PERSPECTIVE:

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What we learned in the Obamacare decision

By Glenn C. Smith

Last week's decision in *King v. Burwell* — with six justices led by Chief Justice John Roberts affirming the right of millions of lower-income Americans in 34 states to federally subsidized health insurance — is of large and immediate practical importance. Up to 8 million Americans keep newly acquired health insurance. State health-insurance markets avoid precipitous declines in insurance participation, rate spikes and other major disruptions. Ultimately, the Affordable Care Act (aka Obamacare) survives a potentially crippling blow.

A bit harder to determine (pending more extensive analysis over time) will be whether the doctrinal duels between the chief justice and dissenting Justice Antonin Scalia will have any lasting, broader impact on future statutory interpretation — the critical enterprise the court engages in even more frequently than big-ticket constitutional interpretations. (The 42 pages of opinions are surely a festival of interpretive canons, presumptions, and theories; I could teach an entire Legislation course out of this one opinion!)

At a less-in-the-weeds level, however, *King* is of immediate legal significance in three ways.

First, *King* represents the second time in three years that core challenges to Obamacare have been rejected by a chief-justice-led coalition based on a common view about how to read seemingly plain statutory language and the proper judicial role when doing so.

True, the issue in 2012's *NFIB v. Sibelius* was a constitutional one — whether the ACA's individual mandate to purchase insurance or suffer a penalty was a valid exercise of federal power; if not, how much of the rest of act should fall along with the mandate? But the key to finding the individual mandate and the act constitutional lay in statutory interpretation — namely, a willingness by Roberts to look beyond the most natural reading of legislative language (that the "mandate" was a legal requirement and its violation triggered a Congress-labeled "penalty"). Roberts' 2012 interpretive indulgence was to construe the mandate as a milder and more typical tax provision, in which taxpayers have the final say about whether to engage in behavior with tax consequences.

In the just-decided *King* case, Roberts similarly admitted that the most natural meaning of the key statutory language about subsidies for purchases on an exchange "established by the State" was a narrow one: Only an exchange set up by one of the 16 states (including California) with their own state-run insurance market qualified. But, like three years ago, Roberts found good reasons in *King* to depart from the obvious. In light of the "context and structure" of the act and congressional reliance on subsidies as one of three crucial tools to "improve health care markets," the Roberts majority held that Congress intended to subsidize insurance in exchanges established by the *federal* government on behalf of recalcitrant states.

More important, Roberts' opinions in *Sibelius* and *King* share a common vision of the judicial role. Both see restraint as the better part of valor when the unelected, life-tenured federal judiciary is invited to reverse signal legislation produced in a pitched partisan process. As the majority opinion concludes:

"In a democracy, the power to make the law rests with those chosen by the people … [W]e must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan."

The crucial bottom line in interpreting statutes: Judicial restraint must restrain myopic adherence to plain meaning.

A second significant aspect of *King* is as a high-profile case study about the connection between Supreme Court oral argument and the decisions the justices ultimately produce. Court watchers took special interest in Justice Anthony Kennedy's pursuit of a pet theory during the *King* oral argument. At several junctures Kennedy asked whether the challengers' literal interpretation of the statute assumed an arguably unconstitutional congressional desire to "coerce" states in disrespect of federalism and state sovereignty. Suddenly it seemed as though Kennedy, an ardent foe of Obamacare in the 2012 *Sibelius* decision, might be an unexpected pro vote this time.

Kennedy did turn out to be one of the six justices supporting Obamacare. But it's hard to gauge to what extent this reflected his coercion concern (as opposed, say, to a basic fairness problem with dis-insuring millions of needy Americans). Kennedy joined the majority opinion without writing a concurrence elaborating a state-protective position. And he did not use his leverage as a member of the majority to include coercion-concern language in the opinion he joined; references in the Roberts majority opinion to state power and autonomy are basically nonexistent.

King thus provides the latest example of how reading tea leaves about oral argument is a limited, dicey enterprise.

A third significance to *King* is how it reinforces that the justices at the pinnacle of our federal judiciary are not interested in "saving" Americans from the act.

This is no mere theoretical concern, in light of still extant legal challenges on other grounds floating around the lower federal courts. (For example, litigants in *Sissel v. Dept. of HHS* still argue in the U.S. Court of Appeals for the District of Columbia that key portions of the act are unconstitutional because Congress violated a relatively obscure constitutional requirement that revenue bills originate in the House of Representatives, not the Senate.)

There comes a time in a democracy based on majority rule when, after serious legal arguments have been resolved, those losing the political battle get with the program (or at least change minds through the *political* process). It is critical to the legitimacy of any free society that the policy losers eventually stop grasping at legal straws and embrace the bedrock principle of our constitutional democracy that, barring serious assaults on individual rights, people should get the policies their elected representatives enact on their behalf.

Let us hope that we've received an early Fourth of July present, in the form of independence from further anti-Obamacare litigation!

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