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Hail to the chief

FOR the second time in three years, Chief Justice John Roberts has departed from his conservative colleagues and voted to keep Obamacare chugging. In 2012, he authored the majority opinion in a 5-4 ruling that turned back a constitutional challenge to the law's requirement that most Americans buy a health insurance policy. This time, he wrote for six justices in scuttling an objection that the legislation, as written, is self-defeating. Mr Roberts is again being booed on Fox News and by opponents of the law. Michael Cannon, a director at the Cato Institute, a libertarian think tank, says the ruling has "validated President Obama's massive power grab" and is proof that the Supreme Court has "allowed itself to be intimidated".

But to read his characteristically lucid 21-page opinion, there are few signs Mr Roberts has been cowed into submission. He seems, instead, rather to like Obamacare. The first few pages of the opinion are about the clearest precis you'll find of the crisis in the American health-care system and how the Affordable Care Act has attempted to ameliorate it. Reading those 1000 or so words, it's hard not to notice inflections of admiration for Barack Obama's signature legislative achievement. The law's three main provisions, Mr Roberts writes, "are closely intertwined" or even "interlocking". "Congress found" that requiring health-insurance companies to issue policies irrespective of subscribers' pre-existing conditions, and mandating that most people buy themselves a policy, "would not work without the tax credits."

The issue that launched King v Burwell was a legislative glitch involving four troublesome words. Tax credits to low and middle-income Americans may be allocated, the law reads, to people buying policies through "exchanges"—that is, online marketplaces—"established by the state." But only 16 states opted to set up their own insurance exchanges, leaving the federal government (under a backup provision of the law) to establish the rest. So did the Internal Revenue Service violate the law when it provided tax credits to people who bought health insurance on both state and federal exchanges? A literal reading of those four words suggests that the millions of Americans buying health care on federal exchanges do not qualify for a federal subsidy.

While granting that the ACA is plagued by "inartful drafting" and accepting that the challengers' view gives the phrase established by the state "its most natural meaning", Mr Roberts argues that context is key. Congress simply could not have intended to deny a primary benefit of the law to so many Americans. "[T]here would be no 'qualified individuals' on federal exchanges" to

receive subsidies, he writes, if the law did not countenance such subsidies in the first place. "And that's a problem."

Even worse is what happens when the subsidies dry up. “The combination of no tax credits and an ineffective coverage requirement could well push a state’s individual insurance market into a death spiral” whereby premiums rise and enrollments fall. “One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent”, the chief notes. “Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent.”

The tax credits, then, “are necessary for the federal exchanges to function like their state exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid....Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.”

In dissent, Justice Antonin Scalia could not be restrained. The majority’s reading of the law “is of course quite absurd,” he begins, before becoming somewhat less polite. “Words no longer have meaning if an exchange that is not established by a state is ‘established by the state’ ". It takes a Supreme Court justice “with no semblance of shame” to conclude otherwise.

And it is no excuse to claim that the challengers’ reading of the law is acontextual. “I wholeheartedly agree with the court,” Justice Scalia writes, “that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.”

Mr Scalia has not changed his tune on this view of statutory interpretation over his nearly three decades on the court. In his 1997 book A Matter of Interpretation: Federal Courts and the Law, he wrote, “Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.” Today, Mr Scalia put several exclamation points on that sentiment. “[C]ontext only underscores the outlandishness of the court’s interpretation”, he wrote. The chief justice’s opinion is a “defense of the indefensible” with reasoning that “suffers from no shortage of flaws.” The Supreme Court “has no free-floating power ‘to rescue Congress from its drafting errors.’ “

In doing just that, Justice Scalia charges, the majority has betrayed their duty as judges. King v Burwell will broadcast the “discouraging truth that the Supreme Court of the United States favours some laws over others, and is prepared to do whatever it takes to uphold and assist its favourites.” Whether or not Obamacare is a “favourite” of Chief Justice Roberts, Mr Scalia’s

analysis contains a seed of truth. John Roberts's decision in King v Burwell is a gift from one chief to another.