Supreme Court Decisions

Part 1 of 2: The King v. Burwell Decision and the Affordable Care Act
with
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Dr. Darrell Bock  Welcome to the table where we discuss issues of God and culture and our topic today is the Supreme Court. Particularly two decisions made in this last term, which deal with on the one hand legislation that's become known in the public square as ObamaCare. And then secondly the decision on same sex marriage, legalizing same sex-marriage across the country.

So we're going to take these cases two at a time. I have two very distinguished guests with me in the studio and over Skype with me today to discuss this. Judge Rollin Van Broekhoven is coming to us from his study in his home over Skype. And we're pleased to have the judge with us. Welcome, Judge.

Hon. Van Broekhoven  Thank you, Darrell.

Dr. Darrell Bock  And then Jeff Mateer who is General Counsel at the Liberty Institute, and they do a lot of legal work in the area of religious liberty. So they're keeping up with this material and getting lots of phone calls and traveling the country, getting up to speed with what's going on. So we can hardly have two better qualified guests to discuss the topics that we're going to deal with.

And some of what we're going to deal with will be fairly technical legal discussion, but that's so that we can get our hands what's actually happening at the legal level in the courts. So all of us have been reading legal briefs lately. And so that's how we're going to begin. So we're going to start with the Burwell case which is the ObamaCare case and Judge, I think I'll let you summarize for us what that decision was adjudicating and how it was resolved by the court.

Hon. Van Broekhoven  Okay, thanks. In King versus Burwell it is the latest in a line of decisions in which the ObamaCare has come under attack. Specifically in King v. Burwell 36 states or 37 states had not established their own exchanges. And 12 had established exchanges and those that did not the Secretary of Health and Human Services attempted to establish exchanges.

Now part of the reason for this was in the earlier attacks against the statute the Supreme Court had ruled out the expansion of Medicare as I recall. And so the Supreme Court had defined the term mandated penalty to mean tax. And they ended up upholding the constitutionality of ObamaCare.
The second case is to a certain extent related to that because essentially the losers in that case continued to litigate the question of the subsidies. And under the law subsidies that were granted to those enrollees in ObamaCare under, as the language of the statute provided, exchanges or marketplaces established by the states.

And the IRS ended up granting subsidies to essentially everyone. And so the question there was whether the words exchanges by the states meant anything. By way of just a little background and I don't want to get too far off here, the statute itself is about 2,500 pages long. And there was a lot of wheeling and dealing between the White House and the democrats and congress over what would be included in the statute. And part of the wheeling and dealing at the time was to encourage states that objected to the mandate to be excluded from the subsidy provisions.

And that is kind of where the language came in which Justice Scalia focused in on and many of the lawyers, which I dealt with here in Washington have said the language says what it does. So the question before the court was does the language which says subsidies are authorized to – and those enrollees which have enrolled under the state exchanges applies to everyone whether those established under the federal exchanges or the state exchanges.

**Dr. Darrell Bock**

So the issue is a hermeneutical one if I can try and say this in a paragraph. Is a hermeneutical one in which you have the language of the statute, which on the surface looks to be clear, but which the court at least the decision of the court argued was ambiguous. And how that applies and then the debate on the other side is, but if you look at the intent of the legislation and what it was intending to do as a whole, everything else and they refer to what they called, I think in artful crafting or something like that in discussing this.

That I think the counter argument is there's no way the real intent of this was to really limit this to the states and to isolate people away from coverage. The whole point of the act was to make sure everybody was covered. And so that's –

**Hon. Van Broekhoven**

See I don't agree with that, Darrell.

**Dr. Darrell Bock**

Okay.
I think the intent of that language was to coerce the states to become a part of the ObamaCare. And the language that flowed around Washington during the time the statute was initially issued and signed into law suggested that component of it.

I see. So they wanted to try and preserve the state's rights and state choice element in this process while also trying to craft this law that theoretically would bring everybody under coverage?

I think that's basically true.

Okay. Jeff, do you have any comment on the structure of this case and what we're looking at here?

