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Morning After: More SCOTUS Reflections from a Non-Lawyer

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In reaction to my post yesterday, and lots of other punditry around the web, my friend Rusty Weiss of Mental Recession fame (he recently celebrated six months of blogging!) emailed me to say he's tired of having to settle for silver linings — that he want points on the board.

A lot of us — political activists, policy geeks, and court watchers alike — were disappointed with the outcome of yesterday's ruling. We wanted a full takedown of Obamacare, for both substantive and political reasons. Instead, we got a ruling that the president's signature legislative achievement passes constitutional muster, even if it was most peculiarly reasoned.

Right of center commentators lambasted the ruling — most notably lawyer commentators Ann Coulter and Mark Levin, neither of whom are ever shy about what they think. And I'm somewhat sympathetic to the line of argument these folks are championing: that a Bush-appointed justice sided with the liberal side of the Court to uphold the individual mandate based on an interpretation of statutory language that wasn't even in the bill. Justices Alito, Kennedy, Scalia, and Thomas wrote in their dissent to the Roberts ruling that the majority's ruling has dangerous implications for the separation of powers enshrined in the Constitution; that Roberts effectively rewrote the shared responsibility provision as a tax to find it constitutional; that revenue bills are the sole dominion of the House of Representatives, and not the bench of the Supreme Court. Roberts's legal reasoning is even more peculiar, as I noted yesterday, since the majority did *not* treat the mandate as a tax when arguing that the Anti-Injunction Act did not apply to this case:

> *And an interesting substantive point — an undergrad political economy professor of mine notices that, for purposes of standing (the right to sue the government over the law), the Court held that the mandate provision was a regulatory penalty, but in finding authority to uphold it, construed the mandate to be a tax. As implementation proceeds, it's not unreasonable to expect further litigation to clarify the precedent.*

The *Wall Street Journal* editorial board this morning smells something fishy, too:

> *But if the mandate is really a tax, why doesn't the law known as the Anti-Injunction Act apply, which says that taxes can't be challenged legally until they've been collected? The Chief Justice actually rules that the mandate is a tax under the Constitution and a mandate for the purposes of tax law.*

I don't have specific case law references, but I've read on teh Internet that the Court has previously deemed things called a "tax" a "penalty," and Roberts simply applied the same test here in reverse. It is the Court's job to look at the substance of statutory provisions and not the lexicon used to write them. In fact, the Court routinely defers to Congress with the assumption that federal statute questions brought before them are constitutional on their faces, and that these sorts of tests must be applied. My friend and United Liberty co-blogging attorney Doug Mataconis made this point yesterday:

Nonetheless, it's worth remembering that the Supreme Court has always said that Congressional legislation deserves a strong presumption in favor of its Constitutionality and that, if there is an argument that can be made in favor of the validity of a law, the Court should be loathe to strike it down because it might fail under another legal theory.

For these reasons, it's hard to argue with Roberts's reading of the statute as a tax in and of itself; it only remains problematic when juxtaposed against his reading that it was not a tax to clear the AIA hurdle. Ted Frank at Point of Law drives the point home:

The complaint is perhaps whether the "penalty" should be called a "tax" when Congress refused to call it a "tax"; the dissent would hold Congress to its language, while Roberts, alone, looks purely at the economics of the matter. Both arguments are colorable: after all, the Court has previously characterized "taxes" as "penalties" when they held the character of penalties, so why not vice versa? To which the Scalia dissent responds that this is the first time the Court has done so, and it is the finest of hair-splitting to say that a penalty isn't a tax for purposes of the Anti-Injunction Act, but is for purposes of the Taxing Power inquiry.

I've previously been unhappy with Roberts's tendencies to blue-line rewrite statutes to avoid tough constitutional questions; the canon of constitutional avoidance is one thing, but creating non-existent text to fix problems just seems to me outside the Article III power. We saw this in Free Enterprise Fund, NAMUDNO, and Wisconsin Right to Life. With it happening again today both in the construction of the penalty as a tax and the rewrite of the Medicaid penalties to the states, we can officially note an unhappy trend in the Chief Justice Roberts jurisprudence.

Something I hadn't considered yesterday is the way in which the ruling expands Congress's taxing power; this remains a chief substantive objection to the ruling (the political objection being that the law wasn't overturned, and this does not include substantive *policy objections*). It seemed to me yesterday that the mandate was constitutional as a tax because of Article I, Section 8, Clause 1 and the 16th Amendment, and that appears to be the case. Yet for Congress to tax someone for *not* doing something appears to be without precedent, and that for this particular law, the constraints Roberts's ruling placed on abuse of the Commerce and Necessary & Proper Clauses were effectively nullified by the affirmation of coercive taxation to achieve behavioral outcomes. Clark Neily, Senior Attorney at the Institute for Justice, a libertarian public interest law firm here in the DC area, expounds upon this point at PolicyMic:

The heart of the Court's reasoning appears to be this: While Congress lacks any specific textual grant of authority to regulate health care or compel Americans to purchase health insurance, it may use its taxing power to create incentives for people to do things — like buy health insurance — that it wants them to do. Putting aside for a moment that President Obama himself assured the country that the individual mandate was a penalty not a tax, this seems like a remarkably roundabout and open-ended way of exercising federal power over individuals. One cannot help but wonder what other activities and transactions Congress may now "incentivize" using the limitless sweep of the tax code.

