University of Cincinnati Law Review

Volume 84 | Issue 1 Article 10

April 2018

Legality of Tax Credits to Federally Established Exchanges in Light of King v. Burwell and the Need to Clarify Chevron Deference

Adair Martin Smith

Follow this and additional works at: https://scholarship.law.uc.edu/uclr

Recommended Citation
Adair Martin Smith, *Legality of Tax Credits to Federally Established Exchanges in Light of King v. Burwell and the Need to Clarify Chevron Deference*, 84 U. Cin. L. Rev. (2018)
Available at: https://scholarship.law.uc.edu/uclr/vol84/iss1/10

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

LEGALITY OF TAX CREDITS TO FEDERALLY ESTABLISHED EXCHANGES IN LIGHT OF *KING V. BURWELL* AND THE NEED TO CLARIFY *CHEVRON* DEFERENCE

*Adair Martin Smith**

I. INTRODUCTION

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (ACA) into law.[1] The ACA is a major health care overhaul, reforming the health care system in the United States to "increase the number of Americans covered by health insurance and decrease the cost of healthcare."[2] Since its passage, the ACA has generated multiple lawsuits concerning its constitutionality, but the Supreme Court upheld the landmark Act on June 25, 2015.[3]

The ACA, in part, achieves its goal of establishing universal health care through the establishment of "American Health Benefit Exchanges" (Exchanges) under § 1311 of the Act.[4] Exchanges essentially are marketplaces that allow individuals to compare and purchase insurance plans online.[5] The ACA allows each state an opportunity to establish its own Exchange, but provides that the Federal Government will establish Exchanges if the state does not in an effort to ensure that all Americans have access to affordable health care.[6]

Also crucial to the success and implementation of the ACA is the availability of tax credits for individuals who need financial assistance or who purchase health insurance through the Exchanges.[7] These tax credits are essential because without the subsidies in place, it would not be economically feasible for many Americans to purchase health insurance.[8] This is contrary to the goals of the ACA and the individual mandate, which requires most Americans to obtain "minimum essential"

---

*Associate Member, 2014-2015, *University of Cincinnati Law Review*. The author would like to thank Marshall Smith and Alice H. Martin for their invaluable commentary in helping to formulate this note and for their endless love and support.

1. *Key Features of the Affordable Care Act By Year*, U.S. Dep't of Health and Human Services, http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html, (last visited Nov. 25, 2014).

2. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2571 (2012).

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

4. 42 U.S.C.S. § 18031 (2010).

5. *King*, 135 S. Ct. at 2482.

6. *Id.*

7. Christine Eibner & Evan Saltzman, *Assessing Alternative Modifications to the Affordable Care Act: Impact on Individual Market Premiums and Insurance Coverage*, RAND CORP. 1 (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR700/RR708/RAND_RR708.pdf.

8. *Id.* at 2.

Published by University of Cincinnati College of Law Scholarship and Publications, 2018

insurance coverage by 2014 or else pay a penalty.[9] The tax credits incentivize all states to establish an Exchange in order to receive a subsidy to lower the amount taxpayers spend on their monthly premium.[10] If a state does not create an Exchange, the Federal Government will provide one through federal Exchanges, running on HealthCare.gov.[11] Despite the creation of a tax credit, only sixteen states and the District of Columbia have established Exchanges, meaning that the remaining thirty-four states rely on federally facilitated Exchanges.[12]

The provision of tax credits to federal Exchanges has resulted in lawsuits filed by a coalition of states, employers, and individuals arguing that, based on the language of the ACA, tax credits can be offered only in state-run Exchanges.[13] On July 22, 2014, the D.C. Circuit and the Fourth Circuit rendered decisions on this issue but reached opposite conclusions, calling into question whether the federal government is properly following the regulations set out in the ACA.[14] On November 7, 2014, the Supreme Court granted certiorari to hear *King v. Burwell* and upheld the tax credit subsidies for both state and federal Exchanges.[15]

This Casenote examines the split circuit decisions in *Halbig v. Burwell* and *King v. Burwell*, ultimately decided by the Supreme Court on June 25, 2015. Part II of the Casenote explains the relevant portions

---

9. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012). *See also* 26 U.S.C.S. § 5000A (2010):

(a) Requirement to maintain minimum essential coverage. An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.

(1) In general. If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures...

10. *See id.*

11. 42 U.S.C.S. § 18041(c).

12. *See* The Henry J. Kaiser Foundation, *Marketplace Enrollment as a Share of the Potential Marketplace Population*, http://kff.org/health-reform/state-indicator/marketplace-enrollment-as-a-share-of-the-potential-marketplace-population/, (last visited Nov. 9, 2014). As of April 2014, the following states have established a state-based marketplace Exchange: California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Kentucky, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. The states of Arkansas, Delaware Illinois, Iowa, New Hampshire, and West Virginia have adopted partnership marketplace, which is essentially a hybrid model in which a state operates certain functions.

13. *See* Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014); King v. Burwell, 759 F.3d 358 (4th Cir. 2014).

14. *See Halbig*, 758 F.3d 390 (holding that subsidies are only available only in state-run exchanges). *But see King*, 759 F.3d 358 (approving the subsidies for state-run exchanges).

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

of the ACA at issue in *Halbig* and *King*. Part III reviews each court's statutory interpretation of the ACA regulations and the ultimate decisions in both cases. Part IV concludes that, despite using an incorrect method of statutory interpretation, the Fourth Circuit correctly decided this issue because applying a plain language reading of the tax credit statute creates an absurdity and is against the clear intentions of Congress. Finally, Part V analyzes the Supreme Court's decision to apply tax credits to all Exchanges, reiterating its decision to uphold the ACA in *NFIB v. Sebelius*.

