"The switch in time that saved nine" is how one wag described a key vote change by a Justice during the New Deal. The "saved nine" part may or may not apply, but Chief Justice Roberts obviously switched his vote in the healthcare case. I can't remember a case in which the opinions made this so obvious. He also wrote an opinion that is designed to have as few legal repercussions as possible.

There's been a lot of speculation about a possible Roberts flip, based in part on peculiar references to Justice Ginsburg's opinion in the dissenting opinion by Scalia & Company. (Scalia & Company call her opinion a "dissent" when it's really a partial concurrence.) But the stronger evidence is the overall language of that dissent. It reads *exactly* like a majority opinion — with just a few sporadic references to Chief Justice Roberts' opinion. It speaks at great length about commerce clause issue, which a dissent would have no need to do because Roberts' majority opinion took the same position. It also spends pages discussing exactly which other provisions should fall along with the individual mandate (which the Court actually upheld) and the Medicare expansion (which the Court actually upheld in large part), which a dissent would also have no need to discuss in such detail. The tone — unlike any dissent that Justice Scalia has ever written — is lacking in sarcasm and invective. This was *not* written as dissent. [UPDATE: CBS is now confirming, based on inside sources, that Roberts flipped.]

There's also been a lot of speculation since the decision came down about its possible legal repercussions (with respect to environmental laws, for example). I'm very skeptical that it will have much impact. From the beginning, the opponents of the healthcare statute argued that it was an unprecedented, qualitative expansion in federal power. Roberts' majority opinion emphasizes this point and goes out of its way to uphold all of the Court's previous rulings in support of federal power:

- In terms of the commerce clause, Roberts says that "Congress has never attempted . . . to compel individuals not engaged in commerce to purchase an unwanted product," adding that "legislative novelty is not *necessarily* fatal. [emphasis added.]" He then distinguishes *all* previous commerce clause cases as involving the regulation of activity, not inactivity. He says that recognizing a power to compel commerce would "fundamentally change[] the relation between the citizen and the Federal Government." He could hardly be more explicit that this opinion is not intended to affect any federal statute other than this one.
- In terms of the necessary and proper clause, Roberts contrasts this case with all previous ones by saying the individual mandate "by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power," which he goes on to say "would work a substantial expansion of

federal authority." In other words, for Roberts this is as if Congress required all Americans to write books,on the theory that the books would then qualify for protection under the copyright clause. Hard to think of any realistic circumstances where this argument is likely to arise, other than the individual mandate itself.

- Use of the "unconstitutional conditions" doctrine in terms of the Medicaid expansion was dramatic but again the legal repercussions seem limited. Roberts points out that the the states "argue that the Medicaid expansion is far from the typical case." He emphasizes that the expansion was a "shift in kind, not merely degree," that the "threatened loss of over 10 percent of a State's overall budget . . is economic dragooning that leaves the States with no real option," that a state could "hardly anticipate" such an expansion when it initially signed onto the program. Also note that Justices Kagan and Breyer joined this part of the opinion — it's hardly plausible that they would have done so if they thought that it was imperiling other federal programs.

Of course, there will be many efforts to leverage the Roberts opinion into something more sweeping, as there are with any significant new Supreme Court case. But Roberts has done little to encourage attacks on existing federal statutes or on futures ones that do not depart dramatically from existing practice.

If the dissent had prevailed, the case would have gone down in history as a monument to conservative activism of a kind we have not seen since the days of our grandparents (or for some, great-grandparents.) We can all be grateful that Chief Justice Roberts thought better of this course and listened to what Lincoln called "the better angels of our nature."

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A post-script: here are my thoughts about the dissent by Scalia & Co."