No, I agree with both of you. I think essentially this is a statutory construction case. Hermeneutical for us in the law we would say statutory construction and I also think it's a separation of powers. I think that's how the Chief Justice viewed it. As you've got a signature piece of legislation by the president, passed by the congress and they went out of their way to save it. I think in the end that's what it is. They used statutory construction in order to do it. But I think and I think the judge would agree, I think Justice Scalia probably has the better day and the better argument but at the end he didn't have the votes.

Interesting. Now when we talk about statutory construction and we're talking about, it's the debate about how this statute is actually worded. Is that what you mean by statutory construction?

Yeah and as the judge noted established by the state. That's the key phrase. What does that phrase mean? Justice Scalia would say it means established by the state. Not you know to save it in order to if the state didn't establish it you still qualify for an individual tax.

Now the chief justice wrote this opinion and which came out in a way that preserved ObamaCare. And basically his argument was is that seeing in light of the entirety of the statute and the intent of the statute this was – it was clear that if you worked it the way the statute was written you wouldn't accomplish what the statute as a whole was seeking to accomplish. Isn't that fundamentally what he was arguing?
Yeah and the response on the part of Scalia was that's not an excuse for rewriting the statute. And I think basically what happens is we are dealing with statutory construction as was just said a separation of powers. But it's not just separation of powers horizontally at the federal level. It's a separation of powers between the central government and the states.

Okay. And then the decision itself ended up being a dispute about what right the court has to fix poor writing of a piece of legislation, isn't that right?

I think that's right. And those of us that have been judges have said that's not our prerogative. We read the statute as it's written.

Oh, I see. Okay, I'm not going to get lost in the details of this, because obviously as we have corresponded about this I've said this is going be a wonderful illustration even in the theological hermeneutics class for hermeneutics. I mean all the argumentation to and fro, if we changed the legislation from ObamaCare to the way certain passages are put together and debated for what they mean, we would be in very similar discussions in terms of how to deal with the whole versus the parts and those kinds of questions. It's an interesting hermeneutical exercise. Unfortunately most people are not hermeneutists and don't care to be.

So as a result I'm not sure how much more there is to say on it. But the core of this is basically this was a very technical legal case in terms of the separation of powers and making sense out of this statute. Is that right?

Well, I would say that those that favored the result would argue that that was what it was all about.

Uh huh.
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<td>Those of us that favor the use of language and its plain meaning would argue that words mean something, both as written and within the context in which they're written. And so what you have here is a subsidy provision and the authority of the Secretary of Health and Human Welfare, Health and Human Services is under one complete section of the statute and then the authority to establish exchanges and the subsidy language is under a completely different section.</td>
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<td><strong>Dr. Darrell Bock</strong></td>
<td>Interesting. Let me ask, this practical question came to me. This may be a silly question. And it's a question of someone who is obviously a layperson, but when adjudicating the writing of a statute like this, does anyone sit down and interview the people who wrote the legislation? Does that become a part of this process at all and why or why not?</td>
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<td><strong>Jeff Mateer</strong></td>
<td>It doesn't. At least not in the sense of you sit down and find out for instance call the person who drafted it. But you can look at legislative history to make a determination. However you don't – and I think this is what Justice Scalia would say. You don't jump to intent until there's a conflict. You can't read the language. And in contract law for instance if a provision in a contract is clear, then you don't go to what the parties intended. You just enforce – as the judge said you enforce the language as written. And that's where will, I mean when you look at the six Supreme Court judges, the language is clear. I mean established by the state means something. We can read it and look at it. However the judges here looked at it and said, &quot;Well, it can't mean what it says. Therefore we're going to figure out what it means and we're going to save this statute.&quot;</td>
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<td><strong>Dr. Darrell Bock</strong></td>
<td>Yeah. I tell you the reason why I ask that question is because at least in philosophical hermeneutics and theology there's a lot of discussion about intent. That words aren't independent of one another. They aren't even independent of a context. They come from a mind and someone from produces that language. And they produce that language to express a certain intent. That's the word we use. And so it seems like to me at least a part of the process of this particular discussion would be to say what was it legislators I don't actually intended by this language and to actually force that out? Now if in the midst of that discussion you find that the phrase was intended and utilized in a variety of ways, the people signed onto it. That becomes part of your pot to assess, if I can say it that way.</td>
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But if you actually are able to resolve that question, doesn't that help resolve the linguistic question and the hermeneutical question that you're going after? Is there a legal reason for not going there, I guess is what I'm asking?

