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Justice Roberts and federal power

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Conservatives have been merciless in attacking Chief Justice John Roberts for his opinion upholding the constitutionality of the individual mandate in the Patient Protection and Affordable Care Act. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). Conservative talk

show host Mark Levin said that Roberts' opinion was "absolutely lawless" and said that "now we have something akin to the Warren Court." Glenn Beck is selling t-shirts calling Roberts a "coward." Law professor John Yoo urges the next Republican president to do a better job of screening nominees to make sure that there isn't another John Roberts.

Roberts' motives have been widely questioned by conservatives. Many have suggested that he did not really believe that the individual mandate was constitutional as a tax, but he voted this way to enhance the image of the court or because he was intimidated by President Barack Obama and the liberal press. Conservative pundit Michael Savage said that Roberts' ruling was a result of his taking medication for a seizure disorder and declared: "Therefore neurologists will tell you that medication used for seizure disorders, such as epilepsy, can introduce mental slowing, forgetfulness and other cognitive problems. And if you look at Roberts' writings you can see the cognitive disassociation in what he is saying."

In his seven years on the Supreme Court, John Roberts has virtually always voted with the conservatives in ideologically divided decisions. Prior to his opinion in the health care case, there had been only one instance in which Roberts joined with the liberal justices to create a 5-4 majority: *Jones v. Flowers*, 547 U.S. 220 (2006), which held that procedural due process was violated by the failure to provide adequate notice before a tax sale of property.

There is absolutely no basis for believing that John Roberts' vote to uphold the individual mandate was anything other than his view of the law. His position was certainly reasonable. Writing for a five-justice majority, he said that the individual mandate is constitutional as an exercise of Congress' broad power to tax and spend for the general welfare. The individual mandate requires most Americans to purchase health insurance or pay a tax penalty. It is calculated as a percentage of income or a small flat sum; in 2014, it is 1 percent of income or \$95. It is collected by the Internal Revenue Service as part of its regular tax collection operations. The funds generated, estimated to be \$4 billion in 2014, go to the federal treasury.

The heated attack on Roberts has obscured a key insight that should have been drawn from the last week of the Supreme Court's term: although Roberts is unquestionably a conservative, he is more inclined to uphold federal power than Justices Antonin Scalia, Clarence Thomas and Samuel Alito. In addition to his opinion upholding the individual mandate, Roberts also joined with the majority in *Arizona v. U.S.*, 132 S. Ct. 2492 (2012), to declare unconstitutional key provisions of Arizona's immigration law, SB 1070.

Intellectual Property

Apple rests high-stakes patent case against Samsung

Apple Inc. rested its case Monday in the high-stakes patent and trade dress infringement trial against Samsung Electronics Co. Ltd., and a federal judge rejected the South Korean company's longshot bid to dismiss it.

Corporate

Financial services firm adds new GC

Sabal Financial Group LP, a privately held diversified financial services firm headquartered in Newport Beach, has appointed a new general counsel, the company announced Monday.

California Courts of Appeal

Appellate court overturns landmark education settlement

A state appellate court has overturned a landmark education settlement that allowed the Los Angeles Unified School District to bypass seniority rules governing teacher layoffs.

Litigation

Foes of insurance measure lose in court

An appeal of a judge's decision to uphold ballot language for a proposition on the state's November ballot was turned down yesterday in the 3rd District Court of Appeal.

Corporate

Yahoo names general counsel

Yahoo Inc. announced Monday the appointment of Ronald S. Bell as general counsel.

Mergers & Acquisitions

Dealmakers

A roundup of the recent mergers and acquisitions and financing activity and the lawyers involved.

Litigation

Networks sue Aereo copycat, BarryDriller.com

The major broadcast networks are serious about their campaign to halt tech ventures that stream broadcast TV online, even if the newest installment appears to be a gag of sorts.

Muslim woman sues Disneyland, claims she lost her job for wearing headscarf

A Muslim woman sued Disneyland on Monday claiming she was forced out of her job for wearing

Justice Anthony Kennedy wrote the opinion for the court, joined by Chief Justice Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor. Justice Elena Kagan was recused and Justices Scalia, Thomas and Alito dissented. Justice Kennedy began by accepting the argument of the U.S. that immigration is solely in the control of the federal government. Anything done with regard to immigration has foreign policy implications and states cannot have their own foreign policy. The court quoted its 1942 ruling in *Hines v. Davidowitz*, 312 U.S. 41 (1942), that states cannot "contradict or complement" federal immigration efforts.

