THE IMPACT OF *KING V. BURWELL* ON JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: AN EXCEPTION TO *CHEVRON,* A MOVE FROM TEXTUALISM, OR SOMETHING ELSE?

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Abstract

Over a year has passed since the Supreme Court rendered its decision in the *King v. Burwell* case. Despite confirming the validity of the law, the case raised more issues regarding interpretation of administrative rulings. This paper will review the importance of the ACA followed by a discussion of previous cases where courts were called upon to review agency determinations, paying close attention to cases involving the interpretation of tax law. The paper next discusses the legal controversies surrounding the regulations issued under IRC section 36B decided by the lower courts in *King v. Burwell*, as well as two related cases, followed by an in depth discussion of the Court's opinion. The paper then analyzes several legal commentaries of the Court's decision in *King* and how it may affect subsequent decisions posit that the Supreme Court has opened the door to more viable challenges to administrative rulings, particularly those from the Treasury Department and the IRS. Implications for business conclude the paper.

I. INTRODUCTION

One of the most important and perhaps most controversial highlights of the Obama Administration was the passage of the Patient Protection and Affordable Care Act (ACA).[1] For years, jurists, politicians, health care experts, insurers, and employers debated how to make health care services more accessible to the millions of Americans who were not covered by health insurance.[2] The result was a compromise that extended the employer-provided medical insurance system, restructured the individual insurance market, and attempted to make health insurance more affordable through increasing eligibility for Medicaid and helping people with moderate incomes to pay for health insurance.[3]

A key component of the ACA is the provision that subsidizes health insurance premiums through a refundable premium assistance tax credit (PTC).[4] The PTC was made available in an attempt to defray the cost for individual health care coverage purchased through an insurance exchange in order to make health insurance more affordable.[5] These tax credits are provided to people with projected income of more than 133 percent but not more than 400 percent of the federal poverty line (FPL).[6]

The language in the Internal Revenue Code (IRC) giving rise to multiple legal challenges and inconsistent holdings centers around the meaning of the provision that grants the subsidy to taxpayers who purchase insurance on an Exchange "established by the State."[7] In all the lawsuits contesting the meaning of these words, the plaintiffs argued that the Internal Revenue Service's ("IRS") broad interpretation of IRC section 36B to authorize the subsidy for insurance purchased on exchanges established by both the Federal government and state

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1. Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2010).

2. Jonathan Oberlander, *Long Time Coming: Why Health Reform Finally Passed*, HEALTH AFFAIRS 29, no.6 (2010).

3. Jennifer Tolbert, *The Coverage Provision in the Affordable Care Act: An Update (2015)*, KAISER FAMILY FOUNDATION, http://www.statecoverage.org/files/KFF_Coverage_Provisions_in_ACA_Updated.pdf.

4. I.R.C. § 36B (2012).

5. *See id.* at § 36B (B)(2)(A) (§ 36B focuses on "refundable credit for coverage" for qualified taxpayers and the "premium assistance credit amount" analyzes the taxpayer's health plan and household income); *see also* Edward A. Zelinsky, *The Health-Related Tax Provisions of PPACA and HCERA: Contingent, Complex, Incremental and Lacking Cost Controls,* N.Y.U. REV. EMP. BENEFITS & EXEC. COMP. 5, 26 (2010), http://ssrn.com/abstract=1633556 (summarizing the many tax provisions of the ACA).

6. Lawrence Zelenak, *Choosing Between Tax and Nontax Delivery Mechanisms for Health Insurance Subsidies,* 65 TAX L. REV. 723, 724 (2012).

7. I.R.C. § 36B (2012).

governments[8], was contrary to the language of the statute, which, they asserted, authorized tax credits only for individuals who purchased insurance on a state-run exchange.[9] Consequently, the Supreme Court of the United States ("SCOTUS") granted certiorari to review the Fourth Circuit decision in *King v. Burwell*.[10] Oral arguments were heard on March 4, 2015, and the Court issued its ruling in favor of the Obama Administration on June 25, 2015.[11]

In upholding the ACA, however, the Court did not follow its own established precedent in deferring to administrative construction of statutory language. Instead, it reviewed the language de novo and arrived at the conclusion that the words "established by the State" should be broadly construed to effectuate the intent of Congress.[12] This approach has be construed by some legal theorists as a retreat from judicial deference to administrative agencies[13] or the continuation of the exception to the rule when interpretations of tax statutes are at issue.[14] It also may represent a shift from the textual approach advocated by the late Justice Scalia to a more contextual approach.[15] This paper will review the importance of the ACA followed by a discussion of previous cases where courts were called upon to review agency determinations, paying close attention to cases involving the interpretation of tax law. The paper next discusses the legal controversies surrounding the regulations issued under IRC section 36B decided by the lower courts in *King v. Burwell*, as well as two related cases, followed by an in depth discussion of the Court's opinion. The paper then analyzes several legal

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8. TREAS. REG. §1.36B-1(K), 26 CFR §1.36B-1(K) (2015) refers to the definition of "Exchange" in 45 CFR §155-20 which defines exchange as follows: "Exchange means a governmental agency or non-profit entity that meets the applicable standards of this part and makes QHPs available to qualified individuals and/or qualified employers. Unless otherwise identified, this term includes an Exchange serving the individual market for qualified individuals and a SHOP serving the small group market for qualified employers, regardless of whether the Exchange is established and operated by a State (including a regional Exchange or subsidiary Exchange) or by HHS."

9. King v. Burwell, 759 F.3d 358, 363 (4th Cir. 2014), *aff'd*, 135 S. Ct. 2480 (2015); Halbig v. Burwell, 758 F.3d 390, 398 (D.C. Cir. 2014); Indiana v. I.R.S., 38 F. Supp. 3d 1003, 1008 (S.D. Ind. 2014); Oklahoma ex rel. Pruitt v. Burwell, 51 F. Supp.3d 1080, 1087 (2014) *appeal held in abeyance*, No. 14-7080, 2014 WL 7521539 (10th Cir. Nov. 19, 2014), *rev'd*, No. 14-7080 (10th Cir. July 28, 2015).

10. King v. Burwell, 759 F.3d. 358 (4th Cir. 2014), *cert. granted*, 135 S. Ct. 2480 (2015).

11. King v. Burwell, 135 S. Ct. 2480 (2015).

12. *See* Robert Pear, *Four Words That Imperil Health Care Law Were All a Mistake, Writers Now Say*, NY TIMES, (2015).

13. *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 64 (2015); *see also* Vanessa L. Johnson, et. al., King v. Burwell: *The Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 1, 29 (2016).

14. Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 71 (2015).

15. Jonathan H. Adler & Michael F. Cannon, King v. Burwell *and the Triumph of Selective Contextualism*, 2015 CATO SUP. CT. L. REV., 35, 52 (2015); Stuart M. Gerson, *Textualism and Contextualism* — King v. Burwell, 2015 COLUM J. TAX L. (2015).

commentaries of the Court's decision in *King* and how it may affect subsequent decisions. We recognize that many scholarly articles were published shortly after the decision, some highly critical of the Court's approach.[16] This paper integrates and synthesizes the major themes of those papers and identifies the likely impact that the opinion may have in the future. We posit that the Supreme Court has opened the door to more viable challenges to administrative rulings, particularly those from the Treasury Department and the IRS. Implications for business conclude the paper.

II. WHY WAS IT IMPORTANT TO UPHOLD THE ACA? [17]

For a second time, SCOTUS saved the ACA.[18] If the Court had ruled otherwise, the effects on healthcare reform would have been devastating.[19] The premium assistance tax credits are "important to the overall structure of the law, because many middle-income Americans can't afford to pay the full price of insurance premiums." [20] In a report issued on June 18, 2014, the Department of Health and Human Services noted the importance of the tax credit to millions of taxpayers as follows:[21] Individuals who selected a plan eligible for a tax credit "have a post-tax credit premium that is 76 percent less than the full premium, on average, as a result of the tax credit—reducing their premium from $346 to $82 per month" (with an average subsidy of $264 per month).[22] In addition, 69 percent of individuals selecting plans with tax credits "have premiums of $100 or less after tax credits—nearly half (46 percent) have premiums of $50 or less after tax credits."[23]

Consequently, a ruling in favor of the plaintiffs that the credit applied only for insurance purchased on state-sponsored exchanges would have disallowed subsidies for about six million people in 34 states with only federally operated insurance exchanges and would

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16. *See* James F. Blumstein, *Mistaken Paradigms and Interpreting Dreams: Some Reflections on* King v. Burwell, 2015 CATO SUP. CT. REV. 79 (2015).

17. Vanessa L. Johnson, et. al., King v. Burwell: *Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 101 (2016).

18. *Id.* at 102.

19. *Id.*

20. *Id.* at 102 n.10; *See also* Margot Sanger-Katz, *What's at Stake in Supreme Court's Latest Health Care Case*, N.Y. TIMES, Nov. 7, 2014, http://www.nytimes.com/2014/11/08/upshot/whats-at-stake-in-supreme-courts-latest-health-care-case.html.

21. Vanessa L. Johnson, et. al., King v. Burwell: *Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 101, 102 n.11 (2016); *see also* Amy Burke, Arpit Misra, and Steven Sheingold, *Premium Affordability, Competition, and Choice in the Health Insurance Marketplace, 2014,* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ASPE (June 18, 2014), http://aspe.hhs.gov/sites/default/files/pdf/76896/2014MktPlacePremBrf.pdf

22. Vanessa L. Johnson, et. al., King v. Burwell: *Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 101,103 n.12 (2016).

23. *Id.* at 103 n.13

have resulted in the lapse of many of these health insurance policies.[24] Before the Court's decision, the Minority Staff of the Committee on Energy and Commerce issued a report entitled, *District-by-District Impact of a Potential Supreme Court Ruling against Affordable Care Act Federal Exchange Tax Credits*, which stated: "The Kaiser Family Foundation estimates that if the Supreme Court rules against the Administration, over 13 million Americans could lose tax credits to help pay for insurance coverage by 2016. These tax credits will be worth an average of over $4,800 annually . . . a total of approximately $65 billion in tax credits are at risk."[25]

Furthermore, a ruling in favor of the plaintiffs would have removed the employer mandate in the states with only federal exchanges since "employers that fail to provide minimum essential coverage or fail to provide affordable and adequate coverage are only subject to a tax penalty if one or more of their employees receive premium tax credits for the purchase of a qualified health plan through an exchange." [26] The individual mandate would have also been weakened, "as many individuals who may owe a tax under the individual mandate are individuals for whom coverage would be unaffordable—and who would thus be exempt from the mandate—were it not for the assistance they will receive for purchasing insurance through premium tax credits."[27] Therefore, premiums in the individual market would have likely risen "sharply in federally facilitated exchange states in the event of a plaintiffs' ultimate victory."[28] To summarize, although the ACA's market reform provisions would have remained in place, a ruling in favor of the plaintiffs-appellants and the resulting combination of no tax credits and an ineffective coverage requirement would have likely pushed some States' individual insurance markets into a death spiral.[29] These

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24. *Id.* at 103 n.14; Drew Altman, *Facing the Political Fallout from* King v. Burwell *Ruling,* WALL ST. J.L. BLOG (June 19, 2015), http://blogs.wsj.com/washwire/2015/06/19/facing-the-fallout-from-a-king-v-burwell-ruling.

25. Committee on Energy and Commerce, Minority Staff, *District-by-District Impact of a Potential Supreme Court Ruling Against Affordable Care Act Federal Exchange Tax Credits,* U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON ENERGY AND COMMERCE (Dec. 2014), https://www.yumpu.com/en/document/view/31963589/fact-sheet-district-by-district-king-vs-burwell-impacts-2014-december; Vanessa L. Johnson, et. al., King v. Burwell: *Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 101, 103 n.15 (2016).

