Written by **Jack Kenny** on March 30, 2012

On Broccoli, ObamaCare, and the Commerce Clause

The most important rule in constitutional law, the late Justice William Brennan liked to tell his law clerks, is "the rule of five." Five votes out of nine on the high court are all it takes to make constitutional law and change the course of history.

As the ideological makeup of the court has shifted over the years, the "rule of five" has in some eras favored liberal and in others more conservative majorities. In the heyday of the Warren Court, Brennan, a 1956 Eisenhower nominee, rarely had to break a sweat to get five or more votes to advance a broad, or "progressive," interpretation of the court's role in bringing about political or social reforms. Indeed in some of the most memorable of the court's groundbreaking decisions, those governing race relations, Chief Justice Earl Warren sought and obtained unanimous 9-0 decisions.

The more conservative Roberts court, like the Rehnquist court before it, has more often lived on the margin, with 5-4 decisions either limiting or granting free rein to the powers asserted by Congress under its authority in Article I, section 8, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" and "To make all laws necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States and in any Department or Officer thereof." Though the justices are always capable of surprising us, another important 5-4 decision is expected in late June when the court will most likely issue an opinion on the case that dominated the headlines this week, the constitutional challenge to he Patient Protection and Affordable Care Act of 2010, often called, in decidedly non-legal terms, "Obamacare."

During the three days of hearings this week, the court's liberal block, made up of Democratic appointees Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan, appeared to favor arguments supporting the law's constitutionality, while their conservative brethren, Chief Justice John Roberts, and Justices Antonin Scalia and Samuel Alito, all Republican appointees, were, to put it mildly, skeptical. Clarence Thomas, nominated for the high court by President George H.W. Bush in 1991, typically asked no questions during the oral arguments. But Thomas, perhaps the most conservative of all the current justices in interpreting the powers of Congress, is all but certain to come down on the side of declaring the law, or at least the provision requiring persons not otherwise covered to purchase health insurance, unconstitutional. Justice Anthony Kennedy, a 1987 Reagan nominee, is often the swing vote in a 5-4 decisions. Kennedy, however, seemed to share the skepticism of his conservative brethren about the power asserted by Congress in the Affordable Care Act.

Scalia is known for his insistence on a jurisprudence of "original meaning," a principle of interpreting a passage according to the text itself and as much as can be known about how it was debated and understood at the time it was ratified as part of the Constitution. Thus Scalia, in the 1995 case *United States v. Lopez*, was part of a court majority that declared unconstitutional the Gun Free Zone Act, by which Congress forbade the possession of any firearm within 1,000 feet of a school. The argument that guns contribute to a climate of violence, which has a negative impact on learning and thereby negatively impacts the future ability of students to participate successfully in interstate and international commerce, struck the court's majority as an untenable stretch of federal authority under the Commerce Clause.

Yet Scalia and a majority of the justices were of a different mind ten years later in the 2005 decision in *Gonzales v. Raich*. In that case, the court upheld the conviction in federal court of a California. man who had grown marijuana for consumption in his own home, allegedly for medicinal use. California had legalized the use of medical marijuana, but federal law still prohibits it. Yet how did the federal ban apply in a case where there was not only no interstate commerce, but no commerce at all?

Considering the contrast between Scalia's opinions in *Lopez* and *Raich*, one might be tempted to assume simply that Scalia likes guns (He is known to be an avid hunter.) and does not like marijuana. (His smoke is Marlboro Light.) But his *Raich* opinion is also at odds with the stand he took in 2000 in *United States v. Morrison*, when he was part of a majority ruling the federal Violence Against Women Act unconstitutional. Violence against women, however reprehensible, is not a commercial activity, the court ruled in rejecting Congress's claim that it comes under its power to regulate interstate commerce. It is among the many matters the Constitution leaves to state and local police powers, the court ruled.

