SCOTUSblog

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We won everything but the case

The following contribution to our post-decision symposium on the health care cases is written by Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review. *He filed* amicus *briefs at the Supreme Court on each of the four issues in the Obamacare case.*

I could never have imagined that the Supreme Court's ringing endorsement of the legal theory I'd pushed for more than two years could feel this hollow. That is, five justices agreed in no uncertain terms that the federal government cannot require people to buy something, cannot regulate inactivity, cannot impose economic mandates as a means of regulating interstate commerce. And yet, Obamacare stands.

The Court adopted the "frivolous" legal argument "concocted" by David Rivkin and Randy Barnett that there are judicially enforceable limits on federal regulatory authority over national economic affairs. It vindicated the "political opportunism" of Virginia Attorney General Ken Cuccinelli and then-Florida Attorney General Bill McCollum to file "sour grapes" lawsuits challenging the Affordable Care Act the same day President Obama signed the law. And yet, Obamacare stands.

Indeed, with the possible exception of Florida district judge Roger Vinson—whose magisterial opinion Cato put on the front page of its March/April 2011 Policy Report—the Supreme Court went farther than any lower court that ruled against the government. Not only did the Court for the first time endorse the activity/inactivity and regulate/mandate distinctions that our opponents derided as appearing "nowhere in the Constitution" but *seven* justices found the Medicaid expansion unconstitutionally coercive of state sovereignty. And yet, Obamacare stands.

How did this happen? Well, as even Fox News and CNN now know, Chief Justice John Roberts put a new gloss on Congress's taxing power just as he rediscovered the meaning of the Commerce, Necessary and Proper, and Spending Clauses. In 13 cryptic pages, Roberts fashioned a not-quite-silk purse out of a sow's ear, salvaging—to continue the porcine metaphor—Obamacare's bacon from the constitutional flames.

That is, the Chief Justice recharacterized a provision explicitly stating that people "shall" obtain health insurance or pay a "penalty" into a "choice," a "tax citizens may lawfully choose to pay in lieu of buying health insurance."

I wonder whether this means that the next time I'm driving I should consider whether to obey the speed limit or simply pay the "speeding tax." Surely I'll spend less time

pondering that "choice" than the one a mugger would give me regarding my money or my life.
In any event, Roberts went on to cabin his taxing-power justification in such a way as to make it seem that this ticket would be good only for this train: the tax (if one chooses to pay it) is not so burdensome as to be punitive, is enforced through normal tax-collection means (with no threat of criminal sanctions), and merely encourages rather than requires certain behavior.

Moreover, this voluntary unicorn-like tax is not a "direct" tax—which the Constitution says must be drawn such that each state pays in proportion to its population—because it's neither a tax on property nor a "capitation" (defined as "a tax that everyone must pay simply for existing"). Instead, Roberts explains, this novel tax is triggered by a specific circumstance: "earning a certain amount of income but not obtaining health insurance." I guess that means it's not an income tax—where income itself is the trigger and sole basis for assessment—which leaves, among the exactions the Constitution authorizes only excises. (We can all agree that the non-punitive indirect voluntary tax incentive isn't a "duty" or "impost.")

But excises are taxes on a use of property, a transaction, privilege, or activity, and here Roberts has already recognized there's no property, transaction, or activity involved. You just have this *condition*—not owning health insurance—that triggers the tax. Does that mean that being free from a government command ("shall") to buy health insurance is a privilege?

I don't think that's what the Chief Justice meant at all, and I'm not trying to be cute. The point is that the opinion's taxing-power section is a complete head-scratcher. Even Justice Ruth Bader Ginsburg, who was skeptical about the taxing-power theory during oral arguments, expressed some disbelief at Roberts's theory in orally summarizing her partial dissent on behalf of the no-limits-on-federal-power bloc.

Quite beyond the direct/indirect/excise/whatever tax issue, it seems odd to have a result whereby Congress cannot make you buy something but can tax you for not buying it. As Roberts himself wrote, "If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something."

Remember, we're not talking tax credits for installing solar panels—an incentive—as an alternative to a solar-panel mandate, but rather tax *debits* for not installing them. And that's after you suspend disbelief and hypothesize that Congress had actually structured its "minimum coverage provision" as a tax rather than regulation-plus-penalty. Nevertheless we're left with a definitive ruling that Congress can't make you buy broccoli—Roberts was clear on that, explicitly rejecting the government's pooh-poohing of that infamous hypothetical—but can tax you for not buying broccoli. That's a constitutional distinction without a practical difference.

Where there may be a practical difference is in the fact that enacting new taxes—particularly for not buying things—is typically more difficult than creating new regulations. But that practical check does not obviate the constitutional ones that should be there: we don't trust our liberties to a political majority's sense of noblesse oblige. Indeed, the judiciary is by definition a counter-majoritarian institution.

And, of course, in this particular case, Congress and the president avoided even running that political gauntlet by explicitly disavowing any attempts to characterize Obamacare as raising taxes on the middle class.

Nor did John Roberts vindicate his constitutional legerdemain by rewriting the Medicaid expansion to tie only *new* federal funding to an acceptance of burdensome and fundamentally transformative regulations. While correct on its face—and a good exposition of the Spending Clause and what strings the federal government can attach to its funds—his analysis on that point is relevant only to a hypothetical statute, not the one that Congress actually passed.

In sum, we take away from *NFIB v. Sebelius* the comfort that the federal regulatory authority recognized in *Wickard* and *Raich* has not been expanded and that the federal government can't compel states to do its bidding. The size and warmth of that comfort will be determined in future cases, which will come when Congress inevitably again pushes the envelope of its enumerated powers.

But is federal overreach inevitable? Will the people ever rein in their elected representatives—or, more fundamentally, the temptation to demand goodies from the public fisc. That's the ultimate question left by the baby-splitting of a chief justice who, after doing so much good work, ultimately refused the charge given him by his model, Chief Justice John Marshall, to say what the law is.

"It is not our job to protect the people," Roberts wrote, "from the consequences of their political choices."

Ok, then, people, the ball is in your court: How much longer will you allow Obamacare and other offenses against the Constitution and good sense to stand?