Hon. Van Broekhoven

I guess I would say since I graduated from law school where we looked at legislative intent differently than we do now, basically – and you've got a problem with whether our contract is written by a committee or a statute is written by a legislature versus a single individual. How do you determine that intent?

And when I graduated from congress – I mean from law school we tended to look at what the legislative intent was by looking at the history of the law. That has moved over the years toward a more inherence to what we would call the plain meaning rule, where you look at the language. And you don't even get into the question of legislative intent unless there's an ambiguity. And you still have problems. And I think what Scalia would argue and what the argument I've heard around Washington before this case was issued as well as since it was issued was there was no ambiguity. The language stood as it did very clearly. And I think the problem with the chief justice's decision was he recognized that without this language it could cause the "Death spiral". Where the law would fall apart.

And so he was trying to save the law. That's not the purpose of the Supreme Court of any judicial decisions. And that's the problem I have.

Dr. Darrell Bock

I see and I get it. Like I say this echoes conversations we have in our theological and hermeneutics classes. In which do you interpret the line in relationship to what it says and should it be intention with the larger piece of what you're dealing with. Then how do you adjudicate that problem? And my sense is in reading the Chief Justice he says – in fact I think most – the Chief Justice says that the plain meaning argument is a strong argument. He acknowledges that.

Then he goes on to say in effect who would construct a law that would have this possibility within it in which there are some people who are not covered when the intent of the law was to make sure everybody was covered. I think that's how he's seeing it.
Hon. Van Broekhoven

Yeah, I think basically what he ignored was at least what seemed to be surrounding the law at the time was the coercive effect of writing it this way to make sure that everybody got the subsidy without regard to whether they were enrolled under a state exchange or under a federal exchange.

Dr. Darrell Bock

Now this raises another question that's not related to the decision, but I think maybe another part of the piece of the puzzle that we're dealing with here and the practicality of this particular case. And that is had this decision gone the other way, had Scalia prevailed and the statute was left as written so that only the state exchanges would have been operative in terms of offering subsidy, then we would – the only way to fix the legislation in terms of the long term intent would have been to redraft the legislation in the legislature – in the congress.

And don't you think that those who were – who played with the language, if I can say it that way – said well, given what we're dealing with today and what the kind of congress we have et cetera, that would be a mess as well. None of that was said, okay, but my sense is that's floating around in the background somewhere isn't it?

Jeff Mateer

Oh, I think it was. But I don't think that's an excuse.

Dr. Darrell Bock

Yeah.

Jeff Mateer

I mean just because it's hard.

Dr. Darrell Bock

Yeah.

Hon. Van Broekhoven

Yeah, one of the things that I was at a forum Thursday at Georgetown University and Ken Starr talked about the conversation that exists between the courts and the congress. And essentially if the court had come down with a way as Scalia thought it should and the way a lot of the writers I read thought it should, basically at that point congress was already trying to think of a fix that would avoid the death spiral that would avoid the problems in their own congressional districts on allowing people to enroll.
And so essentially what happened when the court decided the way it did is it cut off that conversation. And congress no longer had a possibility. Not every writing of the old statute, but it's simply dealing with the subsidy question.

_Dr. Darrell Bock_ Interesting. You know now there's an irony in this, and I'm going to transition now to the other case, because I think this is the irony. Is that what in effect I'm hearing you say is that in both of these decisions a similar thing was done. In that there's a democratic process and a structure of the way our government is designed to operate. And the justices for whatever reason they chose to do, exercised their power in such a way that the normal way these structures should work were precluded from working in the justices in effect made if I can use a phrase probably not technically correct, made a summary judgment on behalf of – and out of some degree of practicality if I can say it that way. Put that in quotes. The way they were reading the situation and thus in both instances and the Chief Justice was on different sides in this case. And these two cases.

But in both instances what the justices did was to take on a responsibility that technically speaking might not have been theirs. Fair enough?

_Hon. Van Broekhoven_ That's fair.

