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INTRODUCTION

In *King v. Burwell*, the Supreme Court was called upon to evaluate the validity of an IRS interpretation of Internal Revenue Code (IRC) Section 36B (Section 36B).[1] Adopted as part of the Patient Protection and Affordable Care Act (PPACA),[2] Section 36B allows individual taxpayers to receive tax credits when they purchase health insurance through "an Exchange established by the State."[3] In a regulation adopted through notice-and-comment rulemaking, the Internal Revenue Service (IRS) contended that health insurance acquired on an exchange established by the federal government for a state qualified for the credit.[4] Four individual taxpayers challenged the IRS's regulation as contrary to the statute.[5] The Supreme Court sided with the IRS.[6]

The Supreme Court's decision in *King* surprised many people, not because of its outcome—many people predicted that the Court would uphold the IRS's interpretation, but not unanimously—but because, even as the

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1. 135 S. Ct. 2480, 2488 (2015).

2. P.L. No. 111-148, 124 Stat. 119 (2010).

3. I.R.C. § 36B (2012) (cross-referencing PPACA § 1311, codified at 42 U.S.C. § 18031); *see also King*, 135 S. Ct. at 2488 (describing the statute).

4. Treas. Reg. § 1.36B-2 (2013); *see also King*, 135 S. Ct. at 2487 (describing the regulation).

5. *King*, 135 S. Ct. at 2487–88.

6. *Id.* at 2496 (concluding that "Section 36B allows tax credits for insurance purchased on any Exchange created under the Act").

Court ultimately agreed with the IRS's interpretation of the statute, the Court expressly denied the IRS *Chevron* deference.[7] According to Chief Justice Roberts for the majority,

> [*Chevron*] "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. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."
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> 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. This is not a case for the IRS.
>
> It is instead our task to determine the correct reading of Section 36B.[8]

The Court's opinion is all the more remarkable when one considers that, only a few short years ago, in *Mayo Foundation for Medical Education & Research v. United States*, in an opinion also written by Chief Justice Roberts, the Court unanimously supported *Chevron* review for the IRS's regulations.[9] In that case, the Court rejected "an approach to administrative review good for tax law only" and concluded that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context."[10]

The Court's seeming curtailment of *Chevron*'s scope in *King v. Burwell* raises a host of questions for future cases, in both the nontax and tax contexts. How should lower courts and commentators interpret the above-quoted passage from *King*? Does *King* reflect a serious intent by a majority

7. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–843 (1984) (counseling judicial deference to reasonable agency interpretations of ambiguous statutes).

8. *King*, 135 S. Ct. at 2488–89 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) and Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)).

9. 562 U.S. 44, 55 (2011). Justice Kagan abstained from the case but has not questioned its holding subsequently. *See, e.g.*, United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012) (citing *Mayo Foundation* and applying *Chevron* review in evaluating a tax regulation, without objection from Justice Kagan).

10. *Mayo Foundation*, 562 U.S. at 55.

of the Court to curtail the scope of *Chevron* review? Should lower courts take the Court's language regarding *Chevron*'s inapplicability in "extraordinary cases,"[11] and its definition of what constitutes an extraordinary case, as a major doctrinal statement, and attempt to apply it in future litigation? And, given that King particularly involved statutory interpretation by the IRS, does *King* herald the beginning of a new tax exceptionalism in judicial deference? Or should lower courts discount those paragraphs as part of a controversial and politically-charged decision and not really intended to influence future cases significantly?

My assessment of *King v. Burwell* has three points. First, the *Chevron* discussion in *King* was not incidental, but the IRS and taxes were not foremost on Chief Justice Roberts's mind. Rather, *King* reflects a careful effort by Chief Justice Roberts to accomplish, through alternative framing, a broader curtailment of *Chevron*'s scope that he advocated unsuccessfully two terms earlier in *City of Arlington v. FCC*.[12] Second, although *King* could be read as announcing a new, additional standard for whether and when a reviewing court should apply *Chevron* review in evaluating an agency's interpretation of a statute that it administers, given the Court's larger body of *Chevron* jurisprudence, it is unlikely that a majority of the Court agrees wholeheartedly with Chief Justice Roberts's preferred view of *Chevron*'s scope. Rather, it seems more likely that most of the Justices did not view the above-quoted passage as sufficiently impactful for future cases to warrant writing separately about the *Chevron* issue.[13] With that understanding, one might expect lower courts to be circumspect in applying *King*'s rhetoric in future tax cases. Nevertheless, and third, Supreme Court rhetoric sometimes leads to unintended consequences, and the *King* opinion has tremendous potential for such—particularly in the tax area, although not necessarily limited to tax.

