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How John Roberts Begat Donald Trump

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When the returns came in from Indiana, so many questions came to mind. How did we get to the point where a reality-TV mogul became the standard-bearer of the party of Abraham Lincoln? Did Barack Obama succeed in transforming an exceptional nation into a “normal” one, such that we finally got the Berlusconi we deserve? Or maybe it's the Republican Party that's to blame, reaping the whirlwind of its appeals to populism such that even Ted Cruz got sucked into the anti-establishment maw?

Or, worse, has our presidential system finally revealed its flaws such that we're stuck with Latin America-style politics that feature crude demagogues and the wives of former presidents, all of no discernible ideology save the will to power?

As I drowned these existential sorrows in Johnny Walker and “Archer” reruns, it occurred to me that, yes, Obama (and George W. Bush before him), the perfidious GOP elite, the Reid-Pelosi nihilists, demographic shifts, globalization, and a host of other forces have brought us to where we are. Plenty of exegeses have been and will be written about all these culprits. But, no, if I have to point to a moment that spawned the current *annus horribilis*, it would have to be John Roberts's vindication of Obamacare on June 28, 2012.

Contempt for Rule of Law

Not because his ruling in *NFIB v. Sebelius*—and last year in *King v. Burwell*, when the die had already been cast—allowed a hugely unpopular piece of legislation to survive and corrode our health-care system and economy. But because Roberts recognized that the Affordable Care Act was unconstitutional yet still saved it out of a misbegotten devotion to judicial restraint—under the guise of deferring to “the people.”

Sure, the chief justice cleverly wrote his opinion so it wouldn't increase Congress's power to regulate interstate commerce and even cut it back under the Necessary and Proper Clause. He also ultimately upheld the individual mandate only by rewriting it into a “unicorn” tax—a creature of no known constitutional provenance that will never be seen again.

But by refusing to follow his own logic, to go where even Justice Kennedy full-throatedly went—I was in the courtroom to hear Kennedy passionately summarize a dissent that would've struck down the entire law—Roberts increased cynicism and anger at play-by-the-rules conservatives and decreased respect for institutions across the board.

The man's twistifications drove the constitutionalist Tea Partiers into the arms of the populists—or made it easy for their populist instincts to “trump” their constitutional ones (pun unintended, but fitting). Why bother with the Constitution? Even when you're right, you lose.

Indeed, if Kennedy had joined the liberals in their view that there are simply no structural limits on federal power, there would have been disappointment, but it would have been understandable given the conventional Left-Right rubric. But to lose in a wholly extra-legal way was a sucker punch, belying the idea that there's a difference between law and politics and that the judiciary is an anti-majoritarian check on the excesses of the political branches.

If It's Will to Power, We'll Play

Roberts essentially told would-be Trumpistas not to bother the courts with important issues, that if you want to beat Obama you have to get your own strongman—complete with pen, phone, and contempt for the Constitution. So they did, bypassing several flavors of constitutional conservative in favor of a populism that knows nothing but “winning.”

It's such a shame, and deeply ironic. A constitutional moment had actually arrived in 2010. Remember, the people had risen up against crony capitalism, against bailouts and out-of-control government in every aspect of our lives. Real constitutionalists were sent to Congress—Massachusetts even elected a Republican senator in a bid to stop Obamacare—and state legislatures turned red based on opposition to federal overreach.

The last domino, the White House, was poised to fall, too—would have already if any A-list constitutionalist had run in 2012—with the most talented and intellectually vibrant GOP primary field since Ronald Reagan ran unopposed in 1984. But then Roberts ushered in the Trump tornado. Constitutional conservatism simply couldn't survive judicial conservatism. The genteel Roberts and the vulgar Trump thus have one thing in common: a belief that judges should stop striking down laws and just let political majorities rule, individual liberty be damned.

In sum, the constitutional moment expired on the shoals of Roberts's judicial restraint. Even Scott Brown, the Republican briefly elected to “Ted Kennedy's seat,” endorsed Trump.

Instead of teaching the people that our republican form of government works, we're left with the false empowerment of a self-consuming democracy.* Comes now our own Peron, leading his modern-age descamisados down the road to a “Great America” that could genuinely have existed if Roberts had only done his job.

** For more on this theme, read Randy Barnett's magisterial “Our Republican Constitution: Securing the Liberty and Sovereignty of We the People.” He and I actually had this same idea Tuesday night and you can watch him present his thoughts along the same lines as this essay.*

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