

A taxing decision

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In upholding Obamacare as a tax, the Supreme Court, led by the politically astute Chief Justice Roberts, took the safest route around a thorny issue. Both sides, arguably, got something they want. The chief justice strongly endorsed the argument that Congress is not allowed to compel people into commerce in order to regulate them under the Commerce Clause. President Obama and his supporters get to claim victory too. The end result, however, is the same. It makes no difference whether it is under the taxing power or the commerce power, Congress can now compel non-purchasers to become purchasers.

The chief justice's opinion upholding the mandate as a tax stresses the supposed "choice" that individuals face when confronted with the penalty for not having health insurance. "The mandate is in effect just a tax hike on certain taxpayers who do not have health insurance," the chief justice writes, and he acknowledges that many Americans may make a "reasonable financial decision to make the payment rather than purchase insurance."

Although this sounds rather unobtrusive, Roberts misses the fundamental argument against upholding the mandate under the taxing power: Congress did not frame the penalty as a tax, and they did not do so, of course, because they did not want to be accused of raising taxes. As the admirable dissent from Justices Scalia, Thomas, Alito, and Kennedy makes clear, "The issue is not whether Congress had the *power* to frame the minimum coverage provision as a tax, but whether it *did* so." The Supreme Court holds today that, unbeknownst to them, Congress passed a substantial tax hike.

Some may dismiss this as a mere drafting error and argue that the language Congress uses is not crucial to whether something is a tax for the purposes of the Constitution. This is true, but only to an extent. A tax has always been considered a government exaction with the primary purpose of raising revenue. Although taxes can be used to change behavior, it is not their primary purpose. Penalties, on the other hand, are designed to change behavior. Presumably, Congress would prefer that everyone comply with the law, pay no penalties and thus raise no revenue.

If I park in a "no parking zone" and get a ticket, can I just call that a "tax" that I pay for choosing to park there? Are speeding fines now just taxes on "moving fast."

No, because words matter. "Tax" is a bad word, and for good reason. The American people — the same people who fought a war over "no taxation without representation" — understand that, in the words of Chief Justice John Marshall, "the power to tax is the power to destroy." We also understand the many possibilities of government abuse of taxation. There is a reason that President Obama explicitly said that the mandate was not a tax: because he knew the American people would have been mad.

So should we be mad now? We should be upset that the court did not perform its constitutional duty to strike down the law as it is written, and not to effectively rewrite the

statute into a more politically palatable form. We should be upset that the court gave Congress yet one more tool for their ever-increasing bag of regulatory tricks that they can use to whip the American people into shape. And we should expect more such “taxes” to come from future Congresses. How could they resist? There are millions of inactive people out there just waiting to become revenue sources.

During his confirmation hearing, the chief justice famously described his judicial style as “minimalist.” He claimed that he would not decide more than the issue before him. He claimed that he would not use the court in an “activist” fashion that disrupts the democratic process. Here, he proved how honest he was. Sometimes, however, the court must act with determination to stop Congress from radically overstepping the boundaries of the Constitution and transforming the United States into something fundamentally different. If they don’t, who will?

And let’s not forget one last thing: the individual mandate is one of the biggest gifts, if not the biggest gift, ever given by a government to a private industry. To get the government to compel the purchase of your product is the ultimate dream of every businessman. Today, the court rubber stamps the shared complaints of the Tea Party movement and the Occupy Wall Street movement — that the government is too intertwined with big business — and emboldens future Congresses to try other crony capitalist schemes.

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