

Right Wing Tries To Move Goal Posts By Redefining Justice Roberts As Not Conservative

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After Chief Justice John Roberts wrote the opinion upholding health care reform, the right-wing media have attacked his conservative credentials. Despite experts' statements that the opinion might have cleared the way for more rulings restricting federal power and progressive legislation, media conservatives are using this as a pretext to demand even more conservative judicial nominees. There is evidence their pressure is having an effect.

[Since Health Care Decision, Conservative Media Have Incessantly Tried To Undermine Roberts' Conservative Credentials](#)

***Wash. Post's* Thiessen: Roberts Is Not The "Rock-Ribbed Conservative" We Thought He Was.** In a July 2 *Washington Post* column, former George W. Bush speechwriter Marc Thiessen wrote:

With George W. Bush's appointments of Samuel A. Alito Jr. and Roberts, conservatives thought finally they had broken the mold and put two rock-ribbed conservatives on the bench -- until last week, that is, when Roberts broke with the conservatives and cast the deciding vote to uphold the largest expansion of federal power in decades. [*The Washington Post*, 7/2/12]

***Wash. Post's* Gerson: Like Souter, Roberts "Unexpectedly Joins The List" Of Justices Who Have Frustrated Presidents Who Appointed Them.** Fellow Bush speechwriter and *Washington Post* columnist Michael Gerson wrote in a column the same day:

Other presidents must also have been frustrated by their selections on the far side of life tenure -- Ronald Reagan's appointment of Sandra Day O'Connor or George H.W. Bush's elevation of David Souter come to mind. Now Chief Justice John Roberts unexpectedly joins the list. [*The Washington Post*, 7/2/12]

Fox's Perino: "Really" Disappointed Because "Every Conservative Said, 'He's a Solid Guy' " During Selection Process. Dana Perino, former George W. Bush press secretary, expressed surprise about Roberts' decision on the July 2 edition of *Fox & Friends*:

PERINO: The thing about Roberts is that almost across the board, every conservative said, "He's a solid guy. He's the one we want." And now the level of disappointment amongst a lot of people, including myself, is really high. [Fox News, *Fox & Friends*, 7/2/12]

Northwestern Professor Presser: "I Wish I Could Say That I Believe Roberts" Shares Ideology of Other Conservative Justices. Northwestern University law professor Stephen B. Presser, an opponent of the health care law, compared Roberts unfavorably to the right-wing bloc on the Supreme Court in a June 28 CNN op-ed:

The court has paid some lip service to the principle that ours is a government of laws, not of men, and that the Constitution exists to reign in arbitrary power. There are four Justices -- Scalia, Kennedy, Thomas and Alito -- who seem sincere in that belief. I wish I could say that I believe Roberts is as well. [CNN.com, 6/28/12]

Fox's Cavuto: "Justice Roberts, We Thought We Were Getting One Justice, We Got Another," As With Souter. Fox News host Neil Cavuto similarly voiced his frustration with Roberts on his July 2 show:

CAVUTO: Do you think, finally, there's anything to be said of -- we have a history of justices who we think we're getting one thing -- Justice Souter comes to mind -- and we get another. Justice Kennedy, we thought we thought we were getting one thing and then in this case we got apparently another. Justice Roberts, we thought we were getting one justice, we got another. [Fox News, *Your World with Neil Cavuto*, 7/2/12, via Nexis]

MRC's Bozell: Roberts "Will Be Seen As A Traitor To His Philosophy." On June 28, The Daily Caller reported that Brent Bozell, founder and president of the Media Research Center, considered Roberts' reputation "forever stained":

Conservative leader and chairman of For America, Brent Bozell had harsh words for Supreme Court Chief Justice John Roberts after Thursday's ruling on ObamaCare. "His reputation is forever stained in the eyes of conservatives, and there will be no rehabilitating of it," Bozell said. "He will be seen as a traitor to his philosophy." [The Daily Caller, 6/28/12]

Cato's Bandow: "Roberts Has Become The Manchurian Jurist." Cato Institute senior fellow Doug Bandow accused Roberts of being "worse" than his liberal colleagues in a July 1 post on *The American Spectator*:

"Dishonest John" is worse than either David Souter or John Paul Stevens. They were clear and unabashed enemies of constitutional liberty. So no one expected anything different than opinions constantly undermining constitutional protections for individual liberty and against government power.