26. Vanessa L. Johnson, et. al., King v. Burwell: *Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 101, 103 n.16 (2016); *see* Timothy Jost, *Implementing Health Reform: Appellate Decisions Split on Tax Credits in ACA Federal Exchange,* HEALTH AFFAIRS BLOG (July 23, 2014), http://healthaffairs.org/blog/2014/07/23/implementing-health-reform-appellate-decisions-split-on-tax-credits-in-aca-federal-exchange/.

27. Vanessa L. Johnson, et. al., King v. Burwell: *Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 101, 103 n.17 (2016).

28. *Id.* at n.18.

29. Vanessa L. Johnson, et.al., King v. Burwell: *Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 101, 104 n. 20 (2016); *see also* Jonathan Gruber, *Health Care Reform Is a "Three Legged Stool": The Costs of Partially Repealing the Affordable Care Act,* CENTER FOR

potential negative effects clearly demonstrated that the legal questions presented in *King v. Burwell* held significant economic and political consequences. [30]

Although the dire predictions did not materialize because the Supreme Court ruled not to dismantle the legislation, its approach to the controversy took a turn not expected by most legal scholars. Instead of relying on the framework that it had established in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*,[31] and used in the lower courts' opinions as well as in many previous cases where an agency interpretation of a statute was at issue, the Court found that using this doctrine was not proper.[32] Under the *Chevron* holding, a court will defer to the administrative agency's judgment when Congressional intent is not clear and the agency's ruling is otherwise reasonable.[33] In *King,* the Court explained that the ACA does not expressly delegate the authority to interpret the statute to the IRS.[34] SCOTUS reasoned, "it is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy."[35] Instead, the Court determined that the correct reading of section 36B was its responsibility and ruled to uphold the IRS' interpretation.[36]

III. REVIEW OF CASES APPLYING THE *CHEVRON* FRAMEWORK

To fully appreciate the impact of *King v. Burwell* on future cases testing the validity of administrative rulings, it is useful to address the history and application of the Court's seminal decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*[37] Prior to that case, the Supreme Court reviewed an agency's interpretation of a statute by either applying a reasonableness test or, in some cases, formulating its own interpretation.[38] When following either approach, the Court often failed to explain why one approach should apply over the other. Criticisms by lower courts and scholars for failure to sustain consistency

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AMERICAN PROGRESS 2 (Aug. 2010), http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing_reform.pdf.

30. Vanessa L. Johnson, et. al., King v. Burwell: *Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 101, 104 (2016).

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

32. King v. Burwell, 135 S. Ct. 2480, 2483 (2015).

33. *See Chevron*, 467 U.S. 837.

34. *King*, 135 S. Ct. at 2489.

35. *Id.* at 2483.

36. *See id.*

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

38. *Compare* Nat'l Labor Relations Bd. v. Hearst Publ'ns, 322 U.S. 111, 131 (1944) (applying a reasonableness test and upholding the National Labor Relation Board's interpretation of the term "employee"), *with* Packard Motor Car Co. v. Nat'l Labor Relations Bd., 330 U.S. 485, 488–90 (1947) (applying its own interpretation of the term "employee" and overturning the National Labor Relation Board's interpretation).

or make clear the reasoning behind these inconsistent judgments plagued the Court during the pre-*Chevron* era.[39]

The issue before the Supreme Court in *Chevron* involved the EPA's interpretation of the statutory language "stationary source" in the amendments to the Clean Air Act to adopt a plant-wide definition of the term.[40] In ruling in favor of the EPA's interpretation, the Court stated that a two-pronged analysis must be followed when a court reviews an agency's construction of a statute that it administers.[41] First

> .... is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[42]

A. *United States v. Mead Adds an Additional Step to the Framework*

For many years, the *Chevron* decision had been followed by courts to defer to administrative interpretations of statutes when the law was silent or ambiguous.[43] In *United States v. Mead*,[44] the Supreme Court created a third step of analysis in the *Chevron* framework, known as Step Zero.[45] According to the Court, before analyzing the administrative interpretation under the *Chevron* two-step framework, a court must first determine whether Congress intended that courts defer to agencies with respect to their interpretation a statute.[46] The Court stated: "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the

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39. Denise W. DeFranco, Chevron *and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829, 834–37 (1990) (discussing the U.S. Supreme Court's different approaches to agencies' interpretations of ambiguous statutes prior to the *Chevron* decision).

40. *Chevron*, 467 U.S. at 840.

41. *See, e.g., How Clear Is Clear in* Chevron*'s Step One*, 118 HARV. L. REV. 1687 (2005).

42. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (citations omitted).

43. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 239.

44. U.S. v. Mead Corp., 533 U.S. 218 (2001).

45. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872 (2001).

46. *See* U.S. v. Mead Corp., 533 U.S. at 218.

force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." [47] While a good indicator of delegation meriting *Chevron* treatment is an express congressional authorization to issue regulations, absent such direction, it is not clear what is needed to insure deference.[48] For example, the Court rejected the argument that only statutory interpretations arrived at through formal "notice and comment" rulemaking warrant *Chevron* deference.[49] On the other side of the spectrum, deference is not warranted with regard to opinion letters, policy manuals, and other decisions lacking force of law.[50]

After *Mead*, lower courts generally apply *Chevron* deference only if Congress delegated, and the agency exercised, the authority to issue interpretations of the statute that have the force of law.[51] However, courts differed as to what evidence demonstrates whether Congress intended an agency to have interpretive power and whether the agency had exercised its authority to do so.[52] For example, in *United States v. W. R. Grace & Co.*, [53] the Ninth Circuit held that based on the "sweeping" language of the definition of "removal" under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Environmental Protection Agency's clean-up of a town where mining activities caused asbestos contamination fell within the bounds of a removal activity.[54]

In *Community Health Center v. Wilson-Coker*,[55] the Second Circuit commented that while it must defer to agency interpretations in valid regulations issued through notice and comment or adjudication, less formal interpretations may also warrant the courts' deference, "depending upon to what extent the underlying statute suffers from exposed gaps in its policies, especially if the statute itself is very

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47. *Id.* at 226–27. In *Mead,* the issue involved a letter from the U.S. Customs Service classifying imported day planners as diaries and subject to higher tariffs than previously imposed. The First Circuit held that a ruling letter is not subject to the notice and comment period as are regulations and thus is not entitled to any deference. *Id.* at 226.

48. Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 824 (2010).

49. Barnhart v. Walton, 535 U.S. 212, 221 (2002).

50. Christensen v. Harris Cnty., 529 U.S. 576, 586–88 (2000). If a *Mead* analysis concludes that the agency is not empowered with rule-making authority, the courts' determination turns to the pre-*Chevron* standard of Skidmore v. Swift & Co., 323 U.S.134, 140 (1944), where the Court placed weight on the thoroughness of the agency's consideration, the validity of its reasoning, its consistency, and other factors indicating its power to persuade.

51. Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action,* 58 VAND. L. REV. 1443, 1458 (2005).

52. Justice Scalia's dissent in *Mead* described the Court's decision as "neither sound in principle nor sustainable in practice." *Mead*, 533 U.S. at 541 (Scalia, J., dissenting).

53. United States v. W. R. Grace & Co., 429 F.3d 1224 (9th Cir. 2005).

54. *Id.* at 1238.

55. Community Health Center v. Wilson-Coker, 311 F.3d 132 (2d Cir. 2002).

complex, as well as on the agency's expertise in making such policy decisions, the importance of the agency's decisions to the administration of the statute, and the degree of consideration the agency has given the relevant issues over time."[56] In this case, the court concluded that even relatively informal interpretations by the Centers for Medicare and Medicaid Services, such as, letters from regional administrators, are entitled to deference due to the complexity of the statute and the considerable expertise of the administering agency.[57]

Assuming the case has been made for deference under the *Mead* analysis, the two-step process under *Chevron* is nevertheless not without problems. While the *Chevron* Court did not explicitly provide guidelines in determining whether the agency's ruling was consistent with the statute, the Court noted that the agency's interpretation need not be the only permissible one, or even the interpretation the Court would reach itself.[58] The Court further explained that ambiguity within a statute may be either explicit or implicit. In most cases, the court will defer to the agency's determination unless it is shown to be "arbitrary and capricious."[59] Courts for the most part are reluctant to overturn the agency's decision even if there are some problems surrounding the ruling.[60] In fact, in only a few instances did the Supreme Court overturn an agency's decision based on a Step Two analysis.[61]

As noted by some commentators, even the two-step process under *Chevron* seems to be ignored by the Supreme Court and lower courts, creating confusion in the application of the review process.[62] For

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56. *Id.* at 138.

57. *Id.*

58. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, at 843 n.11 (1984).

59. *See* Natural Resources Defense Council v. U.S. Environmental Protection Agency, 526 F.3d 591, 608 (9th Cir. 2008); N.Y. Pub. Int. Res. Grp. v. Whitman, 321 F.3d 316, 324 (2d Cir. 2003) (analyzing EPA statute); In *Ft. Hood Barbers Ass'n v. Herman*, 137 F.3d 302, 308 (5th Cir. 1998), the court held that unless the agency's approach is "irrational and not reasonably related to the purposes of the legislation," the court must uphold that approach.

60. *See* Queen of Angels v. Shalala, 65 F3d 1472, 1480-81 (9th Cir. 1995) ("Even if these scattered statements suggest that the Secretary has been somewhat inconsistent in her view of the PRO Payment Rule, ... and even if we ... assume the statute is ambiguous, the Secretary's inconsistency is probably insufficient alone to invalidate her interpretation."); National Classification Committee v. United States, 22 F.3d 1174, 1177 (D.C. Cir. 1994) ("The ICC's current position appears to be consistent with its past decisions.... Even if the ICC's interpretation of the section [] has changed since 1988, no rule of law prevents such a change. Rather an agency may depart from its past interpretation so long as it provides a reasoned basis for the change.") (citation omitted).

61. *E.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 485 (2001); AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 392 (1999).

62. Marianne Kunz Shanor, *Note: Administrative Law—The Supreme Court's Impingement of* Chevron's *Two-Step*, 10 WYO. L. REV. 537, 552 (2009) (Shanor stated: "The United States Supreme Court continually uses inconsistent and elusive applications of the *Chevron* doctrine in reviewing cases of statutory interpretation by agencies. The Court applies the *Chevron* doctrine with varying force and, at times, ignores the doctrine completely. Additionally, the Court describes the *Chevron* doctrine in different and conflicting manners.").

example, in *Entergy Corp. v. Riverkeeper, Inc.*,[63] the Court considered whether the EPA's application of a cost-benefits analysis in setting national standards was consistent with the Clean Water Act. Without addressing Step One, the Court began its analysis stating: "if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts," the interpretation should be upheld.[64] Similarly, the D.C. Circuit addressed the arbitrary and capricious standard with respect to a regulation of the EPA without consideration of *Chevron* or *Mead*.[65]

Moreover, the Supreme Court has made exceptions to *Chevron's* recognition of judicial deference to administrative agencies.[66] In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,[67] the Interstate Commerce Commission argued that its determination that a carrier engaged in an unreasonable practice when it attempted to collect the filed rate after the parties have negotiated a lower rate is entitled to deference because the Interstate Commerce Act did not specifically define unreasonable practices and its construction is rational and not inconsistent with the statute.[68] The Court disagreed, stating that this interpretation was inconsistent with the Court's previous rulings dating back to 1908—holding that secret negotiations and collection of rates lower that the filing rate violated the Act.[69] In *Lechmere, Inc. v. NLRB*,[70] the Supreme Court ignored *Chevron* altogether and determined, under principles of stare decisis, that NLRB's legal interpretation was erroneous and impermissible.[71] The Court noted that before deciding the issue of deference to the Board, it must decide whether the ruling is consistent with its past interpretation of the law. "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis,* and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."[72] Once deciding that the NLRB's interpretation conflicted with its prior

63. Entergy Corp. v. Riverkeeper, Inc. 555 U.S. 208 (2009).

64. *Id.* at 218 (emphasis added).

65. Am. Petroleum Inst. v. EPA, 684 F.3d 1342, 1350 (D.C. Cir. 2012).

66. *See* FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1294-95 (2000).

67. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990).

68. *Id.* at 130 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

69. *Id.*

70. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

71. *Id.* at 539.

72. *Id.* at 537 (quoting Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990)).

ruling, the Court substituted its own statutory construction for that given by the NLRB.[73]

B. *Standards for Reviewing Interpretations of Tax Law*

After the decisions in *Chevron* and *Mead,* courts continued to be split in their interpretations and scholars disagreed over whether *Chevron* deference or some other standard should apply when reviewing Treasury regulations.[74] Supporters of the "tax exceptionalism" view argued that tax laws are different, saying that tax standards for deference should be treated differently from other areas of administrative law.[75] In many respects, taxation is different from and more important than other federal activities as it is the source of revenue needed to fund all federal administration.[76] Tax scholars argue that the complexity of tax law requires "additional weight to be given to legislative history in interpreting specific Code sections."[77] Rather than applying *Chevron* deference for Treasury regulations, tax exceptionalists relied on the Court's previous decision in *National Muffler Dealers Ass'n, v. United States*[78] *to support their claim* that "tax is different" and to compel greater judicial involvement in interpreting the Code.[79]

At issue in the *National Muffler* case was whether a trade organization qualified for a tax exemption as a "business league."[80] Tax regulations defined a business league as an organization whose activities "are . . . directed to the improvement of business conditions of one or more lines of business" similar to a chamber of commerce or

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73. Susan K. Goplen, *Judicial Deference to Administrative Agencies' Legal Interpretation After* Lechmere, Inc. v. NLRB, 68 WASH, L. REV. 207, 207-08 (1993). It is argued that reliance on stare decisis can lead to multiple interpretations of an administrative ruling as every circuit could judge the interpretation based on its prior decisions. Further, the Court's application of the principle of stare decisis conflicts with its stated reasons for adopting judicial deference: agency expertise, agency flexibility, and political accountability.

74. Kristin Hickman, *The Need for* Mead: *Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1538 (2006).

75. *Id.* at 1541.

76. Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 VA. TAX REV. 269, 279 (2012).

77. Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 532 (1994).

78. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472 (1979).

79. Hickman, *supra* note 14, at 1540; Swallows Holding, Ltd. v. Comm'r, 126 T.C. 96, 130 (2006) (quoting Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979)), *vacated* 515 F.3d 162 (3d Cir. 2008) (Legal scholars agree that the standards for interpreting tax law under *Chevron* allow for more deference to the Treasury and the IRS than does the *National Muffler* standard. "An interpretative Federal tax regulation is reasonable under *Natl. Muffler Dealers Association v. United States* ...only if it harmonizes with the plain language of the statute, its origin, and its purpose."); The Tax Court had applied *National Muffler* and ruled for the taxpayer while the court of appeals held that *Chevron* was the appropriate standard and reversed. *Id.* at 167.

80. 440 U.S. at 473.

board of trade. [81] The IRS denied the plaintiff an exemption under this definition stating that the purposes of the organization must be industry wide and not solely to benefit a single group of franchisees.[82] A split in the circuits on this definition led the Supreme Court to grant certiorari.[83]

The Court noted that there is no common understanding of the definition "business league" and that Congress intended that courts defer to administrative interpretation if it reasonably implements Congressional mandate.[84] In determining whether a regulation carries out legislative intent, the Court examined whether the language "harmonizes with the plain language of the statute."[85] The Court then reviewed the legislative history of Code provision IRC § 501(c)(6), starting with the Tariff Act of 1913, previous interpretative regulations, and court decisions. Other factors examined by the Court included the manner in which the regulation evolved and the length of time it had been in effect, consistency of prior interpretations, and whether Congress addressed the regulation when the statute was amended.[86] Acknowledging that the IRS's interpretation of the law is not the only possible one, the Court found that it bore a fair relationship to the language of the statute and "merits serious deference."[87]

Subsequent to the decision in *National Muffler*, courts relied on its multi-factor approach to decide the validity of tax regulations.[88] Even after the *Chevron* case was decided, courts were still split whether *National Muffler, Chevron* or the pre-*Chevron* standard of *Skidmore* should be the proper standard of review of Treasury decisions.[89] In its decision in *Mayo Foundation for Medical Education and Research v. United States*, the Court appeared to reject the approach of tax exceptionalism, stating: "Mayo has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency."[90] The issue in *Mayo* involved Treasury Regulations excepting from the definition of student any full-time employee normally working more than 40 hours

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81. *Id.* at 474. (quoting Treas. Reg. § 1.501(c)(6)-1 (1798)).

82. 440 U.S. at 474.

83. *Id.* at 476.

84. *Id.*

85. *Id.* at 477.

86. Leslie Boodry, *Judicial Deference Post*-Mayo Foundation*: Why the* National Muffler *Factors Should Be Incorporated into* Step Two of Chevron, 8 FED. CTS. L. REV. 1, 5 (2014).

87. 440 U.S. at 484.

88. *See* Nalle v. Comm'r, 997 F.2d 1134, 1136 (5th Cir. 1993).

89. Matthew H. Friedman, *Reviving* National Muffler: *Analyzing the Effect of* Mayo Foundation *on Judicial Deference as Applied to General Authority Tax Guidance,* 107 NW. U.L. REV. COLLOQUY 115, 129 (2012).

90. Mayo Foundation for Medical Educ. & Research v. United States, 562 U.S. 44, 55 (2011).

per week.[91] Under such definition, medical school residents would not be treated as students and thus were subject to FICA tax withholding.[92] The Mayo Foundation sued for a refund of FICA taxes claiming that the interpretation was contrary to the definition of student because the educational aspect of residents' work was more important than their service to the employer.[93] The Court applied the *Chevron* analysis and upheld the Treasury's regulation.[94] Under Step One, the Court found that the statute was ambiguous as applied to working professionals [95] and did not specifically address the status of residents.[96] Thus, the issue turned to the judicial deference to be accorded to the Treasury regulation, and the Court noted that there was no "justification for applying a less deferential standard of review to Treasury Department regulations than [it] [applied] to the rules of any other agency. In the absence of such justification, [it][was] not inclined to carve out an approach to administrative review good for tax law only."[97] The Court also abandoned its previous distinction between interpretations contained in a rule adopted under a "general authority" and interpretations "issued under a specific grant of authority to define a statutory term," stating both are entitled to equal deference as long as "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[98]

Indeed, many scholars proclaimed that *Mayo* laid to rest the tax exceptionalism approach to reviewing tax regulations.[99] The tax bar generally reacted negatively to this decision, fearing that too much deference was being granted to the IRS, making it impossible to effectively challenge any Treasury Regulation.[100] Taxpayers' concern over the application of *Mayo Foundation* may have been premature however, as subsequent cases revealed an unwillingness to extend unfettered judicial deference to Treasury Regulations. For example in *United States v. Home Concrete & Supply, LLC*,[101] the Court rejected the

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91. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(i)-(iii), 26 CFR § 31.3121(b)(10)-2(d)(3)(i)-(iii) (2015).

92. 562 U.S. at 44.

93. *Id.* at 51.

94. *Id.* at 58.

95. *Id.* at 52.

96. *Id.* at 53.

97. *Id.* at 55.

98. *Id.* at 56–57 (citing United States v. Mead Corp., 533 U.S. 218,226–27).

99. Jeremiah Coder, *Year in Review: Tax Law's Vanity Mirror Shattered*, 134 TAX NOTES 35 (2012).

100. Boodry, *supra* note 86, at 17; Michael Hall, *From Muffler to Mayo: The Supreme Court's Decision to Apply* Chevron *to Treasury Regulations and Its Impact on Taxpayers*, 65 TAX LAW 695, 706–07 (2012).

101. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012).

IRS interpretation of the statute,[102] which extended the statute of limitations for assessment of a deficiency when the deficiency was based on an omission from gross income.[103] Applying the doctrine of stare decisis, the Court relied on its decision in *Colony, Inc. v. Commissioner*[104] where it held that overstating the basis in property is not an omission and thus does not extend the limitation period to six years.[105] The IRS argued that *Colony* should not apply because a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the *unambiguous* terms of the statute. . . ."[106] The Court disagreed, however, finding a "fatal flaw" in the government's position in that "*Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency."[107] According to the Court, even though the statute may have been ambiguous, that does not give the IRS authority to overturn the Court's prior interpretation,; *Chevron*, which was decided almost 30 years after *Colony*, was not intended to delegate "gap-filling power" to the agency when the gap had already been filled by the Court.[108] The Court further noted that the analysis used in the *Colony* decision relied on both the textual language of the statute as well as legislative history, and concluded that they were "persuasive indications that Congress intended overstatements of basis to fall outside the statute's scope," leaving no room for a contrary interpretation by the IRS.[109] Finally, the Court ignored the government's argument that the statute had been amended subsequent to the *Colony* decision and thus opened the door to an alternative interpretation.[110] That argument was irrelevant to the Court, finding that the operative language in the amended statute was identical to the original provision.[111]

Against this backdrop of *Chevron* and its progeny, this paper examines the issues of *King v. Burwell* and related cases.

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102. 26 U.S.C. § 6501(e)(1)(A) (2012).

103. 132 S. Ct. at 1839.

104. Colony, Inc. v. Comm'r, 357 U.S. 28 (1958).

105. *Id.* at 33.

106. 132 S. Ct. at 1842 (quoting Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)).

107. *Id.* at 1843.

108. *Id.* at 1844.

109. *Id.* (citing *Colony*, 357 U.S. at 33–37).

110. *Id.*

111. *Id.* at 1841. The Court stated: "It would be difficult, perhaps impossible, to give the same language here a different interpretation without effectively overruling *Colony*, a course of action that basic principles of *stare decisis* wisely counsel us not to take." *Id.*

IV. THE LEGAL CONTROVERSIES AROUND IRC SECTION 36B

While the Supreme Court ultimately granted certiorari in the *King v. Burwell* litigation,[112] there were three other separate lawsuits challenging the IRS's interpretation of the words "established by the State."[113] These were *Halbig v. Burwell* in the District of Columbia Circuit, *Pruitt v. Burwell* in the Tenth Circuit, and *Indiana v. IRS* in the Southern District of Indiana.[114] Although plaintiffs' claims in each case were virtually identical, the rulings and rationales of the courts varied significantly.[115] In addition, the lower courts applied the framework from *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*[116] to analyze the legal merits of the parties. In this section, the paper will briefly describe the proceedings in *Halbig v. Burwell* and *Pruitt v.*

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112. Jonathan H. Adler, *Why Did the Court Grant Cert in* King v. Burwell*?,* THE WASHINGTON POST (Nov. 7, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/07/why-did-the-court-grant-cert-in-king-v-burwell/. Many legal scholars were surprised that the Supreme Court granted certiorari because there was no active split among the circuits. Jonathan H. Adler, *Will the Supreme Court grant certiorari in* King v. Burwell*?,* THE WASHINGTON POST(November 3, 2014) http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/03/will-the-supreme-court-grant-certiorari-in-king-v-burwell/. Both *Indiana v. IRS* and *Pruitt v. Burwell* were United States District Court cases. While *Pruitt v. Burwell* was appealed to the Tenth Circuit, further proceedings were stayed pending the Supreme Court's decision in *King v. Burwell.* The D.C. Circuit in *Halbig v. Burwell* vacated the IRS rule, but an en banc rehearing of the case scheduled for December 17, 2014, was also stayed pending the Supreme Court's decision in *King v. Burwell.* Nevertheless, per Supreme Court Rule 10, *King v. Burwell*, "unquestionably concerns an 'important question of federal law,' as the resolution of this case could have a significant impact on the implementation of the PPACA, particularly in the 36 states that have not established their own exchanges." Jonathan H. Adler, *Why Did the Court Grant Cert in* King v. Burwell*?,* THE WASHINGTON POST (Nov. 7, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/07/why-did-the-court-grant-cert-in-king-v-burwell/. Furthermore, "an additional reason to take the case now is that the litigation creates substantial uncertainty about the operation of the law, and should the plaintiffs' claims been upheld, policymakers, insurance companies, and those who would otherwise be eligible for subsidies will need time to figure out how to respond." *Id.*

113. Jonathan H. Adler, *Will the Supreme Court grant certiorari in* King v. Burwell*?,* THE WASHINGTON POST (November 3, 2014) http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/03/will-the-supreme-court-grant-certiorari-in-king-v-burwell/.