II. BACKGROUND

A. Patient Protection and the Affordable Care Act

The ACA requires that "[a]n Exchange . . . be a governmental agency or nonprofit entity that is established by a *State*"[16] and that "[a]n Exchange . . . make[s] available qualified health plans to qualified individuals and qualified employers."[17] Therefore, the ACA delegates the primary responsibility to the states to establish their own Exchanges.[18] Because Congress cannot require states to implement federal laws,[19] if a state elects not to establish an Exchange, the federal government, through the Secretary of Health and Human Services (HHS), "shall . . . establish and operate such Exchange within the state and the Secretary shall take such actions as are necessary to implement such other requirements."[20] Furthermore, under each qualified health plan, there shall be a refundable tax credit available to subsidize costs for the individual consumer who purchased health insurance through an Exchange.[21]

B. 26 CFR 1.36B-2 (IRS Rule)[22]

Despite the ACA's charge that the Exchanges must be established by a state, the Internal Revenue Service passed a regulation (IRS Rule),

16. 42 U.S.C.S. § 18031(1) (2010) (emphasis added).

17. *Id.* § 18031(2)(A) (2010).

18. *See id.*

19. *Halbig*, 758 F.3d at 394.

20. 42 U.S.C.S. § 18041(c)(1)(B)(II) (2010).

21. 26 U.S.C.S. § 36B(a) (2010).

22. 26 C.F.R. § 1.36B-2 (2012), Eligibility for premium tax credit:

(a) In general. An applicable taxpayer . . . is allowed a premium assistance amount only for any month that one or more members of the applicable taxpayer's family . . . .

(1) Is enrolled in one or more qualified health plans through an Exchange; and

(2) Is not eligible for minimum essential coverage. . . .

which interprets Section 36B broadly and authorizes subsidies for insurance purchased on federally established Exchanges.[23] In passing this rule, the IRS asserted that the statutory language of Section 36B, the ACA in its totality, and the legislative history supported its position.[24] Yet, "[c]ommentators [disagree] on whether the language in Section 36B(b)(2)(A) limits the availability of the premium tax credit only to taxpayers who enroll in qualified health plans on State Exchanges."[25]

Two major differences exist between the petitioner's interpretation and the IRS Rule. First, the IRS Rule increases the number of individuals who will be required to purchase health insurance due to the provisions in the individual mandate.[26] Under this mandate, individuals do not suffer a penalty for failing to maintain "minimum essential coverage" if the annual cost of the cheapest available coverage, *less any tax credits*, exceeds eight percent of their income.[27] By some estimates, these credits "will determine on which side of the eight percent threshold millions of individuals fall," which could significantly increase the number of taxpayers who must choose between purchasing health insurance or paying a penalty.[28]

Second, the IRS Rule induces large business owners to provide full-time employees with health insurance.[29] Under the IRS's interpretation of the ACA, large employers who fail to offer full-time employees suitable coverage if one or more of those employees enroll in a qualified health plan, are penalized under the ACA.[30] Thus, the tax credits penalize large employers—those with fifty or more employees—and forces them to provide their full-time employees with health insurance.[31]

III. D.C. CIRCUIT VERSUS FOURTH CIRCUIT SUBSIDY INTERPRETATION

A. Halbig v. Burwell

In *Halbig v. Burwell*, the appellants were individuals and employers who lived in states that chose not to establish Exchanges and sued on

23. *See id.* § 1.36B-2(a)(1)("In general. An applicable taxpayer . . . is allowed a premium assistance amount only for any month that one or more members of the applicable taxpayer's family . . . [i]s enrolled in one or more qualified health plans through an Exchange." [hereinafter IRS Rule].

24. Halbig v. Burwell, 758 F.3d 390, 395 (D.C. Cir. 2014).

25. *Id.* (quoting Health Insurance Premium Tax Credit, 77 Fed. Reg. 30.377, 30.378 (May 23, 2012)).

26. *Id.*

27. *Id.* (citing 26 U.S.C.S. § 5000A(e)(1)(A)-(B) (2010) (emphasis added)).

28. *Id.*

29. *Halbig*, 758 F.3d at 395.

30. *Id.*

31. *Id.*

grounds that the federal government's interpretation of Section 36B was not in accordance with law.[32] The primary argument proffered by the appellants was that the statutory language of the ACA stating "through an Exchange established by the State"[33] clearly demonstrates that only state-based Exchanges may receive subsidies.[34] The appellants asserted that the federal government was not a "State" under 42 U.S.C. § 18024(d),[35] and therefore, all federally-created Exchanges were not eligible to receive tax credits under the ACA.[36] In contrast, the government argued that appellants' reading of Section 36B would render the ACA absurd and frustrate the purpose of the health care overhaul.[37] Because of this, the subsidies must also apply to federal Exchanges.[38]

The D.C. Circuit ultimately ruled in favor of the appellants, finding that "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."[39] The D.C. Circuit reached this decision by: (1) reviewing Section 36B in relation to ACA §§ 1311 and 1321, (2) finding the government's absurdity argument baseless, and (3) examining the ACA's purpose and legislative history.[40]

First, the D.C. Circuit examined §§ 1311 and 1321 of the ACA and determined that the statutory language intentionally excluded subsidies from applying to the federal government.[41] Section 1311 of the ACA provides that states "shall" establish Exchanges. Despite this language, both parties agreed that this was merely a suggestion and not a requirement.[42] However, if a state chose not to establish an Exchange, § 1321 required the federal government to "establish and operate *such Exchange* within the State."[43] The D.C. Circuit found that the use of the word "such" in § 1321 conveyed that federal Exchanges were "the equivalent of the Exchange a state would have established had it elected to do so."[44] Therefore, if a state chose not to establish an Exchange, the federal government would establish one within the state. Yet, nothing in

32. *See generally id.*
33. 26 U.S.C.S. § 36B(c)(2)(A)(i) (2010).
34. Halbig v. Burwell, 758 F.3d at 399.
35. *Id.* at 398 (defining "State" as "each of the 50 States and the District of Columbia.").
36. *Id.* at 399.
37. *Id.*
38. *Id.*
39. *Halbig*, 758 F.3d at 399.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* (quoting 42 U.S.C.S. §18041(c)(1) (2010) (emphasis added)).
44. *Halbig*, 758 F.3d at 399.

the ACA deemed federally established Exchanges to be considered "Exchange[s] established by the State."[45] The D.C. Circuit found that this omission demonstrated that Congress intended only for state-created Exchanges to receive tax credits. Furthermore, the court noted that widely accepted canons of statutory construction indicate that Congress acted intentionally when it used certain language in one part of the statute and omitted the same language in another part of the statute.[46]

