

Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

2015

King v. Burwell: What Does It Portend for Chevron's Domain?

Leandra Lederman

Indiana University Maurer School of Law, llederma@indiana.edu

Joseph C. Dugan

Indiana University Maurer School of Law

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [Administrative Law Commons](#), and the [Taxation-Federal Commons](#)

Recommended Citation

Lederman, Leandra and Dugan, Joseph C., "King v. Burwell: What Does It Portend for Chevron's Domain?" (2015). *Articles by Maurer Faculty*. 1880.

<https://www.repository.law.indiana.edu/facpub/1880>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

King v. Burwell: What Does It Portend for Chevron's Domain?

Leandra Lederman* & Joseph C. Dugan**

INTRODUCTION	72
I. THE <i>KING</i> COURT'S TREATMENT OF <i>CHEVRON</i>	73
II. WHY DIDN'T THE <i>KING</i> COURT DEFER?.....	76
CONCLUSION	80

INTRODUCTION

In *King v. Burwell*,¹ the U.S. Supreme Court affirmed the Fourth Circuit's decision, upholding regulations that extend the Premium Tax Credit (the Credit) to qualifying taxpayers who purchase health insurance on the Internet-based "Marketplace" operated by the federal Department of Health and Human Services (HHS), despite statutory language extending the subsidy to individuals who purchase through "an Exchange established by the State."² This was the second time in just three years that the Roberts Court engaged in what one critic called "linguistic acrobatics"³ that rescued President Obama's signature healthcare law, the Affordable Care Act (ACA)⁴—or, as Justice Scalia derisively called it, "SCOTUScare"⁵—from attacks that would have gutted its core provisions.⁶

* William W. Oliver Professor of Tax Law, Indiana University Maurer School of Law.

** J.D. 2015, Indiana University Maurer School of Law.

The authors are grateful to Fred Aman for helpful comments on a prior draft.

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

2. I.R.C. § 36B(b)(2)(A) (2012) (emphasis added).

3. See Chris Mondics, *Roberts' ACA Ruling Reveals Conservative Thinking*, PHILLY.COM (June 27, 2015), http://articles.philly.com/2015-06-27/news/63865425_1_justice-roberts-commerce-clause-conservatives.

4. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

5. *King*, 135 S. Ct. at 2507 ("This Court . . . rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.").

6. In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the Court upheld the shared responsibility payment provision of the ACA's individual mandate as a constitutionally permissible tax, even though "Congress took pains to label it a penalty and not a tax." Kevin Sack, *Arguing That Health Mandate Is Not a Tax, Except When It Is*, N.Y. TIMES (Mar. 26, 2012), <http://www.nytimes.com/2012/03/27/health/policy/arguing-that-health-mandate-is-not-a>

While the *King* Court could have achieved the same result by deferring to Treasury's interpretation in the regulation the plaintiffs were challenging,⁷ it elected not to defer. Instead, the Court rejected the application of *Chevron*⁸ and, declaring *King* an "extraordinary case[]," conducted its own interpretation of the ACA. Thus, the Court reached a pro-government result without deferring to an agency rule.

After *King*, scholars and lower courts may find themselves struggling with the contrast between decisions that seem to expand agency power⁹ and those that find *Chevron* inapplicable. Accordingly, this Essay analyzes what *King* suggests about the future of *Chevron* deference. Part I considers the *King* majority's treatment of *Chevron*. Part II examines the effect of the Court's lack of deference in *King*. The Essay concludes that although *King* was an "extraordinary case" for the Court, *Chevron*'s heyday may be on the wane.

I. THE *KING* COURT'S TREATMENT OF *CHEVRON*

In *King*, four plaintiffs sued the Secretaries of HHS and Treasury, as well as the acting Commissioner of the IRS, because they did not wish to comply with the ACA's individual mandate.¹⁰ The plaintiffs, residents of Virginia, lacked access to employer- or government-sponsored insurance, so their alternative was to purchase a plan on Virginia's federally facilitated Exchange.¹¹ Although plaintiffs' incomes (absent any subsidy) would have

tax-except-when-it-is.html.