114. Halbig v. Burwell, 758 F.3d 390, 398 (D.C. Cir. 2014); Pruitt v. Burwell, 51 F. Supp. 3d 1080 (S.D. Okla., 2014), *rev'd*, No. 14-7080 (10th Cir. 2015); Ind. v. IRS, 38 F.Supp.3d 1003 (S.D. Ind. 2014). The named defendant in the complaints against the U.S. Department of Health & Human Services when the complaints were originally filed was then Secretary Kathleen Sebelius. The name of the defendant was changed to Sylvia Mathews Burwell after she was sworn into office succeeding Secretary Sebelius. Stephanie Coden, *3 Big Obamacare Challenges for Sylvia Matthews Burwell*, CBS NEWS (April 11, 2014), https://www.cbsnews.com/news/3-big-obamacare-challenges-for-sylvia-mathews-burwell/.

115. Adler, *supra* note 113.

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

Burwell[117] and will then discuss both the lower courts' opinions and the Supreme Court's decision in *King v. Burwell*.[118]

A. Halbig v. Burwell

Four individual plaintiffs and three employers from several states brought suit against the Department of Health and Human Services seeking a declaratory judgment that the IRS rule violates the APA and injunctive relief prohibiting the application or enforcement of the IRS regulations.[119] The individual plaintiffs argued that under the IRS ruling they are disqualified from the provision that would exempt them from purchasing insurance and thus are subject to the individual mandate penalty.[120] As a result, they would be forced to either pay a penalty or purchase health insurance that they otherwise would prefer not to buy.[121] The employer plaintiffs based their claim that, absent the IRS rule, their employees would not be eligible for federal subsidies and therefore their businesses would not be subject to assessable payments under the employer mandate.[122]

United States District Court Judge Paul L. Friedman granted the defendants' motion for summary judgment, denied the plaintiffs' motion for summary judgement, and entered a judgment for the defendants.[123] Basing his decision on the *Chevron* framework, Judge Friedman noted that IRC § 36B(a) "does not distinguish between taxpayers residing in states with state-run Exchanges and those in states with federally-facilitated Exchanges."[124] However, he acknowledged that "the plain language of 26 U.S.C. § 36B(b)-(c), viewed in isolation, appears to support plaintiffs' interpretation,"[125] but stressed that in making the threshold determination under Step One of *Chevron*, "the meaning–or ambiguity–of certain words or phrases" must be determined in context; "one cannot look at just a few isolated words in 26 U.S.C. § 36B, but also must at least look at the other statutory provisions to which it refers."[126]

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117. *See* Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014); *see also* Pruitt v. Burwell, 51 F. Supp. 3d 1080 (S.D. Okla., 2014), *rev'd*, No. 14-7080 (10th Cir. 2015).

118. King v. Burwell, 135 S. Ct. 2480 (2015).

119. Halbig v. Sebelius, 27 F. Supp. 3d 1 (D.C. Cir. 2014).

120. *Id.* at 9.

121. *Id.*

122. *Id.* at 13.

123. *Id.* at 25–26.

124. *Id.* at 18.

125. *Id.*

126. *Id.* at 18–19 (citing United States v. McGoff, 831 F.2d 1071, 1080 (D.C. Cir. 1987)) (The Court "reject[ed] a construction that isolated the disputed statutory provision from an expressly cross-referenced statute.").

While the defendants' arguments appeared "more credible when viewed in light of the cross-referenced provisions,"[127] because each side provided a plausible construction of the language of section 36B(b)-(c), the court considered other "tools of statutory construction[] under *Chevron*, . . . including the structure of the statute and the context in which the language of Section 36B is set."[128] "Focus[ing] on two provisions in the ACA: the reporting requirements for state and federal Exchanges [(Section 36B(f))], and the eligibility requirements for individuals purchasing insurance through the Exchanges [(42 U.S.C. § 18032)]."[129] The court found "the defendants' arguments compelling and the plaintiffs' counter-arguments unpersuasive."[130] Thus under the *Chevron* framework, the Court held that "the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges"[131] and concluded "that 'Congress has directly spoken to the precise question' of whether an 'Exchange' under 26 U.S.C. § 36B includes federally-facilitated Exchanges."[132] As a consequence, the court "must give effect to the unambiguously expressed intent of Congress[]"[133] and it found that the IRS appropriately promulgated "regulations authorizing the provision of tax credits to individuals who purchase health insurance on federally-facilitated Exchanges as well as to those who purchase insurance on state-run Exchanges."[134]

The plaintiffs timely appealed to the U.S. Court of Appeals for the D.C. Circuit, and a three judge panel reversed the district court, and vacated the IRS's regulation,[135] concluding "that the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges 'established by the State,'"[136] The court of appeals concluded that the "appellants have the better of the argument: a federal Exchange is not an 'Exchange established by the State,' and section 36B does not authorize the IRS to provide tax credits for insurance purchased on federal Exchanges."[137] The court stated that "nothing in section 1321 deems federally-established Exchanges to be 'Exchange[s] established

127. *Sebelius*, 27 F. Supp. 3d at 20.

128. *Id.* (quoting Chevron U.S.A., Inc. v Natural Res. Def. Council Inc., 467 U.S. 837, 843 n.9 (1984)).

129. *Id.* at 21.

130. *Id.* at 20.

131. *Id.* at 25.

132. *Id.* (citing *Chevron,* 467 U.S. at 842).

133. *Sebelius*, 27 F. Supp. 3d at 25.

134. *Id.*

135. Halbig v. Burwell, 758 F.3d 390, 390 (D.C. Cir. 2014).

136. *Id.* at 394.

137. *Id.* at 399.

by the State.'"[138] Further, the court noted, "[the]omission is particularly significant since Congress knew how to provide that a non-state entity should be treated as if it were a state when it sets up an Exchange"[139] in light of "a nearby section, [in which] the ACA provides that a U.S. territory that 'elects . . . to establish an Exchange . . . shall be treated as a State.'"[140] Therefore, the court concluded, "the absence of similar language in section 1321 suggests that even though the federal government may establish an Exchange 'within the State,' it does not in fact stand in the state's shoes when doing so."[141]

B. Pruitt v. Burwell

The plaintiffs in this lawsuit were the State of Oklahoma and Scott Pruitt, in his official capacity as Attorney General, who asked for "declaratory and injunctive relief with respect to final federal regulations issued under Internal Revenue Code Section 36B[.]"[142] The plaintiffs argued that the regulations violated the Administrative Procedures Act ("the APA"),[143] and directly conflicted with the unambiguous language of the Internal Revenue Code."[144]

In response to the cross-motions by both sides for summary judgment, the court ruled in favor of the plaintiffs, holding "that the IRS Rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, pursuant to 5 U.S .C. §706(2)(A), in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, pursuant to 5 U.S.C. §706(2)(C), or otherwise is an invalid implementation of the ACA, and is hereby vacated."[145] The court found

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138. *Id.* at 400.

139. *Id.*

140. *Id.* (quoting 42 USC §18043).

141. Halbig v. Burwell, 758 F.3d at 400. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2583 (2012) ("[W]here Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.") (citing Russello v. United States, 464 U.S. 16, 23 (1983)). The court also rejected defendants' argument based on legislative history, and their argument that the plaintiffs' position would generate an "absurd" result if the plain language of § 36B were not interpreted as including both state and federal exchanges. *See Halbig*, 758 F.3d at 399, 402–06.

142. Amended Complaint at 3, Oklahoma ex rel. Pruitt v. Sebelius, No. CIV-11-030-RAW, 2013 WL 4052610 (E.D. Okla. Aug. 12, 2013) (No. CIV-11-030-RAW). The original complaint challenged the ACA as an unconstitutional exercise of Congress's powers under Commerce and Necessary and Proper Clauses and was filed in 2011 before the Supreme Court issued its decision in *National Federal of Independent Business v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012). The action was stayed while the SCOTUS decision was pending and morphed into this action challenging the interpretation of §36B.

143. Oklahoma ex rel. Pruitt v. Sebelius, No. CIV-11-030-RAW, 2013 WL 4052610, at *9 (E.D. Okla. Aug. 12, 2013) ("[A] court may set aside a regulation that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"); *see* 5 U.S.C. § 706 (2012).

144. Pruitt v. Sebelius, 2013 WL 4052610, at *2.

145. Oklahoma *ex rel*, Pruitt v. Burwell, 51 F. Supp. 3d. 1080, 1093 (E.D. Okla. 2014).

the rationale of the court of appeals in *Halbig v. Burwell* persuasive.[146] Similar to the court of appeals' opinion in *Halbig*, the court resolved the issue at the first stage of *Chevron,* finding that "the ACA unambiguously restricts the section 36B subsidy to insurance purchased on an Exchange 'established by the State[.]'"[147] The court concluded by acknowledging the *Halbig* majority's stated reluctance in vacating the IRS rule.[148] However, the district court downplayed the potential impact of its decision, finding the language in Judge Edward's dissent in *Halbig* informative: "Appellants' not-so-veiled attempt to gut the Patient Protection and Affordable Care Act ('ACA')"[149] emphasizes that the case was simply one of statutory interpretation and that "the court is upholding the Act as written" with the assumption that "Congress says what it means."[150] The court thus vacated the IRS ruling.[151]

The defendants timely filed a petition for rehearing en banc, which was granted on September 4, 2014.[152] However, before oral arguments, the Supreme Court granted certiorari in *King v. Burwell* and the en banc proceedings were held in abeyance pending the Supreme Court's decision.[153]

C. King v. Burwell

The plaintiffs in *King v. Burwell,* individuals aged 55 or older and residents of Virginia, filed a lawsuit to the United States District Court for the Eastern District for Virginia, challenging the IRS's rule that tax subsidies are available to all eligible Americans regardless of whether they purchased insurance on a state-run or federally facilitated exchange. [154] The plaintiffs argued that they would be economically injured by the IRS ruling because they would be required to choose between buying health insurance or paying the minimum coverage provision penalty.[155] In addition, the plaintiffs argued that allowing subsidies, even in states with only federallyestablished exchanges, disburses monies from the Federal Treasury in excess of the authority

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146. *Id.* at 1087.

147. *Id.* at 1089.

148. *Id.* at 1091.

149. *Id.* (citing Halbig v. Burwell, 758 F.3d 390, 412–13 (D.C. Cir. 2014) (Edwards, J., dissenting)).

150. Pruitt v. Burwell, 51 F. Supp. 3d at 1092-93.

151. *Id.* at 1093.

152. Halbig v. Burwell, 2014 WL 4627181, 114 A.F.T.R.2d 2014-5868, at *1 (D.C. Cir. Sept. 4, 2014) (en banc).

153. Halbig v. Burwell, 114 A.F.T.R.2d 2014-6576 (D.C. Cir. 2014) (per curiam), *cert. granted*, King v. Burwell, 135 S.Ct. 2480 (2004).

