

A taxing decision

So, the Supreme Court ruling upholding the Patient Protection and Affordable Care Act (aka Obamacare) ended as a head scratcher. Like most of the country, I spent a few days trying to sort out what the ruling means. Like most conservatives, I also induced a few headaches trying to figure out how it happened.

The speculation following the ruling is remarkable. It has been as intense as the speculation leading up to it. The Court's reasoning caught almost everyone by surprise. In agreeing with conservatives on the Commerce Clause (Congress has no power to compel commerce by forcing individuals to buy something) and on states' rights (the federal government cannot coerce states into expanding Medicaid by threatening to take away funding), the opinion by Chief Justice John Roberts was spot on, and significant.

But then there was the rest of the opinion, and a sick feeling Friday morning that Obamacare is still with us. Roberts, joined by four liberal Justices, upheld the law applying an expansive reading of Congress' power to tax. Indeed, the Court seems to hold that Congress does not have the power to compel an individual to buy something, but Congress can tax him into oblivion if he doesn't.

For me, the reasoning of Chief Justice Roberts' opinion is hard to square with the newly-confirmed Chief Justice I met in Washington in 2006. Over a 90-minute lunch, my twelve-person class of White House Fellows had a chance to interact with Roberts about the Court and his judicial philosophy. My impressions were that the new Chief Justice was a brilliant, solid conservative, and that the nation's highest court was in very able hands.

Based on that, my first reaction to the Obamacare decision is that the Chief Justice is playing chess, not checkers. His opinion must be an attempt to craft precedent that would be farther-reaching than this one case. His Commerce Clause analysis is rock solid conservative. Calling the mandate a "tax," despite Democrats' serial denials that it is, throws the question back to the political process for decision, this November. In some ways, the opinion is judicially conservative.

Maybe this Chief Justice mirrors another Chief Justice from two hundred years ago. *Marbury v. Madison* was a landmark of landmarks when Chief Justice John Marshall handed down the opinion in 1803. Marshall was nominated and confirmed during the waning days of the John Adams Administration, and served 34 years, longer than any other Chief Justice. Marshall was a Federalist who favored a strong central government. His views were bitterly opposed by new President Thomas Jefferson, who had defeated Adams in 1800.

Marshall actually handed President Jefferson a procedural win in the *Marbury* case. But Chief Justice Marshall also used the opinion to establish the principle of judicial review, which reserved for the courts the power to strike down laws that the courts deemed unconstitutional. In winning that one case, Jefferson's supporters lost long term. Marshall applied *Marbury* over three decades to establish a powerful Supreme Court as a co-equal branch of government, often at the expense of Jeffersonian policies.

Something similar could be afoot in Chief Justice Roberts' Obamacare opinion. Certainly, conservatives hope that Roberts'

legal jujitsu will somehow strengthen a framework of limited government.

Clever as a fox, or too clever by half? It remains to be seen. And the explanation may be depressingly simple. Over the weekend, CBS News reported that Roberts had initially sided with the four dissenting conservatives, who would have struck down the whole law. Perhaps bowing to pressure, the story goes, Roberts changed his vote and found a way to affirm.

That brings to mind another event from Chief Justice Marshall's time. In 1824, the presidential election was thrown into the House of Representatives when none of the four candidates got a majority in the Electoral College. Henry Clay, who had run fourth and who served as Speaker of the House, threw his support behind John Quincy Adams, who had finished second behind Andrew Jackson. Adams then defeated Jackson, and Clay became Secretary of State, leading to bitter accusations of a "Corrupt Bargain" that outraged Jackson's supporters. Something smelled, and four years later, the voters remembered. Jackson whupped Adams, and Clay never shook the Corrupt Bargain.

Our next election is in only four months. Conservatives feel a similar, and growing, sense of betrayal, irrespective of the basis for the Court's decision. Obamacare retains an air of illegitimacy, dating back to its passage. Now conservatives can, and must, render a verdict of their own.

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