



Written by [Jack Kenny](#) on June 28, 2012

## Supreme Court Sidesteps Commerce Clause, Cites Tax Power, Says ObamaCare Is Constitutional

In a 5-4 opinion written by Chief Justice John G. Roberts, the U.S. Supreme Court upheld the main provisions of the “ObamaCare” healthcare law, including the controversial individual mandate requiring uninsured persons to purchase healthcare insurance or pay a penalty. The Court upheld the mandate on the strength of the taxing power of Congress, but not before writing another chapter in the Court’s often tortured and zigzag interpretations of the Constitution’s Commerce Clause.



The Commerce Clause empowers Congress “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The most heated arguments both during and leading up to the three days of hearings the Court held in March on the constitutional challenge to the Patient Protection and Affordable Care Act of 2010 centered on whether the individual mandate could fall under the power granted by this clause. Since a private decision not to buy something does not appear to involve commerce, interstate or otherwise, the arguments had conservative jurists and court watchers scratching their heads over how the Court might justify the expansion of power inherent in the health insurance mandate.

Had the Court affirmed the government’s position on the Commerce Clause, the decision would have been consistent with the famous *Wickard v. Filburn* ruling of 1942 in which the high court ruled that a farmer growing wheat for consumption on his own land could be fined for exceeding his allotted acreage for wheat under the New Deal’s second Agriculture Adjustment Act. The Court ruled in that case that had the farmer not grown the wheat for his own use, he would have had to buy the product in an Interstate market and therefore Congress and the Roosevelt administration were within the parameters of the Commerce Clause in regulating such growth to control the price of wheat and in penalizing the farmer for exceeding the quota.

In the 1990s, however, the Supreme Court under Chief Justice William Rehnquist took a more narrow view of the Commerce Clause and ruled that a federal ban on the carrying of firearms within the vicinity of a school building exceeded the powers of Congress. Neither the school nor the carrier of the firearm were engaged in interstate commerce, the Court ruled in *U.S. v Lopez* (1995) and therefore the clause was misapplied and the Congress had exceeded its authority. In a similar ruling, the Court held that the Violence Against Women Act was not a regulation of commerce, interstate or otherwise, and struck down the law.

But in a stunning reversal, the Court ruled in favor of the government in the 2005 *Gonzalez v. Raich* case, involving the conviction of a California resident for growing marijuana at his residence for use in his own home. The action was legal under state law, since California had legalized the growth and consumption of medical marijuana, but the federal ban remained on the books. In that case, the Court reached back to 1942 and followed the *Wickard* precedent, even though there is no legal interstate



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commerce in marijuana. Surprisingly, it was Associate Justice Antonin Scalia who provided the key vote and wrote the opinion in the *Raich* case, departing from his previous more narrow construction of the Commerce Clause. And while Justice Anthony Kennedy has often been the swing vote in the high court's 5-4 decisions, as Justice Sandra Day O'Connor was before her retirement, on Thursday it was Chief Justice Roberts, who joined the court's liberal bloc — Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan — to resolve the healthcare case in favor of the Obama administration and the Congress that passed the Affordable Care Act in 2010. The bill was passed by both houses and signed by the President before the elections of that year changed the balance of power in Congress, giving the Republicans back the control of the House of Representatives that they had gained in 1994 and lost in 2006. The Senate remains under Democratic control.

Dissenters in Thursday's decision included, as expected, Justices Scalia, Clarence Thomas and Samuel Alito. Justice Kennedy, who expressed his concern about the constitutionality of the law during the oral arguments, also joined the conservative bloc in dissenting from the Court majority's opinion, written by Chief Justice Roberts.

The controversial individual mandate will take effect in 2014. The entire program depends on the mandate, since premium payments from those who do not now have health insurance, including the young and healthy, are needed to pay for the care of the sick and elderly and to make feasible the requirement that insurance companies do not turn away those with pre-existing conditions. The penalty for not purchasing health care insurance under the law initially will be \$285 per family or 1 percent of family income, whichever is greater. By 2016 the penalty rises steeply, to \$2,085 per family or 2.5 percent of family income.

Sparing no ream of paper, Chief Justice Roberts, in his 65-page opinion, demonstrated in detail why the penalty imposed under the individual mandate could not be upheld either by assertion of the Commerce Clause or by invoking the power of Congress to make laws "necessary and proper" to the carrying out of its delegated powers. By page 39, he reached the crux of the matter by bringing the Court into agreement with the government's "second argument," that the penalty fell under the power of Congress to "lay and collect taxes." The point was one that led to much backpedaling and zigzagging by the government during oral arguments, since Congress's longstanding Anti-Injunction Act prevents the judiciary from ruling on the constitutionality of a tax until the tax has been collected. But since the penalty would not be enforced until 2014, the Obama administration wanted to have the challenge to the constitutionality of the Act resolved before it went into effect. Thus, the government, for the purpose of avoiding the Anti-Injunction Act, argued that the mandate was not a tax. But to fit the mandate under the powers granted by the States to the Congress under the Constitution, the government also argued that the authority fell under the power to "lay and collect taxes." Faced with that internal contradiction in the government's argument, the Roberts opinion sidestepped the Commerce Clause and "necessary and proper" arguments and punted.

"It is, of course, true," Roberts wrote, "that the Act describes the payment as a penalty, not a tax. But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question."

Regarding another controversial section of the law, the Court, "upheld a major expansion of Medicaid intended to add millions of low-income people to its rolls, but limited the power of the federal



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government to enforce this provision by penalizing states that refuse to go along,” the [New York Times reported](#). In a lengthy concurring opinion, Justice Ginsburg expressed her agreement with the Roberts finding on the constitutionality of the individual mandate, but found his construction of the Commerce Clause needlessly narrow.

In his dissent, joined by Justices Thomas, Kennedy and Alito, Justice Scalia acknowledged that the arguments made in the case raised many “difficult questions.” But he insisted that in its essence the case was a simple one to decide. In a concise paragraph, the conservative jurist made the following argument:

What is absolutely clear, affirmed by the text of the 1789 Constitution, by the tenth Amendment, ratified in 1791, and by innumerable cases of ours in the 200 years since, is that there are structural limits upon federal power — upon what it can prescribe with respect to private conduct and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs

Photo: Tea Party supporter William Temple of Brunswick, Ga., protests against President Barack Obama’s health care law outside the Supreme Court in Washington, June 28, 2012:

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