I. *CITY OF ARLINGTON* AND THE DEBATE OVER *CHEVRON*'S SCOPE

Although the Supreme Court often disagrees over how *Chevron* applies to resolve a given case,[14] in the thirty years since deciding *Chevron*, the Court has never wavered significantly from its commitment to the validity of the *Chevron* standard.[15] The same cannot be said with respect to the scope

11. *King*, 135 S. Ct. at 2488.

12. 133 S. Ct. 1863 (2013).

13. *See* discussion *infra* notes 62–64 and accompanying text (elaborating this point).

14. *See, e.g.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014) (featuring a Court that agreed unanimously to apply the *Chevron* standard but divided four ways over how *Chevron* applied).

15. *But see* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J. concurring) (suggesting

of *Chevron*'s applicability.

Some cases suggest relative agreement among the Justices regarding *Chevron*'s scope. In *United States v. Mead Corp.*, the seminal case regarding that issue, the Court held that the *Chevron* standard applies "when 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."[16] Only Justice Scalia disagreed.[17] In *Mayo Foundation*, a case most familiar to the tax community, the Court held that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context," with Chief Justice Roberts writing for a Court of eight.[18] *King v. Burwell* is hardly different, as the majority opinion written by Chief Justice Roberts represented six Justices, and Justice Scalia's dissenting opinion for the remaining three was silent regarding *Chevron*.[19]

But other cases addressing the circumstances in which *Chevron* applies reflect a much more fractured Court.[20] As I have written elsewhere, one can discern from the Court's jurisprudence at least three distinct theories of *Chevron*'s scope and the interaction of *Chevron* and *Mead*.[21] One of the more recent cases to highlight the disagreement is *City of Arlington*, which in turn offers important context for unpacking and understanding the potential of *King*'s limitation on *Chevron*'s scope.

In *City of Arlington*, the substantive issue facing the Court concerned an interpretation of the Communications Act of 1934 in which the FCC claimed the power to impose deadlines upon local zoning authorities considering site proposals for telecommunications towers and antennas.[22] Perhaps not surprisingly, the local zoning authorities objected, claiming that the statute left such decisions solely to their discretion without FCC interference.[23] The

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that the *Chevron* standard may be "in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies").

16. 533 U.S. 218, 226–27 (2001).

17. *See id.* at 239, 245, 250, 261 (Scalia, J. dissenting) (describing *Mead* as "mak[ing] an avulsive change in judicial review of federal administrative action," "absurd," and "irresponsible," with "enormous, and almost uniformly bad" potential consequences).

18. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011); *see also supra* note 9.

19. *See* King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (Scalia, J. dissenting).

20. *See generally* Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 536–47(2014) (analyzing the Court's jurisprudence regarding the scope of *Chevron*'s applicability and documenting at least three distinct views among the Justices).

21. *Id.*

22. *Id.* at 1866–67.

23. *Id.* at 1867.

Fifth Circuit had deferred to the FCC's interpretation under *Chevron*,[24] but in so doing acknowledged both that the interpretive question implicated the very scope of the FCC's statutory jurisdiction and that the circuit courts were divided over whether *Chevron* review was appropriate for such interpretations.[25] The Supreme Court explicitly granted the City of Arlington's petition for certiorari to resolve that circuit split.[26] The Court divided six to three regarding the outcome, with Justice Scalia writing for the Court. Justice Breyer wrote separately in concurrence, while Chief Justice Roberts authored the dissenting opinion.

According to Justice Scalia for the *City of Arlington* majority, *Chevron* provides the standard for reviewing jurisdictional as well as nonjurisdictional interpretations for the simple reason that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage"[27] and "judges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'nonjurisdictional.'"[28] (Notably, however, Justice Scalia then proceeded to offer several examples of past cases in which the Court had extended *Chevron* deference to jurisdictional interpretations, arguably demonstrating that the distinction might not be so difficult.)[29] Justice Scalia encountered little opposition from his colleagues for those conclusions. Justice Breyer agreed wholeheartedly,[30] while Chief Justice Roberts for the dissenters maintained that focusing on jurisdictional versus nonjurisdictional interpretations "misunderst[oo]d the argument."[31]

Stepping away from the jurisdictional versus nonjurisdictional distinction, however, the opinions in *City of Arlington* reflect a much more substantial disagreement over how to evaluate the scope of *Chevron*'s applicability. Notwithstanding his general disdain for *Mead*,[32] Justice Scalia

24. *See* City of Arlington v. FCC, 668 F.3d 229, 254 (5th Cir. 2012).

25. *See id.* at 248.

26. City of Arlington v. FCC, 133 S. Ct. 524 (2012). The Court limited the grant of certiorari to "Question 1 presented by the petition." *Id.* That question asked "[w]hether . . . a court should apply Chevron to review an agency's determination of its own jurisdiction." Petition for Writ of Certiorari, *City of Arlington*, 133 S. Ct. 524 (No. 11-1545).

