After *King v. Burwell*

The Supreme Court's decision in *King v. Burwell* upheld President Obama's massive power grab, allowing him to tax, borrow, and spend $700 billion without congressional approval. This establishes a precedent that could let any president modify, amend, or suspend any enacted law at his or her whim.

As it stands, Obamacare will continue to disrupt coverage for sick Americans until Congress repeals it and replaces it with reforms that make health care better, more affordable, and more secure. Despite the ruling, Obamacare remains unpopular with the American public and the battle to set in place a health care system that works for all Americans is far from over. At a Capitol Hill Briefing in July, Michael Cannon, director of health policy studies at Cato, and Ilya Shapiro, a senior fellow in constitutional studies at the Institute, came together to discuss the impact of *King v. Burwell* on health care reform, the separation of powers, and the rule of law.

MICHAEL CANNON: The ink wasn't yet dry on the ruling in *King v. Burwell* before supporters declared that the debate over repealing Obamacare is over. Well, that debate has been declared over so many times at this point that I've lost count. But I believe that Obamacare supporters dodged a bullet with this ruling.

The way the Affordable Care Act (ACA) was written, approved by both chambers of Congress, and signed into law by the president, it gave states the power to block major provisions of the law. States can block the subsidies that are supposed to flow through the health insurance exchanges. They can block the employer mandate and, to a large extent, the individual mandate. The law as written gave states these powers.

Obamacare supporters dodged a bullet because 34 or 38 states—depending on how you count—did not establish health insurance exchanges, which they needed to do in order for those provisions to take effect. They effectively exercised the vetoes that Congress gave them over portions of the ACA. And eliminating those subsidies would have revealed the full cost of this coverage to enrollees in HealthCare.gov. That is what the Obama administration and its supporters fear. (I do not consider them ACA supporters, by the way, because they do not really support that law as written.)

Nevertheless, the repeal debate is not over and there are a lot of reasons why. First, more than six years after the first draft of Obamacare was introduced in the House, it remains unpopular. In fact, it is as unpopular now as it was when it was enacted more than five years ago. And this is a year and a half into implementation, a year and a half after people have been receiving the benefits under this law, as rewritten by the Obama administration and the Supreme Court. And a lot of the costs of the law have not even taken effect yet: the Cadillac tax, some premium hikes on the horizon, the fact that some of the temporary programs designed to mitigate adverse selection will expire. This law has been unpopular for six solid years, and you know what? Unpopular laws, in a democracy, are always up for repeal.

Second, the Obamacare repeal debate is going to keep going on because Obamacare hurts the sick. Yes, it does insure more people by throwing lots and lots of money at health insurance. But it also threw millions out of their health care plans in 2013—including cancer patients and others with severe illnesses—leaving them with inferior coverage. It threatened to throw millions more out of their plans again until the Supreme Court amended the law in this latest ruling. And it is going to continue to threaten coverage for cancer patients and others as long as that law remains on the books.

It is not just opponents of the law that are noticing this. If you look at the January 29 issue of the *New England Journal of Medicine*, the lead article is about how Obamacare is pushing insurers into a race to the bottom by jettisoning coverage for HIV patients. There are other studies that have found the same thing happening with other high-cost chronic conditions, like mental illness, diabetes, rheumatoid arthritis, and cancer. This has happened in other markets with Obamacare-like bans on discrimination on the basis of preexisting conditions. There are a number of examples where community rating rules have encouraged insurers to avoid, mistreat, and ultimately dump the sick. And it does not matter that it is only happening with a few insurers now. The *New England Journal of Medicine* article said that a quarter of the insurance plans that they studied displayed these characteristics. But eventually all insurers will have to follow suit. Supporters of the law will likely blame this on greedy insurance companies. But the truth is that it is Obamacare that forces these companies into this race to the bottom, even when insurers are not trying to discriminate against the sick.