_Dr. Darrell Bock_ Okay. Okay. Well, let's transition now to the other case, this is Obergefell versus Hodges among others. This is actually a grouping together I think of several cases related to same-sex marriage. And we are resuming a discussion we had I think when the Windsor Case came down. I think that's the right name.

_Hon. Van Broekhoven_ Right.

_Dr. Darrell Bock_ When there was a recognition of the right of same-sex marriage. And in his dissent, Justice Scalia made the point of we're going to come back to this. We're going to come back to this and you're going to see down the road a case that forces all the states kind of into the same situation. I mean – and I don't think he had to be much of a prophet to make that statement. I think that you could see the direction that things were going and this is what was happening at a legal level.
And so what I want to do in talking about this case is to actually look at the decision itself, which was written by Justice Kennedy. And look at the four premises for arguing that same-sex marriage comes under the protection of the 14th amendment. But to do that first probably it would be a good idea, Jeff, if you would help us with telling us what the 14th amendment is so that people understand why we're connecting it to this.

Jeff Mateer

Yeah, the 14th amendment is a series of three amendments passed after the civil war. They're called the Civil War amendments. They were clearly the purpose of the framers of the 14th amendment were to eradicate slavery and its effects. And the 14th outlawed slavery, and the 14th then guaranteed two things, due process rights and equal protection of the laws.

And through the years the 14th amendment has been expanded to find what so called fundamental rights. In the past the court has interpreted those fundamental right as having some sort of historical basis. Obergefell goes beyond that. And because even Justice Kennedy recognizes in his majority opinion, again a five four decision that historically for millennia this right has not been there. But all of a sudden knew as of June 26th there is now a fundamental right pursuant to the 14th amendment to both clauses, due process and equal protection that all states have to recognize marriage licenses of same-sex couples.

Dr. Darrell Bock

So in previously this has been – it started with slavery, but didn't it come to – was the women's right to vote brought under the 14th amendment?

Jeff Mateer

No.

Dr. Darrell Bock

What –?

Jeff Mateer

No under the 14th – there's actually a constitutional amendment –

Dr. Darrell Bock

For women's rights?
Dr. Darrell Bock: Okay, so let's take a look at the premises and I'm reading directly from the decision here. And for those of you who care to look it up and to be sure that I'm being fair and just on this, I'm on page three of the decision by Kennedy. This is what he says. He says, "The first promise —" well, let me back up. "Four principles and traditions demonstrate that the reasons marriage is fundamental under the constitution —" yeah, "The reasons marriage is fundamental under the constitution apply with equal force to same sex couples." So here we go.

And I'm going to list out the four and then we can talk about them as a group. "The first premise of this court's relevant precedence is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why loving and validated interracial marriage bans under the due process clause." So that's the first one.

Second principle, "In this court's jurisdiction is that the right to marry is fundamental, because it supports a two person union unlike any other in its importance to the committed individuals." Then he talks about the legal basis for that. Third, "A third basis for protecting the right to marry is that it's safeguards children and families and thus draws meaning from related rights of childbearing, procreation and education." We'll come back to that one.

And then fourth finally, "This court's cases in the nations traditions make clear that marriage is a keystone of the nation's social order." And then it goes onto talk about how the state has supported that.

So now the last paragraph in this section reads as follows, "The limitation of marriage to opposite sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest." Okay. So that's Justice Kennedy. And now I'm going to play my theological card. I'm a theologian. Not a lawyer. Okay, so I'm going to let the lawyers speak for the four premises.
Who wants to go first?

*Hon. Van Broekhoven*  There's no law in any of these four premises. So you're capable of speak on them as you want.

*Dr. Darrell Bock*  Okay.

*Hon. Van Broekhoven*  There is just simply no rationale. And if we go back to the Burwell-King case, I argued in a blog post on that one that what we were dealing with in Obergefell is a matter of definition. We weren't even talking about rights. And what happened significantly in Obergefell was he changed the entire definition of marriage, which by his own admission it existed for many millennia and across many civilizations.

So you've got a language problem to start with. And what is interesting is that the Chief Justice has problems with this and he had problems in an Arizona legislative case to define legislature but he had no problem in King versus Burwell changes the meaning of the language. But my sense is that if you go back to for example the Casey case, which was an abortion case Justice Kennedy talked about dignity and personal autonomy. And he picks up those two themes here. He's not talking about law. He's talking about autonomy and personal dignity. And to a certain extent that harks back to how he ties them to the right of privacy that was just mentioned.

