COMMENT ON PROFESSOR GLUCK'S "IMPERFECT STATUTES, IMPERFECT COURTS"

Richard A. Posner[*]

Professor Abbe Gluck is far more steeped in the scholarly literature on statutory interpretation than I, and far more familiar with the workings of Congress than I, including the specific legislative process that generated the provision of the Affordable Care Act[1] that was at issue in *King v. Burwell*.[2] It would be an impertinence, therefore, for me to criticize her Comment, and I have no inclination or intention to do so. But I do have experience in judicial interpretation of statutes, being a judge, and I do have my own ideas about statutory interpretation, and they differ somewhat from Professor Gluck's. They differ in being simpler, cruder — and cynical. And being simpler and cruder, they can be set forth with considerable brevity.

Professor Gluck sees the Court struggling in the *King* case to work out an approach to statutory interpretation that would be based on a realistic understanding of the modern Congress and a sense of the proper balance between Congress and the courts in determining the meaning of particular statutes. She discusses theoretical approaches such as textualism,[3] and interpretive rules such as the "canons of construction,"[4] and sees the Supreme Court Justices trying to use these approaches and rules and other analytical tools to figure out the best interpretation of statutory provisions that get drawn into litigation. The picture is of judges as neutral problem solvers.

I daresay that some judges (and Justices) some of the time actually use these approaches and these tools (other than as window dressing), and that more think they are using them but aren't really. But I think that most of the time statutory interpretation is better described as creation or completion than as interpretation and that politics and consequences are the major drivers of the outcome. So take this old chestnut: an ordinance states "no vehicles in public parks." An ambulance driver is ticketed for ignoring the ordinance (though its text is clearly posed at the entrance to the park) by driving the ambulance into the park to save a person who has fallen into a pond and is strug-

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[*] Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

[1] Pub. L. No. 111-148, § 1401(a), 124 Stat. 119, 213–14 (2010) (codified as amended at 26 U.S.C. § 36B (2012)).

[2] 135 S. Ct. 2480 (2015).

[3] Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 63–64 (2015).

[4] *Id.* at 91–93.

gling. Has the ambulance driver violated the ordinance? Yes if the ordinance is interpreted literally. But the literal interpretation has absurd consequences. A judge is apt to say: the city council, or other official body, that enacted the ordinance couldn't have wanted the ordinance interpreted literally. They "meant" there to be an exception to the prohibition of vehicles, but just forgot to write it into the ordinance. So a correct judicial "interpretation" is that "no vehicles in public parks" means "no non-emergency vehicles in public parks."

This is the right result, but I don't think it's a product of interpretation. Through carelessness, haste, stupidity, or some other defect in the legislative process, a critical provision was left out of the ordinance; and the courts, to avoid a bad consequence, will pretend it's there. Which is essentially what happened in *King v. Burwell*. Because of the extraordinary complexity of the congressional process (authoritatively described in Professor Gluck's article) that resulted in the enactment of the 2700-page Affordable Care Act, the Act said "an Exchange established by the State" where, to avoid absurd consequences in states that had failed to create their own exchanges, it should have said either "an Exchange established by the State or the Federal government" or just "an Exchange."[5] So in effect the Supreme Court either inserted four words ("or the federal government"), or deleted all but "Exchanges," in order to avoid a bad consequence.

But in what sense "bad"? Three Justices dissented, in an opinion by Justice Scalia.[6] Two of the Justices who repaired the Act by in effect rewriting the exchanges provision, Chief Justice Roberts and Justice Kennedy, are conservative, as are of course the three dissenters (Justices Scalia, Thomas, and Alito). Conservatives *hate* the Affordable Care Act, because they hate any emanation of President Obama. (They did not hate the quite similar statute that Mitt Romney engineered for Massachusetts when he was Governor of that state, because Romney is one of them.) Justice Kennedy is erratically conservative, but how to explain Chief Justice Roberts's votes in both Affordable Care Act cases decided by the Supreme Court, the 2012 challenge to the entire Act[7] and the 2015 challenge to the exchanges provision? Professor Gluck suggests that Chief Justice Roberts is struggling to alter the relation of the courts to Congress in statutory cases,[8] but an alternative is that he is struggling to preserve the Supreme Court's, and his own, standing in the public eye. 2012 was a presidential election year; 2015 is the first stage of the next presidential campaign. A decision against the Affordable Care Act in either case would have been a

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[5] *Id.* at 76–77.

[6] *King*, 135 S. Ct. at 2496 (Scalia, J., dissenting).

[7] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[8] Gluck, *supra* note 3, at 110.

gift to the Democrats in campaigning for the Presidency, because the decisions would have created turmoil in the health care market and would have deprived many people of subsidized health benefits, and would have been produced by a judicial majority consisting exclusively of appointees of Republican Presidents (Reagan and the two Bushes). As Chief Justice, Roberts would have been a particular target, as Warren was the particular target of critics of the extremely liberal "Warren Court," because the public has a tendency to identify the Court with its Chief Justice.

