

# Opinion: A health care ruling with something for everyone

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THE RECORD

JOHN ROBERTS has avoided the Taney taint. He will not be remembered in history as the chief justice who put political expediency above the law and turned back universal health care.



AP PHOTO / LINO ARRIGO AZZOPARDI

Chief Justice John Roberts arriving for a lecture on the history of the U.S. Supreme Court at the Old University of Malta in Valletta, July 3.

Roger Taney was the chief justice who wrote the Dred Scott decision and is remembered as the jurist who helped bring on the Civil War.

At the same time, Roberts avoided completely alienating his conservative followers. He wrote a very narrow opinion that rejected a broad reading of the Commerce Clause and offered a lot of red meat to states-rights advocates, emphasizing the constitutional limits on the federal government and espousing a conservative vision of American federalism.

Indeed, there is not a lot in the Roberts' opinion, other than its bottom line, that conservatives can quarrel with. His conclusion that the Affordable Care Act was constitutionally sustainable under Congress' tax powers offends almost no one.

Opponents of the law have always agreed that Congress had the power pursuant to its taxing authority to enact such legislation. They merely argued that Congress had failed to do so, and instead relied on its powers under the Commerce Clause.

Roberts went out of his way to sustain the narrow view of the Commerce Clause advocated by his conservative brethren. And in so doing, he deliberately ignored judicial doctrines that counsel against deciding constitutional issues unnecessarily.

In other words, under normal constitutional precepts, once he decided the law could be upheld under the tax powers, there was no reason for him to reach out and decide the Commerce Clause issue. (In legal jargon, the Commerce Clause discussion was all dicta.) He obviously did so to placate the anti-Obama forces.

### **The broccoli argument**

Indeed, the chief justice went so far to identify with the retrogressive views of the far right as to adopt the ludicrous broccoli argument — the canard that if Congress can make unwilling consumers buy health insurance, then it can make them buy broccoli in the name of proper health care.

According to that argument, in regulating commerce, Congress can only regulate “activity,” not “inactivity.” It cannot force someone to participate in commerce.

Justice Ruth Bader Ginsburg’s dissent made short shrift of that argument, pointing out that everyone must eventually consume health care, while many people will never eat or buy broccoli. As Justice Ginsburg wrote, “Although an individual might buy a crown of broccoli one day, there is no certainty she will ever do so. And if she ever has a craving for broccoli, she will be obliged to pay at the counter before receiving the nourishment.”

And, the justice emphatically added: “She will get no free food at the expense of another consumer forced to pay an inflated price.” That was a reference to the \$116 billion in “free” care taxpayers were forced to fork over to hospitals and other health care professionals to cover the uncompensated care of the uninsured in emergency rooms and elsewhere in 2008.

In walking the narrow line he did, the chief justice’s statesmanlike opinion was faithful to both his own conservative ideology and the institutional role of the Supreme Court. By rejecting the nay-saying views of his usual conservative allies and sustaining the legislation, he avoided letting his court be branded as a partisan subsidiary of the Republican Party.

Such a designation would have surely followed another 5-4 right-wing decision in the wake of the uproar over the Citizens United ruling and its impact on the presidential election. Not to mention *Bush v. Gore*, the court’s 5-4 ruling appointing George W. Bush President in 2000.

### **Medicaid benefits**

Even the part of his ruling limiting the reach of the Medicaid provisions in the new law, while pleasing the right, will probably have limited real-world impact. States that wish to take advantage of the expanded Medicaid program will be free to do so, and even red states will be encouraged to opt into it because of the additional federal funding it will bring.

In New Jersey, [Governor Christie](#) says he will make no decision until after the November election. But unless Mitt Romney is elected president and there is a real prospect of repealing Obamacare, it is very unlikely that he will forego the more than \$100 million in federal funds the expanded Medicaid provisions will bring to the state.

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