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John Roberts: Rarely Has Such A Smart Judge Written Such A Bad Opinion

Rarely has so smart a judge written so bad an opinion with such ill consequences for the nation. Such is the handiwork of Chief Justice John Roberts in *NFIB vs. Sebelius*, the constitutional challenge to ObamaCare.

His support for the president's signature legislation has secured plaudits from the Washington establishment, which undoubtedly will make his stay in the nation's capital more pleasant. But his gain comes at the cost of Americans' liberties. That Justice Roberts would abandon the Constitution for his reputation was feared, but none expected him to do so in such calculated fashion.

More than two years ago President Barack Obama won a celebrated political victory with passage of the misnamed Patient Protection and Affordable Care Act. As usual, Congress promised the impossible: expanded coverage of more people for more services at lower cost and reduced federal spending. The measure exceeded even the extraordinary powers previously claimed by the federal government. Legislators simply assumed they could do whatever they wanted, irrespective of the Constitution.

However, the Founders created a government of limited, enumerated powers, none of which empowered Congress to mandate that people purchase a private product, in this case health insurance. So multiple lawsuits were filed. ObamaCare supporters were shocked, shocked that anyone still believed that the Constitution limited federal authority. But the issue went to the Supreme Court.

There was much speculation about the likely outcome after oral arguments before the high court in March. The left-wing justices were widely expected to let the government do what it wanted, irrespective of the Constitution. Only the center-right jurists were thought open to argument, especially Justice Anthony Kennedy, usually the court's swing vote.

However, vigorous questioning from Kennedy demonstrated profound skepticism of the government's case. The prospect that a majority might take the Constitution seriously generated sustained caterwauling on the Left. The center-right justices might vote together and overturn the law. Horrors! Liberal justices were expected to march in lock-step irrespective of precedent and argument, but conservative jurists had to break ranks to

demonstrate that they were not partisans. "Activism for me but not for thee" became the Legal Left's informal slogan.

The campaign continued, even after the case theoretically had been decided, with pressure largely applied to Roberts. Surely he wouldn't want to lead a sharply divided, partisan court, now would he? Wrote *New Republic's* Jeffrey Rosen in May: "In addition to deciding what kind of chief justice [Roberts] wants to be, he has to decide what kind of legal conservatism he wants to embrace." In short, if he voted to overturn ObamaCare, liberal society in Washington would never forgive him.

At the time there were rumors of judicial maneuvering involving a Roberts shift. Circumstances back this interpretation. For instance, the four other center-right justices issued an opinion which repeatedly termed the four liberals, who joined with Roberts to uphold the law, as the "dissent." In fact, the conservatives wrote the real dissent. Perhaps this reference reflects maladroit draftsmanship. More likely the opinion was originally written for the majority—until Roberts defected.

It wouldn't be so bad if the chief justice had forthrightly embraced the Legal Left's view that the enumerated powers doctrine is dead. Supreme Court jurisprudence had been heading in that direction, despite occasional small detours. The result would have been an honest burial of constitutional liberties, as reflected in Justice Ruth Bader Ginsburg's opinion, which concurs in the result but not Roberts' tortured "reasoning." On this point Ginsburg makes the far better case.

Instead the chief justice appeared to take the most political course possible. He offered the Legal Right rhetoric and the Legal Left results. Thus, he hopes advocates of constitutional governance will applaud his compelling but irrelevant argument while the forces of government reaction will apply his bizarre but decisive ruling

Roberts began his opinion by rejecting the constitutionality of ObamaCare under the most widely claimed ground: "interstate commerce." He delivered a lengthy lecture tailored for the Federalist Society about the Framers' intentions to limit government. Then he made the obvious point that requiring people to purchase health insurance is creating, not regulating, commerce. The Founders did not intend to empower the government to create an activity for the purpose of regulating it.

But the language, while eloquent, is of no effect. As Ginsburg pointed out, Roberts had no cause to even discuss the so-called Commerce Clause because it was irrelevant to his ruling—it was "not outcome determinative," as she put it. Had he joined with the four conservative dissenters to void the mandate, he would have established new doctrine. However, he opined that the requirement was constitutional on other grounds. As a result, his Commerce Clause verbiage is but meaningless dicta. It sounds nice but binds no one.

The language suggests how he would rule if presented with a similar case without extenuating circumstances. But there is no reason to believe that the chief justice would

not similarly find extenuating circumstances in the future if he believed doing so advanced his interests.

After asserting that ObamaCare was a dramatic, unprecedented, and unconstitutional assertion of government power under the Commerce Clause, Roberts announced that it wasn't really a mandate at all: "While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful." Instead, the mandate was a tax and thus permissible.

No lower court had adopted this reasoning. Virtually none of the advocacy—oral argument, official briefs, amicus ("friend of the court") submissions, or other commentary treated the issue seriously. Noted the dissent, "The government's opening brief did not even address the question—perhaps because, until today, no federal court has accepted the implausible argument." Moreover, added the dissenters, there is a "mountain of evidence that the minimum coverage requirement is what the statute calls it—a requirement—and that the penalty for its violation is what the statute calls it—a penalty."

The president said it wasn't a tax. Congress called it a "penalty" and a "requirement." The legislation cited the Commerce Clause as its source of constitutional authority. The mandate did not appear in the bill's list of taxes or expected revenue. Enforcement for the penalty was not like any other tax, with no recourse to normal IRS collections. Even if the penalty counted a tax, it did not fall within the levies authorized by the Constitution: direct, which must be apportioned based on the census; excise, which must be uniform; or income, which must be triggered by income, not insurance status.

