CHIEF JUSTICE ROBERTS, OBAMACARE AND THE SUPREME COURT EMPERORS' CLOTHES

AUTHOR'S NOTE:

Why does an article about the Supreme Court's ObamaCare decision appear on a site devoted to victims of the worst crimes?

The answer is simple. No institution of government has done more to harm and torture homicide survivors than the Supreme Court. The court has victimized victims by arrogantly imposing personal values of justices and applying the law and Constitution with utter dishonesty. They have gone so far as to provide immunity from punishment for the most depraved convicted barbarians when they commit new savagery; and they have made a farce out of the legal system by forcing victim families to endure multiple decades of legal proceedings when guilt is not in doubt.

If this scandalous judicial assault on victims is ever going to be reversed, it will first be necessary to expose and understand the duplicitous and dishonorable abuse of judicial review by many justices. Few cases better illustrate this and are more easily understandable than ObamaCare.

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Are Justices Uniquely Honest Angels?

By Lester Jackson

The ObamaCare decision exposed the Supreme Court as an emperor without clothes. Hoping for deliverance from ObamaCare, many usual critics defended the Court. But with a new term fast approaching, a month before a critical election, Chief Justice Roberts' handiwork should be remembered as a final wake-up call to consider, once and for all, whether the Court and judicial review merit respect, acceptance and legitimacy.

Upon Paul Ryan's vice presidential selection, supporters noted his objection that Chief Justice Roberts had "contort[ed] logic and reason to come up with [the ObamaCare] ruling." Such contortion is nothing unusual except for one thing. The Supreme Court, which normally operates in obscurity, could not escape a glaring spotlight this time, affording a rare opportunity to inform the public about the dark side of what many justices do. This raises questions concerning the utility of elections, what remains of our actual Constitution, the rule of law, and public acceptance of judicial review.

The Roberts opinion as well as attempts to defend it provide easily understood textbook examples of how justices have turned "interpretation" into a scam by manipulating words to mean anything in order to impose their will by authorizing what is constitutionally prohibited and prohibiting what is authorized or required.

Bluntly acknowledging, in order to challenge, the charge that Roberts is "a liar [and] coward," devoted Roberts apologist Matthew Franck candidly clarified high stakes questions rarely presented to the public. Are all high court justices always honest? Or are many of them, often a majority, just politicians undemocratically, crassly and lawlessly imposing their personal morality based on misplaced public faith in them — blind faith similar to that once placed in witch doctors and medicine men?

If many justices are merely skilled charlatans distinguished from the latter solely by using far more sophisticated and incomprehensible mumbo jumbo, then what they do is illegitimate, their whole enterprise and institution are illegitimate, and they are not entitled to public trust and respect.

This is so critical that even justices most faithful to the law, but understandably committed to their court, avoid directly saying the judicial emperor has no clothes. For example, Justices Scalia and Thomas seem torn between institutional loyalty and reality. Recently, Scalia pronounced himself "enrage[d]" by references to his Court as "politicized"; and Thomas said his colleagues were all "good" and "principled." Nevertheless, long ago, Scalia warned that the people would not "le[ave] us alone" if they realized that justices misused Constitutional "adjudication" as a ruse to force their own personal values upon everyone else. And Thomas lamented the Court's "dissembling … damaging to the credibility of the Federal Judiciary."

The ObamaCare decision vividly illustrates that, in major cases, justices shamelessly resort to blatant lawyerly sophistry to produce whatever meanings suit their predilections. Of course, when words mean anything, they mean nothing, destroying the rule of law and the very purpose of a written Constitution.

Because trying to justify court sophistry requires even greater and cleverer sophistry, rationalizing Roberts' fast shuffles leads to ever faster shuffles.

Fast Shuffle #1: Misstating the Proper Standard for Evaluating Roberts

Franck objects to what he calls the "evidence-free" charge that Roberts did not sincerely believe what he wrote but instead acted for political reasons. Because we don't *"know"* why Roberts decided as he did, Franck denies there is "any reason to rule … out" that Roberts' opinion was "respectably principled."

This is really a demand for a heavy burden of proof greater than required to determine criminal guilt. Even in criminal trials, juries need not declare that they "know" the defendant is guilty but only must find guilt beyond a "reasonable doubt."