27. *City of Arlington*, 133 S. Ct. at 1868.

28. *Id.* at 1870.

29. Id. at 1871-73.

30. *Id.* at 1875 (Breyer, J. concurring in part and concurring in the judgment).

31. *Id.* at 1879 (Roberts, C.J. dissenting).

32. Justice Scalia has filed several solo concurring and dissenting opinions seemingly for the sole purpose of complaining about *Mead*. *See, e.g.*, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 296 (2009) (Scalia, J. concurring) ("I favor overruling *Mead*."); Smith v. City of Jackson, 544 U.S. 228, 244 (2005) (Scalia, J. concurring) (criticizing *Mead* for creating "unduly constrained standards of agency deference"); United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J. dissenting) (objecting strongly to *Mead*'s limitation of *Chevron*'s scope).

interpreted the Court's *Mead* jurisprudence as requiring only "a general conferral of rulemaking or adjudicative authority" for *Chevron* to extend to the entirety of a statute.[33] Past that relatively limited inquiry, the key question for Justice Scalia was "simply, whether the agency has stayed within the bounds of its statutory authority."[34]

While agreeing with much of Justice Scalia's analysis, Justice Breyer wrote separately to suggest a somewhat more limited scope for *Chevron*.[35] Contending that "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill," Justice Breyer detailed at some length the slew of factors he considers relevant for purposes of evaluating whether *Chevron* provides the appropriate standard of review in a given case.[36]

Finally, Chief Justice Roberts's dissenting opinion envisioned yet another approach to *Chevron*'s scope. He rejected the claim that *Chevron* review should be available for every ambiguous statutory provision contained in a statute over which Congress has given an agency general rulemaking or adjudicative power to act with the force of law.[37] Rather, for Chief Justice Roberts, upon deciding that a statutory provision is ambiguous, reviewing courts ought to ask whether Congress intended to give the agency the power to resolve that particular ambiguity.[38]

Put slightly differently, in *City of Arlington*, Chief Justice Roberts called for applying *Mead* and evaluating *Chevron*'s applicability to an agency's interpretations of a statute on a provision-by-provision, ambiguity-by-ambiguity basis, whereas Justice Scalia (and a majority of the Court) preferred determining *Chevron*'s scope on a statute-by-statute basis. Moreover, only two other Justices agreed with Chief Justice Roberts in *City of Arlington*, while Justice Scalia's characterization of *Mead* in that case corresponds to several other Court opinions.[39]

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33. *City of Arlington*, 133 S. Ct. at 1874.

34. *Id.* at 1868.

35. *Id.* at 1875 (Breyer, J. concurring in part and concurring in the judgment). Justice Breyer does not object to *Mead*, but like Justice Scalia, he has often written separately to describe his understanding of *Chevron* and *Mead*. *E.g.*, Carcieri v. Salazar, 555 U.S. 379, 396–97 (2009) (Breyer, J. concurring); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003–05 (2005) (Breyer, J. concurring); *see also* Christensen v. Harris County, 529 U.S. 576, 596–97 (2000) (Breyer, J. dissenting) (offering, in a predecessor case that foreshadowed *Mead*, a different vision of *Chevron*'s scope from that articulated by either Justice Thomas (for the majority) or Justice Scalia in that case).

36. *City of Arlington*, 133 S. Ct. at 1875–76.

37. *Id.* at 1881 (Roberts, C.J., dissenting).

38. *Id.*

39. *See, e.g.*, Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 52–53, 57–58 (2011); Negusie v. Holder, 555 U.S. 511, 513–15 (2009); United States v. Eurodif S. A., 555 U.S. 305, 314–18 (2009); *Brand X*, 545 U.S. at 980–81; Household Credit Servs., Inc. v. Pfennig, 541

II. UNPACKING *KING V. BURWELL*

Although Chief Justice Roberts failed to persuade many of his colleagues in *City of Arlington* to embrace his vision of *Chevron*'s scope, administrative law doctrine generally offers more than one way to skin a cat. Enter *King v. Burwell*.

Congress has clearly delegated to the IRS the general authority to adopt legally-binding regulations interpreting the IRC, including Section 36B. I.R.C. § 7805(a) authorizes Treasury and the IRS to adopt "all needful rules and regulations for the enforcement of" the IRC. Again, the Supreme Court in the *Mayo Foundation* case—in an opinion written by Chief Justice Roberts, no less—held that regulations promulgated by Treasury and the IRS pursuant to the authority of § 7805(a) carry the force of law and are eligible for *Chevron* deference.[40] *Mayo Foundation*'s holding is entirely consistent with the statute-by-statute approach to *Chevron*'s scope described by Justice Scalia in *City of Arlington* and followed by the Court elsewhere.[41] Consequently, although the briefs in *King* debated the possibility of denying *Chevron* deference even if the Court found the statute ambiguous,[42] the likelihood that the Court would find the case beyond *Chevron*'s scope seemed slim.

