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LEVY: Obamacare politics produce poor policies

Supreme Court sacrificed liberty for compromise

By Robert A. Levy - October 4, 2012

On the final day of the Supreme Court's 2012 term, Chief Justice John G. Roberts Jr. issued his blockbuster decision on the constitutionality of Obamacare — aka the Affordable Care Act. In a single opinion, Justice Roberts gave us a treatise on constitutional law in *National Federation of Independent Businesses v. Kathleen Sebelius*. The complex opinion, far from ending litigation, resulted in Oklahoma amending its suit challenging the constitutionality of Obamacare. The states are still grappling with the choice of expanding Medicaid or forgoing additional Medicaid funds from Washington.

In a nutshell, here's what the court held: First, Justices Antonin Scalia, Samuel Anthony Alito Jr., Clarence Thomas and Anthony M. Kennedy, writing jointly, agreed with Justice Roberts that the mandate requiring persons to purchase health insurance or pay a penalty is not within the Commerce Power. Congress cannot force people to engage in commerce in order to regulate them.

Second, the same five justices held that the mandate is also not covered by the Necessary and Proper Clause. That clause must be tied to some other enumerated power, such as the Commerce Power. Congress cannot create a problem by passing a statute like Obamacare, which requires that insurance companies cover pre-existing conditions and not raise premiums, then claim constitutional authority for a specific provision, like the insurance mandate, because it's necessary to fix the problem that Congress itself created. In addition, the mandate had no limiting principle, so even if it were necessary, it could not be considered "proper" within a federal system supposedly constrained by limited and enumerated powers.

But the government ultimately got what it wanted. Justice Roberts, joined by the four liberal justices, held that the mandate is authorized under the Taxing Power. Even though Congress and the president called the fee for not buying insurance a penalty — and even though Justice Roberts said the fee should be treated as a penalty under the Anti-Injunction Act — when he interpreted the fee for constitutional purposes, what mattered was how the fee functioned, not how it was labeled. He concluded that the fee operates much the same as a tax and is therefore authorized under the Taxing Power.

Finally, Justice Roberts and six justices (all except Ruth Bader Ginsburg and Sonia Sotomayor) held that federally directed Medicaid expansion is unconstitutional if noncooperating states would otherwise lose all of their funding. That's coercive. But if

the states would lose only new funds for expansion, that's permissible under the Spending Power.

From a constitutional perspective, the decision was a mixed bag. The good parts are new limits on the Commerce and Spending Powers. Those limits are very important going forward. But the Taxing Power argument could be pernicious. If the Roberts opinion were interpreted to mean that Congress could force you to do whatever it wants by penalizing you for not doing it — and if your only recourse were the ballot box — that would eradicate the notion of limited government under a republic bound by a Constitution.

On the other hand, that's not quite what Justice Roberts wrote. According to him, when a tax crosses some threshold, it can become coercive and leave the individual no option. At that point, no one would pay the tax. Its purpose would be to force people to buy a product; it would be purely punitive and thus would no longer qualify as a tax. So the Taxing Power has a built-in limit, although we don't know precisely what that limit is. What we do know is that the Obamacare "tax" was too small to cross the limit. If Justice Roberts had upheld the mandate under the Commerce Clause, the power would have been unlimited.

If the limits on government are to be stretched, better under the Taxing Power than under the Commerce Clause. Taxes are politically toxic, and that limits their use. Moreover, the Taxing Power imposes monetary burdens when you do something wrong, such as not buying insurance. By contrast, the Commerce Power can impose prison when you do something wrong, such as violating federal drug laws.

The Roberts opinion is a masterpiece of political compromise. It gives something to everyone. It suggests that Justice Roberts was intent on consensus-building and ensuring that the court doesn't have an overtly political or ideological cast. Those motives aren't inherently bad unless, as in this case, they lead to legal analyses that condone an unconstitutional law. That's why Justice Roberts' Obamacare opinion ultimately failed. Once again, the court found a way to expand the reach of the federal government at the expense of individual liberty.