A far less rigid appearance standard applies to evaluating judicial impartiality. No one has charged Roberts with committing a crime. The charge is that he functioned as a politician rather than a judge. To doubt a judge's impartiality requires only a reasonable basis.

Significantly, for decades, when unable to dig up dirt on political opponents who have done nothing improper, double-standard leftist partisans have abusively brandished the weapon of "appearance of impropriety." However, in the case of judges, the appearance standard is codified by statute. Roberts' opinion, coming after vicious personal attacks by *de facto* parties to the case, including President Obama and Senate Judiciary Committee Chairman Leahy, clearly *appeared* to result from intimidation. It was "fully plausible" that to appear to act "under fire" would subject the Court to "reasonable condemnation for … a surrender to political pressure." Ironically, Franck himself cites abundant sources making that point.

Nevertheless, disregarding his own cited compelling evidence establishing an appearance of gross impropriety, Franck grants Roberts the presumption of innocence to which a criminal defendant is entitled, requiring a reason to "rule out" Roberts' sincerity rather than rule it in.

Fast Shuffle #2: The Opinion: Declare Victory and Go Home

For Franck, the trump card is Roberts' written opinion.

Fair enough. Let's see if what Roberts wrote is a basis for ruling sincerity in or out and examine the sophistry required to defend it.

First, consider ***the Chief Justice's "Principles" in a Nutshell:***

> (1) "Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant … fatal to the application of the Anti-Injunction Act …."
>
> (2) "The joint dissenters argue … [i]n effect … that … the law must be struck down because Congress used the wrong labels … labels should not control here…."

Dissenting Justices Scalia, Kennedy, Thomas and Alito devastingly characterized these "principles" as "verbal wizardry" and "forbidden…sophist[ry]. Instead of responding to this, attorney Cameron Reddy, an apologist for apologist Franck, further illustrates lawyerly sophistry. In the words of early judicial review critic John Gibson, he "take[s] for granted the very thing to be proved," baldly denying the contradiction is what it is.

First, Reddy changes the subject. Instead of answering the 2012 joint dissent, he turns to what Justice Story wrote — in 1833 — to justify Roberts' assertion that those who don't like ObamaCare should rely on elections. In essence, Reddy appeals to the authority of a long-dead justice to justify the impropriety of a very much alive chief justice.

Story, who never confronted a 2700-page monstrosity (38), wrote when just one federal law had been held unconstitutional. The *Dred Scott* disgrace had not yet occurred; nor had the long history of frequent judicial review abuse. He wrote long before law professor Lino Graglia famously observed: "The first and most important thing to understand about constitutional law is that it has virtually nothing to do with the Constitution."

Fast Shuffle #3: Prescribing While Subverting an Election Remedy

Reddy also ignores that elections are meaningless if voters have no idea what dishonest candidates will to do once elected, a predicament aggravated by Roberts' "principled" stamp of approval for lying (see below). Moreover, the Framers deliberately created impediments to change. Those who rammed ObamaCare down the throats of the American people, defying the intensely held wishes of a substantial number, knew exactly what they were doing — that once enacted, repeal would be extremely difficult.

Even if Democrats lose the presidency and entire Congress, ObamaCare repeal is far from certain. Just witness the 2010 election. Republicans gained control of the House of Representatives on a promise to do away with the law. Nevertheless, timorous leaders blocked use of their *absolute power* to end ObamaCare immediately by defunding it. Only because of this dereliction did John Roberts become the last forlorn misplaced hope of freedom's proponents.

If elections are no panacea, formally amending the Constitution is even more dubious. Yet, Reddy concludes his election diversion with a flourish, disingenuously quoting Justice Story on the "salutary power of amendment, provided in the constitution itself." Of course, this extremely difficult to exercise formal "salutary power" has been exercised a scant 17 times in over two centuries.

Because Supreme Court has abused its power, repeatedly, the Constitution can be amended easily only by five ***unelected*** justices. Now they have struck again by refusing to apply the actual Constitution to ObamaCare. What Roberts did was to purport to amend prior Court-concocted amendments that rendered the commerce power virtually unlimited, while at the same time amending the tax power to make ***it*** unlimited instead. First under the commerce clause and now under the tax clause the Court has grotesquely amended (i.e., rewritten) the Constitution. All Roberts did was to shift the source of unlimited presidential and congressional power from one clause to another, disregarding that the actual Constitution grants only limited enumerated powers to the federal government.