Hindsight is 20/20, and the Court in the end did decide that the IRS's interpretation of Section 36B was beyond the scope of *Chevron* review. Writing for the majority, but without repudiating *Mayo Foundation*, Chief Justice Roberts concluded that *Chevron* review was unwarranted because Congress could not have intended to give the IRS the authority to resolve the particular question of whether tax credits are available for insurance acquired on a federally-established exchange.[43] Notably, this rationale is highly reminiscent of Chief Justice Roberts's preferred provision-by-provision, ambiguity-by-ambiguity approach to *Mead* as reflected in his *City of Arlington* dissent. Yet, in *King*, Chief Justice Roberts framed the point a

U.S. 232, 238–39 (2004); Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45–46 (2002); *see also* Hickman, *supra* note 20, at 539-41 (describing formalistic approach to *Mead* and *Chevron* that resembles Justice Scalia's opinion for the Court in *City of Arlington*)

40. *See supra* notes 9–10 and accompanying text.

41. *See supra* notes 33–34 & 39 and accompanying text.

42. *See, e.g.*, Brief for Petitioners at 51–56, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114); Brief for the Respondents at 57–59, *King*, 135 S. Ct. 2480 (No. 14-114); Reply Brief at 22–23, *King*, 135 S. Ct. 2480 (No. 14-114); Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioners at 11–18, *King*, 135 S. Ct. 2480 (No. 14-114); Brief of The Galen Institute and State Legislators as *Amici Curiae* in Support of Petitioners at 21–24, *King*, 135 S. Ct. 2480 (No. 14-114); Brief of *Amici Curiae* Former Government Officials in Support of Respondents at 5-22, *King*, 135 S. Ct. 2480 (No. 14-114).

43. *King*, 135 S. Ct. at 2488–89.

little differently.

In *City of Arlington*, Chief Justice Roberts spoke sweepingly about *Marbury v. Madison*,[44] administrative tyranny, and the proper application of *Mead*.[45] By contrast, in *King*, Chief Justice Roberts ignored *Mead* altogether. Instead, he highlighted and relied upon a relatively obscure bit of dicta from a pre-*Mead* case, *FDA v. Brown & Williamson Tobacco Corp.*,[46] to avoid applying *Chevron* to evaluate the IRS's the interpretation of Section 36B.[47]

Brown & Williamson Tobacco concerned whether the Food, Drug, and Cosmetic Act gave the Food and Drug Administration (FDA) the power to regulate tobacco advertising—authority the FDA had denied it possessed for decades, until the FDA reversed course and adopted politically-controversial regulations claiming that nicotine was a "drug" and that cigarettes and smokeless tobacco were "drug delivery devices" as defined in the statute.[48] The Court rejected the FDA's interpretation and explicitly framed its conclusion in *Chevron* step one terms, concluding that "Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products," and backing up its holding with more than twenty-five pages of analysis of statutory context and legislative history.[49] At the end of its opinion, however, the Court offered as a passing final thought that *Chevron* review might not be applicable in some instances:

> Deference under *Chevron* to an agency's construction of a statute that it administers 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. *In extraordinary cases*, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.
>
> This is hardly an ordinary case.[50]

The Court went on to suggest that what made *Brown & Williamson Tobacco* extraordinary was the agency's decades of rejecting the very

44. 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

45. *See* City of Arlington v. FCC 133 S. Ct. 1863, 1877–83 (2013) (Roberts, C.J. dissenting).

46. 529 U.S. 120 (2000).

47. *King*, 135 S. Ct. 2480, 2488–89 (2015) (quoting *Brown & Williamson Tobacco*, 529 U.S. at 159).

48. *Brown & Williamson Tobacco*, 529 U.S. at 125–131 (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco, 61 Fed. Reg. 44,396, 44,397, 44,402 (Aug. 28, 1996)).

49. *Id.* at 133.

50. *Id.* at 159 (emphasis added).

interpretation it was then asserting as well as tobacco's "unique place in American history and society" and "unique political history."[51] Under such circumstances, the Court called itself "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[52]

In *King v. Burwell*, Chief Justice Roberts not only invoked the extraordinary cases language of *Brown & Williamson Tobacco* but emphasized three aspects of PPACA and Section 36B that he said made the case at bar similarly extraordinary. First, he noted the centrality of the tax credits provided by Section 36B to the Act.[53] Second, he described the "deep 'economic and political significance'" of the credits, in terms of "billions of dollars" spent and "millions of people" affected.[54] Lastly, he emphasized the IRS's lack of expertise "in crafting health insurance policy."[55] Combined with *Brown & Williamson Tobacco* itself, one can envision *King* as launching a new extraordinary cases exception from *Chevron*'s scope that considers whether the question at issue (1) is central or interstitial to the statutory scheme, (2) is economically and politically significant, and (3) implicates the agency's core expertise. Indeed, such an approach to evaluating *Chevron*'s scope finds additional support in Justice Breyer's rhetoric on the issue in *City of Arlington* and other cases (although Justice Breyer has generally offered his more fluid version to expand rather than curtail *Chevron*'s applicability).[56]

