not a reference to the people with the badges and the guns--but in fact, it's a general power that all states have to pass laws to protect their citizens. That's not the case with the federal government. If you remember your high school civics, the federal government is one of limited powers. What that means is that Congress can't just pass any old law it wants to. When Congress wants to pass a law, it generally has to refer to one of the grants of power it has in the Constitution. Article I--that's the portion of the Constitution addressed to Congress--has Section 8. And that's a list of what are sometimes called "enumerated powers." These are a list of actual powers granted to Congress. One of those is the commerce power. The Constitution says the Congress has the power to, quote, "regulate commerce with foreign nations and among the several states and with the Indian tribes." In 1970, Congress passed what's called the "Controlled Substances Act." It's a really complicated set of laws meant to regulate how and whether different drugs can be manufactured, sold, or possessed. Drugs that are considered the most dangerous are part of what's called "Schedule I." Marijuana is classified as a Schedule I drug. What that means is that under the federal law--except for very narrow circumstances--it's a violation of the law to grow, distribute, import, or possess marijuana. It's a federal crime. Those same things--manufacturing, possessing, and distributing illegal drugs--can be made crimes as a matter of state law, too. But remember states have what is called the police power. They don't have to refer to any specific power in the Constitution.

**Roman Mars:** So, the basis of federal drug laws are the commerce power. But the states--as long as they're not violating the U.S. Constitution and their own constitution--they can make a law that marijuana is illegal just because they say it's illegal. Is that correct?

**Elizabeth Joh:** That's right. That's the main difference. Because states have what's called a general police power and Congress doesn't, that's a big difference in the ability of states to legislate with regard to anything--but in this case with drugs and crime. And the federal government always has to say, "Here's the specific reason that we're able to legislate in this area." So that's really an important distinction for constitutional law.

**Roman Mars:** Cool.

**Elizabeth Joh:** So, about 20 years ago, things began to change for one particular drug, marijuana. And in 1996, California voters passed Proposition 215. Prop 215 became a state law that allowed people who were suffering from serious medical conditions to have

access to marijuana for medical purposes. The state law basically shielded doctors and patients from being prosecuted, as long as they were using marijuana in a legitimate way--for medical reasons. So, when Prop 215 became law, two women, Angel Raich and Diane Monson, were each living in California. Each of them were suffering from very serious medical conditions, and each of them relied upon medical marijuana to help them ease their pain. The problem here for Raich and Monson is that what they were doing, which was perfectly legal under state law, actually, at the same time violated federal law. So that meant that their use of medical marijuana put them at risk of federal prosecution for something that California law allowed them to do. What did they decide to do? They decided to file a lawsuit in federal court. They asked a judge to decide that applying the federal law to them--the Controlled Substances Act--was unconstitutional. The reason? Well, in this case, they said what they were doing--just using very small amounts of marijuana for medical reasons--was just not something that Congress was allowed to do. Congress was not allowed to regulate them under the Constitution's commerce power. Now, they weren't arguing that Congress couldn't regulate the national black market for illegal drugs, including marijuana--just not them.

**Roman Mars:** This argument might sound familiar.

**Elizabeth Joh:** In 2005, the Supreme Court disagreed with these California women. Congress could pass a federal law that could regulate even what Monson and Raich were doing, even though they didn't want to sell their marijuana across state lines or do anything except use it in their own homes for their own reasons. Now, why did they lose? Here's the interesting part. To the Supreme Court, Angel Raich sounded a lot like Roscoe Filburn, the Depression era wheat farmer. Remember his claim? Filburn said, "Well, it's just little old me. Congress, you can't reach me because of my homegrown wheat. I'm not going to put it in the national market. You're not allowed to punish me in this way." And he lost. In the 2005 case, the Supreme Court decided that these women's situations were not any different. If federal law couldn't regulate what these women did, imagine if hundreds or thousands of them did the same thing. Wouldn't that frustrate Congress's ability to control the national black market and illegal drugs? For that reason, at least in theory, Raich and Monson were going to risk federal prosecution if they were going to use medical marijuana. The Controlled Substances Act--that federal law--could be used as an exercise of Congress's commerce power. It could reach them.

**Roman Mars:** And they lost.

**Elizabeth Joh:** Now, of course, there's a huge difference between what the federal government can do in theory and what it actually does. So, remember, you know, not every violation of the law gets prosecuted. Everybody knows that if you speed, there's a good chance you're not going to get pulled over. And so that's the difference here. So, the federal government isn't going to prosecute every single person who violates the Controlled Substances Act because it just doesn't have the resources to do that. Now, at the same time, the number of states that began to recognize legal uses of marijuana began to grow. And it kept growing. More and more states recognize that medical marijuana could be legalized or should be legalized. And some states went further. In 2012, Colorado and Washington passed initiatives to allow recreational marijuana for totally non-medical purposes. It was going to be okay.

**Roman Mars:** But what was happening at the federal level at this time?

**Elizabeth Joh:** Well, during the Obama administration, the Department of Justice issued two memos--one in 2009 and one in 2013. So, these memos basically said, "Look, if you're using marijuana in your state and you're following state laws and you're not doing any other crazy things like engaging in drug trafficking or harming children, we're not going to prosecute you--not because we can't but because we're going to decide that here is an exercise of our discretion." That just simply means they're going to make a choice not to prosecute you under federal law. So, what the Department of Justice is saying in this instance is, "Well, you know, we could prosecute you. But we're not going to, and we're going to put it in a memo saying you can rest easy for now."