Fast Shuffle #4: Declaring the Same Act Unconstitutional but Constitutional

Attorney Reddy disputes that Roberts acted improperly in declaring that, while it was unconstitutional for Congress to impose the individual mandate directly, it validly employed its tax power as a bludgeon to compel indirectly acceptance of what it had no power to compel straightforwardly.

> …it takes no intellectual gymnastics to understand that what Congress may not do under one power, it may do under another. Thus, no one would argue that Congress has the power to open a post office according to the power to provide and maintain a navy. Yet, clearly, Article I, Section 8, Clause 7 provides the power to open a post office, whereas it's Clause 13 which provides the power to build and maintain a navy.
>
> The same can be said for ObamaCare; it's sustainable under the taxing power but not under the Commerce or Necessary & Proper clauses. We may dislike the result, but it is hardly lawless….

This statement exemplifies the very lawyerly "gymnastics" Reddy purports to shun. Opening post offices and providing a navy are powers *specifically* granted by the clauses cited. By contrast, the tax clause provides no specific power to impose any individual mandate. Consider this: the First Amendment (speech, press, religion, petition, assembly) and Third Amendment (quartering of soldiers) say nothing about abortion. Does it follow that the Court therefore justifiably struck down abortion laws under other amendments that also said absolutely nothing about abortion? The tax power says nothing about an individual mandate any more than the Bill of Rights says anything about abortion.

Reddy's point boils down to this: because the Constitution contains *some* specific provisions, it simply must contain *any* specific provisions justices desire, even if nowhere mentioned in the document. This bold assertion does no more than show how, pretending to "interpret," justices make up their own law case by case.

Fast Shuffle #5: The Non-Tax Tax

Uncritically accepting Roberts' characterization that ObamaCare "looks like a tax in many respects" (after Roberts himself denied just that), Reddy amplifies: "if it looks like a tax, smells like a tax, walks like a tax, and is collected like a tax by the people who usually collect taxes…well, the dang thing must be a tax." This clever wording does not answer the dissent's questioning how "the very same textual indications that show this is ***not*** a tax under the Anti-Injunction Act show that it ***is*** a tax under the Constitution."

Reddy asserts that two different questions require two contradictory answers but does not explain how or why. He also ignores that the dissent makes crystal clear the difference between a tax and a penalty. A "tax is an enforced contribution to provide for the support of the government; a penalty … is an exaction imposed…as punishment for an unlawful act." A tax cannot make an act unlawful. That must be done under a granted power. Reddy cites no such power. Reddy's cute looks-walks-smells-like-a-tax casuistry glaringly omits the most essential feature of a tax — it raises revenue. If every person upon whom the individual mandate has been imposed complies with that mandate, there will be no "taxes" collected. How can a mandate be a tax measure if it raises no revenue? Are we to believe that that looks and smells like a tax?

President Obama says he doesn't believe it. One day after Roberts' edict, Press Secretary Carney explained: "It's a penalty because you have a choice. You don't have a choice to pay your taxes, right? You have a choice to buy … health insurance." It's a sad day when this president is less untruthful than the chief justice.

Reddy asserts that calling the mandate a tax and not a tax is "nuanced to be sure. But such is the life of adjudicating constitutional matters." Perhaps the dissenters lacked the intellectual skills to grasp such "nuance." But perhaps "such is life" in "the forbidden land of the sophists." Proponents of false labeling (see below) are unlikely to convince many people that contradictory double talk is not what it is just by relabeling it "nuance."

In sum, Franck, Reddy and Roberts exemplify sophistry piled upon sophistry to justify sophistry (e.g., bald assertion without proof while demanding proof; applying an inapplicable standard; changing the subject to divert attention from the indefensible; irrelevant appeal to irrelevant authority, etc.). One more fast shuffle deserves special attention.