Roberts has become the Manchurian Jurist, whispering sweet rhetoric into conservatives' ears while delivering results to the leftish establishment which runs Washington. His dicta against an expansive interpretation of the Commerce Clause sounds nice, but is meaningless, since he has provided the roadmap for evading its effect in the future. Even Nancy Pelosi cannot have missed "Dishonest John's" invitation to treat everything as a tax, which doesn't even require calling it a tax. [*The American Spectator*, 7/1/12]

[In Fact, Experts Say Roberts' Decision May Have Opened Door To More Conservative Rulings](#)

Yale Professor Balkin: Roberts' Opinion May Turn Out To Be "The Beginning Of An Important Transformation In Constitutional Law." Yale law professor Jack Balkin pointed out the potentially dangerous consequences for progressive legislation due to Roberts' rewriting of long-established precedent in a June 28 post on Slate:

If Mitt Romney wins, on the other hand, he may be able to appoint a strong conservative majority to work with Chief Justice Roberts. Then, in hindsight, Roberts' seemingly

compromised opinion won't be very compromised at all. His apparent flip-flop won't be understood as a change of mind. Instead, his opinion may turn out, in hindsight, to be the beginning of an important transformation in constitutional law. [Slate, **6/28/12**]

Stanford Professor Karlan: "A Congress That Can Tax But Not Do Much Else -- Spend Money, Regulate The Economy Or Enforce Civil Rights -- Will Be Hamstrung." Stanford public interest law professor Pamela Karlan wrote in a June 30 op-ed for *The New York Times* that the Supreme Court's recent term "may come back to haunt liberals":

But the conservative majority also laid down a cache of weapons that future courts can use to attack many of the legislative achievements of the New Deal and the Great Society -- including labor, environmental, civil rights and consumer protection laws -- and to prevent new progressive legislation. Far from being a source of jubilation, the term may come back to haunt liberals.

[...]

What, then, to make of the court's landmark decision to uphold the individual mandate? Chief Justice Roberts construed the mandate not as a requirement that individuals purchase health insurance but as a choice: buy insurance or pay a tax. But the conservatives surely know that a Congress that can tax but not do much else -- spend money, regulate the economy or enforce civil rights -- will be hamstrung. Taxes are unpopular and nearly every Republican member of Congress has promised to oppose any additional taxes on individuals or businesses.

A Congress that can advance national priorities only through its taxing power is a Congress with little power at all. That is the real legacy of the last term. The Supreme Court has given Americans who care about economic and social justice a reason to worry this Fourth of July. The court's guns have been loaded; it only remains to be seen whether it fires them. [*The New York Times*, **6/30/12**]

George H.W. Bush Legal Adviser Rivkin: Roberts' Acceptance Of The Conservative Argument On the Commerce Clause Was "The Ultimate Silver Lining." In a June 30 *New York Times* article describing conservative and libertarian satisfaction with Roberts' reasoning, David B. Rivkin Jr., former legal adviser for the

George H.W. Bush administration and the lawyer who successfully argued against the constitutionality of the health care law in the 11th Circuit Court of Appeals, was quoted:

And while deeply disappointed by the outcome in the health care case, the libertarian lawyer David B. Rivkin Jr., a partner in the Washington office of Baker Hostetler, called the court's interpretation of the commerce clause "the ultimate silver lining." The opinion, he said, "reaffirms with enormous vigor the fundamental limits to the government's power. The administration sailed under the flag of the commerce clause and it was decisively rebuked. No one will try to do this type of mandate again." [*The New York Times*, 6/30/12]

Notre Dame Professor Garnett: "Judicial Conservatives, It Seems To Me, Should Be Thankful (And Grateful To The Chief Justice)" For His Decision. Richard Garnett, University of Notre Dame law professor and former clerk to the late Chief Justice William H. Rehnquist, was similarly baffled by conservatives' "misguided criticism of Roberts" in a National Review Online post on June 28:

But also, and more important, the Court's decision today contains some of the most muscular enumerated-powers and constitutional-structure-matters language of any (majority) opinion in decades. Judicial conservatives, it seems me to me, should be thankful (and grateful to the chief justice) for the approach taken by a majority to the Necessary and Proper Clause and to the so-called Spending Power, and should probably see this "good" about the ACA decision as outweighing the "bad" (i.e., that, because the mandate is, contrary to the president's earlier assurances, a "tax," it will have to be repealed legislatively and electorally, rather than judicially). The ruling on the Medicaid expansion, in particular, is a big "win" for federalism, it seems to me. [National Review Online, 6/28/12]