154. King v. Sebelius, 997 F. Supp. 2d 415, 418, 420–21 (E.D. Va. 2014).

155. *Id.* at 424.

granted by the Act.[156] Based on these arguments the plaintiffs sought a declaratory judgment that the regulations were illegal under the APA and injunctive relief barring its enforcement.[157]

The district court granted defendant's motion to dismiss and denied as moot all remaining motions.[158] Judge Spencer, relying on *Chevron*, stated: "At the first step of *Chevron,* a court may also employ traditional tools of statutory construction to ascertain whether Congress has expressed its intent regarding the precise question at issue."[159] After explaining the meaning of "exchange" in § 36B, the court stated, "[a]t first blush, each party presents seemingly credible constructions of the language in section 36B. Viewed in a vacuum, it seems comprehensible that the omission of any mention of federally-facilitated Exchanges under section 36B(b)(2)(A) could imply that Congress intended to preclude individuals in federally-facilitated Exchanges from receiving tax subsidies. However, when statutory context is taken into account, Plaintiffs' position is revealed as implausible."[160] Further, stated the court: "[c]ourts have a duty to construe statutes as a whole"[161] and that "Plaintiffs' reading of section 36B grows even weaker when other sections of the ACA are taken into account."[162] Judge Spencer concluded that the Plaintiffs' interpretation would make section 36B(f) "superfluous with respect to federally-facilitated Exchanges under Section 1321 because such Exchanges would not be authorized to deliver tax credits."[163] Instead, he held "Section 36B(f) thus indicates that Congress assumed that premium tax credits would be available on any Exchange, regardless of whether it is operated by a state under [Section 1311] or by HHS under [Section 1321]."[164]

Further, even if under Step One, the language section 36B was found to be ambiguous, Judge Spencer held that "Plaintiffs' arguments fail at *Chevron* Step Two.[165] *Chevron* deference is afforded only when an 'agency's interpretation is rendered in the exercise of [its] authority [to make rules carrying the force of law]' . . . [and] HHS and IRS should receive *Chevron* deference in their interpretation of section 36B and the

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156. *Id.* at 418, 427.

157. *Id.* at 426.

158. *Id.* at 432.

159. *Id.* at 426-27 (citing Chevron U.S.A., Inc. v Nat. Res. Def. Council Inc., 467 U.S. 837, 843 n.9; Nat'l Elec. Mfr's Ass'n, 654 F.3d 496, 504 (4th Cir. 2011)).

160. King v. Sebelius, 997 F. Supp. 2d at 427-28.

161. *Id.* at 428; *see* Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 290 (2010).

162. King v. Sebelius, 997 F. Supp. 2d at 428.

163. *Id.* at 429.

164. *Id.* (quoting Halbig v. Sebelius, 27 F. Supp. 3d 1, 15 (D.D.C. 2014)).

165. *Id.* at 431.

ACA because the ACA is a 'shared-administration' statute and both HHS and the Department of the Treasury are in full agreement about how to interpret the word 'Exchanges' within the context of section 36B."[166] To summarize, Judge Spencer ruled that even if the "Plaintiffs' interpretation of the ACA, section 36B, and related HHS regulations is reasonable, Plaintiffs have not met their burden to show that Defendants' contrary reading is unreasonable;"[167] therefore, "in light of the applicable legislative history of the ACA and the above discussion of the anomalous consequences of Plaintiffs' reading of the ACA, Defendants at the very least have presented a reasonable interpretation of HHS's regulations and, thus, section 36B."[168]

The Plaintiffs timely appealed to the Fourth Circuit Court of Appeals, and the court affirmed the district court's judgment and upheld the IRS rule "as a permissible exercise of the agency's discretion."[169] The court examined both sides of the argument noting, "[t]here can be no question that there is a certain sense to the plaintiffs' position. If Congress did in fact intend to make the tax credits available to consumers on both state and federal Exchanges, it would have been easy to write in broader language, as it did in other places in the statute."[170] However, the court then explained, "when conducting statutory analysis, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, [t]he meaning[—]or ambiguity[—]of certain words or phrases may only become evident when placed in context.'"[171] Therefore, concluded that "the defendants' primary counterargument points to ACA §§ 1311 and 1321, which, when read in tandem with 26 U.S.C. § 36B, provide an equally plausible understanding of the statute, and one that comports with the IRS's interpretation that credits are available nationwide."[172] Finally, the court added, "Given that Congress defined 'Exchange' as an Exchange established by the state, it makes sense to read § 1321(c)'s directive that HHS establish 'such Exchange' to mean that the federal government acts on behalf of the state when it establishes its own Exchange."[173] While the court chose not to "ignore the common-sense appeal of the plaintiffs' argument"[174] since "a literal reading of the statute undoubtedly accords more closely with their position . . . . based solely on the language and

166. *Id.*

167. *Id.* at 432.

168. *Id.*

169. King v. Burwell, 759 F.3d 358, 363 (4th Cir. 2014).

170. *Id.* at 368 (citing 42 U.S.C. § 18032(d)(3)(D)(i)(II) (referencing Exchanges "established under this Act")).

171. *Id.* (citing Nat'l Ass'n of Home Builders v. Def. of Wildlife, 551 U.S. 644, 666 (2007)).

172. *Id.* at 368–69.

173. *Id.* at 369.

174. *Id.*

context of the most relevant statutory provisions,"[175] the court concluded: "[We] cannot say that Congress's intent is so clear and unambiguous that it 'foreclose[s] any other interpretation.'"[176]

Moving to *Chevron's* second step, the court phrased the issue as follows: "whether the 'agency's [action] is based on a permissible construction of the statute'"[177] and found that "this is a suitable case in which to apply the principles of deference called for by *Chevron*."[178] The court explained that it was "primarily persuaded by the IRS Rule's advancement of the broad policy goals of the Act"[179] since it was "clear that widely available tax credits are essential to fulfilling the Act's primary goals and that Congress was aware of their importance when drafting the bill."[180] Therefore, the court concluded "[i]t is thus entirely sensible that the IRS would enact the regulations it did, making *Chevron* deference appropriate. Confronted with the Act's ambiguity, the IRS constructed a rule ensuring the credits' broad availability and furthering the goals of the law. In the face of this permissible construction, we must defer to the IRS Rule."[181]

The Supreme Court granted certiorari, and in a 6-3 decision, the Court affirmed the court of appeals, thereby preserving the statutory framework of the ACA.[182] However, instead of applying the two-step *Chevron* analysis, Chief Justice Roberts, writing for the majority, stated: Our "approach 'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.'"[183] However, such analysis does not apply to "extraordinary cases" where the intent of Congress to delegate such important authority is questionable.[184] Because the legal question presented in *King v. Burwell* was one of "deep economic and political significance", delegation to the IRS absent the express intent of Congress was not warranted.[185] The court noted that "the tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people."[186] Thus, concluded the Court, it is highly unlikely the Congress intended

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175. *Id.*

176. *Id.* (quoting Grapevine Imps. Ltd. v. United States, 636 F.3d 1367, 1377 (Fed. Cir. 2011)).

177. *Id.* at 372 (citing Chevron U.S.A., Inc. v Natural Res. Def. Council Inc., 467 U.S. 837, 843 (1984)).

178. *Id.* at 373 (citing Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203 (2014)).

179. *Id.*

180. *Id.* at 374.

181. *Id.* at 375 (citing *Scialabba,* 134 S. Ct. at 2213).

182. King v. Burwell, 135 S. Ct. 2480, 2496 (4th Cir. 2015).

183. *Id.* at 2488 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

184. *Id.*

185. *Id.* at 2483.

186. *Id.* at 2489.

that such decision-making to the IRS, "which has no expertise in crafting health insurance policy of this sort."[187]

Having determined that the deference to the IRS was not required, the Court undertook its own analysis of the interpretation of the words "established by the state."[188] The Court applied "the Whole Act Rule," which encompasses both the context and the purpose of the legislation[189] and concluded that the phrase "an Exchange established by the State under [42 U.S.C. § 18031] is properly viewed as ambiguous."[190]

Rather than determining whether the IRS's interpretation of the statute was reasonable, as would have occurred had the Court applied *Chevron* Step Two, the Court examined the three key provisions of the ACA: guaranteed issue and community rating requirements; the individual mandate that required purchase health insurance coverage or payment to the IRS; and the availability of tax credits for individuals with incomes below 400 percent of the federal poverty line.[191] Under the plaintiffs' reading of the statute, the availability of tax credits would be virtually eliminated for Americans living in states with only a federal exchange and individual mandate would cease to apply in any meaningful way.[192] "It is implausible that Congress meant the Act to operate in this manner," said the Court.[193] Instead, the Court noted that the statutory construction of Section 36B supports the contention that credits are available to anyone who meets the income threshold.[194] The Court concluded its opinion as follows: "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."[195]

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187. *Id.*

188. *Id.* at 2488–89.

189. *Id.*; *see* Katherine Clark and Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes*, available at http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf (citing William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (3d. ed. 2001)).

190. King v. Burwell, 135 S. Ct. at 2491.

191. *Id.* at 2493.

192. *Id.*

193. *Id.* at 2494 (citing *National Federation of Independent Business v. Sebelius, 567* U.S. ----, ----, 132 S. Ct. 2566, 2674 (2012) (Ginsburg, J., dissenting) ("Without the federal subsidies . . . the exchanges would not operate as Congress intended and may not operate at all."). (The Court rejected the plaintiffs'' argument that Congress intended the language to apply only to state-established exchanges as a means to entice states to establish exchanges, noting that Section 10841 of the ACA anticipated that some states would not create an exchange and that the Secretary of HHS would operate an exchange in such states.)); *see* 42 U.S.C. § 18041(c)(1)(A) (2012).

194. 135 S. Ct. at 2495.

195. *Id.* at 2496.

Justice Scalia, with whom Justice Thomas and Justice Alito joined, dissented.[196] They first noted that the authority for establishing an exchange by the state and an exchange by the federal government is found in two separate provisions of the Act.[197] Thus, to say that an exchange established by the state includes an exchange established by the federal government give these words "bizarre meanings."[198] They also observed seven different places where the words "an exchange created by the state" occurs.[199] The Court suggested that if there were no intention of the usage of these words, then they would not have been used seven times.[200] They reasoned that one occurrence of the words could be justified; however, the dissenting justices believed that seven times was an attempt to establish a difference.[201] Further, in some parts of the Act, the phrase "an Exchange established by the State" is used.[202] Yet, within other parts of the Act, only the words "an Exchange" are used.[203] The dissenters suggested that if there were no intended difference between an exchange established by the state and a federal exchange, then lawmakers would have neither specifically used the term "an Exchange established by the State" so many times, nor excluded the phrase out of the Act so many times.[204] In their opinion, this was done to show there is a difference between a federal exchange and an exchange created by a state.[205]

Dissenters also rejected the majority's reliance on the three-pronged purposed of the ACA as requiring tax subsidies.[206] Justice Scalia stated, "the express terms of the Affordable Care Act make only two of the three reforms mentioned by the Court applicable in States that do not establish Exchanges. It is perfectly possible for them to operate independently of tax credits."[207] Further, that upholding the plaintiffs' interpretation might reduce the number of people subject to the individual mandate and "destabilize the individual insurance market" simply reveals a flaw in the statutory scheme and does not justify undermining the clear words of the Act.[208]

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196. *Id.*
197. *Id.*
198. *Id.* at 2498.
199. *Id.*
200. King v. Burwell, 135 S. Ct. at 2499.
201. *Id.*
202. *See id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. 135 S. Ct. at 2502.
207. *Id.* at 2503.
208. *Id.*

The dissent also questioned the majority's characterization of the discrepancies in the language of the statue as due to "unartful drafting" of the Affordable Care Act.[209] The opinion noted, "the Supreme Court has no free-floating power to rescue Congress from its drafting errors."[210]According to the dissent, only when it is "patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake."[211] The language in the statue, "established by the state" does not meet the standards to qualify as a drafting error, especially considering the fact that the specific wording occurs twice in section 36B and five additional times in other parts of the Act.[212]

The dissent concluded by suggesting that the majority opinion's reading of the statute did not merely interpret the Affordable Care Act, but gave it a completely different meaning, in order to preserve the ACA. Justice Scalia opined, "Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges."[213]

V. IMPLICATIONS FOR LEGAL RESEARCH

Unlike the lower courts in the *King*, *Halbig*, and *Pruitt* cases, the Supreme Court decided to ignore its previous and landmark decision in *Chevron* even though the issue stemmed from a legal controversy about the IRS's interpretation of a statute. Under the *Chevron* framework once the Court determined the wording of the ACA to be ambiguous – which seemed to be the only reasonable conclusion[214] – the question for the Court would have been whether the IRS's ruling was "based on a permissible construction of the statute."[215] SCOTUS declined to apply the doctrine, arguing that the legal question presented in *King v. Burwell* was one of such deep "economic and political significance" that it should not be delegated to the IRS absent the express intent of Congress.[216]

What was especially unusual is that the Court could have reached the same conclusion and upheld the IRS's interpretation by relying on *Chevron.*[217] In ruling that *Chevron* does not apply because the consequences are too important to defer to the judgment of the IRS,

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209. *Id.* at 2504

210. *Id.*

211. *Id.* at 2505.