So did *King v. Burwell* truly signal a new beginning for *Brown & Williamson Tobacco*'s extraordinary cases language as a new limitation on *Chevron*'s scope? Not necessarily. The Court has been here before, and failed to pursue a robust extraordinary cases doctrine as an exception from *Chevron*'s scope.

The Court decided *Brown & Williamson Tobacco* only one year before restricting *Chevron*'s scope in *Mead*, and only weeks before foreshadowing *Mead* in *Christensen v. Harris County*.[57] Given the timing, it would have

51. *Id.* at 159–60.

52. *Id.*

53. *King*, 135 S. Ct. at 2489 (describing the tax credits as "among the Act's key reforms").

54. *Id.* (quoting Util. Air Regulatory Grp. V. EPA, 134 S. Ct. 2427, 2444 (2014)).

55. *Id.*

56. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1876 (2013) (Breyer, J. concurring) (quoting Justice Breyer's opinion for the majority in Barnhart v. Walton, 535 U.S. 212, 222 (2002), to emphasize "the interstitial nature of the legal question, the related expertise of the Agency, [and] the importance of the question to administration of the statute" as relevant considerations in evaluating *Chevron*'s applicability); *see also* Hickman, *supra* note 20, at 542–45 (analyzing Justice Breyer's post-*Mead* statements regarding *Chevron*'s scope).

57. 529 U.S. 576, 587 (2000) (calling for *Skidmore* rather than *Chevron* review for "[i]nterpretations such as those in opinion letters—like interpretations contained in policy

been unsurprising for the Court either to incorporate *Brown & Williamson Tobacco*'s rhetoric about extraordinary cases into *Mead*'s standard for evaluating *Chevron*'s applicability or to develop an extraordinary cases doctrine as a separate limitation on judicial review from the *Mead* standard. The Court did neither. Even if some of the justices have previously expressed views of *Mead* and *Chevron* that may be theoretically reconcilable with *Brown & Williamson Tobacco*, none of those discussions have turned on distinguishing between extraordinary cases and ordinary ones.[58] Instead, the Court generally has relied on *Brown & Williamson Tobacco* for other propositions in the course of applying *Chevron*, such as its skepticism when an agency discovers new powers to regulate within old statutes.[59] When, in *Massachusetts v. EPA*, the EPA disclaimed authority to regulate greenhouse gas emissions based on the unique political history and the economic and political significance of climate change,[60] the Court applied *Chevron* review and declared the EPA's reliance on *Brown & Williamson Tobacco* as "misplaced."[61] And, as noted above, the Court's refusal in *City of Arlington* to distinguish jurisdictional questions from nonjurisdictional ones seems wholly inconsistent with the notion that some interpretations are extraordinary while others are not. If the Court cannot meaningfully distinguish between jurisdictional and nonjurisdictional interpretations, then how can the Court meaningfully distinguish between extraordinary and ordinary cases, notwithstanding the three factors listed by Chief Justice Roberts in *King v. Burwell*?

Moreover, as Thomas Merrill has observed, both *Mead* and *Chevron* are meta-standards, meaning that the justices can disagree over whether those standards apply or how they work but still agree to accept or reject an agency's particular statutory interpretation in a given case.[62] While commentators like to analyze and ascribe significance to every snippet of Supreme Court rhetoric, the justices may be more willing to let minor disagreements over what they perceive as dicta go unremarked, rather than write separately over every questionable turn of phrase.[63] Moreover, some

statements, agency manuals, and enforcement guidelines, all of which lack the force of law").

58. *See* Hickman, *supra* note 20, at 536–547 (describing the three approaches to *Chevron* and *Mead* reflected in the Court's post-*Mead* jurisprudence).

59. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism.") (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

60. 549 U.S. 497, 512 (2007).

61. *Id.* at 530.

62. Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812-13 (2002).

63. *See, e.g.*, Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3

of the justices seem profoundly disinterested in the theoretical nuances of deference doctrine, which admittedly sometimes resemble the old debate over how many angels can dance on the head of a pin. In many cases, minor rhetorical tweaks and blurred language may be enough to persuade even justices who are more interested in the deference doctrine debate to join opinions in favor of outcomes with which they disagree.[64] Particularly in a highly-politicized case such as *King v. Burwell*, even justices in the majority who care deeply about *Chevron* theory may have felt particularly compelled to stick with Chief Justice Roberts, just as he may have tweaked his rhetoric explicitly to keep them on board, even as he sought to accomplish much the same end doctrinally as he failed to do in *City of Arlington*. But if a majority of the justices are not really on board with the doctrinal adjustment, then much like *Brown & Williamson Tobacco*, *King v. Burwell* will fade into obscurity as doctrinally insignificant with respect to *Chevron*'s scope.