I don't know Chief Justice Roberts; I am not privy to his thinking. I suppose it's *possible* that his decision in the *King* case was the product of protracted rumination on the academic and other extrajudicial literature on statutory interpretation — the works of H.L.A. Hart and Henry Hart and William Eskridge and John Manning and Felix Frankfurter and Learned Hand and Antonin Scalia and countless others, including Professor Gluck — but I am dubious.

If I'm right that the superstructure of doctrine and scholarship that dominates judicial and academic discussion of statutory interpretation is largely superfluous to an understanding of what judges do when they "interpret" statutes, the question arises why the superstructure has been erected. There are multiple answers. One is that judges tend to tread cautiously when dealing with legislatures, because legislatures — Congress, if one is speaking of federal judges — have considerable power over judges with respect to appointment, removal, salary, and tenure. Legislators do not bridle at common law, because, though it is judge-made "legislation" in a realistic sense, it is subject to legislative revision. But they do not — and especially members of Congress do not — cotton to aggressive judicial interpretation of their handiwork. They are likely to consider it an encroachment on legislative prerogatives. So judges like to pretend that when they interpret a statute they are merely articulating what the legislature intended but expressed imperfectly.

Another cause of the judicial pretense (for I think it is largely pretense) of judicial deference to Congress is a desire of judges to hide behind the "law" — "the law made me do it" might be a judicial motto. Most judges would be profoundly uncomfortable having to explain that they had "interpreted" a statute in a particular way because an issue had arisen that the legislators had not envisaged when they enacted the statute and so the judges resolved it in what they thought was a sensible way at least roughly congruent with what the statute seemed to be concerned with. In short, judges prefer for reasons of self-protection to be thought of as agents rather than as principals.

Another obstacle to meaningful statutory interpretation that judges are reluctant to acknowledge is that a statute is the output of a group rather than of an individual. The legislators who voted for the statute may not have agreed on its scope of application, so that if a new and

unforeseen issue within the statute's semantic scope arises it may be impossible to say how the legislature would have resolved it had they foreseen it. But the judges still have to decide, though the decision cannot be "interpretive" in a meaningful sense.

Still another cause of the elaborate conceptual structure that has arisen to enable meaning to be assigned to vague or inapt or ill-considered statutory provisions is that judges and law professors are forever "complexifying" law. They will not leave well enough alone. Take the matter of "standards" of appellate review. They are many, including plenary review, abuse of discretion, arbitrary and capricious, substantial evidence, clearly erroneous. The impression conveyed is that the weight that an appellate court gives to a lower court's or administrative agency's decision varies in accordance with the particular standard applied. But the only real as opposed to nominal difference is between plenary review, of pure issues of law, and mildly deferential review, of findings of fact and applications of legal doctrines to facts found by the lower court or agency. Review of pure issues of law has to be plenary as otherwise, within a single federal circuit for example, different district judges might adopt and apply different rules of law. For the rest, difficult cases will be resolved by affirmance of the lower court or agency if the appellate court agrees with the result, considers the case a toss-up, or, though dubious or uncertain, is willing to defer because impressed by the seeming competence and demonstrated greater familiarity of the lower court or agency with the facts.

With regard to judicial review of statutory issues, we have, in part as a counterpart to the confusing medley of standards of review, the fifty-seven canons of construction approved by Justice Scalia and Mr. Garner in their formidable treatise,[9] and we also have the *Chevron* doctrine[10] and the "hard look" doctrine[11] and "plain meaning" and legislative purpose and much else besides. And yet if one considers the interpretation of difficult literary and historical texts (the Bible for example), one discovers that it's done by critics and scholars without the aid of a system of rules. For interpretation is a natural process; we do it any time we hear someone speak and any time we read anything. Interpretation can be difficult but it isn't made easier by bringing a formal apparatus to bear; it is made easier by familiarity with the texts to be interpreted. And cases must be decided even if interpretation is impossible and the judges must bluff their way to a decision — which is often.

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[9] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

[10] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[11] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

I mentioned political factors, which I think must have played a role in the votes of the Justices in the two Affordable Care Act cases. But I don't want to exaggerate the influence of those factors on judicial decisions. They are only a subset of the "priors" that influence judicial decisions. Confronted with a novel issue to resolve, one often will have an intuitive, even an unconscious, response; and while that response may be modified or even abandoned as one gathers evidence bearing on the issue, it often will still have an impact, sometimes a decisive impact, on one's final decision. And that is true in judging. Judging is not a hard science, a soft science, or any kind of science. Law is not a scientific discipline even to the extent that the social sciences are scientific. And the result is that judges' priors, which include but are not exhausted by the judges' political or ideological leanings, are bound to influence many of their decisions. This need not be a bad thing, because their priors will often be fruits of experience and insight. My point is only that the more difficult it is to gather evidence to challenge one's priors, the more likely the priors are to determine the outcome of a case.

Because interpretation is so natural, instinctive, and unsystematized an activity, notably in law, priors, including political or ideological ones, are bound to influence many decisions involving the application of statutes. *King v. Burwell* may well have been one such decision and *National Federation of Independent Business v. Sebelius*[12] (the predecessor Affordable Care Act case) another.

[12] 132 S. Ct. 2566.