212. King v. Burwell, 135 S. Ct. at 2505.

213. *Id.* at 2506.

214. Jody Freeman, *The* Chevron *Sidestep: Professor Freeman on King v. Burwell* (2015), http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/.

215. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 842–43 (1984).

216. 135 S. Ct. at 2483.

217. Leandra Lederman & Joseph C. Dugan, King v. Burwell*: What Does It Portend for* Chevron*'s Domain?* 2015 PEPP. L. REV. ONLINE 72, 80 (2015), http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2880&context=facpub.

Chief Justice Roberts eliminated the possibility that the IRS, under a different administration, could change its interpretation and allow subsidies only to those individuals enrolled on state exchanges.[218] This is a very significant step in insuring that the ACA remains part of the legislative mandate for health care coverage in the U.S.[219] By deciding the case without deferring to the IRS, the Court prevented the possibility that a newly elected administration could issue new regulations and completely reverse the current interpretation of the IRS.[220]

It is without a doubt that the Court's decision was in large part motivated by a political agenda to maintain the availability of tax credits to all otherwise eligible persons regardless of where they live and, arguably, this was the intention of Congress.[221] All three cases were clearly brought for a political purpose—to bring down the ACA.[222] To do so, the political adversaries of the ACA chose to capitalize on four words in a 2,700-page "monster" of a document and rely on the Court's dominant theorists, its textualists, to interpret the statute in a way that would undermine the entire statutory scheme.[223] It is also evident that the Courts' history in applying *Chevron* has been "elusive, inconsistent and unpredictable"[224] at best, with some jurists and scholars calling for

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218. Bob Seng & Holly Fistler, King v. Burwell: *The Last Piece of Obamacare Puzzle*, 72-AUG BENCH & B. MINN. 16, 17 (2015) (Chief Justice Roberts indicated in his questions during oral argument a concern that application of *Chevron* could leave room for a subsequent administration to change the IRS's interpretation); Tom Miller, *Unfair Coercion, or Greater Deference? Two New Sides of King v. Burwell*, 23 U. MIAMI BUS. L. REV. 297, 311 (2015).

219. Seng & Fistler, *supra* note 218, at 17.

220. By ruling that the statute was ambiguous, the Court avoided application of its prior ruling *in Nat'l Cable & Commc'ns Assn. v. Brand X Servs.*, 545 U.S. 967, 982 (2002), where it held that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. According to the *Brand X* Court, this principle stems from *Chevron* which established a presumption that if Congress any left ambiguity in a statute it intended that an agency (rather than the courts) would resolve the ambiguity and would possess some degree of discretion in making its determination including reversal of a prior ruling.

221. Andy S. Grewal, King v. Burwell: *Where Were the Tax Professors*? 2015 PEPP. L. REV. 48, 50 (2015); Johnson, Finley & Rohack, *supra* note 30, at 29; Richard A. Posner, *Comment on Professor Gluck's "Imperfect Statutes, Imperfect Courts"*, 129 HARV. L. REV. F. 11, 11-12 (2015).

222. Timothy Jost, *Implementing Health Reform: Appellate Decisions Split on Tax Credits in ACA Federal Exchange*, HEALTH AFF. BLOG, (Oct. 16, 2015, 10:27 AM), http://healthaffairs.org/blog/2014/07/23/implementing-health-reform-appellate-decisions-split-on-tax-credits-in-aca-federal-exchange/.

223. Gluck, *supra* note 13, at 63.

224. Shanor, *supra* note 62, at 537; (Shanor and other scholars argue that the two-step inquiry in *Chevron* has been addressed by the courts on numerous occasions and should in fact be a one-question analysis: "[W]hether the agency's construction is permissible as a matter of statutory interpretation.") *Id.* at 547; *see also* Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron's *Step Two*, 2 ADMIN. L.J. 255, 256 n.10 (1988); *see also* Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 314 n.5 (1996); *see also* Ronald M. Levin, *The Anatomy of*

the reversal of the doctrine altogether.[225] The outcome of the decision in *King v. Burwell* reflects the problem with the *Chevron* framework in that not only is it subject to political manipulability,[226] but also that the various cases interpreting the doctrine often result in inconsistent outcomes.[227]

A. Effect on the Chevron Principles

The Supreme Court's decision not to follow *Chevron* and accord no deference to the IRS's interpretation appears to signal a move away from the courts' adopting deferential treatment to agency decisions.[228] In the event that the Court deems agency delegation under a statute unclear, an agency ruling that conflicts with judicial interpretation could be subject to invalidation.[229] At first blush, one could argue that the *King* Court applied a Step Zero analysis and addressed the question: "Does the statute expressly delegate sole authority to the agency to interpret

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Chevron: *Step Two Reconsidered*, 72 CHI-KENT. L. REV. 1253, 1284 (1997); *see also* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 597 (2009).

225. Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (J. Thomas, concurring) (deference raises serious separation-of-powers issues and is contrary to Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies); Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 807-08 (2010).

226. Evidence of political manipulability is demonstrated by the Court's decisions: conservative Justices are more likely to validate Conservative agency interpretations than liberal ones, and liberal Justices are similarly likely to agree with liberal agency interpretations more often than conservative ones. James J. Brudney, *Looking Back and Looking Forward:* Chevron *and* Skidmore *in the Workplace: Unhappy Together* 83 Fordham L. Rev. 497, 510 (2014) (citing Connor N. Raso & William N. Eskridge, Jr., Chevron *As a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1786-89 (2010); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823-33, 836, 842, 847 (2006)).

227. In an empirical study of Court rulings between 1984 and 2006, the authors found a "haphazard" array of decisions ranging from methodical application of the rule of deference to no mention of it at all. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); The rulings in *Halbig v. Burwell* are an example of the inconsistencies in application, often stemming from the political perspective of the decision-makers. In the District Court, Judge Friedman settled the matter at Step One, holding that "the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges." Furthermore, he concluded "that 'Congress has directly spoken to the precise question' of whether an 'Exchange' under 26 U.S.C. § 36B includes federally-facilitated Exchanges." Halbig, 27 F. Supp. 3d at 25 (citing Chevron, 467 U.S. at 842); The Circuit Court's panel also settled the matter at step one but concluded "that the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges 'established by the State." Halbig, 758 F.3d at 394; The only difference were the political affiliations of the jurists. District Judge Paul L. Friedman was a Democratic appointee, while two of the three-member panel in the DC Circuit Court were Republican appointees. Jost, *supra* note 222.

228. Lee A. Sheppard, *News Analysis: Recent Supreme Court Decisions and Judicial Deference*, 148 TAX NOTES 7 (July 6, 2015).

229. Leandra Lederman & Joseph C. Dugan, King v. Burwell: *What Does It Portend for* Chevron's *Domain?* 2015 PEPP. L. REV. 72, 80 (2015).

the statute?"[230] In *King v. Burwell*, asking this question as an initial step would have achieved the result that SCOTUS aimed to achieve – eliminating the deference to the agency. Under this analysis, if the statute does not expressly delegate sole authority to the administrative agency that issued the regulation being challenged, the Court then determines the meaning of the statute by examining the statutory language, the legislative intent, context, and purpose of the legislation as its guide. However, if the statute does expressly delegate authority to the agency, it is appropriate for the Court to address the questions: "whether the statute addresses the issue and is unambiguous" and "whether the agency's answer is based on a permissible construction of the statute."[231]

However, this view of the Court's analysis is flawed for several reasons. First, the Court never indicated that the basis for its decision was *Chevron* as modified by *Mead*. Chief Justice Roberts concluded that *Chevron* "simply did not apply--the issue was of such 'economic and political significance' that it was inconceivable that Congress would simply have left it to the IRS to resolve."[232] Second, under a *Mead* analysis it would have been difficult to hold that the IRS did not have statutory rule-making authority as IRC § 36B(g) expressly empowered the IRS to "prescribe such regulations as may be necessary to carry out the provisions of this section."[233] Moreover, the Court had previously confirmed its deference to IRS regulations stating that IRS regulations should be treated the same as all other executive agencies because of "the importance of maintaining a uniform approach to judicial review of administrative action."[234]

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230. *See generally* Cass R. Sunstein, Chevron *Step* Zero, 92 VA. L. REV. 187, 191 (2006).

231. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 842 (1984).

232. Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1868 (2015) (quoting *King*, 135 S. Ct. at 2488–89).

233. 26 U.S.C. § 36B (2012). The IRS already had authority to "prescribe all needful rules and regulations for the enforcement of this title." *Id.* § 7805(a). The plaintiffs presented a counterargument, citing 42 U.S.C. § 18082(a) (2012), which provides that Treasury and Health and Human Services share joint responsibility for administering the premium assistance tax credits. That argument did not negate the IRS' authority to promulgate regulations as noted by the district court which held that *Chevron* deference applied since both the HHS and the Department of the Treasury, through the IRS, have coordinated and created a consistent definition of "exchange" under the IRS ruling and related HHS regulations. King, 997 F. Supp. 2d at 432.

234. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011) (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)); *see* Hickman, *supra* note 14, at 62; Scholars have largely agreed that deference to the IRS is justified in that it allows for a more consistent application of Treasury regulations to taxpayers. John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 68 (1995); Arguably, less formal rulings of the IRS such as Revenue Rulings and Procedures do not enjoy judicial deference because they are not subject to the notice and comment period required for regulations. Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 242-52 (2009); *but see* Ryan Lirett, *Giving* Chevron *Deference to Revenue Rulings and Procedures*, TAX NOTES 1357, 1357 (Dec. 10, 2010).

Having concluded that *Chevron* did not apply was not completely at odds with the Court's previous rulings when the Court indicated that it might decline to defer to an agency finding if the issue was the "too important to let an agency to decide."[235] In *FDA v. Brown & Williamson Tobacco Corp.*,[236] the FDA determined that nicotine is a "drug" and that cigarettes and smokeless tobacco are "drug delivery devices," and therefore it had jurisdiction under the Food, Drug and Cosmetics Act (FDCA) to regulate tobacco products as customarily marketed.[237] Finding that tobacco products were harmful to children and adolescents, the FDA issued regulations restricting the promotion, labeling, and accessibility of tobacco products, including smokeless tobacco products.[238] A group of tobacco producers, retailers, and advertisers sued, and the district court held that while the FDA had the authority to regulate tobacco products, the regulations challenged exceeded its authority.[239] The court of appeals reversed, holding that Congress did not grant the FDA jurisdiction to regulate tobacco products.[240] The Supreme Court affirmed the court of appeals finding that based on the statutory scheme and subsequent amendments of the FDCA,[241] "Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.[242] Under a straightforward application of Step Zero, the analysis could have stopped here. However, the Court continued: "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.[243] The Court found that regulation of the tobacco industry was such an extraordinary case and that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[244] However, while this decision seems to support the Court's decision in *King*, it is important to note that the FDA's regulation of

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235. Three other conditions might lead the Court to deny agency deference when (1) there is a clash of different governmental interpretations or when the agency interpretation, (2) the interpretation expands a criminal or punitive statute, or (3) the ruling raises serious constitutional problems. William N. Eskridge Jr., *Symposium Issue: 30 Years of Comparative Institutional Analysis: Expanding* Chevron's *Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 448 (2013).

236. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

237. *Id.* at 127.

238. *Id.* at 128.

