Why King v. Burwell Should Cheer the Right

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By Peter Berkowitz
RCP Contributor
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The Supreme Court's 6-3 decision upholding the Obama administration's interpretation of a critical provision of the Affordable Care Act was the rare judicial action that helped both Democrats and Republicans, at least in the short run.

Democrats didn't have to witness the death spiral of Barack Obama's signature domestic policy achievement. On the Republican side, the 15 or so candidates running to succeed Obama don't have to cope with the wrath of more than 6 million Americans, many of them living in Republican "red" states, who would have had their federal health insurance subsidy taken away.

But the understandable interest in the decision's impact on short-term political fortunes has perhaps obscured its long-term implications for party politics and constitutional government.

King v. Burwell consists of an unusually succinct majority opinion by Chief Justice John Roberts—joined by swing-jurist Anthony Kennedy and the four progressive justices—and a vehement dissent by Antonin Scalia, joined by Clarence Thomas and Samuel Alito. Not a single word—for the majority opinion or against it—was authored by the court's reliable left-wing bloc: Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

Roberts' opinion has occasioned gnashing of teeth among conservatives. Many see it as bow to establishment sensibilities, a betrayal of conservative principle, and a harbinger of irreconcilable division within conservative ranks. Meanwhile, the case generated glee among liberals, who found in it confirmation of the goodness of their cause and the irreversible advance of social justice.

Both conservative despondency and progressive triumphalism are misplaced.

Another way to look at what happened in *King v. Burwell* is that the dispute between Roberts and Scalia illustrates the vitality of conservative thinking about constitutional government while the absence of so much as a single concurrence by one of the four liberal justices indicates a certain complacency and rigidity in progressive thinking about the court and Constitution.

The case revolved around the interpretation of a provision buried deep within the ACA that, contrary to the interpretation offered by the Internal Revenue Service, appeared on its face to restrict federal subsidies to individuals who purchase insurance through "an Exchange established by the State." The court held that the Affordable Care Act also authorizes the federal government to provide tax credits to individuals who purchase health insurance through exchanges set up and administered by the federal government.

In an aspect of the decision that has received relatively little attention, Roberts affirmed the court's power to interpret aspects of the law that it had appeared to cede to administrative agencies in *Chevron v. National Resources Defense Council* (1984). In ordinary cases, Roberts argued, the court must determine whether the statute is ambiguous; if it is, then it must consider whether the pertinent executive branch agency—in this case the IRS—to whom Congress has implicitly delegated power to interpret the law has put forward a reasonable interpretation. But, according to Roberts, in "extraordinary cases" like *King v. Burwell* that possess "deep 'social and political significance'" the court itself "must determine the correct reading."

If the phrase or provision is clear, the court must "enforce it according to its terms." If ambiguous, the court is obliged to take into account the law's context, structure, and purpose.

According to Roberts, the statutory text at issue in *King v. Burwell* is ambiguous because the ACA's key reforms—barring insurers from denying coverage because of preexisting conditions and prohibiting them from charging more for that reason, requiring everyone to buy insurance or make a payment to the IRS, and providing tax credits for the needy—are "closely intertwined" and intended by Congress to work together. If individuals in the 34 states that chose not to create exchanges were denied tax credits for the insurance they purchased through exchanges established by the federal government, Obamacare would collapse.

Congress can't have intended the collapse of the system, Roberts reasoned. Therefore, the statutory scheme taken as a whole requires that the ambiguous phrase—"an Exchange established by the State"—must be read to include federal exchanges, which makes purchasers of insurance through federal exchanges as well as state exchanges eligible to receive tax credits.

Roberts admitted that the argument that the plain meaning of "an Exchange established by the State" excludes exchanges established by the federal government is strong. And he conceded that such a conclusion is the "natural reading." What then compels him to discover ambiguity and resolve the case contrary to the text's natural reading?

The answer is his understanding of the limited role the Constitution assigns to the courts.

"In a democracy," the chief justice wrote, "the power to make the law rests with those chosen by the people." With more than a little understatement, he added, "That is easier in some cases than in others." In *King v. Burwell,* Roberts performed feats of interpretive wizardry in order to avoid a decisive judicial intervention with massive political repercussions, thereby leaving to the elected branches and to the people the responsibility to extend, reform, or dismantle the Affordable Care Act.

Justice Scalia provided a bracing rebuttal, but he is in *agreement* with Roberts that in deciding cases judges must take with utmost seriousness the confined role of the courts in our constitutional system.

Scalia's dissent mainly consists in demonstrating that Roberts' initial premise is patently false. The statute, he argued, is clear as day. While the restriction of tax credits to insurance purchased on state exchanges may be odd or flawed it is in no way ambiguous.

"Words no longer have meaning if an Exchange that is *not* established by a State is 'established by the State,'" proclaimed Scalia in one of his gentler formulations. Because there is no ambiguity in the statutory language, there are no grounds for the court to launch a search for the ACA's legislative plan and to interpret the contested clause in light of the statute's context, structure, and purpose.

Scalia vehemently criticizes Roberts in part because, like Roberts, he believes that judges must respect courts' limited role under the Constitution. Scalia stresses, as does Roberts, that the "Court holds only the judicial power—the power to pronounce the law as Congress has enacted it."

So why do Roberts and Scalia come down on different sides of the question presented in *King v. Burwell*?

It is because of an ambiguity built into the notion of judicial restraint to which they both subscribe. For Roberts, judicial restraint involves doing the utmost to leave questions that will effectively decide large-scale policy issues to the political branches. For Scalia, it essentially means applying the law as written, come what may.

Both senses have merit. The bitter disagreement among the court's conservatives about how to reconcile them provokes a question about its four left-liberal judges: Is the progressive legal mind so utterly results driven that it is entirely unmoved in the face of the complexities of constitutional government?

Peter Berkowitz is the Tad and Dianne Taube senior fellow at the Hoover Institution, Stanford University. His writings are posted at PeterBerkowitz.com and he can be followed on Twitter @BerkowitzPeter.