Yet neither the *Lopez* nor the *Morrison* precedent "involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation," Scalia wrote in the marijuana case. The usually conservative justice invoked the 1942 Supreme Court decision in *Wickard v. Filburn*, a ruling most avowed "strict constructionists" and advocates of a "jurisprudence of original meaning" regard as an anathema. In that case, the court upheld a fine assessed against an Ohio farmer for growing wheat on 23 acres of his own land instead of limiting his farming activities to the 11 acres the government allowed him to cultivate under the New Deal's second Agriculture Adjustment Act (the first AAA having been ruled unconstitutional by what President Roosevelt derided as a "horse-and-buggy" Supreme Court). The court in *Wickard* did not dispute Roscoe Filburn's claim that the wheat he grew in excess of the government allotment was what he fed to his livestock, which consumed it on his farm, which was entirely within the state of Ohio. Rather, the court ruled that in so doing Filburn interfered with Congress's scheme for regulating the interstate market in wheat. Had he not grown that extra wheat, the court held, he would have had to buy it, thereby increasing the demand for wheat bought and sold in interstate commerce. "The potential disruption of Congress's interstate regulation and not only the effect that personal consumption of wheat had on interstate commerce justified Congress's regulation," Scalia wrote of the *Wickard* precedent.

But if *Wickard* stretched the meaning of regulating commerce "among the states," the *Raich* decision went even further, since there was and is no legal interstate market in marijuana for Congress to regulate. But Congress "may regulate even noneconomic local activity," Scalia wrote in his concurring opinion, "if that regulation is a necessary part of a more general regulation of interstate commerce."

It's hard to imagine how one might get further from either the text or the "original meaning " of the Commerce Clause than by declaring the policing of "noneconomic local activity" a "necessary part" of

regulating "commerce among the states." As Justice Thomas protested in his dissenting opinion, "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything — and the Federal Government is no longer one of limited and enumerated powers."

And has not been for quite some time. "This jurisprudence," former New Jersey Judge Andrew Napolitano has written, "has resulted in the courts approving the congressional regulation of the thickness of leather in shoes, the water pressure in home showers, the amount of sugar in ketchup, ad infinitum. Wherever you go in the United States, it is impossible to avoid confronting federal regulation of human behavior unmentioned in the Constitution, but justified by Congress under the Commerce Clause."

The Commerce Clause, Napolitano contends, was written to "protect the freedom to trade, Madison used the word 'regulate,' which to him and his colleagues meant 'to keep regular.' So, the Constitution delegated to Congress the constitutional power to keep interstate commerce regular by prohibiting state tariffs, and it did so."

Madison's own words confirm that point. In an 1829 letter to Joseph C. Cabell, the man known as "the father of the Constitution" wrote that the regulatory power delegated to Congress "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged."

In 1791, Thomas Jefferson, arguing against the establishment of a national bank, wrote the following concerning the regulatory power of Congress:

> For the power given to Congress by the Constitution does not extend to the internal regulation of the commerce of a State, (that is to say of the commerce between citizen and citizen,) which remain exclusively with its own legislature; but to its external commerce only, that is to say, its commerce with another State, or with foreign nations, or with the Indian tribes.

Congress did eventually establish a national bank, an establishment the Supreme Court upheld as constitutional in *McCulloch v. Maryland* (1819). But unlike the mandate to buy health insurance, attorney Paul Clement argued at the Supreme Court, the law establishing a national bank did not require individuals to put their money in it. To penalize an inactivity, to compel someone to enter a commercial relationship in order that Congress may regulate it, goes beyond even the *Wickard* and *Raich* precedents. As Justice Kennedy noted, it would require a fundamental change in the role of the federal government.

> But the reason, the reason this is concerning is because it requires the individual to do an affirmative act. In the law of torts, our tradition, our law has been that you don't have the duty to rescue someone if that person is in danger. The blind man is walking in front of a car and you do not have a duty to stop him, absent some relation between you. And there is some severe moral criticisms of that rule, but that's generally the rule. And here the government is saying that the Federal Government has a duty to tell the individual citizen that it must act, and that is different from what we have in previous cases, and that changes the relationship of the Federal Government to the individual in a very fundamental way.

Ironically, as Damon Root pointed out on reason.com, the Justice Department attorneys incorporated Scalia's arguments in *Raich* into their brief defending the constitutionality of the Affordable Care Act

and its mandate to buy health insurance. Scalia appeared unpersuaded during oral arguments. At one point he suggested that if the federal government can define the health care market broadly enough to declare that everyone is in it and thus may be required to buy health insurance, then it might at some point declare that, because everyone is in the food market, Congress may "regulate" that market by requiring people to "buy broccoli."

Perhaps Scalia's "broccoli doctrine" will ensure his vote to find the Affordable Care Act unconstitutional. It's even possible he dislikes broccoli almost as much as marijuana.