

The Supreme Court's rule by talking points

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Body

In the United States, we frequently reaffirm that we have a government ruled by laws, not men. The Supreme Court recently suggested a third possibility -- rule by talking points.

In deciding two pivotal cases concerning the Affordable Care Act and the Fair Housing Act, the Court interpreted these laws according to the rhetoric surrounding them, rather than the rules that Congress actually enacted.

In *King v. Burwell*, Chief Justice John Roberts held that an "Exchange established by a State" includes healthcare exchanges established by the federal government. Rather than follow the natural reading of the law -- that "established by the State" means "established by the State" -- Roberts resorted to the Affordable Care Act's purported goals, echoing the arguments of political supporters that giving the law its ordinary meaning would push health insurance markets into a "death spiral." The talking points trumped the law.

Similarly, in *Texas Department of Housing v. Inclusive Communities Project*, the Court held that disparate impact liability was actionable under the Fair Housing Act. Everyone agrees that this statute forbids intentional discrimination "because of" race, but the law is silent with respect to policies that are not facially discriminatory but might incidentally have a disparate impact on one race. Even so, in a 5-4 decision, Justice Anthony Kennedy rejected this ordinary reading. He held that the Fair Housing Act has a "continuing role in moving the Nation toward a more integrated society," and thus allowed a case on disparate impact liability to move forward. The talking points won again.

The Court explains these and other decisions as relying on the "purpose" of a law. But in ordinary language, the purposes of the law are just its talking points. What is the law trying to accomplish? What is the mischief to be fixed? Why is this law important and necessary?

Even for good textualist judges, the purpose of a law plays an important role in understanding a law's meaning because it provides context for what Congress did. Knowledge of a law's purpose can also help the public understand complex regulatory schemes like Obamacare that even most legislators cannot be bothered to read.

Still, the talking points of a law are not the law. A true government of laws cannot exist without reference to the specific, complex language that actually passes Congress and ends up in the U.S. code. Obamacare may have intended to increase access to healthcare or bring down healthcare costs, but those purposes tell us little about what Congress did to achieve those goals or whether it would be effective. Purpose can shed light on meaning, but it should not be used to rewrite statutes.

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Many important Supreme Court decisions now relate to the arcana of statutory interpretation. As such, their reasoning rests in the lawyers' domain, relatively inaccessible to most citizens. Yet methods of interpretation have important consequences for our democracy, the political process, and the role of courts.

Enacting laws is difficult business, especially with complex and contentious issues like healthcare or racial discrimination. Laws rarely promote their purposes to the fullest extent. Even some members who vote for a law are likely to have reluctance about its goals and methods. What eventually gets passed by the House and Senate and signed by the president is often an amalgam of compromises, concessions and competing values. Talking points fail to capture this reality.

The judiciary has a duty to "say what the law is," not what some lawmakers hoped it would be.

Our federal courts were designed for independence precisely so they could exercise judgment and stay out of the talking points business. This term the Court has demonstrated, in constitutional and statutory cases, how grand themes rarely make for good law.

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