Most important, the government emphasized that the mandate was "essential" and "necessary" for the rest of the legislation, that ObamaCare could not work if people were not forced to purchase insurance. Indeed, Roberts quoted the government's contention that "the mandate is an 'integral part of a comprehensive scheme of economic regulation'." The mandate was necessary because it was a mandate, intended to ensure that the healthy buy insurance, not because it was a tax, which the legislation did not even count as raising one cent.

Supreme Court precedent long distinguished taxes and penalties, and everyone in Washington other than Roberts recognized which term best characterized the health insurance mandate. Moreover, as the dissent noted, "The provision challenged under the Constitution is either a penalty or else a tax," but "we know of no case, and the government cites none, in which the imposition was, for constitutional purposes, both." Finally, the Court had previously ruled that while Uncle Sam could tax when he could not regulate, he could not so tax for the *purpose* of regulating. In *Bailey vs. Drexel Furniture* Chief Justice William Howard Taft explained: "To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress."

Roberts' argument was disingenuous at best, dishonest at worst. Law professor Richard Epstein called Roberts' contentions "absurd." The four dissenters savaged the chief justice's unjustified rewrite of the health care law. Even the four liberal justices distanced themselves from Roberts' argument. They included two throwaway lines agreeing that the mandate "is a proper exercise of Congress' taxing power" and concurring with "that determination," but refused to endorse his unpersuasive rationale.

Instead, they defended reliance on the Commerce Clause. Had ObamaCare's future not depended on Roberts' bizarre rationale, they probably would have joined the dissenters on this point. During oral argument Ginsburg observed: "This is not a revenue-raising measure, because, if it's successful, they won't—nobody will pay the penalty, and there will be no revenue to raise."

So Roberts' legal contention that you can turn a dog into a cat by simply renaming the former is not likely to set an enduring judicial precedent. He wrote the most important opinion in one of the Supreme Court's most important cases, but it is likely to be mostly cited as an example of judicial idiosyncrasy and legal vanity. One can imagine Ginsburg pulling Roberts aside during the drafting process to ask: "wouldn't it just be easier to cast an honest vote for unlimited government?"

In fact, that would have been best even for those promoting constitutional protection of individual liberty. Some right-leaning observers hope that Roberts' Commerce Clause rhetoric will narrow that avenue of government intrusion, but he opened the door while closing the window. Only if a future Congress is so stupid not to include the faintest, most nominal pretext of a tax will any future mandate, or other extraordinary government imposition, run into constitutional resistance. Under the guise of endorsing a government of limited, enumerated powers Roberts has written the detailed plan for subverting constitutional rule.

This makes him far worse than John Paul Stevens or David Souter, two justices who cheered on virtually every government assertion of power. Neither of them ever made any pretense that the Constitution had anything to do with individual liberty and limited government. But their arguments were judged accordingly.

Roberts, in contrast, has become the Manchurian Justice. He proclaims the continuing vitality of restrictions on federal power while he votes for extending that same power. In *NFIB* he "decides to save a statute Congress did not write," noted the dissent. He presumably stands ready to perform a similar service for the Washington establishment in the future.

In defending Roberts from earlier leftish criticism, columnist George Will said the jurist was "apt to reveal his spine of steal." Instead, Roberts demonstrated that he, like President William McKinley, in the timeless words of Teddy Roosevelt, had "no more backbone than a chocolate eclair."

Roberts already is enjoying the "new found respect" with which Washington routinely greets proponents of constitutional liberty who break ranks. His role as legal savior dominated news coverage of the case. Harvard's uber-liberal Lawrence Tribe said the chief justice had "delivered a heroic rebuke" to those who feared judicial partisanship and "ensured that no contrived constitutional obstacle will stand in the way of millions of uninsured Americans" gaining "health coverage." Roberts "saved an institution," enthused Tribe.

The *Washington Post* included Roberts' picture when it editorialized that he "was statesmanlike in choosing to side with four more liberal justices." Wrote Dan Eggen in the *Washington Post*: "the ruling was praised by many regular critics of Roberts, including Obama." No doubt a flurry of valued dinner invitations will follow.

Indeed, no less shameless than Roberts was the Legal Left as it rushed to embrace Roberts' ruling. Never mind the narrow majority backed by an ideologically homogenous block built upon dubious reasoning. Never mind the politics behind Roberts's apparent flip-flop. All was good and right in the world since a massive new government program had been validated. Had a politically-motivated liberal instead joined center-right justices in overturning a government program, cries of outrage would have swept across the land.

Roberts did perform one public service, however—banish forever the argument that disaffected Republicans had to vote for big-spending Republicans over big-spending Democrats to ensure that the former controlled judicial appointments. Even if Mitt Romney, who has taken both sides of most important issues, including the health care mandate, could be trusted to nominate judicial "conservatives," the latter could not be trusted to enforce the Constitution. Indeed, decades of GOP appointments have failed to reverse the judiciary's embrace of expanded government.

So it is with the Roberts opinion in *NFIB*. The chief justice undermined our system of constitutional liberty as he proclaimed his commitment to limited government.

Congress may not mandate activity to regulate it—unless Congress is taxing people. And to count as taxing people legislators don't have to admit that they are taxing, act like they are taxing, enforce like they are taxing, or even argue in court that they are taxing. Instead, the chief justice will enthusiastically rewrite their legislation to make it constitutional.

So much for either democratic or constitutional accountability. Concluded the dissent: "The fragmentation of power produced by the structure of our government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it."

At least the New Deal's Justice Owen Roberts' famed "switch in time" to back New Deal programs was supposed to save all nine justices. Chief Justice John Roberts' seeming "switch in time" to back ObamaCare was probably meant to boost only his career.