The D.C. Circuit next analyzed whether prohibiting federally established Exchanges from receiving tax credits would render the ACA absurd and found that it would not because the Act still enforced the individual mandate.[47] Under the absurdity doctrine, courts do "not give effect to a statute's literal meaning when doing so would 'render [the] statute nonsensical or superfluous . . . or [create] an outcome so contrary to perceived social values that Congress could not have intended it.'"[48] To avoid giving the absurdity doctrine an overbroad application, the D.C. Circuit imposed a "high threshold" of unreasonableness before it "concluded that a statute does not mean what it says."[49] This high threshold provides that a provision "may seem odd" without reaching the level of absurdity and, in these instances, it is Congress's duty, not the court's, to clarify the law.[50] In framing the absurdity argument, the government alleged that failure to provide tax credits would render Section 36B superfluous.[51] The D.C. Circuit rejected this argument, finding that reporting by federal Exchanges still served the purpose of enforcing the individual mandate, even if tax credits were not available.[52]

Finally, the D.C. Circuit looked at the legislative history and purpose of the ACA to determine congressional intent.[53] Courts must assume "that the legislative purpose is expressed by the ordinary meaning of the words used."[54] It is only when "apparently plain language compels an odd result [that the Court] might look to legislative history to ensure that

45. *Id.* at 400.

46. *Id.* (quoting Russello v. United States, 104 S.Ct. 296 (1983)).

47. *Id.* at 402.

48. *Id.* at 402 (quoting United States v. Cook, 594 F.3d 883, 891 (D.C. Cir. 2010)).

49. *Halbig*, 758 F.3d at 402 (citing *Cook*, 594 F.3d at 891).

50. *Id.*

51. *Id.*

52. *Id.* at 403.

53. *Id.* The court noted that precedent is split. One line of cases instructs the court to stop its review and give effect to the statute's unambiguous language, while another line of cases instructs the court to consider legislative history. *See* Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 137 (D.C. Cir. 2012) and Sierra Club v. EPA, 551 F.3d 1019, 1027 (D.C. Cir. 2008).

54. *Halbig*, 758 F.3d at 407 (quoting Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys., 468 U.S. 137 (1984) (noting that the most traditional tool to determine congressional intent is to read the text).

the literal application of a statute will [not] produce a result demonstrably at odds with the intention of its drafters."[55] There must be evidence in the legislative history that Congress meant something other than the plain meaning of the statute to depart from a plain reading.[56] The D.C. Circuit found that the ACA's legislative history provided little insight into congressional intent regarding the availability of tax credits for Exchanges created by the federal government.[57] The government assumed that all states would cooperate and create their own Exchanges and, accordingly, subsidies would be available on all Exchanges.[58] Additionally, the government and its amici did not provide any specific floor statements by Senate sponsors on this particular issue, so the court was left to infer meaning from silence.[59] Determining there was no evidence regarding congressional intent, the D.C. Circuit refused to depart from the plain meaning of the ACA.[60]

B. King v. Burwell

In *King v. Burwell*, the plaintiffs, four individuals from Virginia, sued several departments in the federal government including the Department of Health and Human Services and the Internal Revenue Service because they did not want to purchase comprehensive health insurance.[61] Virginia failed to establish a state-run Exchange and was served by a federal Exchange, known as HealthCare.gov.[62] The plaintiffs would have been exempt from the individual mandate under the unaffordability doctrine[63] if the tax credits did not apply to federal Exchanges; however, because subsidies were available to all individuals

55. *Id.* (citing Engine Mfrs. Ass'n, ex. Rel. Certain of its Members v. United States EPA, 88 F.3d 1075, 1088 (D.C. Cir. 1996)) (quoting United States v. Ron Pair Enters. Inc., 489 U.S. 235 (1989) (internal citations omitted)).

56. *Id.*

57. *Id.*

58. *Id.* at 407-08 (referencing Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES at A17 (Aug. 5, 2012) ("When Congress passed legislation to expand coverage two years ago, Mr. Obama and lawmakers assumed that every state would set up its own exchange . . . .")).

59. *Halbig*, 758 F.3d at 408. While there were some specific floor statements on this issue, as the Fourth Circuit notes in *King v. Burwell*, the D.C. Circuit considered only information given by the amici and the Court itself did not search for applicable floor statements.

60. *Id.*

61. King v. Burwell, 759 F.3d 358, 365 (4th Cir. 2014).

62. *Id.*

63. The unaffordability doctrine exempts individuals from buying health care under the individual mandate if health care premiums are more than 8% of household income or if household income is below the filing threshold. *See Unaffordable Coverage Under the Affordable Care Act*, THOMAS REUTERS, http://cs.thomsonreuters.com/ua/ut/2014_cs_us_en/ius/faq/unaffordable-coverage-under-affordable-care-act.htm?refType=pod (last visited Mar. 8, 2015).

participating in any Exchange under the IRS Rule, the plaintiffs were subject to the minimum coverage penalty.[64] The plaintiffs asserted that, as a result of the IRS Rule, they would incur financial loss by being forced to either purchase insurance or pay the individual mandate penalty.[65]

Specifically, the plaintiffs argued that taxpayers should not receive a tax credit for purchasing insurance through a federal Exchange because the statutory language only mentions the credit being available under state-run Exchanges in § 1311 of the ACA.[66] The plaintiffs first argued that if Congress had intended to include federally-run Exchanges, it would not have specifically used the word "State." The plaintiffs also contended that the federal government was not a "State," so the phrase "Exchange established by the State" alone supported the idea that credits were unavailable to consumers on federal Exchanges.[67] Therefore, the plaintiffs argued that the omission in Section 36B of any reference to the federal Exchanges showed Congress's intent to provide tax subsidies only to state Exchanges.[68]

Section 1312 of the ACA provides that only "qualified individuals"—defined as an individual who "resides in the State that established the Exchange"—may purchase health plans through marketplace Exchanges.[69] The defendants argued that if tax credits can be given only in state Exchanges, there would be no qualified individuals present in states with federally facilitated Exchanges. Accordingly, federal Exchanges would have no eligible customers, a clear frustration of Congress's intent in passing the ACA.[70]