III. IMPLICATIONS FOR TAX CASES

Whether or not Chief Justice Roberts or his colleagues intended in *King v. Burwell* to prompt a shift in the jurisprudence concerning *Chevron*'s scope, it seems at least doubtful that future tax cases were their primary focus, for two reasons. First, again, only a few years ago, in the *Mayo Foundation* case, the Court all-but-unanimously embraced *Chevron* deference and rejected the arguably less deferential *National Muffler* review standard for general authority Treasury regulations.[65] Second, Chief Justice Roberts's own rhetoric in *King*, emphasizing economic and political significance as well as a lack of IRS expertise, seem aimed more at high-profile and politically-prominent nontax cases than the sort of run-of-the-mill tax case like *Mayo Foundation*. Nevertheless, the justices may have underestimated the extent to which their rhetoric in *King* might extend to a significant number of tax cases.

As noted above, the Court's conclusion in *King v. Burwell* that Congress could not have intended to delegate decision-making responsibility over the Section 36B tax credits to the IRS was predicated on three key factors: (1) the credits were central to the statutory scheme, (2) the credits were

(2010) ("[A] Justice, contemplating publication of a separate writing, should always ask herself: Is this dissent or concurrence really necessary?"); *cf.* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–15 (1995) (discussing reasons why judges write concurring or dissenting opinions).

64. *Cf.* Wald, *supra* note 63, at 1377–80 (discussing ways in which judges negotiate the rhetoric of judicial opinions to accommodate one another).

65. *See* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 53–58 (2011); *see also supra* note 9.

economically and politically significant, and (3) the IRS lacked expertise with respect to the subject matter driving the credits, health insurance policy.[66] Must all three factors be present? Or will only one or two of the three suffice? The Court did not say. But to varying degrees, some or all of those factors apply to an increasingly broad range of IRS actions.

Although the tax system has always served multiple legislative goals,[67] recent decades have seen a dramatic escalation in IRS administration of government programs and statutory provisions that serve purposes other than traditional revenue raising. Congress regularly uses tax expenditures—hundreds of them, representing over $1 trillion annually[68]—to achieve policy goals across a broad range of topics. Former Joint Committee on Taxation Chief of Staff Edward Kleinbard has called tax expenditures "the dominant instruments for implementing new discretionary spending policies."[69] The result is an IRS that serves multiple missions, many of which fall outside the scope of traditional IRS expertise. As observed by former Assistant Secretary of the Treasury for Tax Policy Pamela Olson,

> The continual enactment of targeted tax provisions leaves the IRS with responsibility for the administration of policies aimed at the environment, conservation, green energy, manufacturing, innovation, education, saving, retirement, health care, child care, welfare, corporate governance, export promotion, charitable giving, governance of tax exempt organizations, and economic development, to name a few.[70]

During one recent five-year period, from 2008 through 2012, almost 20% of final, temporary, or proposed Treasury regulations adopted interpreting the Internal Revenue Code concerned tax expenditure items.[71]

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66. *See supra* notes 53–55 and accompanying text.

67. *See* Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1725–28 (2014) (offering examples).

68. *See generally, e.g.*, JOINT COMM. ON TAXATION, 113TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2014-2018 (2014),), *available at* https://www.jct.gov/publications.html?func=select&id=5 [hereinafter JOINT COMM. ON TAXATION REPORT] (summarizing and estimating budgetary impact of tax expenditures); CONG. RESEARCH SERV., TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS (2012) [hereinafter TAX EXPENDITURES] (offering detailed descriptions and analysis of 250 separate tax expenditure items).

69. Edward D. Kleinbard, *Woodworth Memorial Lecture: The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1, 3 (2010).

70. Pamela F. Olson, *Woodworth Memorial Lecture: And Then Cnut Told Reagan . . . Lessons from the Tax Reform Act of 1986*, 38 OHIO N.U. L. REV. 1, 12–13 (2011) (citations omitted).

71. Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1748–50

Those regulations addressed matters as disparate as pension plans sponsored by employers who have filed for bankruptcy,[72] the role of utility allowances and submetering arrangements in determining whether a particular building qualifies for a credit intended to incentivize low income housing,[73] and the definition of which solid waste materials and which processes to dispose of solid waste qualify a disposal facility for tax-exempt bond financing,[74] just to name a few examples. Tax expenditures are not central to the income tax, but they may be central mechanism for accomplishing the goals for which Congress adopted them. Many tax expenditures are small and narrowly targeted, individually representing merely millions (rather than billions) of dollars of governments pending.[75] But many tax expenditures involve billions of dollars and affect millions of people.[76] And it is easy enough to say that although the IRS is quite good at structuring the mechanics of credits and deductions, the IRS has no specific expertise regarding the policies or politics surrounding things like pension plans, low-income housing, or municipal waste disposal. Would challenges to IRS regulations in these areas count as extraordinary cases ineligible for review using the *Chevron* standard?

Much like Congress enacted the Section 36B tax credit to accomplish its health insurance policy goals, Congress increasingly relies on refundable tax credits rather than direct subsidies to alleviate poverty and support working families.[77] Amounts expended by the government on the earned income tax credit and the child tax credit each surpassed those for Temporary Assistance for Needy Families and its predecessor, Aid to Families with Dependent Children, years ago.[78] In other words, the IRS is now one of the

(2014).

72. Defined Benefit Plan of Plan Sponsor in Bankruptcy, 77 Fed. Reg. 66,915-01 (Nov. 8, 2012) (T.D. 9601).

73. Section 42 Utility Allowance Regulations Update, 73 Fed. Reg. 43,863-02 (July 29, 2008) (T.D. 9420); Utility Allowances Submetering, 77 Fed. Reg. 46,987-01 (Aug. 7, 2012) (Notice of Proposed Rulemaking).

74. Definition of Solid Waste Disposal Facilities for Tax-Exempt Bond Purposes, 76 Fed. Reg. 51,879-01 (Aug. 19, 2011) (T.D. 9546).

75. Joint Committee on Taxation reports list and describe as "quantitatively de minimis" tax expenditures costing less than $50 million over five years. JOINT COMMITTEE ON TAXATION REPORT, *supra* note 68, at 17–20

76. *See* TAX EXPENDITURES, *supra* note 68, at 5–6 (listing the largest tax expenditures for individuals and corporations in 2011, ranging individually from $4.2 billion to $109.3 billion in government spending).

77. *See* Francine J. Lipman, *Access to Tax ~~In~~Justice*, 40 PEPP. L. REV. 1173, 1180–84 (2013) (describing the history of the earned income tax credit as a mechanism for alleviating poverty); Michelle Lyon Drumbl, *Those Who Know, Those Who Don't, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113, 120–123 (2013) (discussing the history of refundable credits with examples).

78. NAT'L TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., 2009 ANNUAL REPORT TO

government's principal welfare agencies, on par with the Department of Health and Human Services and the Social Security Administration.[79] Other scholars have documented some of the administrative challenges posed by this arrangement, given the complexity of program requirements and the IRS's lack of affinity for (i.e., expertise regarding) anti-poverty policies and objectives.[80] For example, the IRS takes the position that an overstated refundable credit can represent an underpayment of tax and, consequently, imposes financial penalties upon individuals who claim excessive credits, irrespective of whether their claims are inadvertent, and notwithstanding the obvious hardship such penalties impose.[81] The National Taxpayer Advocate has criticized and the Tax Court has rejected the IRS's interpretation.[82] If Treasury were to adopt a regulation incorporating the IRS's interpretation—as Treasury has done before in response to other adverse court decisions[83]—and taxpayers were to challenge those regulations, would *Chevron* review apply, as *Mayo Foundation* suggests that it should? Or would the case qualify as extraordinary?

The IRS monitors and regulates the activities of more than 1.5 million tax exempt organizations[84] across a few dozen separate statutory classifications that encompass universities with billion-dollar endowments and tiny religious schools teaching a few dozen students; large hospitals and small, free health clinics; labor unions; chambers of commerce; the National Football League; churches, big and small; the Metropolitan Opera and tiny, rural theater companies; the local Elks Lodge; and your Aunt Sadie's garden club.[85] The nonprofit sector comprises more than 10% of the country's private-sector workforce.[86] Nonprofit organizations receive more than $100 billion in charitable contributions and generate over $1 trillion in total revenues each year.[87] Tax administrators in this sector routinely adopt

CONGRESS: VOLUME TWO: RESEARCH AND RELATED STUDIES 78 (2009), *available at* http://www.irs.gov/pub/tas/09_tas_arc_vol_2.pdf.

79. Lipman, *supra* note 77, at 1173.

80. *See generally* Drumbl, *supra* note 77 (describing at length the mismatch between the IRS's usual approach to tax enforcement and the needs and challenges of credit recipients).

81. *See id.* at 152–57.

82. Rand v. Comm'r, 141 T.C. 376 (2013); Drumbl, *supra* note 77, at 152–57.

83. *See* Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 671–94 (2012) (discussing Treasury and IRS use of regulations and rulings to influence litigation).

