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“Chief Justice Roberts and His Apologists”

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John Yoo

White House judge-pickers sometimes ask prospective nominees about their favorite Supreme Court justice. The answers can reveal a potential judge’s ideological leanings without resorting to litmus tests. Republican presidential candidates similarly promise to appoint more judges like so-and-so to reassure the conservative base.

Since his appointment to the high court in 2005, the most popular answer was Chief Justice John Roberts. But that won’t remain true after his ruling on Thursday in *NFIB v. Sebelius*, which upheld President Barack Obama’s signature health-care law.

Justice Roberts served in the Reagan Justice Department and as a White House lawyer before his appointment to the D.C. Circuit Court of Appeals and then to the Supreme Court by President George W. Bush. Yet he joined with the court’s liberal wing to bless the greatest expansion of federal power in decades.

Conservatives are scrambling to salvage something from the decision of their once-great judicial hero. Some hope *Sebelius* covertly represents a “substantial victory,” in the words of conservative columnist George Will.

After all, the reasoning goes, Justice Roberts’s opinion declared that the Constitution’s Commerce Clause does not authorize Congress to regulate inactivity, which would have given the federal government a blank check to regulate any and all private conduct. The court also decided that Congress unconstitutionally

coerced the states by threatening to cut off all Medicaid funds if they did not expand this program as far as President Obama wants.

All this is a hollow hope. The outer limit on the Commerce Clause in *Sebelius* does not put any other federal law in jeopardy and is undermined by its ruling on the tax power (discussed below). The limits on congressional coercion in the case of Medicaid may apply only because the amount of federal funds at risk in that program’s expansion—more than 20% of most state budgets—was so great. If Congress threatens to cut off 5%-10% to force states to obey future federal mandates, will the court strike that down too? Doubtful.

Worse still, Justice Roberts’s opinion provides a constitutional road map for architects of the next great expansion of the welfare state. Congress may not be able to directly force us to buy electric cars, eat organic kale, or replace oil heaters with solar panels. But if it enforces the mandates with a financial penalty then suddenly, thanks to Justice Roberts’s tortured reasoning in *Sebelius*, the mandate is transformed into a constitutional exercise of Congress’s power to tax.

Some conservatives hope that Justice Roberts is pursuing a deeper political game. Charles Krauthammer, for one, calls his opinion “one of the great constitutional finesses of all time” by upholding the law on the narrowest grounds possible—thus doing the least damage to the Constitution—while

turning aside the Democratic Party's partisan attacks on the court.

The comparison here is to *Marbury v. Madison* (1803), where Chief Justice John Marshall deflected President Thomas Jefferson's similar assault on judicial independence. Of the Federalist Party, which he had defeated in 1800, Jefferson declared: "They have retired into the judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased." Jeffersonians in Congress responded by eliminating federal judgeships, and also by impeaching a lower court judge and a Supreme Court judge.

In *Marbury*, Justice Marshall struck down section 13 of the Judiciary Act of 1789, thus depriving his own court of the power to hear a case against Secretary of State James Madison. *Marbury* effectively declared that the court would not stand in the way of the new president or his congressional majorities. So Jefferson won a short-term political battle—but Justice Marshall won the war by securing for the Supreme Court the power to declare federal laws unconstitutional.

While some conservatives may think Justice Roberts was following in Justice Marshall's giant footsteps, the more apt comparison is to the Republican Chief Justice Charles Evans Hughes. Hughes's court struck down the centerpieces of President Franklin Roosevelt's early New Deal because they extended the Commerce Clause power beyond interstate trade to intrastate manufacturing and production. Other decisions blocked Congress's attempt to delegate its legislative powers to federal agencies.

FDR reacted furiously. He publicly declared: "We have been relegated to a horse-and-buggy definition of interstate commerce." After winning a resounding landslide in the 1936 elections, he responded in February 1937 with the greatest attack on the courts in American history. His notorious court-packing plan proposed to add six new justices to the Supreme Court's nine members, with the obvious aim of overturning the court's opposition to the New Deal.

After the president's plan was announced, Hughes and Justice Owen J. Roberts began to switch their positions. They would vote to uphold the National Labor Relations Act, minimum-wage and maximum-hour laws, and the rest of the New Deal.

But Hughes sacrificed fidelity to the Constitution's original meaning in order to repel an attack on the court. Like Justice Roberts, Hughes blessed the modern welfare state's expansive powers and unaccountable bureaucracies—the very foundations for ObamaCare.

Hughes's great constitutional mistake was made for nothing. While many historians and constitutional scholars have referred to his abrupt and unprincipled about-face as "the switch in time that saved nine," the court-packing plan was wildly unpopular right from the start. It went nowhere in the heavily Democratic Congress. Moreover, further New Deal initiatives stalled in Congress after the congressional elections in 1938.

Justice Roberts too may have sacrificed the Constitution's last remaining limits on federal power for very little—a little peace and quiet from attacks during a presidential election year.

Given the advancing age of several of the justices, an Obama second term may see the appointment of up to three new Supreme Court members. A new, solidified liberal majority will easily discard *Sebelius*'s limits on the Commerce Clause and expand the taxing power even further. After the Hughes court switch, FDR replaced retiring Justices with a pro-New Deal majority, and the court upheld any and all expansions of federal

power over the economy and society. The court did not overturn a piece of legislation under the Commerce Clause for 60 years.

If a Republican is elected president, he will have to be more careful than the last. When he asks nominees the usual question about justices they agree with, the better answer should once again be Scalia or Thomas or Alito, not Roberts.