239. *Id.* at 130.

240. *Id.*

241. *Id.* at 120.

242. 529 U.S. at 160–61.

243. *Id.* at 159 (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration")).

244. 529 U.S. at 160.

tobacco products represented a significant departure from its previous position that it lacked jurisdiction to regulate tobacco.[245]

A more recent indication of the Court's rejection of *Chevron* deference appears in *City of Arlington v. FCC*.[246] In that case, the Court's majority opinion deferred to the FCC's ruling, holding that there is no different analysis when deciding whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity when the issue concerns the scope of the agency's statutory authority (that is, its jurisdiction).[247] While the case is important for the Court's further support of *Chevron,* even if the basis of the interpretation involved an agency's jurisdiction, SCOTUS watchers will observe Chief Justice Roberts dissent as a harbinger of future rulings. He began his opinion as follows:

> My disagreement with the Court is fundamental. It is also easily expressed: A court should not defer to an agency until the court decides, *on its own*, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.[248]

The dissent acknowledged the application of *Mead* but suggested that a general grant of rulemaking authority under the statute is not sufficient. Chief Justice Roberts stated: "If a congressional delegation of interpretive authority is to support *Chevron* deference, however, that delegation must extend to the specific statutory ambiguity at issue. The appropriate question is whether the delegation covers the 'specific provision' and 'particular question' before the court".[249] Accordingly, the dissent concluded that the court of appeals first should have determined on its own whether Congress delegated interpretive authority over the statute to the FCC before affording *Chevron* deference and that the decision should have been remanded for further consideration on that issue.[250]

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245. *See id.* at 156 (Under these circumstances, it is clear that Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco).

246. City of Arlington v. FCC. 133 S. Ct. 1863 (2013).

247. *Id.* at 1874.

248. *Id.* at 1877 (Roberts, C.J., dissenting, joined by Justices Alito and Kennedy) (emphasis added).

249. *Id.* at 1883 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 842, 844 (1984)).

250. *See id.* at 1886 (observing that there is nothing nefarious behind the view that courts must decide on their own whether Congress has delegated interpretative authority to an agency, before deferring to that agency's interpretation of law).

One explanation of Chief Justice Roberts' dissent in *City of Arlington* and his later opinion in *King* is that the Court has become increasingly dissatisfied with the extent to which rulemaking power has been delegated by Congress to administrative agencies.[251] At the same time, the Court is attempting to strike a balance between its role as statutory interpreter and effectuating Congressional intent by deferring to administrative decision-making where appropriate.[252] Going forward, it remains to be seen whether these cases signal a significant cut back on federal agencies' lawmaking authority and judicial deference to that authority. In one respect, the opinion represents the judiciary reclaiming its rightfully held authority to interpret the law, while others argue that the courts should curb the excessive authority held by administrative agencies.[253] In *King*, the Court's de novo interpretation of the statute was consistent with that of the IRS and HHS regulations, but that may not always be the result.[254]

In the term following the King v. Burwell, the Court once again had the opportunity to apply *Chevron* in reviewing an agency ruling. At issue in *Encino Motorcars, LLC v Navarro*[255] was the question whether a change in the Department of Labor's policy to exclude service advisors from the overtime exemption under the Fair Labor Standards Act entitled employees from Encino Motorcars to overtime pay. Since 1978, the DOL had taken the position that service advisors were exempt and thus not entitled to overtime pay. In 2011, the DOL abandoned its "decades-old position" of treating these employees exempt and issued final regulations stating that only employees actually engaged in selling vehicles would be treated as exempt.[256] Not only was the final rule inconsistent with proposed regulation issued in 2008, but also the DOL gave little explanation for its decision.[257]

The Court pointed out that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[258] Applying that principle, the Court found that the "unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position . . . ."[259] Further, the Court noted *Chevron* deference

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251. *See id.* at 1879 (Roberts, C.J., dissenting) (stating the danger posed by the growing power of the administrative state cannot be dismissed).

252. Symposium, Chevron *at 30: Looking Back and Looking Forward: What 30 Years of* Chevron *Teach Us about the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 611 (2014).

253. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1002-03 (2015).

254. King v. Burwell, 135 S. Ct. 2480, 2482 (2015).

255. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2017).

256. *Id.* at 2123.

257. *Id.*

258. *Id.* at 2124.

259. *Id.* at 2126.

requires that administrative rulemaking follow a relatively formal procedure including a notice-and-comment period and that the agency must give adequate reasons for its decisions.[260] Because the DOL issued the 2011 regulation without a reasoned explanation for its significant change of position, the issue whether or not service advisors are exempt under the statute must be determined without placing controlling weight on the DOL's position. The Ninth Circuit's reliance on *Chevron* was misplaced and thus the case was remanded to the court of appeals to decide the issue.[261]

Under the case-by-case approach suggested by the *King* opinion, it will be up to the courts to decide whether an issue is sufficiently "extraordinary" to forgo *Chevron* deference and decide whether the statute delegates rulemaking authority in each instance where a regulation ruling is challenged. This has the chance of creating a myriad of statutory interpretations—which is exactly what the *Chevron* framework was intended to avoid.[262] Further, little guidance is provided as to what constitutes an extraordinary case. The Court did not explain how to distinguish issues of such economic or political significance requiring judicial interpretation rather than deference to the agency's ruling.[263] In his dissent in *City of Arlington,* Chief Justice Roberts noted that he was not suggesting a need to draw a "specious, but scary-sounding" line between "big, important" interpretations on the one hand and "humdrum, run-of-the-mill" ones on the other.[264] Decisions surrounding interpretation of the ACA evidently are examples of a big or important decision, but certainly every Income Tax Code provision involving tax credits is not worthy of a de novo interpretation by the courts. Perhaps, the "you know it when you see it" standard should apply. [265] Further, in light of the *Encino Motorcars* decision, failure to

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260. *Id.* at 2125.

261. *Id.* at 2127. A dissenting opinion was written by Justice Thomas who agreed that no deference under *Chevron* is warranted when a regulation is procedurally defective but disagreed with the decision to "punt" the substantive issue back to the court of appeals. *Id.* at 2128. Instead, based on the statute, he would have held that the service advisors are exempt and thus the DOL's 2011 regulation was not correct. On remand, the Ninth Circuit held that the service advisors did not fall within the FLSA exemption. Navarro v. Encino Motorcars, LLC, 845. F.3d 925, 927 (9th Cir. 2017).

262. *See* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1120 (1987) (noting that the *Chevron* Court fashioned its presumption of agency delegation "unconnected to congressional wishes reflected in any given law"); *See id.* (describing the *Chevron* framework as not "just as a rule about agency discretion," but "as a device for managing the courts of appeals that can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy").

263. Ellen P. Aprill, *King v. Burwell and Tax Court Review of Regulations*, 2015 PEPP. L. REV. 6, 17-18 (2015).

264. *City of Arlington*, 133 S. Ct. at 1884 (Roberts, C.J., dissenting).

265. Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (paraphrasing Justice Potter Stewart's famous expression when defining the meaning obscenity).

follow administrative procedures may be create a sufficiently extraordinary situation to disregard *Chevron*.

B. Effect on Statutory Construction

Prevailing wisdom suggests that the majority opinion in *King* was motivated by a desire to keep the statutory scheme of the ACA intact, even if it required a controversial interpretation of the statute.[266] Scholars contend that the Court's decision signifies a move away from Justice Scalia's textual approach to statutory interpretation and toward a contextual approach where the purpose and legislative intent become relevant to the inquiry.[267] According to textualists, legislators use their words in a way that a reasonable person would read the text to specify both the means and the ends of a statutory provision.[268] In the majority opinion, Chief Justice Roberts rejecting this approach, writing: "the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase" in order to allow a tax credit to all persons otherwise eligible.[269] Some would argue that the Supreme Court's refusal to apply a textual analysis and "engaging with interpretation methods that consider external sources," it has set a "dangerous interpretation precedent in ignoring the statutory text to interpret a major political question." [270] However, under a contextual approach, because Congress enacts laws to make policy, legislative interpretation is better served by emphasizing policy cues from a statute's structure, context, and history, rather than dwelling on every word and semicolon.[271]

Regardless of whether one agrees or disagrees with the outcome, the Court's opinion is instructive insofar as what it looked at and did not look at when determining the meaning of "established by the State." [272]

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266. *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting) ("[T]he normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.").

267. Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2d 407, 421 (2015); Christopher J. *Walker, What King v. Burwell Means for Statutory Interpretation*, YALE J. ON REG.: NOTICE & COMMENT (June 25, 2015), http://www.yalejreg.com/blog/what-king-v-burwellmeans-for-statutory-interpretation-by-chris-walker.

268. John F. Manning, *Inside Congress' Mind*, 115 COLUM. L. REV. 1911, 1913 (2015).

269. *King*, 135 S. Ct. at 2496.

270. Erin Michelle Peterson, *Dangers in Justifying a Means for an End: U.S. Supreme Court Faces Risky Interpretation Question with PPACA, Exchanges, and Premium Tax Credits*, 49 GA. L. REV. 1193, 1229 (2015).

271. Manning, *supra* note 268, at 1914 (citing Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*), 60 Harv. L. Rev. 370, 370 (1947) (noting that some "purpose lies behind all intelligible legislation"); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-39 (1947) ("Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government.").

272. *See King*, 135 S. Ct. at 2489–96 (laying out the relevant statutes and methods of interpretation in the Court's definition of "established by the state").

Interestingly, the Court did not dwell on the legislative history of the statute.[273] In fact, the only place where the Court mentions legislative history is when it suggests that Congress's "inartful" drafting of the statute was because much of the work was done behind closed doors, rather than through the traditional legislative process, in order to bypass the Senate's normal 60-vote filibuster requirement.[274] Instead, the Court took a contextualized approach when deciding two issues: (1) Is the wording of Section 36B unambiguous; and (2) If so, what do the words "established by the State" mean? In an answer to the first question, the Court noted that, when read out of context, the meaning of that phrase might not be as clear as it appears.[275] If an exchange established by the federal government is by definition an exchange established under 42 U.S.C. § 18031, which the Court concluded it was, it makes no sense to distinguish between State and Federal Exchanges.[276] Thus, the Court concluded that the statute was ambiguous as it could be read to apply only to exchanges established by a state or to all exchanges whether established by a state or the Secretary of HHS.[277]

Having decided that section 36B was in fact ambiguous, the Court then stated that it must turn to the broader structure of the Act to determine the meaning of the words. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[278] Here, the Court rejected the plaintiffs' interpretation of the statute as such meaning would "destabilize the individual insurance market" in the 34 states which did not establish an exchange, creating the very "death spirals" that the ACA was designed to avoid.[279] Eliminating the tax credits in those 34 states would, according to the Court, would undermine the coverage requirement of the Act and effectively eliminate the state insurance market.[280] Clearly, Congress did not intend the Act to operate in such a manner. While the Court acknowledged that the plaintiffs' arguments were strong, it nevertheless decided to depart from what would otherwise be the most

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273. *See King*, 759 F.3d at 371 (acknowledging the present legislative history and then quickly moving on).

274. *King*, 135 S. Ct. at 2492.

275. *Id.* at 2489–90.

276. *Id.* at 2491.

277. *See id.* (pointing out other statutory provisions that seemed to assume tax credits would be available on both State and Federal Exchanges).

278. *Id.* at 2492 (quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)).

279. *Id.* at 2492-93.

