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INTRODUCTION

King v. Burwell drew unusually wide attention for a tax case. Members of the public, the mainstream media, health care professionals, Washington think tanks, and constitutional, administrative, and health law professors, to name a few groups, all debated the merits of the challengers' arguments. Everyone, it seems, had something to say about the case—except tax professors.[1]

Why was this so? Although all areas of the legal academy, including tax, have become increasingly divorced from the work of judges, lawyers, agency officials, and legislators,[2] tax academics are usually drawn to high-

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1. I must qualify this statement by noting the valuable contributions of Professor David Gamage who, as a Treasury employee, worked on the regulations that were challenged in *King v. Burwell*. *See* David Gamage & Darien Shanske, *Why the Affordable Care Act Authorizes Tax Credits on the Federal Exchanges*, 71 STATE TAX NOTES 229 (2014), *available at* http://ssrn.com/abstract=2389446. But in this essay, I want to encourage tax professors to participate in debates over which they lack a pre-existing interest, aside from the desire for a well-functioning tax system. Of course, the inimitable Professor Gamage would have developed useful insights about *King v. Burwell* even if he had not worked at the Treasury.

2. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) ("[J]udges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy."); Jasper Cummings, *Academic Articles On Tax*, TAX NOTES TODAY, Mar. 7, 2001, *available at* 2011 TNT 44-11 (LEXIS) (arguing that any search for useful academic tax scholarship must be "far and wide," given that "much of the academic work [is] practically useless," and even tax-specific journals have "edged toward the economic articles"). For a thoughtful rejoinder, see Lawrence Zelenak, *Tax Scholarship: Useful and Useless*, TAX NOTES TODAY, Mar. 15, 2011, *available at* 2011 TNT 50-6 (LEXIS) (challenging Edwards' and Cummings' characterization of academic legal

profile controversies in their area. The D.C. Circuit's regrettable initial decision in *Murphy v. IRS*,[3] for example, drew withering criticisms from prominent academics, which likely influenced the court's subsequent withdrawal of that opinion.[4] Yet tax professors almost all shied away from public discussion of *King v. Burwell*.

This contribution to *Pepperdine Law Review's* Tax Law Symposium explores potential reasons for that reticence and argues that tax professors should play a more important role in cases like this. I am acutely aware that a symposium about *King v. Burwell*, involving numerous tax professors, reflects a somewhat awkward forum through which to argue that tax professors did not pay sufficient attention to *King v. Burwell*. However, the many fine contributions to this Symposium will ultimately further my point. The tax professoriate could have made valuable real-time contributions to the controversy.

My own hesitation to comment on *King v. Burwell* informs my analysis here. As the debate over the Section 36B premium tax credit traveled from the pages of a journal through the federal courts, I did not offer any commentary of value, unless one credits occasional and characteristically shallow Facebook posts. I decided to remain rationally ignorant about the case, believing that learning about the issues would not reflect a productive use of my time.

But at a fairly late stage in the controversy, after the Supreme Court had already granted certiorari, I came across an issue raised by *King v. Burwell* that implicated my research interests. I quickly wrote a short article on that issue and in doing so broadened my understanding of the case.[5] From there, I saw numerous other areas where the perspective of a tax professor could improve public discussion over *King v. Burwell*, and this motivated various substantive blog posts, another short article,[6] and Congressional testimony.[7]

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scholarship and arguing that they adopt unduly narrow characterizations of the academic mission).

3. 460 F.3d 79 (D.C. Cir. 2006), *vacated*, 493 F.3d 170 (D.C. Cir. 2007).

4. Sheryl Stratton, *Experts Ponder* Murphy *Decision's Many Flaws*, TAX NOTES TODAY, Sept. 4, 2006, *available at* 2006 TNT 171-3 (LEXIS) ("The decision is an embarrassment to the D.C. Circuit, said George Yin, the former head of the Joint Committee on Taxation, now a professor at the University of Virginia School of Law.").

5. *See* Andy Grewal, *How* King v. Burwell *Creates Tax Problems for Consumers and What The Treasury Can Do About It*, 32 YALE J. ON REG. ONLINE 1 (2015).

6. *See* Andy Grewal, *Lurking Challenges to the ACA Tax Credit Regulations*, BLOOMBERG BNA TAX INSIGHTS, Apr. 23, 2015, *available at* http://ssrn.com/abstract=2598317.