Another reason the repeal debate will continue is because Obamacare, and the way it has been implemented, demeans voters. And they feel it. They sense that it demeans them. The way that the Obamacare's architects designed, sold, enacted, and implemented this law has been an ongoing string of insults to the intelligence, the compassion, the dignity, and the sense of fair play of Americans who oppose this policy. Obamacare's architects have lied to the public. They have called voters stupid. They have called opponents evil. President Obama and the Supreme Court have rewritten the ACA now in so many ways

that it disempowered and disenfranchised Obamacare opponents.

Finally, this debate is going to continue because there are ways to provide more secure health coverage to the sick. No one wants the pre-Obamacare world where government had already been making health insurance less secure. But in spite of the tax exclusion for employer-sponsored insurance and all the other things that the government has done to cripple private health insurance markets, they were still innovating to develop products that made health insurance more secure. One example is guaranteed renewability. Another example is preexisting condition insurance, an innovation that was happening right underneath Congress's nose as they were debating the Affordable Care Act. It was first introduced in late 2008, and UnitedHealthcare was getting regulatory approvals in early 2009. What was this product? It was basically an insurance product where, at a cost of just 20 percent of what you would pay for health insurance, you can buy the *option* to purchase that health insurance plan at any time, no matter how sick you get. Even if you develop a preexisting condition, you pay the same rate as everyone else. This was available in 2008. There were further innovations that markets were likely to develop that encouraged insurers to compete to cover the sick rather than to avoid them.

But Obamacare destroyed these innovations. When you think about it, if Obamacare were such an improvement over the status quo ante as it existed before the law, then why do 65 percent of HealthCare.gov enrollees want the freedom to purchase their pre-Obamacare plans? Obviously something is amiss there. Unfortunately, these innovations are not coming back until we get rid of Obamacare, specifically its community rating price controls, and that's why the debate is going to keep happening.

Now, what should Congress do in the wake of *King v. Burwell*? It should stay focused on what it has always been focused on with regard to Obamacare—which is repealing it. We are not going to get lower costs and more secure health insurance for the sick until this law is off the books.

Repeal is actually more important after *King v. Burwell*. With that ruling, the president and the Supreme Court just created entitlements and imposed taxes on 70 million Americans—employers and individuals—that no Congress ever approved and from which Congress specifically exempted those 70 million employers and individuals. The fact that tens of millions of Americans are currently subject to taxes that Congress never approved makes it all the more important that Congress repeal Obamacare. *King v. Burwell* shows that what we are living under right now is an illegitimate law.


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I like to say that the Affordable Care Act is imperfect. But, gosh, it is a lot better than what we've got.

ILYA SHAPIRO: Look, I'm a simple constitutional lawyer. Essentially everything I know about health care I've learned through litigating two cases, *NFIB v. Sebelius* three years ago and now *King v. Burwell*. Originally, when we were planning this forum, we thought the case could go either way. It was really a 50/50 toss-up, and I thought I could add some value by explaining the nuanced rules of decision: for instance, what does this mean for health care or other types of regulatory policy going forward? Given the Court's opinion, however, all I can say is that there's really very little law, as it were, in the majority opinion. It's as if the whole opinion just said "Affirmed." The reasons don't matter because they don't make any sense whatsoever. Words have whatever meaning the writer wants them to have—which is a far cry from the following judicial opinion: "It is not our job to protect the people from the consequences of their political choices." Now who wrote that? Is that from Justice Antonin Scalia's dissent here in *King v. Burwell?* No. Is it from Justice Anthony Kennedy's (combined with Scalia's) dissent in *NFIB v. Sebelius?* No. It was Chief Justice John Roberts in the majority opinion in *NFIB*.

