Opinion: Obamacare, cannabis and the Supreme Court

By Steve Kubby

If you've been following the Supreme Court hearings regarding Obamacare, you've undoubtedly heard pundits and legal experts proclaiming that the Commerce Clause preempts state law, which in turn provides constitutional support for the government to require you to buy health care insurance. However, such statements are false and deliberately misrepresent the historical record.

The Commerce Clause of the U.S. Constitution proclaims: "The Congress shall have power … To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

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It would seem obvious that, if you're growing plants for your own personal consumption, then you're not engaged in commerce with another state, an Indian tribe, or a foreign nation. But, according to the Supreme Court, you'd be wrong.

That's because the court ruled in Gonzales v. Raich and even growing one cannabis plant, for strictly personal use, is forbidden by federal law and the Commerce Clause.

Now that decision has become center stage in the current

review of Obamacare by the Supreme Court because the federal government is relying upon the Supreme Court decision in Gonzales v. Raich, which found that consuming one's locally grown marijuana for medical purposes affects the interstate market of marijuana, and hence that the federal government may regulate – and prohibit – such consumption. This argument stems from the landmark New Deal case Wickard v. Filburn, which supposedly held that the government may regulate personal cultivation and consumption of crops, due to the effect of that consumption on interstate commerce, however minute it may be. That may be true, but only under certain circumstances.

Lost in all the arguments presented in Gonzales v. Raich was the fact that Roscoe Filburn was a farmer who accepted New Deal federal money to limit how much wheat he grew. Filburn was caught violating his contract with the federal government by producing wheat in excess of the amount permitted. The government then sued Filburn for violating the terms of his contract, Filburn objected on constitutional grounds and the case went to the Supreme Court.

During 1941, producers who officially enrolled in the Agricultural Adjustment Act of 1938 received an average price on the farm of about $1.16 a bushel, as compared with the world market price of 40 cents a bushel. Filburn signed up for the federal program and was paid to not grow over an allotted amount of wheat. In July 1940, pursuant to the Agricultural Adjustment Act, Filburn's 1941 allotment was established at 11.1 acres and a normal yield of 20.1 bushels of wheat per acre. Filburn was given notice of the allotment in July 1940 before the fall planting of his 1941 crop of wheat, and again in July 1941, before it was harvested. Despite these notices and a signed contract with the federal government, Filburn planted 23 acres and harvested 239 bushels from his 11.9 acres of excess area.

Filburn argued that because the excess wheat was produced for

his private consumption on his own farm, it never entered commerce at all, much less interstate commerce, and therefore was not a proper subject of federal regulation under the Commerce Clause. Unfortunately, Raich failed to point out that once Filburn accepted Federal money and violated the terms of his contract, then and only then, did it become a Federal matter. Had Raich argued that Wickard v. Filburn only applied in cases where farmers had enrolled in Federal programs, signed contracts and accepted Federal money, the Supreme Court would not have had any basis to render the defective decision that they did.

Hopefully, the Supreme Court will revisit Wickard v. Filburn and recognize that only when private citizens enter into a contract with the government, and accept money from the government, can the Commerce Clause be applied.

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