[And Voices Across Political Spectrum Still Say Roberts Is Conservative](#)

Slate's Lithwick And NYU Law Professor Friedman: "There Can Be No Serious Question That Roberts Is A Conservative." Slate legal affairs writer Dahlia Lithwick and NYU Law Professor Barry Friedman expressed their full expectation that Roberts would tilt back right in a joint July 2 article on Slate:

There can be no serious question that Roberts is a conservative. Crawford's story about the conservative's pique is reminiscent of how Justice Antonin Scalia famously drove

Justice Sandra Day O'Connor away from his camp with his repeated slights and insults. Roberts is a big boy and one suspects he will vote in the future in a manner consistent with his long-standing conservative priors. [Slate, 7/2/12]

***The Nation's* Vanden Heuvel: "Thursday's Decision Notwithstanding, This Is Still A Court Of, By And For The 1 Percent."** In a July 3 column, *Washington Post* columnist and editor of *The Nation* Katrina vanden Heuvel pointed out that regardless of the decision, Roberts still presides over a court extremely disposed to corporate America:

It's a reminder that Roberts and his conservative colleagues have not shied away from empowering malignant, moneyed interests who undermine our democracy. Thursday's decision notwithstanding, this is still a court of, by and for the 1 percent. [*The Washington Post*, 7/3/12]

Chicago Law Professor Stone: Roberts' Decision May Be "Merely A One-Off Hiccup In An Otherwise Long, Depressing And Dependably Very Conservative Tenure." Professor and former dean of the University of Chicago Law School Geoffrey Stone noted in a July 3 Huffington Post piece that he has been consistently disappointed with Roberts' "adher[ence] to a rigid and generally extreme conservative line:"

It is, of course, much too soon to know whether Roberts' vote to uphold the Affordable Care Act implies that he is finally coming to his senses. This may be much ado about nothing -- merely a one-off hiccup in an otherwise long, depressing and dependably very conservative tenure. [The Huffington Post, 7/3/12]

George Washington U. Professor Kerr: "Folks On The Right Who See Roberts As Some Kind Of Traitor" Are Wrong. In a June 29 Volokh Conspiracy post titled "The Conservative John Roberts," George Washington University of law professor and former clerk to Justice Anthony Kennedy pointed out that "the key [Roberts] opinion that leads to that result is not a liberal opinion; rather, it strikes me as a largely conservative opinion that just happens to get to a liberal result:"

So there will be a lot of folks on the right who see Roberts as some kind of traitor, or at least not a real conservative. Roberts took a liberal position, the argument will run, so he must be a liberal.

I don't think that's right. Reading over the Roberts opinion, the opinion strikes me as quite conservative. The opinion starts from the premise that the federal government is a government of limited powers. The opinion goes on to reject the federal government's power to regulate inactivity under the Commerce Clause. It then goes on to reject a broad reading of the Necessary and Proper Clause. The opinion also imposes new limits on the federal government's ability to force the states to adopt federal programs, striking down the condition that Congress can withdraw all Medicaid funding if a state refuses to go along with the Medicaid expansion. [The Volokh Conspiracy, **6/29/12**]

Georgetown Professor Barnett: After Roberts' Opinion, Conservatives "Are Way Ahead Of Where We Would Be If The Law Had Been Enacted In Exactly The Same Form As It Was Upheld Today." In a Volokh Conspiracy post on July 6, Georgetown law professor Randy Barnett, an opponent of the law, wrote that Roberts' legal reasoning was a significant conservative victory:

In short, as Pam Karlan, Neil Katyal and others on the left have realized, we who favor the judicial recognition and enforcement of the limits of enumerated powers are *way* ahead of where we would be if the law had been enacted in exactly the same form as it was upheld today, and even had it included a tax penalty rather than the "pure" tax that was upheld as constitutional. [The Volokh Conspiracy, **7/6/12**]

George W. Bush Attorney General Gonzales: Roberts Will Still "Decide Most Cases In [A Conservative] Fashion." Former George W. Bush Attorney General Alberto Gonzales did not share his ex-colleagues' alarm about Roberts' purportedly hollow conservatism in a CNN interview on June 28:

GONZALES: I have a great deal of confidence and faith in John Roberts. You know, obviously, he's only been on the court six or seven years. I think his legacy's yet to be written. And I think we just need to reserve judgment. He's a very bright man. He obviously is aware of his place in history. Obviously aware about the protection, the reputation, of the court.

