The Supreme Court and the ACA: 5-4? Really? What the decision is about. And not about.

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The Roberts Court brought the curtain down on a fractious Term in a stranger-than-fiction kinda way. Roberts' opinion in the health reform case has been declared by many to be a high-minded approach to doing the right thing and forging a new way forward, to bringing the Court together across the aisle of ideological divide and taking the first step to restoring its reputation in the minds of all Americans. Others find that it should be recognized instead for what it is: a straitened re-reading of Commerce Clause jurisprudence, which will serve as the foundation for further narrowing of the powers of the Federal government over the coming decades of the Roberts Court -- and, consequently, for further limiting the rights of the disenfranchised, the minority opinion holders, those who need the protection of the Court. The opinion upholding the health reform law (except for the mandatory part of the Medicaid expansion) is nominally a 5-4 decision, but even a casual reading of the opinions reveals that the liberal wing of the court concurs in judgment only with the Chief, dissenting in serious part with the Chief's reasoning, and the conservative wing dissents entirely. In other words, the Chief stands alone, encircled by eight dissenting Justices. Not exactly a model of consensus-forging. The Chief's rationale for the Court's ruling is his alone - nobody on the Court, even those who agree with his conclusions, concurs with his reasoning. The process of reaching the decisions that were reached is detailed in a leaked story now circulating in the **MSM** and the **blawgosphere**.

Roberts' opinion on the individual mandate is an interesting exercise in angels-on-heads-of-pins textual analysis -- a penalty is a tax for purposes of the Constitution, but it is not a tax for purposes of the Anti-Injunction Act -- and it exhibits, to this reader, an odd disregard for the history of the Supreme Court's Commerce clause jurisprudence (read Roberts' and Ginsburg's for differing perspectives on the Commerce Clause, the precedents on Federal regulation of medical marijuana and wheat production (yes, really) and read the conservative dissent to get a sense of how far off the reservation Roberts has strayed), and a misunderstanding of the economics and realities of health care. (See the **Supreme Court opinions on the ACA case**, and earlier discussion of the **dissents**.)

For purposes of the current national conversation, however, the bottom line is the bottom line -- everything in the health are law stands, except for the mandatory aspect of the Medicaid expansion.

Roberts' opinion on the Medicaid expansion opens the door to one of the horribles feared by those who hoped the individual mandate would not be struck down: no, not broccoli, but the continued exclusion of

millions of people from health insurance -- in this scenario, in states whose Medicaid programs choose not to implement the ACA's Medicaid expansion provisions. While it may be unlikely, let's assume that the 26 states that challenged the Medicaid expansion implement their "win" by not operationalizing the expansion at all. Such a move could leave millions of folks uninsured, while they would be newly-eligible for Medicaid if they lived in one of the states implementing the expansion. Some state officials have stated since the decision came down that they would not want to implement "Obamacare" in their jurisdictions, and others will be taking a close, hard look at the costs and benefits of the Medicaid expansion and the viability of alternative approaches. Presumably, though, the political difficulties that might be occasioned by the refusal to implement the expansion in the face of the 100% Federal coverage of the first few years' expense would limit any refusal on this front to a handful of diehards. Limiting the size of the big tent of health insurance under the ACA will also result in increased costs to the system as a whole, as folks without insurance continue to defer care due to cost or unfamiliarity with the health care system, only to incur high costs, and experience more severe illness, when prompted to seek medical care in a critical or emergency situation.

More likely than any future black-and-white scenario following the Court's decision is a return to realpolitik, shucking and jiving, compromising and making do, and working with new words of wisdom coming from CMS to State Medicaid Directors in the near future regarding the range of options available to the states, and the regulatory and even statutory changes that might be needed in the wake of the Court's ruling. And, of course, the fall elections may change the landscape as well.

In the end, the future of health reform will be determined by the political process. In the course of ruling on the law, though, the Supreme Court has staked a claim in the frontier lands of limited Federal government. It remains to be seen whether this claim will pan out.

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