7. Throughout this Essay, we refer to the rule at issue as a Treasury regulation—because that is what it is, despite the fact that the Supreme Court, Fourth Circuit, and Eastern District of Virginia each referred to it as an "IRS Rule." See *King*, 135 S. Ct. at 2487; *King v. Burwell*, 759 F.3d 358, 364 (4th Cir. 2014); *King v. Sebelius*, 997 F. Supp. 2d 415, 418 (E.D. Va. 2014). The regulation was published in the *Federal Register*, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377-01 (May 23, 2012), and subsequently codified in title 26 of the *Code of Federal Regulations*, Treas. Reg. § 1.36B-2 (2014). It is worth noting that the plaintiffs used the "IRS Rule" terminology in their complaint. See Complaint at 1, *King*, 997 F. Supp. 2d 415 (No. 3:13-CV-630-JRS). By contrast, the defendant agencies, in their responsive motions, consistently described the subject matter of the suit as a Treasury regulation. See, e.g., Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at 11, *King*, 997 F. Supp. 2d 415 (No. 3:13-CV-630-JRS); Defendants' Memorandum in Support of Their Motion to Dismiss or, in the Alternative, Their Cross-Motion for Summary Judgment, and in Opposition to Plaintiffs' Summary Judgment Motion at 13, *King*, 997 F. Supp. 2d 415 (No. 3:13-CV-630-JRS).

8. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

9. See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (holding that courts must defer under *Chevron* to agency interpretations with respect to ambiguities that concern the scope of their jurisdiction); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011) (extending *Chevron* deference to Treasury regulations); *Auer v. Robbins*, 519 U.S. 452 (1997) (granting deference to agency's interpretation of its own regulation).

10. *King*, 997 F. Supp. 2d at 420–21.

11. *Id.* Virginia is one of thirty-four states that elected not to create their own Exchanges,

been low enough to qualify them for an exemption from the individual mandate, they were each deemed eligible for the Credit.¹² As a result, they came within the ambit of the mandate, and they were required to either purchase insurance or remit a “shared responsibility payment.”¹³

Plaintiffs contended that the regulation extending the Credit to federal Exchange purchasers, Treas. Reg. § 1.36B-2,¹⁴ was incompatible with the unambiguous language of I.R.C. § 36B (Section 36B) and its companion provisions and thus exceeded Treasury’s authority.¹⁵ The district court and the Fourth Circuit ruled in favor of the government, deferring to Treasury’s interpretation under the traditional *Chevron* formulation.¹⁶

The Supreme Court granted certiorari and, in a 6–3 decision, found the Credit available to purchasers on the federal Marketplace.¹⁷ After reciting the issue, the Court stated:

When analyzing an agency’s interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency’s interpretation is reasonable. This approach “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended

triggering the provision of the ACA that empowers HHS to establish a federal Exchange, i.e., the Marketplace at HealthCare.gov. See *State Health Insurance Marketplace Types, 2015*, KAISER FAM. FOUND., <http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/> (last visited Oct. 12, 2015).

12. *King*, 997 F. Supp. 2d at 420–21.

13. I.R.C. § 5000A(b) (2012).

14. Treasury regulation § 1.36B-2(a) (2014) parrots the ACA’s grant of a subsidy for taxpayers who enroll in plans via an Exchange. See I.R.C. § 36B(b)(2)(a) (2012). But § 1.36B-1(k), the regulation’s definitions provision, states that “Exchange” has the same meaning as in 45 C.F.R. § 155.20 (2014), an HHS regulation. That regulation provides that “Exchange” includes insurance markets for qualified individuals “regardless of whether the Exchange is established and operated by a State . . . or by HHS.”

15. *King*, 997 F. Supp. 2d at 428. Section 36B(b)(2)(A) authorizes the Credit for taxpayers who purchase plans “through an Exchange established by the State under [section] 1311 of the Patient Protection and Affordable Care Act.” ACA section 1311—now codified at 42 U.S.C. § 18031—in turn provides that an Exchange “shall make available qualified health plans to qualified individuals.” 42 U.S.C. § 18031(d)(2)(A) (2012). A “qualified individual” is someone “seeking to enroll in a qualified health plan in the individual market offered through the Exchange” and, importantly, “resides in the State that established the Exchange.” *Id.* § 18032(f)(1)(A). That language seems to suggest that the Credit authorized by Section 36B is limited to consumers who purchase insurance products on a state Exchange. Obviously, the regulatory provisions discussed in *supra* note 14 are incompatible with that reading—hence the dispute in *King*.

16. *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

17. *Id.* at 2496.

such an implicit delegation.”

This is one of those cases.¹⁸

Thus, in just a few sentences, the majority dispensed with *Chevron*.