What's going on here is an unholy confluence of liberal judicial activism and conservative judicial passivism that has found a perfect home with John Roberts. It's not that the Court is liberal. Nor is John Roberts "evolving," as so many justices have in the past. What's going on here is that, well, Obamacare is special. As Scalia pointed out in his dissent, all the normal rules of constitutional—and now statutory—interpretation go out the window when it comes to the Affordable Care Act. Mind you, it wasn't a matter of enforcing the text of the Affordable Care Act. It was rewriting the text in a different way to do what John Roberts thought in his infinite wisdom would cause the least disruption in public policy or the health care system. And it shows why we don't want judges making these kinds of extra-legal de-

terminations, because again this is not a liberal decision. In *NFIB*, the individual-mandate case, Justice Ruth Bader Ginsburg's partial concurrence/partial dissent said that there are no constitutional limits on federal power. That's the liberal position.

Similarly here, the liberal position would have been to say that the IRS gets to do whatever it wants, applying what is known as *Chevron* deference. *Chevron* is a legal doctrine named after a case from more than 30 years ago, which says that when a law is ambiguous, courts are to defer to an agency's interpretation of that law, unless that agency is being arbitrary and capricious. So even if courts might disagree with the agency's determination, as long as it's not completely crazy they'll defer to it. In other words, A, B, C, D, and E are all somewhat plausible interpretations. One might be better; one might be worse. But as long as the agency doesn't go for X, Y, or Z—which are all completely out of left field—they'll be okay. Roberts specifically said in *King v. Burwell* said that that was not what he was doing. This was not an administrative-law, agency-deference case.

And that was backed up in June in the *Michigan v. EPA* case, where Justice Clarence Thomas wrote a concurring opinion on the need to narrow *Chevron*. Justice Scalia's majority opinion there said that the agency's determination was indeed unreasonable and therefore sent it back to the drawing board. But that doesn't mean, I don't think, that in some future instance *Chevron* is going to be narrowed. I don't know if the Court has the five votes necessary to do that. Some people are saying the fact that *Chevron* wasn't expanded is the silver lining in *King v. Burwell*. It sort of is. But again, this is kind of a sui generis opinion, good for the Affordable Care Act only. I'm sure some lower-court judges will use it to buttress some future fanciful statutory interpretations—to say that A is equivalent to Not-A, as it is here—that "exchange established by the state" means "exchange not established by the state." Possibly. But really the way that it's written, John Roberts's goal in *King*, as it was in *NFIB*, was to achieve a certain result without really changing legal doctrine, without expanding federal power.

Let me extrapolate from that. Looking forward, there's a lesson we can draw to avoid that unholy alliance of liberal activism—rewriting the law—with conservative passivisim—restraining and bending


ILYA SHAPIRO

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over backwards to let Congress do whatever it wants. The way we avoid that is to learn the lessons of history.

In the late 1930s and early 1940s, the Supreme Court started going off the rails and eviscerating the doctrine of limited and enumerated powers. It began eviscerating federalism and bifurcating (even trifurcating) our rights, such that some rights are more equal than others. Then, from the 1950s to the 1970s, when the Warren and Burger Courts continued these "evolving" notions of what the Constitution means, the conservative response to that sort of activism was not: "You're wrong. Here's the correct theory of constitutional or statutory interpretation." Instead and alas, the response was: "Why are you not deferring to the political branches? You are unelected judges. You should be restrained. You should be deferring. You should be sitting on your hands." And that's why we have what we have now.

The answer is to appoint judges who are actually committed to judging. We should be fighting for judges who have a proven track record of saying what the Constitution actually is—of engaging with the law—rather than trying to bend over backwards and defer to agencies or to Congress. The judicial branch is a branch of the federal government for a reason. It's there to check and balance the others.

John Roberts's background was too smooth in many ways. He checked all the right boxes and excelled at the legal craft, but he never identified as an originalist or movement conservative. It's clear that he's a Republican. But it's never been clear that he was committed to any particular theory of judicial interpretation. So congratulations to him, but future Republican administrations will have to be more careful about what *kind* of conservative they want on the Supreme Court: someone who focuses on restraint (a judicial mode) or someone who has a particular substantive theory of jurisprudence.