**Roman Mars:** But that's not necessarily the case in a Trump administration.

**Elizabeth Joh:** That somewhat uneasy stance of federal hands-off noninterference looks to be changing under this president. In February, then White House Press Secretary Sean Spicer said to a bunch of reporters, "I do believe you'll see greater enforcement regarding marijuana." Trump's attorney general and head of the Department of Justice, Jeff Sessions, is no fan of marijuana himself. He gave a speech in March of this year, and he said, and I'm going to quote here, "I realize this may be an unfashionable belief in a time of growing tolerance of drug use. I reject the idea that America will be a better place if marijuana is sold in every corner store." Sessions has been pretty consistent with this view. Last April, when he was still a senator, Sessions said in a hearing that, quote, "good people don't smoke marijuana." Now remember, the Department of Justice has had a hands-off approach to cracking down on people who violate the federal Controlled Substances Act.

**Roman Mars:** But that's just a matter of choice. They're allowed to do whatever they want.

**Elizabeth Joh:** So, Sessions, of course, now, as the attorney general and head of the Department of Justice, could simply withdraw those official pronouncements and change the priorities of federal prosecutors and say, "You know what? We're going to start cracking down on marijuana use." Will that happen? Now, this is the part that's really hard to say. Five months after Sean Spicer made those comments, he resigned. Four months after sessions gave his speech saying he was no fan of recreational marijuana, Trump tweeted that his attorney general was "beleaguered under siege." What is clear, however, is that if Jeff Sessions decides that the Department of Justice is going to start cracking down on marijuana, he could simply by changing the department's priorities. And the law that he be relying on--the federal Controlled Substances Act--would be an unquestionable use of Congress's commerce power.

**Roman Mars:** One more act of commerce and Trump Con Law will continue.

**Elizabeth Joh:** Oh, here's a postscript. What happened to Roscoe Filburn? So, he lost at the Supreme Court, right? Here's a picture of this, you know, American farmer who was really fighting big government. For reasons that aren't quite clear about ten years after he lost at the Supreme Court, he changed his last name, but not by much. He changed it to "Fillbrunn." And the family farm was sold for development in 1966. The land he farmed became a housing subdivision. One of the streets there is named for him: Fillbrunn Lane.

**Roman Mars:** This is the end of the first session of What Trump Can Teach Us About Con Law. But don't fear, we will be back in October with new episodes. I asked Elizabeth to reflect a little on our summer podcast project of teaching common law through Trump, and what might be coming up in the fall.

**Elizabeth Joh:** Well, I mean, I wasn't sure what to expect when this started. I mean, I knew that we had a pretty unusual president, and it seemed like a good time to talk to people about how unusual this presidency was. I mean, some of the things that Trump has brought up--whether it's been the concept of self-pardon or whether it's been how much you could fire people in the president's cabinet--these are things that are... You know, people generally aren't that aware of what the Constitution says in terms of the presidential authority. And there are two things, really. I mean, one of the things I think I'm glad that we've talked about is letting people know that while the Constitution's clear in some respects, it's actually pretty vague and lots of others. And there isn't any definitive answer for a lot of these questions in part because these have not been topics that have been brought up. The Emoluments Clause is not really something that has a definitive answer because we haven't yet had a president until this one where that was really much of an issue. I mean, we have a president now who has no problem defying norms. And the other thing that comes up with this series of conversations we've had is that, you know, it turns out that the law itself is wrapped up in a series of norms. And one of the reasons we don't get to a lot of these questions in terms of a definitive answer is because the parties involved typically act as if, "Well, I am going to at least pretend that I'm behaving legally, or I'm going to follow the things that my predecessors have done." And so, this president actually brings this into focus--that when someone does not respect norms at all, a lot of these legal questions really are not clear. We don't know what the answers are. And it's not even clear that a court named the Supreme Court in particular will be able to answer those questions for us. So that's been maybe one of the biggest things. And in terms of what's coming up next? Oh, boy. I mean, there are so many things that could come up. I mean, some of them still seem to be largely theoretical. You know, impeachment, the 25th Amendment--which has never really been tested, but people keep asking questions about it... There is the possibility since now there's an on-again-off-again nuking of Guam question in the air... What does it take for a president to order a nuclear strike? Is that the same as a declaration of war? And what does the Constitution say about war powers? We are at a time in which the president is provoking a lot of political controversy. On the ground level, people are taking to the streets of all political stripes. What does the First Amendment say about that? And, you know, what can people expect? And again, a lot of these areas, too--there aren't clear answers. But people are really hungry for something they can grab on to in terms of what is our history and what can we learn from our history and our constitutional law to answer those questions?

**Roman Mars:** This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at [trumpconlaw.com](http://trumpconlaw.com), on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective that will get you happy when you need to be happy, will get you angry when you need to be angry, and will get you moving when you need to be moving, which is always. Find them at [doomtree.net](http://doomtree.net). We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and donors who are listeners just like you. Like I mentioned before, this was designed to be a short summer series that was meant to scratch some intellectual itch I was having. But we're having such fun doing it that we're going to pick it up again in October. If you like what we're doing, leave a review on Apple Podcasts, tell all your friends, and send us suggestions for Con Law topics that Trump is making you consider for the first time. We would love to hear from you. Until then, get a U.S. Constitution and put it in your pocket. It might come in handy.