Ultimately, the Fourth Circuit ruled in favor of the defendants and held that the tax credit subsidies applied to federal Exchanges.[71] The court found that, while a literal reading of the statute comported more closely with the plaintiff's position, the IRS Rule better complimented the broad policy goals of the ACA.[72] Therefore, the IRS Rule must be given deference under the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[73]

In making its decision, the Fourth Circuit first reviewed the statute

64. *King*, 759 F.3d at 365.
65. *Id.*
66. *Id.* at 368.
67. *Id.*
68. *Id.*
69. *King*, 759 F.3d at 370.
70. *Id.*
71. *Id.* at 369.
72. *Id.*
73. *Id.* at 376.

itself and applied the two-step *Chevron* test of statutory interpretation.[74] The first step looks to the plain meaning of the statue to determine if the regulation responds to the plain meaning and, if it does, the regulation stands.[75] However, if "the statute is susceptible to multiple interpretations, the court then moves to *Chevron*'s second step and defers to the agency's interpretation so long as it is based on a permissible construction of the statute."[76]

Using the *Chevron* analysis, the court first considered the language of the statute.[77] The Fourth Circuit specifically noted that when conducting a statutory analysis, a court should not confine itself to only examining a particular part of the statute in isolation, but should look at the provision when placed in context to determine its meaning.[78] Under this statutory framework, the Fourth Circuit found neither side's argument so persuasive as to make the intent of Congress clear.[79] Because the plain language did not provide a solution to the issue, the court next reviewed the legislative history to determine the statute's plain meaning. The Fourth Circuit determined that the ACA's legislative history failed to provide insight on the issue of tax credits despite the length of the bill.[80] However, the Fourth Circuit ruled that there were several floor statements from senators that only made sense if all Americans are understood to have access to the tax credits.[81]

The Fourth Circuit also noted that the plaintiffs had a compelling argument because it is possible that these statements were made under the assumption that each state would establish its own Exchange and therefore legislators could not foresee the issue being litigated.[82] Both the plaintiffs' and defendants' arguments were persuasive, so the Fourth Circuit ultimately ruled that nothing in the legislative history of the ACA provided compelling support to adopt either side's position. Therefore, this case could not be resolved by simply looking at the first step of the *Chevron* analysis.[83]

Because plain language and legislative history provided no results, the court moved to the second step of the *Chevron* two-step test, which asks whether the "agency's [action was] based on a permissible

74. *King*, 759 F.3d at 367.

75. *Id.*

76. *Id.*

77. *Id.* at 368 (citing Duncan v. Walker, 533 U.S. 167, 172 (2001)).

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

79. *King*, 759 F.3d at 371.

80. *Id.*

81. *Id.* at 372.

82. *Id.*

83. *Id.*

construction of the statute."[84] The Fourth Circuit found that the statute permitted the IRS to decide whether tax credits were available on federal Exchanges because the IRS Rule promoted the ACA's broad policy goals to increase the number of Americans with health insurance and decrease coverage costs.[85] Several provisions of the ACA were necessary to advance these goals, including the individual mandate requiring near-universal participation in the insurance marketplace.[86] Congress created various incentives—including the tax credits—to increase market participation among low- and middle-income individuals, so denying these tax subsidies to individuals on federal Exchanges would frustrate Congress's policy goals in enacting the ACA.[87] Not allowing tax credits to be distributed on federal Exchanges "would cause premiums to rise, further discouraging market participation, and the ultimate result would be an adverse-selection 'death spiral' in the individual insurance markets in States with federally-run Exchanges."[88] These findings demonstrated that tax credits are essential to the ACA and, without the credits in place, millions of Americans would be unable to purchase insurance and would be forced to pay a penalty that Congress did not foresee.[89] The IRS Rule avoided this result by ensuring that the tax credits are offered on federal Exchanges. Accordingly, the Court deferred to the IRS under *Chevron* because the IRS interpretation of the ACA was a "reasonable policy choice for the agency to make."[90]

IV. ANALYSIS

Subpart A of this Section discusses three standards of statutory construction: the plain language test, the *Chevron* test, and the *Skidmore* test. Subpart B concludes that the D.C. Circuit placed too much emphasis on the plain language of the statute when it should have considered congressional intent. Subpart B also determines that the Fourth Circuit incorrectly used the *Chevron* test and instead should have

84. *King*, 759 F.3d at 372 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

85. *Id.* at 373. *See also* Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 666 (D.C. Cir. 2011) (holding that "when an agency interprets ambiguities in its organic statute, it is entirely appropriate for that agency to consider . . . policy arguments that are rationally related to the [statute's] goals."); Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (holding "as long as the agency stays within [Congress's] delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference.").

86. *King*, 759 F.3d at 374.

87. *Id.*

88. *Id.*

89. *Id.* at 375.

90. *Id.*

analyzed this case under the *Skidmore* test because it historically has been the standard applied to tax issues. Subpart C then analyzes the Supreme Court opinion in *King v. Burwell* and concludes that while the Court reached the correct result, it erroneously applied the major questions doctrine instead of the *Chevron* test, which will create uncertainty for agencies and the government in future decision-making.

A. Applicable Statutory Interpretation Methods

The underlying issue in this case is whether the relevant code sections, §§ 36B, 1311, and 1321, are ambiguous. When analyzing a statute, it is widely accepted that "a reviewing court should not confine itself to examining a particular statutory provision in isolation, as the meaning, or ambiguity of certain words or phrases may only become evident when placed in context."[91] When a court finds the "terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances."[92] A situation is considered "rare and exceptional" if following the letter of the law would result in an "absurdity . . . so gross as to shock the general moral or common sense." Additionally, "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail."[93] Therefore, unless a plain language reading would result in an absurdity or produce a result demonstrably at odds with the intentions of its drafters, courts must apply the plain language of a statute when the language is unambiguous because it is presumed that a "legislature says in a statute what it means and means in a statute what it says there."[94]

However, if a statute is ambiguous, courts are required to apply a different test that analyzes and interprets the statute instead of considering the mere plain language of the law. There are several applicable statutory interpretation tests for federal review of an agency's interpretation of the law. The first agency deference test the Supreme Court adopted was developed in *Skidmore v. Swift & Co.*[95] In *Skidmore*, the Court held that the deference given to an agency reading of a statute depends on "(1) the thoroughness evident in [the agency's]

91. Kristine Cordier Karnezis, *Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court*, 3 A.L.R. Fed. 2d 25, 8 (2005) (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).