84. *See* MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONG. RESEARCH SERV., R40919, AN OVERVIEW OF THE NONPROFIT AND CHARITABLE SECTOR 3 (2009).

85. I.R.C. § 501(c)(1)–(29), (d)–(f) (2012); *see also* Charles A. Borek, *Decoupling Tax Exemption for Charitable Organizations*, 31 WM. MITCHELL L. REV. 183, 201–07 (2004); James J. Fishman, *The Nonprofit Sector: Myths and Realities*, 9 N.Y. CITY L. REV. 303, 303–05 (2006).

86. SHERLOCK & GRAVELLE, *supra* note 84, at 4.

87. *Id.* at 9, 17.

interpretations of law that implicate issues as varied as free speech, politics, and religion;[88] election law and campaign finance;[89] and, again, health policy and hospital governance[90]—significant topics all, and obviously outside the IRS's primary expertise. Might disputes over these interpretations qualify as extraordinary cases exempt from *Chevron* review as well?

These are just a few examples of the IRS's vastly expanded collection of responsibilities. The bottom line is that litigants who are unhappy with the IRS's administration of these and other programs that stretch the boundaries of traditional tax expertise would be well-advised after *King v. Burwell* to portray IRS interpretations as extraordinary to obtain de novo rather than *Chevron* review. And lower courts that take seriously the Court's articulation of factors that make a case extraordinary, or that simply are skeptical of deference and seek to curtail *Chevron*'s scope, may find many more Treasury regulations outside *Chevron*'s scope and opt for de novo review instead.

CONCLUSION

Forecasting the future impact of any Supreme Court case is an iffy proposition. Often, a case that seemed potentially consequential when the Court decided it turns out to be a one-off, as the Court distinguishes and minimizes it into near-nothingness.[91] Such treatment seems especially likely when the case concerns a high-profile and politically-controversial issue, as in *King v. Burwell*.[92] When *King* is viewed in the context of the Court's

88. *See generally* Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?*, 84 IND. L.J. 447 (2009); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875 (2001).

89. Demonstrating the issues that the IRS faces in this area, in 2011, the *Election Law Journal* published an entire volume on this topic. For just a couple of examples of the contributions to that volume, see Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407 (2011), and Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427 (2011).

90. *See, e.g.*, Jessica Berg, *Putting the Community Back into the "Community Benefit" Standard*, 44 GA. L. REV. 375, 377 (2010) (discussing IRS-developed "community benefit" criteria that nonprofit hospitals must satisfy to maintain exempt status).

91. Examples of this pattern are legion. One of my favorites is the Court's decision in *Myers v. United States*, 272 U.S. 52 (1926), in which Chief Justice Taft wrote essentially a mini-treatise supporting a virtually unfettered presidential power to remove agency officials from office at will. *Id.* at 108–77. Less than a decade later, the Court dismissed most of Chief Justice Taft's opinion in *Myers* as dicta and limited the precedential force of *Myers* to first-class postmasters. Humphrey's Executor v. United States, 295 U.S. 602, 626–27 (1935).

92. *Cf.* Bush v. Gore, 531 U.S. 98 (2000) (representing another example of a high-profile,

broader *Chevron* jurisprudence, although Chief Justice Roberts arguably tried to make a significant doctrinal statement about *Chevron*'s scope, it seems unlikely that his colleagues intended to embrace the most sweeping interpretation of his views.

On the other hand, irrespective of the Court's intentions, sometimes a decision will take on a life of its own. Such was the case with *Chevron* itself, which was unintentionally revolutionary.[93] The specificity of the Court's rhetoric regarding *Chevron*'s scope and the present content of the IRC just may coalesce into an environment that allows *King v. Burwell* to shape significantly the future trajectory of the *Chevron* doctrine particularly in the context of tax cases. Thus, having expressly rejected tax exceptionalism from *Chevron* review just a few short years ago in *Mayo Foundation*, the Court may now have inadvertently opened the door to a new, de facto version of tax exceptionalism in judicial review of tax cases. How ironic that would be.

politically-controversial case that the Court has largely ignored since).

93. The scholarly consensus is that neither Justice Stevens, who wrote the *Chevron* decision, nor any of his colleagues, who joined his opinion, had any notion whatsoever of saying anything unique or pivotal about judicial deference. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188 (2006) (acknowledging the Court's lack of intent and tracing subsequent cases demonstrating Justice Stevens's ambivalence regarding *Chevron*); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10606, 10613 (1993) ("One of the greatest surprises in the Marshall papers was the lack of any indication that the Justices appreciated the significance of their decision in *Chevron* . . . ."). Yet, according to Westlaw, more than 14,000 judicial decisions have cited *Chevron*. *See also, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1274 (2008) (describing *Chevron* as "the preeminent authority in American statutory interpretation").