7. *See Rewriting the Law: Examining the Process That Led to the ObamaCare Subsidy Rule: Hearing Before the Subcomm. on Oversight, Agency Action, Fed. Rights and Fed. Courts of the S. Comm. on the Judiciary*, 114th Cong. (2015) (testimony of Andy S. Grewal), *available at* http://www.judiciary.senate.gov/meetings/rewriting-the-law-examining-the-process-that-led-to-the-obamacare-subsidy-rule.

My "rational ignorance" had actually proved irrational.

King v. Burwell may now be water under the bridge, but given the Supreme Court's warm embrace of the taxing power in *National Federation of Independent Business v. Sebelius*,[8] it seems likely that Congress will again use the tax code to pursue objectives unrelated to the measurement of net income. This increases the likelihood that another dispute over the meaning of a tax code provision will draw popular attention. Yet tax professors may hesitate to join the public discussion, based on misconceptions similar to those that may have discouraged involvement in *King*. I would like to explore and debunk three of those possible misconceptions: (1) *King v. Burwell* wasn't really a tax case, (2) *King v. Burwell* was always about politics, and (3) Nontax scholars had already occupied the field.

I. *KING V. BURWELL* WASN'T REALLY A TAX CASE

King v. Burwell involved the IRS's construction of I.R.C. § 36B (Section 36B),[9] which allows a premium tax credit for purchases of health care policies on federal and state-based insurance exchanges. The statute reflects what might be called a "tax expenditure" provision—that is, a provision concerned with implementing nontax policy rather than measuring a taxpayer's net income. One might consequently believe that debates over Section 36B should be left to those with expertise in the relevant nontax policy area.

I suspect that this argument at least partially explains the tax professoriate's silence on *King v. Burwell*. Understanding Section 36B probably requires more legwork than that associated with most tax provisions, given the statute's incorporation of various concepts found in the Patient Protection and Affordable Care Act of 2010 (popularly referred to as Obamacare). A tax academic might thus have believed that *King v. Burwell* should be left to health policy experts.

But I am skeptical of this view. Tax professors routinely provide thoughtful analysis of non-core tax provisions, like those relating to the Earned Income Tax Credit. Also, discussions of tax expenditures have enjoyed somewhat of a resurgence in recent years. Interpretive and policy issues related to non-core provisions fit comfortably within the tax

8. 132 S. Ct. 2566 (2012).

9. Standing alone, Section 36B(b)(2)(A) refers to credits only for persons "enrolled in through an Exchange established by the State," but the Treasury and IRS looked to related statutory provisions and concluded that credits were available for persons enrolled in health plans purchased through federally established exchanges. *See* Treas. Reg. § 1.36B–2(a)(1) (2014) (providing tax credit eligibility to anyone "enrolled in one or more qualified health plans through an Exchange"); *id*. § 1.36B–1(k) (defining "Exchange" to include federally established exchanges).

professoriate's bailiwick.

More importantly, the dispute in *King v. Burwell* reflected a classic tax question.[10] Deciding the case required not only reading the contested phrase ("established by the state") in isolation, but it also required examining the phrase's intersection with provisions found in Section 36B and elsewhere. Admittedly, many related provisions were codified outside of the tax code, but the interpretation of the tax laws frequently calls for the examination of nontax statutes, whether involving state law or federal law.

Nothing about Section 36B makes it impenetrable to a tax academic. In fact, interpretive puzzles raised by the statute's complexity would seem especially appropriate for tax professors to resolve, given their proficiency with technical analysis. And unlike the earlier Obamacare case, *NFIB v. Sebelius*, which largely involved constitutional questions, *King v. Burwell* presented a pure statutory question. Tax professoriate commentary would thus have been especially welcome in light of other commentators' failure to fully address how other sources of tax law bore on the controversy (more on that later).

II. *KING V. BURWELL* WAS ALWAYS ABOUT POLITICS

If a legal dispute turns on politics, there may be little reason for anyone to provide serious legal analysis. Why bother arguing fine points of law when the relevant decider cares only about his or her policy preferences? Debates over the case can be safely left for the pundits, who will offer the sort of political arguments that might sway the justices.

This sentiment may very well have discouraged tax professoriate involvement in *King v. Burwell*, which drew substantial attention from partisan pundits. Most tax professors take seriously the text of the tax laws and probably do not want to jump into purely political debates, at least while acting in their scholarly capacities.[11] Consequently, academic debates over the Section 36B premium tax credit might reflect a waste of time.