92. Rubin v. United States, 449 U.S. 424, 430 (1981) (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)). *See also* United States v. Ron Pair Enters., 489 U.S. 335, 241-42 (1989) (holding that "as long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute.").

93. Crooks v. Harrelson, 282 U.S. 55, 60 (1930).

94. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992).

95. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

consideration, (2) the validity of its reasoning, (3) its consistency with earlier and later pronouncements, and (4) all those factors which give it power to persuade, if lacking power to control."[96] Thus, *Skidmore* gives deference to the agency in proportion to the agency's power to persuade.

Forty years later, the Supreme Court adopted the two-step standard in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, discussed in Section III of this Note, which gave agency interpretation even greater deference and effectively replaced *Skidmore*.[97] However, in 2001 the Supreme Court reaffirmed *Skidmore* as the default deference regime with its ruling in *United States v. Mead Corp.*, holding that *Chevron* is limited to instances when there is a congressional delegation of lawmaking authority to the agency.[98] The Court ruled that the measure of deference to be given to an agency's interpretation of a statute varies with the circumstances, and courts must look "to the degree of the agency's care, its consistency, formality, relative expertness, and to the persuasiveness of the agency's position."[99] *Mead*, therefore, merely is an extension of the Court's prior ruling in *Skidmore*, reaffirming the controlling law.

As demonstrated, there are several tests that courts could consider using in its analysis of statutory interpretation. To further complicate matters, research show that the majority of time, the Supreme Court does not apply a deference regime in its decision-making and when it does, its application of the standard is inconsistent.[100] This confusion results in uncertainty as to how lower courts should assess agency interpretations of statutes and makes Supreme Court decision-making even harder to predict. A study conducted by professors from Yale Law School examined all 1,014 of the agency interpretation cases decided by the Supreme Court from 1984 to 2006 and found that the Court applied no deference regime in its decision-making 53.6% of the time, with the agency interpretation prevailing in 68.3% of cases.[101] In 17.8% of cases, the Court invoked consultative deference, in which it did not invoke a named deference regime, but relied on input from the agency in its decision-making.[102] Finally, *Skidmore* deference was applied 6.7% of the time with an agency win rate of 73.5%, and *Chevron* deference

96. *Id.* at 140.

97. *See generally* William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083 (Apr. 2008).

98. United States v. Mead Corp., 533 U.S. 218, 237-38 (2001).

99. *Id.* at 228.

100. *See* Eskridge, *supra* note 97, at 1090-91.

101. *Id.* at 1099.

102. *Id.*

was applied 8.3% of the time with an agency win rate of 76.2%.[103]

The Yale study interestingly found that the Court was more likely to give deference to the agency interpretation in certain areas of law: primarily national security, tax, or instrumental economic regulation.[104] For tax, the study found that the Court generally applied the *Skidmore* test and that the agency win rate was 75.7%.[105] Not surprisingly, the study also found that the Justices agreed more with statutory interpretations that were in line with their political ideology[106] and that Justices overall were more likely to side with the agency interpretation.[107] The study concluded its findings by suggesting that the Court should simplify its deference standard by applying *Chevron* deference in cases which "Congress has delegated lawmaking authority to an executive or independent agency[,]"[108] and by applying *Skidmore* in cases where "(a) the agency has expertise on issues as to which judges do not; (b) the agency has rendered a reasoned judgment after input from the public; and/or (c) there has been public or private reliance on agency rules or guidelines."[109] The study found that these are the guidelines that the Court uses in voting, so the aforementioned method should be adopted to simplify the deference continuum.[110]

B. The Fourth Circuit Incorrectly Applied the Chevron Test in Concluding that Tax Credits Must be Allowed in All Exchanges When it Should Have Invoked the Skidmore Deference Test

Unlike the D.C. Circuit, the Fourth Circuit was correct in its decision to not apply the plain language test. The statute has obvious ambiguities that render the plain language test inapplicable. For example, Section 36B explicitly states that Exchanges are to be established by the States[111] and § 1311 states "[e]ach state shall . . . establish an American Health Exchange" to "facilitate[] the purchase of qualified health plans."[112] Despite this language suggesting Exchanges must be

103. *Id.* at 1099. The remaining 13.6% not accounted for is made up of minority deference regimes rarely used.

104. *Id.* at 1179.

105. *Id.* at 1145.

106. *Id.* at 1155.

107. *Id.* at 1153 (finding no Justice displayed an overall agency agreement rate less than 52.6%).

108. *Id.* at 1092.

109. *Id.*

110. *Id.*

111. 26 U.S.C.S. § 36B(c)(2)(A)(i) (2010). "[A]s of the first day of such month the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer is covered by a qualified health plan . . . that was enrolled in through an *Exchange established by the State* under section 1311 of the Patient Protection and Affordable Care Act . . . ." (emphasis added).

112. 42 U.S.C.S. § 18031(b)(1) (2010).

established by the state, § 1312 adds ambiguity in allowing the Department of Health and Human Services to operate "such [an] Exchange within the State[s]" that do not establish an Exchange independently.[113] The term "such Exchange" provides ambiguity as to whether it is referring to state- or federal-based Exchanges. Therefore, the Court cannot apply a plain language reading of this statute but must look to either the *Chevron* or *Skidmore* test to determine how much deference to give the IRS Rule.

Though the Fourth Circuit correctly determined that tax credits must be allowed in all health care Exchanges, it incorrectly applied the *Chevron* test instead of the *Skidmore* standard. The Fourth Circuit should have used *Skidmore* in its analysis because the Supreme Court most frequently uses this standard when dealing with tax-related issues and it is now the default test pursuant to *Mead*.[114] Under *Skidmore*, the IRS Rule would still have been given deference because it has all the "factors which give it power to persuade."[115] The IRS interpretation is more persuasive than the D.C. Circuit's decision in *Halbig v. Burwell*, because the legislative history and broad policy goals of the ACA support a finding that tax credits apply to all Exchanges, not just state-created ones. Also, the IRS Rule is persuasive in showing that a failure to apply tax credits to federal Exchanges would render parts of the ACA absurd.