Those of you, especially here on Capitol Hill, who are going to the barricades to fight for a proper judiciary, make sure you're fighting for the right people so that it's worth the effort. Someone who has displayed loyalty to generic conservatism or some kind of "Red Team, Blue Team" fight is not enough. We need judges who actually are willing to make the difficult "balls and strikes" calls—as John Roberts said at his confirmation hearings—rather than kick the plate a little bit, squint, and call it a strike because Congress "in-

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A conference on financial regulation and economic growth

Risk, Regulation, and Capital Markets

Economic growth—including, importantly, wage growth—is ultimately driven by increases in productivity. The most effective way of driving productivity is a deepening of the capital stock. Capital, however, only multiplies in a hospitable environment—one of liquid, efficient capital markets with a respect for both contract and property.

Has America lost that hospitable environment? If so, can it be regained? In June, the Institute hosted a conference, "Capital Unbound: The Cato Summit on Financial Regulation," during which a distinguished panel of experts examined the current state of U.S. capital markets regulation and offered proposals for unleashing a new engine of economic growth. The all-day event was held at the historic Waldorf-Astoria in New York City. Mark Calabria, Cato's director of financial regulation studies, opened the summit by discussing the foundations of the economic meltdown of 2008.

"Unfortunately, the federal reaction to the financial crisis has been to double down on many of the distortions that drove it," he said. For instance, policymakers have loaded ever more mortgage risk onto the backs of taxpayers, despite the fact that residential mortgages play a central role in the turmoil. "As unbelievable as it sounds, Washington is again calling for reducing underwriting standards and pushing homeownership as a get-rich-quick scheme for everybody," Calabria said. "I thought it would at least be a few more years before we went down that path again."

Joshua Rosner, managing director at Graham Fisher & Co. and coauthor of *Reckless Endangerment*, added that attempts to assign blame have prevented policymakers from recognizing the real causes of the crisis. "There's a false meme in Washington where a lot of the Democrats suggest that it was private markets and a lot of the Republicans suggest that it was government," he said—when in reality it was both.

In June, the Institute hosted "Capital Unbound: The Cato Summit on Financial Regulation" in New York, where a distinguished panel of experts critiqued the state of U.S. capital markets regulation.

Kevin Dowd, a professor at Durham University and an adjunct scholar at the Cato Institute, focused on the problems with the Federal Reserve's so-called "stress tests." Using risk modeling, the tests subject banks to various scenarios to determine the capital "buffer" banks need to safely weather poor economic conditions. The problem, Dowd said, is that the models themselves suffer from many fatal flaws. Ending the Fed's stress tests is a necessary first step toward reducing this "carnage by computing," Dowd concluded.

Other speakers at the summit included Commissioner Michael Piwowar of the Securities and Exchange Commission; George Selgin, director of the Cato's Center for Monetary and Financial Alternatives; and Thaya Knight, associate director of financial regulation studies at the Institute.

In his keynote address, Commissioner J. Christopher Giancarlo of the Commodity Futures Trading Commission highlighted the fact that a return to traditional American prosperity begins with efficient capital markets. "It's not a matter of opinion," he said. "It's a matter of economic fact that everywhere in the world today where there are free and competitive markets, combined with free enterprise, personal choice, voluntary exchange, and legal protection of person and property, you will find the underpinnings of broad and sustained prosperity."

"Yet here at home," Giancarlo concluded, "these same elements are under attack by critics of our financial markets. These critics constantly talk about separating markets from risk, as if they have no idea that risk and prosperity are invariably intertwined." ■

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tended" it to be a strike. This is not going to change overnight. It's not a matter of winning the White House. It's a matter of picking the right judges and understanding the climate of ideas such that the proper judicial philosophy isn't being conservative or minimalist or incrementalist or restrained. It's about judging in a particular way and applying the standard tools of statutory and constitutional interpretation regardless of where the political chips may fall. ■