Fast Shuffle #6: Legislative History, Judicial Dishonesty & Who Called Whom a "Liar"

In rescuing the statute, Roberts distinguished between the "most straightforward … natural" and the "reasonable … fairly possible" readings of the mandate. Apologist Franck pronounced the latter acceptable as the "most *favorable* reading … on the basis of which [ObamaCare] can be upheld," opining that it is "plausible" to disregard the characterization of its creators.

Roberts and Franck would have the American people believe that it is "reasonable" and "plausible" to read a statute contrary its own clear wording and to what those who intentionally and carefully chose their words said they meant.

With one exception, all the justices have resorted to "legislative history," which purports to glean the meaning of a statute by examining statements by those who enacted it. Although Justice Scalia strongly objects that contradictory comments by legislators can be cherry-picked to support any "interpretation," ***rarely, if ever, has a statute's legislative history been so devoid of conflicting statements and clearer*** than ObamaCare. The legislators and president who imposed it unanimously pronounced it a non-tax.

This was disregarded by Roberts and his accomplices. They thus ignored legislative history, all the more dishonestly because they had cited it in other cases when far less plain.

Moreover, anyone objecting to the indelicacy of branding Roberts a "liar" should consider that he himself effectively declared those responsible for ObamaCare to be "liars" — twice! First, if he is to be believed, they lied about what they were passing. Second, they deliberately mislabeled it (which would surely attract the attention of regulators if a consumer product). And of course, they continued to insist the mandate was not a tax even after Roberts said it was. So they too were calling him a liar!

Worse still, as previously elaborated, if Roberts really believed all these elected officials lied, this severely undermines the effectiveness of elections. If Roberts contends that legislators should not be held accountable for their actual words, he is not only being dishonest in calling the same wording a tax that isn't a tax, he is also dishonest in saying that elections are a viable corrective.

Briefly, Roberts is not alone. For example, four current justices have made clear that, to save the lives of brutal rapist-murderers, they are quite prepared to lie about the law. Compelling cases have been made questioning the ethics and integrity of Justice Sotomayor and Justice O'Connor.

Is it gauche to question the honor of justices? Well, over the years, many justices themselves have not thought so. The ObamaCare dissent itself accused Roberts of sophistry. Again and again, justices have questioned other justices' integrity and propriety (e.g., "disingenuous"; "agenda" driven; "lawmaking"; "mischaracterizing"; "misleading"; "interpretive gymnastics"; "semantic acrobatics"; "stunning slur on…integrity; etc. etc.). In reality, we have it on the authority of justices themselves that other justices are dishonest. Although about the only term they have not used is "liar," their meaning has been unmistakable.

Conclusion: It's Time to Realize that Our Judicial Emperor Has No Clothes

Prior to June 28, hoping for deliverance from ObamaCare, many usual critics defended the Supreme Court. Chief Justice Roberts' handiwork is a final wake-up call to consider, once and for all, whether the Court and judicial review merit respect, acceptance and legitimacy.

If Prof. Graglia is correct, that the justices have rendered the Constitution irrelevant to "constitutional law," then we must painfully conclude that they have long perpetrated a fraud upon the American people. It is time to dispense with the pretense that justices are angels with halos. James Madison pointed out: "If men were angels, no government would be necessary." Hence, even without the substantial contrary evidence provided, it is preposterous to assume that, alone among government officials, justices are immune to the failings of mere mortals — that they all are pure as the driven snow and honest, always acting on principle. Franck would apply a presumption of honesty to the Supreme Court. This flies in the face of human nature as well as actual opinions of justices, some of them quite brazen in their dishonesty. (For example, Justices Brennan and Marshall insisted capital punishment is unconstitutional despite its being explicitly authorized by the Constitution four times.)

Some are indeed honest. The far too many who are not honest have undermined the rule of law, emasculated the Constitution they purport to apply and enforce, and done great harm. Now they have assaulted the democratic process by encouraging elected officials to lie to the voters with impunity. And if the Court uses blatant sophistry to uphold a flagrant abuse of power unconstitutionally confiscating fundamental freedom, why do we have judicial review anyway?

All this is what devout Roberts groupies strive to obscure and, hopefully, that is what this article makes clear.

Lester Jackson, Ph.D., a former college Political Science teacher, views mainstream media truth suppression as essential to harmful judicial activism. His recent articles are collected here.