1. Legislative History and the ACA Text Demonstrate a Congressional Intent that Tax Subsidies Should be Made Available to All Americans

a. Legislative History

Although there is not much documented in the legislative history as to whether Congress specifically addressed the issue of whether tax credits apply to all Exchanges or only state-created Exchanges, there is evidence of Congress's intent available in a 2009 CBO Report, floor statements from various senators, and the highly politicized nature of the law, thus making it unlikely that Congress would have trusted the states

113. *Id.* § 18041(c)(B)(ii)(II) (2010):

"In general. If–

(B) the Secretary determines, on or before January 1, 2013, that an electing State–

(i) Will not have any required Exchange operational by January 1, 2014; or

(ii) has not taken the actions the Secretary determines necessary to implement–

(II) . . . the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements."

114. United States v. Mead Corp., 533 U.S. 218, 237-38 (2001).

115. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

to implement the legislation without oversight from the federal government.

A report from the Congressional Budget Office (CBO) issued in November of 2009—several months before the ACA was passed into law—further demonstrates Congress's intent that the subsidies be used nationwide.[116] This report estimated that approximately "23 million people would purchase insurance through the *exchanges* in 2016" and 18 million of those people would receive subsidies.[117] "For the people who received subsidies, those subsidies would, on average, cover nearly two-thirds of the premiums for their policies in 2016."[118] The sheer number of individuals covered in this estimate demonstrates that Congress presumed that the drafters intended that the tax credits would be available to all individuals. In addition to the CBO report, there are several floor statements that demonstrate a congressional intent to apply subsidies to both state and federal Exchanges. For example, one senator stated, "tax credits will help to ensure all Americans can afford quality health insurance,"[119] while another senator estimated that half of the thirty million Americans with no health insurance "will qualify for . . . tax credits to help them pay their premiums so they can have and afford health insurance."[120] The CBO report and congressional floor statements support the Fourth Circuit's holding that Congress intended for the credits to be available on a wide-scale basis.

Despite the lack of legislative history, it seems unlikely that Congress would have intended the tax credits to be limited only to state-created Exchanges, because this understanding of the statute means Congress would have to entrust the functioning of major federal legislation to political decisions of the states. While there are several historic examples of the federal government giving states the power to implement federal legislation—Social Security and Medicaid, for example—these programs did not encounter the bitterness and opposition in their implementation to the extent faced by the Affordable Care Act.[121] Most legislation that has a state implementation plan also

116. Congressional members requested the CBO to provide an analysis of how proposed health care laws would affect premiums paid for health insurance in various markets. Although the CBO is independent of Congress, this report was requested by congressional members and therefore is persuasive insight into the intent of Congress in passing the ACA. *See* CONG. BUDGET OFF., *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, 24 (Nov. 30, 2009), http://www.cbo.gov/sites/default/files/11-30-premiums.pdf.

117. *Id.* (emphasis added).

118. *Id.*

119. King v. Burwell, 759 F.3d 358, 371 (4th Cir. 2014) (quoting 155 Cong. Rec. S11, 964 (Nov. 21, 2009)).

120. *Id.* (quoting 155 Cong. Rec. S13, 559 (Dec. 20, 2009)).

121. *See* Official Social Security Website, *The Evolution of Medicare*, http://www.ssa.gov/history/corningchap1.html, (noting there was "little opposition to the idea" of

has a federal implementation plan, so as to avoid "disastrous consequences."[122] An example of such legislation is the Clean Air Act.[123] In light of the highly politicized atmosphere surrounding the ACA and many states' opposition towards its implementation, it is unlikely that Congress would pass legislation that relied on state implementation.

b. Language in the Affordable Care Act

Finally, if tax credits are not available to all individuals who purchase insurance through an Exchange, there are parts of the Affordable Care Act that are rendered absurd. For example, when looking at another provision of the ACA,[124] there is a reporting requirement that can only be met if tax credits are available to both state and federal Exchanges.[125] Section 36B(f) requires the IRS to reduce the amount of a taxpayer's end-of-year premium tax credit by the amount of any advance payment of such credit.[126] In order for the IRS to track advance payments, the ACA requires that each Exchange provide certain information to the Department of Treasury, including: level of coverage, premium costs, the aggregate amount of any advance payment of credit or reductions, the information of the primary insured, any information provided to the Exchanges, and information necessary to determine whether a taxpayer has received excess advance payments.[127] If subsidies were not available on federally-run Exchanges, there would be no reason to require federal Exchanges to report the amount an individual or family receives in tax credits.[128] This further highlights Congress's intent that all purchasers on the Exchanges should receive tax credits because Congress would not have imposed these reporting requirements if it had

Medicare and workers' compensation by the states) (last visited Nov. 25, 2014).

122. Oral Argument at 19:24-20:4, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114), https://apps.oyez.org/player/#/roberts6/oral_argument_audio/23286.

123. *See* Clean Air Act §110(a), 42 U.S.C. §7410(c)(1)(A)-(B) (1995) (noting that Section 110 of the Clean Air Act gives the EPA authority to implement a federal plan to supersede a state plan if the state implementation plan fails to satisfy certain criteria).

124. Such an analysis must be done because a court, when reviewing a statute, should not confine itself to examining the particular provision at issue in isolation, but should consider the text as a whole to determine the statute's meaning. *See* Kristine Cordier Karnezis, *Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court*, 3 A.L.R. Fed. 2d 25 § 8 (2005) (citing FDA. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).

125. King v. Burwell, 759 F.3d 358, 370 (4th Cir. 2014).

126. *Id. See also* 26 U.S.C.S. § 36B(f)(1) (2010) ("The amount of the credit allowed under this section for any taxable year shall be reduced (but not below zero) by the amount of any advance payment of such credit under section 1412 of the Patient Protection and Affordable Care Act.")

127. *Id.* (4th Cir. 2014). *See also* 26 U.S.C.S. § 36B(f)(3) (2010).

128. *Id.*

thought that federal Exchanges would not offer subsidies.