But there are several rejoinders to this argument. First, numerous nontax academics jumped into the debate over the premium tax credit. Law reviews, newspapers, blogs, and other sources reflected considerable parsing of Section 36B's text by well-respected scholars.[12] These academics were

10. *See also* Brian Galle, *Interpretative Theory and Tax Shelter Regulation*, 26 VA. TAX REV. 357, 358 (2006) ("The practice of tax law is fundamentally the practice of statutory interpretation.").

11. *But see* Richard J. Kovach, *Personal and Political Bias in the Debate over Federal Income Taxation Rates and Progressivity*, 21 AKRON TAX J. 1 (2006) (noting the counterproductive effects of overheated rhetoric in scholarship supporting increased tax progressivity).

12. *See, e.g.*, Nicholas Bagley & David K. Jones, *No Good Options: Picking Up the Pieces After* King v. Burwell, 125 YALE L.J. F. 13 (2015), http://www.yalelawjournal.org/forum/no-good-

obviously willing to take seriously the issue presented in *King v. Burwell*, rather than assume that the case would be decided on political grounds.

Second, even if tax professors thought that the Court would decide the case based on politics, they could not form a legitimate opinion about the Court's behavior until it actually decided the case. And given the significance of *King v. Burwell*, the possibility that the Court would decide the case based on legal considerations, not political ones, should have encouraged input from tax professors. Anyone who rejects the strongest versions of so-called legal realism[13] should presume that well-crafted doctrinal analysis may aid and influence the judiciary.

Nonetheless, even if the Justices really decide cases based on what they "ate for breakfast,"[14] there is a third reason to support tax professor participation in pending cases: The Court will eventually issue a legally binding opinion, and academic commentary may influence the shape of that opinion. In fact, when it comes to the Supreme Court, commentators frequently aim their crosshairs at potential *dicta* rather than potential holdings,[15] especially in light of the talismanic weight often given to anything the Court says.[16]

For *King v. Burwell*, academic commentary likely would not have changed the case's ultimate holding, but that commentary could have improved the Court's final opinion. As the contributions to this Symposium

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options-picking-up-the-pieces-after-king-v-burwell; Timothy Jost, King v. Burwell*: Unpacking the Supreme Court Oral Arguments*, HEALTH AFFAIRS BLOG (Mar. 5, 2015), http://healthaffairs.org/blog/2015/03/05/king-v-burwell-unpacking-the-supreme-court-oral-arguments/.

13. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 282 (1984) (Stevens, J., dissenting) ("Some students of the Court take for granted that our decisions represent the will of the judges rather than the will of the law. This dogma may be the current fashion, but I remain convinced that such remarks reflect a profound misunderstanding of the nature of our work.").

14. *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making,* 75 B.U. L. REV. 941, 944 (1995) ("[A popular caricature] of judicial decision-making is extreme legal realism, which supposes that judges' decisions depend on . . . what the judge ate for breakfast on the morning of a decision") (citing Jerome Frank, *Law and the Modern Mind* 118–59, 207, 264–84 (1930)). Scholars have described more refined versions of legal realism. *See, e.g.*, Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997).

15. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 752–53 (2000) (noting that most interested parties "will never be able to secure a direct ruling on their issue" and instead will "try to influence the way the Court writes opinions in the cases it does decide, in order to secure broad rulings or dicta that may influence the disposition of other matters").

16. *See, e.g.*, Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."). *See also* Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 58 (2015) ("Supreme Court rhetoric sometimes leads to unintended consequences, and the King opinion has tremendous potential for such . . . .").

show,[17] the Court's handling of deference issues raises some novel issues.[18] Also, as Professors Stephanie Hoffer and Christopher Walker nicely explain, the Chief Justice may have channeled his "inner tax lawyer" when writing for the majority.[19] One must necessarily conjecture, but the Court might have phrased its opinion differently had it been aware of the concerns raised in this Symposium.

III. NONTAX SCHOLARS HAD ALREADY OCCUPIED THE FIELD

Even if a tax professor believed that *King v. Burwell* would be decided on non-political grounds, she might decline to comment if she thought she had nothing useful to add. Given the wide and intense interest in the case, this seemed like a distinct possibility. The scholarly debate over *King v. Burwell* was, in fact, most closely associated with a handful of nontax scholars. However, the public discussion over Section 36B exhibited some holes that a tax professor could fill.