*Dr. Darrell Bock*  Yeah, we're going to work through these a little bit one at a time in just a second. I want to get Jeff's comments first. And then I do want to work through them. Because I have comments I want to make on the first and the fourth points.
Jeff Mateer

Yeah, and I mean we can start with the first. I mean the first the interesting, because he talks about the right to personal choice regarding marriage is inherent in the concept of individual autonomy. As the judge noted no cites to legal precedent. That should be the first clue that something is amiss here. The second thing is marriage in this country and in the United States has historically been a state issue. And so when he talks about marriage being – and bringing it now that it's some sort of federal right. That's really contrary to 200 years of constitutional law. And so he's mistaken in that. And then of course they throw out and you go to you throw out the loving case, which had to deal with interracial marriage.

Dr. Darrell Bock

Right.

Jeff Mateer

But again that was race, the reasons for the 13th, 14th and 15th amendments were to eradicate racial discrimination. It made sense that the court in Loving versus U.S. use those to strike down a racial discrimination case. There's none of that here. And so I think on the first one I think it's just incorrect constitutionally to say that somehow there's a right to marriage somewhere, was lurking in the 14th amendment. So don't forget this Supreme Court case overruled another Supreme Court case from the 1970's that said there was no right to same-sex marriage.

Dr. Darrell Bock

Yes. And not only that it also contradicted, I'm glad you brought up state's rights, because in the earlier decision which was the Windsor decision there was an effort to preserve state's rights in that decision, which this decision now overturns.

Again just to make this clear, because we're trying to – we're trying to get people to understand all that's involved here. There's a practicality that the justices are wrestling with here that is a genuine real problem. And it's this, you've got certain states recognizing same-sex marriage. And then those couples move to states where same-sex marriage is illegal and those kinds of things. What do you do with the uneveness in our laws? That's probably why this case made it to the Supreme Court or an aspect of why it made it to –?
Jeff Mateer
Well, I think it's an aspect. I mean here you had the sixth circuit go on contrary to other circuits. Which is the classic circuit split, which causes the Supreme Court case. But there are other issues in which some laws are treated differently in different jurisdictions. The state of Colorado has legalized marijuana, does that mean all the states have to legalize marijuana? Of course not. I mean the states are founders viewed the states a place for experimentation. So the court asked two questions in Obergefell it really answers only one and therefore answers the second. The first one is does the 14th amendment require all states to license same-sex? The second question, which they could have said no to that and answered the second was, does a state have to recognize another state's issuing of a marriage license between same-sex couples. I mean the court could have said it's not a fundamental right, but under full faith and fair credit states are going to have to accept.

Dr. Darrell Bock
Now that raises an issue that I think can get lost than important. And that is before this decision was made, I think in the back of my head there were three possible scenarios for how this decision could have been made. Recognizing that the likelihood was that some type of pro same-sex marriage decision was coming down the pike. And two of those options, I don't remember the details on them now. Two of those options involved not directly linking this right to the 14th amendment. But in some ways circumscribing it so that you didn't have what we're going to discuss next which is the possibility of the 14th amendment and the first amendment being intention with one another.

But that was a route the court did not take. And this was the most – if I can describe it or characterize it. This was the most extensive way to make this decision given the options that were on the table as the court was running into this. Have I got that basically right, Rollin, or am I – have I messed that up somehow?
No, I think you've got that right. The problem with the whole decision is any legal rationale is totally absent. So you're dealing as I've said before where a judge writes – a justice writes an opinion citing primarily earlier opinions that he has written. And it's kind of a lazy way to start doing your homework. And so you know he goes back to the Lawrence case in Texas that decriminalized if you will, homosexual activity, and then he takes the Robert case out where he throws out a state ban or a state declaration of what marriage is. And he moves to this area. And Scalia said in the Lawrence case, we've only begun to see where this is going. And so I think the problem is that there's a philosophical drive which I am not sure is libertarian in its origin or whether it is more just interested in providing equal rights for same-sex couples and individuals.