280. *See id.* (arguing that eliminating the tax credits would significantly increase insurance premiums while decreasing enrollment).

natural reading of the pertinent statutory phrase.[281] Instead, it relied on a contextual and structural approach to statutory interpretation, noting that in such extraordinary cases, such interpretation is necessitated in order "to avoid the type of calamitous result that Congress plainly meant to avoid."[282] The Court thus eschewed its previous reliance on a textual approach and instead read the statute in a manner that was consistent with Congress' plan.[283]

The Court's opinion in *King* provides some guidance for statutory interpretation within or outside the *Chevron* framework where the Court had previously been silent or unclear as to the proper approach when deciding alternative meanings.[284] This caused uncertainties about the relationships among non-*Chevron* canons and inconsistencies in the *Chevron* cases themselves.[285] Rather than looking at words in isolation, the Court advocates a more holistic approach to understanding a statutory scheme from its "text, structure, and the statute's own, codified stated purposes" (not legislative history).[286] The role of the courts, under this approach, is to determine both text and purpose to uncover Congress's plan, which assumes that "Congress has a rational plan that statutes are meant to work."[287] This reasoning was evident in another case decided by the Court earlier in its session. In *Yates v. United States*,[288] the Court rejected the government's argument that the words "tangible object" within the Sarbanes-Oxley Act (SOX) covers any physical evidence that might be relevant in a federal investigation—in this case an undersized fish that was thrown back into the water by a commercial fisherman.[289] Writing for the plurality, Justice Ginsberg noted that the provision of SOX containing the words "tangible object" related to the destruction of evidence and thus must be interpreted as limited to an object used to record or preserve information, and not to all objects in the physical world.[290] According to the Court, Congress did not intend to bury a general spoliation provision in a statute targeting fraud in financial recordkeeping.[291]

Not all jurists and scholars agree with the Supreme Court's refusal to follow a textualist approach; most notably, Justice Scalia in his

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281. *Id.* at 2495.

282. King v. Burwell, 135 S. Ct. 2480, 2496 (2015).

283. *Id.*

284. *Id.* at 2488–89; Gluck, *supra* note 13, at 611.

285. *King*, 135 S. Ct. at 618.

286. Gluck, *supra* note 13, at 66.

287. Gluck, *supra* note 13, at 91.

288. *See* Yates v. United States, 135 S. Ct. 1074, 1077 (2015) (stating that 1512(c)(1) should not be read in such a way as to render an entire provision of the act superfluous).

289. *Id.* at 1078, 81.

290. *Id.* at 1081.

291. *Id.* at 1087.

dissenting opinion wrote, "[t]he somersaults of statutory interpretation [the Court has] performed will be cited by litigants endlessly, to the confusion of honest jurisprudence."[292] The Court's abandonment of textualism which allowed it to consider external sources risks setting a "dangerous interpretation precedent in ignoring the statutory text to interpret a major political question" in a manner that the court sees fit.[293] Adopting a contextual approach also risks a court's selection of those statutory provisions which support its view of Congress's plan while ignoring other sections that might contradict such a perceived purpose, creating uncertainly as to what the law means.[294] However, following the death of Justice Scalia a scant 10 months after the *King* decision, it is probable that we will see less reliance by the Court on textual interpretations of statutory language.

C. Effect on IRS Rulings

Despite the Court's ruling in the *Mayo Foundation for Medical Education and Research v. United States*[295] that *Chevron* deference to IRS regulations rulings should apply with the same force and effect as it does with respect to other administrative pronouncements, followers of *Chevron* believe the *King* decision foreshadows a trend that *Chevron* deference "is now receding" in tax controversies.[296] Even before *King,* courts were finding ways to undercut the IRS's authority under *Chevron.*[297] In reaching their decisions, courts often either ignored *Chevron* altogether or were able to fashion an exception to the principle.[298] For example, in a 2012 decision, the Court applied the principle of stare decisis to conclude that once the Supreme Court interpreted a tax law, even if the law had been amended subsequent to its decision, there is no longer any possible contrary interpretation and

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292. *King v. Burwell*, 135 S. Ct. 2480, 2507 (Scalia, J., dissenting).

293. Erin Michelle Peterson, *Dangers in Justifying a Means for an End: U.S. Supreme Court Faces Risky Interpretation Question with PPACA, Exchanges, and Premium Tax Credits*, 49 GA. L. REV. 1193, 1229 (2015).

294. Adler & Cannon, *supra* note 15, at 77.

295. Mayo Found. for Med. Educ. and Research v. U.S., 562 U.S. 44 (2011).

296. Steve R. Johnson, *The Rise and Fall of* Chevron *in Tax: From the Early Days to* King *and Beyond*, 2015 PEPP. L. REV. 19, 22 (2015); Much of the controversy regarding the weight of deference accorded to Department of Treasury regulations and IRS rulings stemmed from the Court's continued application of its pre-*Chevron* holding in *National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979), wherein the Court recognized the authority of the IRS Commissioner to interpret the Tax Code, but it also* tested the reasonableness of a tax regulation using *a* multi-factor test that subsequently gave courts a number of bases for invalidating tax regulations. Aprill, *supra* note 263, at 8; In *Mayo Found. for Med. Educ. and Research v. United States,* the Supreme Court noted the differences in analyses between *Chevron* and *National Muffler* and resolved the issue holding that the *Chevron* doctrine applies to tax regulations promulgated pursuant to the grant of both specific and general authority under the IRC. 562 U.S. at 55.

297. Johnson, *supra* note 296, at 26.

298. *Id.* at 29–30.

Treasury Regulations adopting an inconsistent construction are not entitled to *Chevron* deference.[299] In addition, under a Step One analysis, courts can avoid *Chevron* deference by concluding that Code provision in question is unambiguous.[300]

Even if the Court did not intend to limit judicial deference in all future tax cases, but only those involving significant public policy issues, the Internal Revenue Code is replete with provisions that were enacted to achieve a non-revenue raising purpose, such as energy conservation, corporate governance, education, pension reform, child care, charitable giving, and economic development.[301] While the IRS is proficient at issuing regulations around the structure and mechanics of tax deductions and credits that are based on larger social and economic concerns, it cannot be said that it possesses any "specific expertise regarding the policies or politics surrounding things like pension plans, low-income housing, or municipal waste disposal."[302] Applying the majority opinion in *King,* it appears that *Chevron* deference would be unavailable in disputes involving the IRS's interpretation of such provisions. Moreover, since most disputes involving tax issues are resolved by the Tax Court, it is likely that the court will welcome the opportunity to apply a precedent that gives primacy to its judicial interpretation in order to invalidate Treasury regulations.[303]

The *King* decision also suggests that the Court now considers an interpretation beyond the literal language of a statutory provision to determine its meaning, which is an application of the well-known tax principle, the substance-over-form doctrine, which requires courts to "look beyond the taxpayers' characterization" of a transaction to determine the transaction's economic effect.[304] In writing the majority opinion, Chief Justice Roberts has "unleashed his inner tax lawyer with a brand of contextualism that seems to take cues from the substance-over-form doctrine," by looking beyond the words of section 36B which appears to deny a tax credit to taxpayers purchasing insurance from other than a state-established exchange, and engaging in a discussion of purpose, effect, and congressional intent.[305] "[F]rom the perspective of a tax lawyer, the Chief demonstrated a preference for legislative

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299. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1844 (2012).

300. *See* Loving v. IRS, 917 F.Supp.2d 67, 75 (D.D.C. 2013) (stating that 31 U.S.C. § 330 (2012) is unambiguous as to whether tax-return preparers are "representatives" who "practice" before the IRS).

301. Hickman, *supra* note 14, at 67.

302. Hickman, *supra* note 14, at 68.

303. Aprill, *supra* note 263, at 11, 14.

304. *See* True v. United States, 190 F.3d 1165, 1174 (10th Cir. 1999) (stating that "this fundamental tax principle" prefers the "true nature of [the] transaction" over "mere formalisms").

305. Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 37 (2015).

substance over form."[306] By moving away from textualism, the Court applied a broader standard to interpret tax law and avoided a result that, in its opinion, was never intended by Congress or the Treasury. Thus, while the *King* decision may suggest a wider change in the courts' inclination to defer to administrative authority when questions involve important issues of economic or political significance, in fact, the cut back on agency lawmaking authority may be limited solely "to extraordinary circumstances at the intersection of tax and administrative law."[307]

The *King* opinion may also reflect reaffirmation of a policy known as "tax exceptionalism," an approach advocating that general administrative law principles do not apply to tax law.[308] That line of reasoning had been seemingly put to rest by the Court in *Mayo Foundation*,[309] a case decided only a few years before *King v. Burwell.* Nevertheless, the Court continues to suggest that tax law is in fact special at least where its provisions were enacted to address very important, non-revenue, social or economic purposes.[310] Whether Treasury regulations will be reviewed using the *National Muffler* standards or other criteria where the issue does not have such potentially far-reaching effects remains to be seen.[311] Professor Hickman noted that while it does not seem likely that the decision will have a sweeping impact on a broad category of administrative challenges, she cautions that the Court "may now have inadvertently opened the door to a new, de facto version of tax exceptionalism in judicial review of tax cases."[312] This may become more apparent when the review involves a tax provision with significant impact to taxpayers.

VI. IMPLICATIONS FOR BUSINESS

Whether or not employers agree with the mandates of the ACA, the decision in *King* brought closure after months of uncertainty whether the law would withstand judicial review. After the decision, employers were able to move on with their consideration of how to best comply with the law and to implement procedures for meeting administrative requirements or, alternatively, whether to drop health coverage

306. *Id.*

307. *Id.* at 35.

308. *Id.*

309. *See King*, 131 S. Ct. at 713.

310. *See id.* at 716–17 (giving the agency interpretation the benefit of the doubt in a social case involving taxation of medical residents).

311. *See* James M. Pluckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1072 (2015) (providing a general principle but questions concerning what deference courts should apply continue).

312. Hickman, *supra* note 14, at 71.

altogether and pay the penalty tax.[313] However, in the long-run, the decision may cast more ambiguity regarding the validity of Treasury regulations and perhaps the rules of other administrative agencies. Although the *King* Court ultimately upheld the IRS' interpretation, the decision provides the basis for courts to ignore an agency's rule-making and substitute their own judgment, unless there is express statutory language delegating authority to the agency.[314] Firms are thus put into an untenable position of trying to second-guess whether a court will overrule the agency's interpretation and impose a different reading of a statute that will affect their tax liability and reporting requirements. Conversely, the decision may provide an advantage to business in the case of an unfavorable regulation or ruling. It may be easier to challenge Treasury interpretations if taxpayers can successfully argue that the statute in question serves an important policy purpose and thus de novo review is warranted. Taxpayers can also point to the *King* opinion to support an argument that the IRS exceeded its discretionary authority and went too far in taking a position contrary to their business interests. Finally, both the government and citizens can rely on the decision to support an argument that statutory language must be interpreted by taking into account both the context and purpose of the law.

VII. CONCLUSION

The Supreme Court's *King v. Burwell* opinion portends a departure from *Chevron* deference in tax controversies regarding statutory interpretation of legislation when the IRS arguably has no policy expertise because the provisions in question intersect both tax and administrative law and/or address non-revenue issues of social, economic or political significance. Instead, the decision suggests that when an IRS regulation ruling is challenged, courts should first decide the issue of whether the statute delegates rulemaking authority to the specific statutory ambiguity at issue. However, if the delegation does not cover "the 'specific provision' and 'particular question' before the court," the court should use a contextual approach to interpret the statute by emphasizing legislative "substance-over-form" and focusing on the legislation's structure, context, and history. To summarize, in *King v. Burwell*, the Supreme Court reasoned that because Congress enacts laws to make policy, in the absence of a specific grant of interpretative authority to an administrative agency, the court should utilize a holistic or contextual approach to interpret statutes in ways that effectuate Congress' intent. Consequently, *King v. Burwell* may

313. Harold M. Bishop, *Notes on*: King v. Burwell: *Post-Decision Implications and Challenges*, 66 LAB. L.J. 187, 191 (2015).

314. Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1148 (2015).

substantially affect subsequent challenges to IRS as well as other agencies' regulatory rulings, which involve statutory provisions that address social, economic or politically significant issues, because the agency's interpretations likely will not receive the deference previously afforded under *Chevron.* Further, in reviewing the language of a statute, the Court is more likely than before to adopt a contextualist approach in arriving at an interpretation that, it its collective opinion, furthers the intent of Congress.