First, for example, commentators inadequately debated the possible implications of I.R.C. § 36B(f)(3). That provision requires persons responsible for running federally-established exchanges to report the amount of any advance premium tax credits actually paid. The statute seemed to support the government's view (why would Congress require the reporting of tax credits on federally-established exchanges if those credits weren't allowable?), but the challengers argued that the government overread that provision.[20]

I remain somewhat befuddled by § 36B(f)(3). To better understand the statute, I would like to know whether other tax code provisions mandate the reporting of benefits that are not allowable. But nontax scholars generally shied away from digging too deeply into the tax code. A tax scholar could have made a valuable contribution here, especially because a similar debate may arise when Congress adds other social programs to the Code and includes cryptic reporting requirements.

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17. *See also* Andy Grewal, King v. Burwell — *The IRS Isn't An Expert?*, TAX PROF BLOG (June 25, 2015), http://taxprof.typepad.com/taxprof_blog/2015/06/grewal-king-v-burwell-the-irs-isnt-an-expert.html.

18. *See, e.g.*, Leandra Lederman & Joseph C. Dugan, King v. Burwell*: What Does It Portend for* Chevron*'s Domain?*, 2015 PEPP. L. REV. 72, 80 (2015) (noting that *King v. Burwell* adds a "wrinkle" to *Brand X* analysis); Hickman, *supra* note 16 at 57 ("*King v. Burwell* raises a host of questions for future cases, in both the nontax and tax contexts.").

19. Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 Pepp. L. Rev. 33, 37 (2015).

20. *See* Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 160–63 (2013) (describing government's view and presenting counterarguments).

Second, tax scholars could have added to the public discussion over the legislative grace canon, which was used by a district court to uphold the challengers' claims.[21] Under that tax-specific canon, courts believe that a tax deduction or credit provision must receive a narrow construction because they are provided only reluctantly and via "legislative grace."[22] The application of this rule to Section 36B reflected a novel situation because the government, not the taxpayer, argued for a broad construction of the statute. Tax scholarship on the effects of this role reversal would have been helpful because Congress may add even more tax credits to the code for which the government seeks a broad construction.

More generally, when a contentious social issue implicates a provision of the tax code, the mere volume of nontax commentary should not discourage the tax professoriate to participate. It is quite possible to add value even if one does not wish to master the nontax areas of law that occupy other scholars' attention.[23] Tax professors can do something most sane people are not willing to do: work through the bowels of the tax code and Treasury regulations. Doing so can yield interpretive clues that nontax commentators would not even think to look for.

In my case, I decided to work through the many pages of regulations under Section 36B, whereas nontax commentators focused almost exclusively on the regulatory sentence dealing with federally-established exchanges. I would like to think that my broader inquiry yielded helpful insights, even if my observations came a little late. I regret not jumping into the debate sooner.

CONCLUSION

As time passes, it seems stranger and stranger that tax professors were generally silent in a debate over the IRS's interpretation of a fairly technical tax code provision. I have tried to put my finger on a few potential justifications for this reticence and have concluded that they do not withstand scrutiny.

Of course, this does not mean that any particular tax professor must, or

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

22. For the classic criticism of the courts' approach, see Erwin N. Griswold, *An Argument Against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace*, 56 HARV. L. REV. 1142 (1943).

23. To give another example, the debate over the I.R.C. § 107 parsonage allowance has focused on First Amendment matters, but tax-centric insights can help further the analysis. *See, e.g.*, Peter J. Reilly, *Clergy Out In Force To Defend Their Housing Tax Break*, FORBES (Apr. 10, 2014), http://www.forbes.com/sites/peterjreilly/2014/04/10/clergy-out-in-force-to-defend-their-housing-tax-break/ (discussing Professor Adam Chodorow's tax-centric analysis of parsonage allowance).

even should, engage in public debates over pending cases. Useful insights and quality scholarship emerge when one follows his research interests, not when one participates in a debate solely for the sake of doing so. Nothing here suggests that a tax professor should manufacture interest in an issue solely because it appears on the front pages.

At the same time, tax professors should welcome opportunities to participate in popular discussions implicating the tax code. With *King v. Burwell*, it seems like artificial barriers kept tax professors out and kept nontax scholars in. The next time around, I hope that tax professors with the relevant research interests and expertise will more readily chime in.