

The New York Times

Blaming the Chief Justice

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May 12, 2016

Do you hold Chief Justice John G. Roberts Jr. responsible for the ascendancy of Donald Trump? The thought never crossed your mind? Then you probably haven't been reading the conservative blogosphere, where Chief Justice Roberts, target of bitter criticism for his failure to vote to dismantle the Affordable Care Act, is now being blamed in some quarters for Donald Trump as well.

The emerging narrative, reduced to its essentials, goes like this:

- Once the Affordable Care Act became law in 2010, the Tea Party and other opponents of government regulation looked to the Roberts court to strike it down.
- In the case that reached the court in 2012, Chief Justice Roberts viewed the individual mandate — requiring people to have health insurance or pay a penalty — as constitutionally flawed; in fact, he provided the fifth vote to hold that it exceeded Congress's power under the Constitution's Commerce Clause. That showed that he understood and accepted the essence of the constitutional attack on the law. But then he unaccountably rescued the mandate by calling it a tax, within the power of Congress to impose.
- This “sucker punch,” in the words of Ilya Shapiro of the libertarian Cato Institute, robbed the Tea Party of the victory it expected and deserved, instead delivering the message that there was no point relying on the courts and that “if you want to beat Obama you have to get your own strongman.” Guess who?

Randy Barnett, a law professor at Georgetown University and an architect of the Commerce Clause-based attack on the Affordable Care Act, put it this way in a speech last week to the Heritage Foundation titled “How John Roberts Gave Us Donald Trump”:

But at the very moment he was called upon to teach the American people of the value of their republican Constitution, Chief Justice Roberts asserted the judicial restraint of the democratic constitution and turned them away. And that, my friends, was the end of our constitutional moment. That was the beginning of the end of constitutional conservatism as a political movement. And it kindled the resentment and populism that led to Donald Trump.

“John Roberts Derangement Syndrome” is how Prof. Jack Balkin of Yale Law School, in a post on his Balkinization blog, labeled the attack on the chief justice.

Even before the Trump-focused blame game started, Chief Justice Roberts was well on his way to becoming the political right's favorite punching bag. In a rambling speech on the Senate floor last month, Senator Charles E. Grassley, the Iowa Republican who heads the Judiciary Committee, defended the Republican refusal to move forward with President Obama's nomination of Judge Merrick B. Garland to fill the Supreme Court's vacant seat. Playing off an observation the chief justice had made shortly before Justice Antonin Scalia's unexpected death, to the effect that the Senate confirmation process had become unfortunately divisive and political, Senator Grassley said it was the Roberts court itself that was political. "Physician, heal thyself," he said, and then offered this observation:

Justices appointed by Republicans are generally committed to following the law. There are justices who frequently vote in a conservative way. But some of the justices appointed by Republicans often don't vote in a way that advances conservative policy.

In other words, could it be that the problem with Chief Justice Roberts is that he isn't sufficiently political in the right direction? That was certainly the message Gov. Greg Abbott of Texas sent last month when he called the chief justice "the tip of the spear in playing politics." In remarks at the Heritage Foundation, he explained: "Chief Justice John Roberts knowingly, clearly and unabashedly rewrote Obamacare twice. What we are seeing is nothing more than naked politics being played by the United States Supreme Court." (By "twice," Governor Abbott was referring to the chief justice's majority opinion last year in King v. Burwell, which saved the statute from a contorted reading that would have stripped the federal government of the ability to set up insurance exchanges.)

In trying to understand how one of the most conservative members of the most conservative court in decades has come to be viewed by fellow conservatives as an enemy of the people, several possible explanations come to mind. Derangement may be one. A mind-clouding obsession with the Affordable Care Act is another.

But something deeper and more systemic is at work here that has little to do with the Affordable Care Act or John Roberts. The scapegoating of Chief Justice Roberts is the clearest demonstration yet of a profound shift in the political polarity of judicial activism. For decades, conservative politicians railed against the "judicial activism" of judges who overturned democratically enacted legislation, accusing such judges of seeking to use the power of the courts to impose their own political and social agendas. It was one of the easiest ways to score political points.

Now it's judges who decline to strike down laws who stand accused of being political. Not so long ago, "judicial restraint" was a conservative goal against which judicial performance was measured. Now it's an epithet hurled at, of all people, Chief Justice Roberts, whose opinion four years ago gutting the Voting Rights Act of 1965 on the basis of a newly manufactured theory of federalism was undoubtedly one of the most activist of all recent Supreme Court decisions. That was the good kind of activism, it seems. Nothing political there. It's judicial restraint that's political.

Are conservatives at all abashed at taking the vocabulary they grew up with and flipping it so openly? I see little sign of that, but I do think the energy behind the blockade of the Garland nomination is fueled by anxiety not only about what a more liberal court might do but in equal

measure by what a judicially restrained court would *not* do. The fear of judicial restraint runs deep. Ilya Shapiro, the Cato Institute scholar who blamed John Roberts for Donald Trump, expressed it vividly. Lamenting the failure of the attack on the Affordable Care Act, he wrote, seemingly without irony: “Constitutional conservatism simply couldn’t survive judicial conservatism.”