And here we see the resurgence of the "broccoli argument," if through a different lens: the Commerce Clause may not give Congress authority to force you to buy broccoli, but the Roberts ruling means they can tax you if you don't buy broccoli. As an old college friend — another George S., and a lawyer to boot (or he will be sometime this year) — communicated in a vibrant Facebook thread yesterday, we aren't more free today than we were yesterday, even in light of Roberts's limiting of Commerce and Necessary & Proper powers. (See, George? We agree!) I recommend reading another George — George Will — for further explanation of this "consolation prize." And of course my former Cato Institute colleagues Ilya Shapiro, Roger Pilon, Trevor Burrus, Michael Cannon, and Michael Tanner have an excellent video out today that also makes these points:

Another interesting point comes from page six of the majority opinion, where Roberts writes "It is not our job to protect the people from the consequences of their political choices." Still not being an expert, this seems to me to be something of a repudiation of Chief Justice John Marshall's opinion in *Marbury v. Madison*, an opinion to which some legal eagles are comparing Roberts's opinion yesterday, in which CJ Marshall asserted the Court's power of judicial review. It may not technically be the function of the high court to "protect people from the consequences of their political choices," but longstanding precedent says it is certainly the Court's prerogative to apply the Constitution to legislation, to shield people from abuses of law at the hands of those who claim to represent them. But referring back to the "consolation prize" we got yesterday, folks are comparing Roberts's *NFIB* ruling to Marshall's *Marbury* ruling because both opinions handed the defendants a *legal* victory while also giving them a political migraine.

As a general rule, Congress writes laws in excessively vague fashion, leaving it up to the executive branch to nail down the specifics. This is chiefly a political strategy; if something fails, Congress can blame the president or his administration for the failure, and if something succeeds, they can claim credit for passing the law on the campaign trail. But when it comes to tax laws, Congress usually writes these with heightened specificity — this is where most special interest handouts come from, in the form of tax credits, deductions, and exemptions. In a vacuum, Congress does this at its political peril, and with the tax code in its current, suffocatingly complex state, it's not easy for people to distinguish when exactly Congress is ram-rodding the market with distortive policy. For this reason, I think it was wise of Roberts to effectively say to voters, "You don't like it? Change it." The Obama reelection effort now has the daunting task of running a campaign on the largest middle class tax increase in history, amid a recession and real unemployment around 14%.

The White House is already aware of the awkward political position in which they now find themselves:

"I'm sure they'll nail us on taxes and I'm sure it will work," said a senior White House official speaking on condition of anonymity. "But, given the alternative, that's a bitter pill I'm ready to swallow."

Also read my former Cato Institute colleague Dan Mitchell's reaction to the ruling for Obamacare-as-tax-policy analysis.

On the political wisdom of the ruling, my friend and outspoken lawyer commentator, Red State editor-in-chief Erick Erickson, notes that Roberts neatly evaded further attacks on the Court's legitimacy, and that has important political implications going forward:

First, I get the strong sense from a few anecdotal stories about Roberts over the past few months and the way he has written this opinion that he very, very much was concerned about keeping the Supreme Court above the partisan fray and damaging the reputation of the Court long term. It seems to me the left was smart to make a full frontal assault on the Court as it persuaded Roberts.... [T]he decision totally removes a growing left-wing talking point that suddenly they must vote for Obama because of judges. The Supreme Court as a November issue is gone.

This, taken with Roberts's attempt to stop the bleeding on abuses of power under Commerce Clause and Necessary & Proper Clause authority, and his affirmation of states' rights in rejecting the government's attempt to compel states to adopt the Medicaid expansion provisions by withholding funding from those who don't comply (a now-defined limit of spending powers in Article I, Section 8, Clause 1), still provides a silver lining to the ruling. I also recommend my friend Sean Trende's piece on the ruling at RealClearPolitics for further legal, policy, and political insights. As another email I received yesterday said, it takes considerable skill to limit congressional power in three distinct ways (limiting Commerce Clause authority; limiting Necessary and Proper Clause authority; and limiting spending clause authority), and still get a pat on the back from the Obama administration. But it's clear that yesterday's decision is much more a mixed bag than I, not-a-lawyer, anticipated.

I just don't buy the arguments of people so incensed by the ruling that they're looking for a bad guy, and trying to make CJ Roberts that bad guy, when in actuality (both in terms of who's responsible for this monstrosity and in accordance with yesterday's ruling) the real bad guys are Barack Obama and the Democrats who passed this legislation along party lines. The sun still came up this morning, I'm still going to Disney World for a week tomorrow, and hockey is still the best sport on the planet. And best of all, Obamacare is easier to dismantle than it ever has been, pending this November's political outcomes. Just because the media is helping the left take their victory laps doesn't mean they actually won.