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My reaction to the health care ruling: joy

Douglas W. Kmiec | Jun. 28, 2012

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COMMENTARY

There were many reactions to the health care ruling, but the one I find most appealing is joy. Obviously, strong supporters of President Obama, like myself, had this reaction, but it was far more widespread than that; indeed, the sentiment was very close to the ebullient inaugural day when those who voted for and against Barack Obama felt good about burying many of the ghosts of slavery and racism and hatred that still can at times walk this blessed land.

Bringing it down to this case, it is a vindication of a discerning President who believes that government is a source of community and accomplishment of the common good. It is not the only way to meet the needs of ourselves and others, but because of the limitations of marketplace incentives, it is often the best means for helping those with the least resource or whose circumstance makes them economically invisible. This is the plight of the poor and the long-term unemployed, but it is also the person with pre-existing condition. It is also the young college student facing a mountain of education debt relieved to have health care because he or she is under 26.

If I had to choose a word for today?s outcome, it would be one of the President?s favorite: Empathy. This opinion is empathy applied. The President was mocked when he placed this at the center of judicial qualities, along with intelligence and integrity, but today all three were on display. Indeed, without the integrity of Roberts, the empathy of the democratic majority would have counted for nothing. Instead, John Roberts at oral argument and in opinion consistently reminded the more ideological conservatives that his oath is to the Constitution and not some faux originalism that stacks the deck against conservatively-disfavored policy choices. I doubt whether the Chief Justice subscribes to the means chosen by Congress, but as a matter of integrity he refused to let his policy doubts override the democratic choice.

The ruling is institutionally wise and personally courageous since it allows the court to stay clear of undermining the majority as expressed in congress and therefore does not repeat the error of bush v. gore. It is courageous since as a conservative voice friendly to the President, I know something of the mean-spirited scorn that one merits in taking on the tea party.

A close reading of the opinion shows that Roberts stayed true to his conservative principles, including supplying

one of the few modern cases to limit the expansive commerce or regulatory power and for the first time ever giving meaning to the excessive coercion limitation on the spending power. The limit until now was hypothetical; Roberts made it real by linking it to the unfairness of re-making a bargain. If States decline the expansion of Medicaid they can lose new money, they ought not to forfeit that promised for earlier performance.

The opinion is a win, win, win. The President won for the disadvantaged and many marginalized citizens who lack healthcare; it is a proud political moment vindicating the power of the people to sacrifice for the needs of others. The chief justice won new limits on the spending power as noted and a limit on the most commonly utilized federal regulatory power. The court won a reprieve from the error that results when it makes itself the center of a presidential election.

There is one loser, and it is Governor Romney for again changing his stripes, abandoning his own health care reform template, and worse: separating himself from the bipartisan voices like former HHS Secretary Tommy Thompson and former Senator Tom Daschle who reject the claim of Mitt Romney that insurance pools don?t work. Romney?s pledge to repeal health care on his first day in office reveals a troubling lack of understanding of the powers of the presidency, but also the antithesis of empathy: disregard. It is a heartlessness that seems out of character for this man of faith and unless he tones down his wedge-politics rhetoric of what?s mine is mine, he is destined to become the McGovern of the Republican Party. Americans can legitimately disagree on the means of addressing social concerns, they will -- I predict -- spurn a self-centered disregard of those social concerns.

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