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The court found unconstitutional as preempted by federal law the provisions of SB 1070 that require non-citizens to carry papers at all times showing that they are lawfully in the country, that prohibit those not lawfully in the country from seeking or receiving employment in Arizona, and that allow police to arrest individuals without warrants when there is probable cause that they are deportable.

The court reversed the preliminary injunction as to the provision which allows police to question individuals about their immigration status if they are stopped for other reasons and if there is reasonable suspicion that they are not lawfully in the U.S. Even this provision was substantially narrowed as the court held that police cannot extend the duration of a stop to check immigration statute and also that state and local police cannot arrest individuals who they determine to be illegally in the country. Moreover, the court left open the possibility of an "as applied" challenge to this provision of SB 1070 if it could be shown that it was being applied in a racially discriminatory fashion.

Chief Justice Roberts' vote with the majority was key because had he joined the four dissenters it would have been a 4-4 tie and the 9th U.S. Circuit Court of Appeals decision would have been affirmed, without opinion, by an evenly divided court. Twice then in the last week of the term, in upholding the individual mandate and in striking down key provisions of Arizona's SB 1070, Roberts voted in favor of federal power.

A key divide between liberal and conservative justices long has been over the importance of federalism and states' rights. Perhaps no one should be surprised that Roberts is more sympathetic to federal power than other conservative justices. He spent many years as an attorney working in the federal government in the Reagan and Bush administrations. On the other hand, his support for federal power should not be overstated. For example, in *Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012), Roberts was with the conservatives in a 5-4 decision to hold that state sovereign immunity precludes suits against state governments for violating the self-care provision of the Family and Medical Leave Act.

Nor should Roberts' votes in the health care and immigration decisions be seen as a more general move to the left by the chief justice. No one has doubt that Roberts will be with the conservatives in the coming term when the Supreme Court revisits the issue of affirmative action by colleges and universities in *Fisher v. University of Texas, Austin*.

Roberts' votes in the last week of the term show that he will not always join with Justices Scalia, Thomas and Alito and predictably take the conservative position, especially as to issues of federal power. It may bitterly disappoint conservatives, but shouldn't it be hoped that every justice will be open-minded and not simply follow a partisan agenda?

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a headscarf. The suit is one of several actions against the company involving the hijab.

Obituaries

Greenberg Traurig partner M. Sean McMillan dies in plane crash

Greenberg Traurig partner M. Sean McMillan died Friday after the small plane he was piloting crashed into a residential area after taking off from Santa Monica Airport.

Bar Associations

LACBA Armed Forces Committee helps, serves military veterans

A little more than a year since its inception, the Los Angeles County Bar Association's Armed Forces committee has mobilized its attorney resources raised awareness of veterans' legal needs.

U.S. Supreme Court

Justice Roberts and federal power

There is absolutely no basis for believing that John Roberts' vote to uphold the individual mandate was anything other than his view of the law. By **Erwin Chemerinsky** of UC Irvine School of Law

Judges and Judiciary

Can all the king's men put our broken legal system together again?

Even if the previous budget cuts went unnoticed by the public, the more recent cuts will definitely be felt by all. By **Sarah K. Goldstein** and **Kimberly A. Westmoreland** of Kaufman Dolowich Voluck & Gonzo LLP

Personal Injury & Torts

Is the primary assumption of risk doctrine on its way out the door?

The Supreme Court's decision in *Nawla* may answer that question soon. By **Donald R. Wild** and **James J. Patrick** of Wild, Carey & Fife

Judges and Judiciary

Modest proposal to loosen budget constraints on courts

We're not helpless with respect to passing the costs associated with providing a court reporter on to clients. By **Matthew L. Kinley** and **Roy J. Jimenez** of Tredway, Lumsdaine & Doyle LLP

Environmental

Certiorari granted in two 9th Circuit CWA cases

Forestry and logging groups, stormwater managers and government entities will be all ears when these decisions come down; private parties and taxpayers should be mindful as well. By **Sudhir Lay Burggaard** of Morris Polich & Purdy LLP