But I still stand by our initial analysis of John Roberts. You know I think he's a conservative justice and will decide, most cases, in that fashion. [CNN, *Anderson Cooper 360*, **6/28/12**]

Reagan Solicitor General Fried: "Roberts's Opinion Was Not Conservative But [A] Radically Reactionary New Doctrine." And former Reagan solicitor general Charles Fried expressed his dismay at Roberts' unprecedented right-wing rationales in a post on SCOTUSblog on July 2:

Activity/inactivity is a new basis for limitation and has no anchor in our jurisprudence. That is why Roberts's opinion was not conservative but radical. I have my doubts about the political and economic virtues of the ACA, but am appalled at this radically reactionary new doctrine. [SCOTUSblog, **7/2/12**]

Nevertheless, Right-Wing Media Are Already Applying Pressure For Next Round Of Judicial Nominations

Former Bush Legal Adviser Yoo: Next Time A Republican Nominee Is Asked "About Justices They Agree With, The Better Answer Should Once Again Be Scalia Or Thomas Or Alito." Former George W. Bush legal adviser and University of California law professor John Yoo declared that Roberts was no longer the ideal type of Republican nominee in a June 29 op-ed for *The Wall Street Journal*:

If a Republican is elected president, he will have to be more careful than the last. When he asks nominees the usual question about justices they agree with, the better answer should once again be Scalia or Thomas or Alito, not Roberts. [*The Wall Street Journal*, **6/29/12**]

Limbaugh: After Roberts Experience, We Should "Insist On Originalists Being Nominated To The Court." On his July 3 show, Rush Limbaugh also declared that the vetting of future conservative nominees would have to be even more determinative:

Chief Justice Roberts and the four other liberal activists on the court have blown yet another giant hole through the Constitution. How do we fix that? Well, there's a way. There's a way. We insist on originalists being nominated to the court, period. But that is for another time. He doesn't need to comment on any case when he's nominated, any prospective judge, but he's gotta tell us who he is, or she is. [Premiere Radio Networks, *The Rush Limbaugh Show*, **7/3/12**]

George Mason Law Professor Bernstein: "It's Better To Nominate The Type Of Individual Who Is Forthright In His Views." And George Mason law professor David

Bernstein echoed the opinion that the only way to ensure conservative justices is to get them to admit their ideology before they are confirmed, in a Volokh Conspiracy post on June 30:

For those disappointed with Roberts' opinion, it may suggest a rule for future nominations: it's better to nominate the type of individual who is forthright in his views, and if asked about his participation in the Federalist Society, would defend the organization and his membership therein (which really tells you nothing more than that the individual in question is not on the "left"). [The Volokh Conspiracy, **6/30/12**]

[And There Is Evidence This Pressure Is Already Having An Effect](#)

Cato's Pilon: "Blowback" Roberts Is Receiving May Be Hardening Conservative Attitudes Toward Judicial Nominations, "And That Would Be Good." Vice president for legal affairs at the Cato Institute Roger Pilon may have tipped his hand about the purpose of right-wing criticism of Roberts in his July 5 post on Cato@Liberty:

On balance, however, Democrats have had a better grasp than Republicans of their agenda and the methods needed to achieve it. But if the blowback Chief Justice Roberts is now receiving is any indication, that may be changing, and that would be good. [Cato@Liberty, **7/5/12**]

Romney Suggests That After Health Care Ruling, He Might Not Nominate Someone In The Mold Of Roberts. The *Los Angeles Times* reported on CBS News' July 4 interview with Republican presidential candidate Mitt Romney, wherein he appeared to back off his previous exaltation of Roberts as the ideal Justice:

Before the healthcare ruling, Romney had praised Roberts. His website says he would "nominate justices in the mold of Chief Justice Roberts and Justices Scalia, Thomas and Alito," candidates who "exhibit a genuine appreciation for the text, structure, and history of our Constitution and interpret the Constitution and the laws as they are written."

But Romney displayed a cooler attitude toward Roberts in his interview with CBS News' Jan Crawford on Wednesday near his vacation retreat of Wolfboro, N.H.

When Crawford asked whether he would nominate a justice like Roberts, now that the chief justice voted to uphold the president's healthcare law, Romney answered that he

"certainly wouldn't nominate someone who I knew" was going to come out with a decision that I "vehemently disagreed with." [*Los Angeles Times*, **7/5/12**]