2. The Court Must Give Deference to the IRS Rule Because Any Other Reading Would Render the ACA Absurd

As previously mentioned, there are two main goals of the Affordable Care Act: (1) to expand the number of individuals who have health insurance coverage and (2) to reduce costs of health care.[129] This is readily apparent in the language of the ACA itself, which says it will "[achieve] near-universal coverage"[130] and features the subtitle "Immediate Improvements in Health Coverage for *All* Americans."[131] Without the tax subsidies in place, such goals explicitly stated in the ACA itself will not be feasible as shown in a recent study conducted by the consulting firm, RAND Health.[132]

The study found that eliminating the subsidies entirely would "cause substantial increases in premiums, as well as large declines in enrollment," both of which frustrate Congress's overarching goals in passing the ACA.[133] Without the ACA's subsidies in effect, the cost of premiums will rise by 43.3% and enrollment will decrease by 68%, leaving 11.3 million more Americans uninsured than if subsidies were in place.[134] Further, if the individual mandate requirement were eliminated, premiums would rise by 7.1% and total enrollment in Exchanges would decrease by 20.4%.[135] Removing the individual mandate has a more modest effect on premium costs and the number of individuals enrolled because the penalty associated with the mandate is small relative to the size of the tax credits.[136] For example, "[i]n 2015, the average penalty for enrollees eligible for tax credits would be $320, compared with an average tax credit amount of $2,650 among enrollees eligible for tax credits."[137] This evidence demonstrates the vast importance of tax credits, which arguably are even more imperative to the success of the ACA than the individual mandate requirement.

The study notes that "[i]n scenarios in which the tax credits are eliminated, [its] model predicts a near 'death spiral,' with very sharp premium increases and drastic declines in individual market

129. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2571 (2012).
130. Patient Protection and Affordable Care Act, 42 U.S.C. § 18001, Sec. 1501(a)(D) (2010).
131. *Id.* at Subtitle A (2010) (emphasis added).
132. *See generally* Eibner & Saltzman, *supra* note 7.
133. *Id.* at 2.
134. *Id.*
135. *Id.* at 21.
136. *Id.*
137. *Id.*

enrollment."[138] If enough individuals feel that the trade-off of accepting the penalties under the ACA is more advantageous to signing up for unsubsidized insurance, the death spiral occurs.[139] A plan that does not incentivize the young and healthy to enroll in coverage essentially renders the ACA unworkable because affordable health insurance requires risk-pooling, which spreads the costs of health care across a wide range of individuals.[140] For risk pooling to be effective, a large number of healthy, low-cost individuals need to enroll in the marketplace Exchanges to offset the costs of older and sicker individuals.[141] In short, without the tax credits in place, Americans are far less likely to want to enroll in the marketplace Exchanges or be able to afford health care coverage.[142]

Because applying tax credits only to individuals enrolled in state-established Exchanges would cause a rise in premiums and greatly reduce the number of enrollees, the D.C. Circuit's reading of Section 36B renders parts of the ACA worthless. Therefore, as demonstrated by the RAND Health study, without the tax credits in place, the policy goals of the ACA simply will not be met. Because of this consequence, the Fourth Circuit was correct in giving deference to the IRS Rule. Though the Fourth Circuit reached its decision by analyzing the statute under *Chevron* deference, it would have reached the same conclusion under the less deferential *Skidmore* test, because the IRS reading of the ACA is more persuasive than the D.C. Circuit's reading. The IRS Rule meets all the requirements required by *Skidmore*: (1) "thoroughness," evidenced by its consideration of the broad policy goals of the Act; (2) "validity of reasoning," demonstrated in nonpartisan materials like the RAND Health study; and (3) "consistency with earlier and later pronouncements," shown in the legislative history and actual language of the Act itself. All of these factors are persuasive and require the court to give the IRS Rule deference under *Skidmore*.

---

138. *Id.* at 2. A "death spiral" or "adverse selection" occurs when young, healthy customers drop their insurance coverage—gambling they won't need it—because it is too expensive. Consequently, this leaves a pool of subscribers who are older and sicker, resulting in more expensive insurance rates and therefore more young and healthy people dropping insurance. This demonstrates that low-risk individuals may need a tax credit to incentivize their signing up. This will result in improving the risk pool and bringing down premiums. *See also* Matt Steinglass, *The Insurance Death Spiral is Here*, The Economist Blog (Feb. 19, 2010, 4:17 PM), http://www.economist.com/blogs/democracyinamerica/2010/02/health_insurance_premium_hikes.

139. Eibner & Saltzman, *supra* note 7, at 2, 4. This study notes that evidence from Massachusetts—the only state that had a similar requirement before the ACA—suggests that an individual mandate brings younger and healthier individuals in to the market.

140. *Id.*

141. *Id.* at 2.

142. *Id.* (finding that if the mandate was overturned, 8.2 million Americans would not purchase health insurance).

C. The Supreme Court Decision

Like in *NFIB v. Sebelius*, Chief Justice John Roberts delivered the majority opinion of the Court.[143] Notably, the majority held in favor of the Federal Government without resorting to *Chevron*. As previously discussed, *Chevron* requires the agency interpretation of the ambiguous statute to prevail. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill the statutory gaps."[144] However, the majority noted that:

> "In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. This is one of those cases. 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. Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."[145]

Accordingly, because Congress did not delegate the interpretation of Section 36B to the IRS, it is within the Court's jurisdiction to determine the correct reading of Section 36B.[146]

The majority then looked at Section 36B within the context of the ACA as a whole.[147] It found that the seemingly unambiguous language of Section 36B—"established by the State"—is not so clear-cut when reviewed within the context of the entire Act.[148] For example, if Exchanges could only be established by the state, there would be no "qualified individuals" on federal Exchanges.[149] Yet, the ACA clearly anticipated that there would be qualified individuals on every Exchange.[150] Throughout the ACA, it is stated that Exchanges make available qualified health plans to qualified individuals, which is

143. King v. Burwell, 135 S. Ct. 2480 (2015).
144. *Id.* at 2488.
145. *Id.* at 2489 (internal citations omitted).
146. *Id.*
147. *Id.*
148. *King*, 135 S. Ct. at 2490.
149. *Id.*
150. *Id.*

something the Exchanges could not do if there was no such Exchange for individuals who live in a state where no Exchange was established.[151] If Congress intended Section 36B to only apply to state Exchanges, it would have provided detailed instructions concerning customers on federal Exchanges just as it did concerning customers on state Exchanges.[152] Since Congress did not make any distinctions between these two Exchanges, it must be assumed that Section 36B is ambiguous and the intent of Congress was that the tax credits apply to all Exchanges.[153]

Given that the text is ambiguous, the Court looked at the broader structure of the ACA to determine the true meaning of Section 36B.[154] The Court rejected the D.C. Circuit's interpretation of Section 36B because it would destabilize the individual insurance market and create a death spiral that Congress intended to avoid.[155] Without the tax credits made available to purchasers on the federal Exchanges, dramatically fewer individuals would be able to purchase health insurance.[156] For example, approximately 87% of individuals who purchased health insurance on Federal Exchanges did so with tax credits.[157] Virtually all of these individuals would be unable to purchase insurance without the tax credits in place, making the ACA obsolete and also failing to achieve its ultimate goal: near universal health care coverage for all Americans.[158] In light of these consequences, it is inconceivable that Congress intended for the ACA to operate without tax subsidies available on all Exchanges.[159]

The majority concludes that the ACA had inconsistencies concerning the Exchanges because the Act was written "behind closed doors rather than though the traditional legislative process."[160] The dissent even admits that laws often include mismatched provisions and because the ACA spans 900 pages, "it would be amazing if its provisions all lined up perfectly with each other."[161] Furthermore, the dissent notes that it is natural for slight mismatches to occur in legislation when "lawmakers

151. *Id.* (citing § 18031(d)(2)(A) requiring all Exchanges to "make available qualified health plans to qualified individuals")and § 18031(e)(1)(B) (providing that an Exchange must consider "the interests of qualified individuals . . . in the State or States in which such Exchange operates")).

152. *Id.* at n. 1.

153. *King*, 135 S. Ct. at 2490.

154. *Id.* at 2492.

155. *Id.* at 2493.

156. *Id.*

157. *Id.*

158. *King*, 135 S. Ct. at 2493.

159. *Id.* at 2494.

160. *Id.* at 2492.

161. *Id.* at 2500 (Scalia, J., dissenting).

draft a single statutory provision to cover different kinds of situations."[162] As a result, the majority maintains that the ACA "does not reflect the type of care and deliberation that one might expect of such significant legislation."[163] However, despite this inartful drafting, § 18041 refutes the argument that Congress believed it was offering the states a deal they could not refuse.[164] Section 18041 provides that if a state elects not to establish an Exchange, the Secretary "shall . . . establish and operate such Exchange within the State." [165] The Court's decision therefore is not a rewriting of the law, but merely a clarification of poorly and hastily written legislation.

While the majority opinion makes a compelling argument for why Section 36B must be considered ambiguous, it does not base its decision on *Chevron* or *Skidmore*. Instead of deferring to the agency interpretation, the majority found that the courts, not agencies, have the primary role of interpreting statutes that have "economic and political significance."[166] Therefore, the Court did not rely on *Chevron* or *Skidmore*, but based its decision on a subsidiary doctrine in administrative law known as the "major questions doctrine."[167] This doctrine holds that "Congress would not intend to give agencies authority over 'major questions' without specific authorization."[168] This reflects a lack of unanimity of what *Chevron* deference means and calls into question when agency deference should be given.

Chief Justice Roberts' reasoning for moving away from the established precedent of *Chevron* is unconvincing. While the majority purports that the IRS has no expertise in crafting and interpreting health insurance policies, the IRS regularly makes health-related rules and clearly has expertise in provisions that affect or work in conjunction with the tax code.[169] Furthermore, there are multiple areas within the tax code where IRS expertise is lacking, but the IRS interpretation is given deference. For example, § 45 of the tax code includes credits for creating electricity from biomass.[170] The IRS interprets these biomass

162. *Id.* at 2501 (Scalia, J., dissenting).

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

164. *Id.* at 2494.

165. *Id.*

166. *Id.* at 2483.

167. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1955 (2015) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).

168. *Id.*

169. King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

170. Andy Grewel, *The IRS Isn't an Expert*, YALE J. ON REG. (June 29, 2015), http://www.yalejreg.com/blog/the-irs-isn-t-an-expert-by-andy-grewal.

provisions despite not being an expert on renewable energy.[171] While the IRS is not an expert in health care or energy, the agency is an expert in deciphering complex tax code provisions. The Court easily could have made the same decision by applying the *Chevron* or *Skidmore* framework. This move away from *Chevron* and *Skidmore* effectively places the power to interpret ambiguous statutes with the Judiciary instead of the Executive Branch. Therefore, while the Court came to the correct conclusion upholding the tax credits under the ACA, its complete disregard of *Chevron* and *Skidmore* was unprecedented and will cause more uncertainty for administrative agencies and the government going forward.

V. CONCLUSION

The Patient Protection and Affordable Care Act was enacted to increase the number of individuals covered by health insurance and to lower the cost of health care premiums.[172] Essential to achieving this goal is the availability of tax credits on marketplace Exchanges. Without subsidies available at both the state and federal levels, not as many individuals will purchase coverage, resulting in a death spiral of increased health care costs and fewer persons in the insurance pool.[173] The Supreme Court found that the ACA was written ambiguously and tax credits should be available to individuals on both the state and federal Exchanges.[174] The Supreme Court based this decision on the major questions doctrine, ruling that the courts and not agencies are better suited to settle matters of "economic and political significance."[175] This ruling dismissed the *Chevron* and *Skidmore* tests as controlling in this situation, which will cause greater confusion and uncertainty going forward for administrative agencies and the government. Instead, the Court should have applied the *Skidmore* test and given deference to the IRS Rule because its construction of the statute was in accord with congressional intent, and the IRS had the expertise to interpret Section 36B since this provision dealt exclusively with the tax code.

171. *Id.*

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

173. Eibner & Saltzman, *supra* note 7.

174. *King*, 135 S. Ct. at 2481, at syllabus.

175. *Id.* at 2489.