The Court then explained why *King* was a case in which Congress may not have intended an implicit delegation:

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*.¹⁹

Oddly, the Court did not address an apparent express delegation to Treasury in the Internal Revenue Code section it was interpreting, Section 36B: “The Secretary [of the Treasury] shall prescribe such regulations as may be necessary to carry out the provisions of this section”²⁰ The Court may have had concerns about whether the delegation encompassed the regulation in question, but it didn't say so. Its silence regarding the delegation is particularly puzzling given that the Fourth Circuit's opinion in the case stated that that language “clearly gives to the IRS authority to resolve ambiguities in 26 U.S.C. § 36B.”²¹

The Supreme Court majority also stated that it was “especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy.”²² However, the inclusive definition of “Exchange” is actually an HHS definition that Treasury cross-references.²³ Presumably, HHS *does* have the requisite expertise to regulate

18. *Id.* at 2488–89 (citations omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

19. *Id.* at 2489 (emphasis added) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

20. I.R.C. § 36B(g) (2012). Other commentators have made this point, too. See Syd Gernstein, *King v. Burwell: A Win for the President, but a Loss for the IRS?*, FED. TAX BLOG (June 25, 2015), <http://www.bna.com/king-burwell-win-b17179928783/>; Andy Grewal, *Brown & Williamson vs. Congressional Intent*, YALE J. ON REG.: NOTICE & COMMENT (June 30, 2015), <http://www.yalejreg.com/blog/brown-williamson-vs-congressional-intent-by-andy-grewal>.

21. *King v. Burwell*, 759 F.3d 358, 375 (4th Cir. 2014).

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

23. See *supra* note 14. The regulatory narrative is murky, however. According to a Report by the House Committee on Oversight and Government Reform, Treasury requested that HHS produce the definition that Treasury then cross-referenced. See DARRELL ISSA & DAVE CAMP, H. COMM. ON OVERSIGHT & GOV'T REFORM, H. COMM. ON WAYS AND MEANS, ADMINISTRATION CONDUCTED

in this area. Yet, because the majority found that this was an extraordinary case, and “not a case for the IRS,”²⁴ it concluded that the Court itself was tasked with interpreting Section 36B.

The majority then reached the same result that the lower courts—and Treasury—had reached.²⁵ However, finding the phrase “Exchange established by the State” ambiguous, the majority looked beyond the text of Section 36B to the ACA’s broader structure.²⁶ It then interpreted the ACA in a manner consistent with what it found was Congress’s intent—i.e., “to improve health insurance markets, not to destroy them.”²⁷ The fact that the Court’s failure to accord *Chevron* deference was unnecessary to the result in the case may say something about the future of *Chevron*: the deference doctrine may not be as bedrock as it once seemed.

II. WHY DIDN’T THE KING COURT DEFER?

At first blush, it could seem that the Court did not accord deference to the regulations because they were tax regulations. That interpretation would be consistent with the Court’s observation that the IRS has no health-policy expertise.²⁸ But, as discussed above, the regulatory definition in question is

INADEQUATE REVIEW OF KEY ISSUES PRIOR TO EXPANDING HEALTH LAW’S TAXES AND SUBSIDIES 18 (2014), <http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf> (“IRS employees . . . sent an email to several HHS officials, . . . asking that HHS remedy the problem by deeming HHS exchanges to be exchanges established by states in HHS’s exchange regulation.”). The Report does not describe how HHS developed its definition but quotes HHS’s proposed regulation’s explanation that “[t]he definition for an ‘Exchange’ . . . is drawn from the statutory text.” *Id.* (quoting Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866, 41,868 (July 15, 2011)).

In its final regulation, HHS reported having received just two comments on its definition of Exchange, but they addressed “whether the term ‘Exchange’ includes both the individual market and SHOP components of an Exchange,” not whether the definition includes HHS-established Exchanges. Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, 77 Fed. Reg. 18,310, 18,314 (Mar. 27, 2012).

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

25. The majority found that it was “implausible that Congress meant the Act to operate” in the dysfunctional manner that plaintiff-petitioners proposed. *Id.* at 2494. “Had Congress meant to limit tax credits to State Exchanges,” the majority concluded, “it likely would have done so in . . . some . . . prominent matter. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit.” *Id.* at 2495.

26. *Id.* at 2491–92.

27. *Id.* at 2496. The Court took a similar approach in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), stating, “In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation.” *Id.* at 132. This approach is reminiscent of the “purposive” approach Judge Learned Hand applied in cases such as *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934), *aff’d*, 293 U.S. 465 (1935). See Shannon Weeks McCormack, *Tax Shelters and Statutory Interpretation: A Much Needed Purposive Approach*, 2009 U. ILL. L. REV. 697, 718.

28. See *King*, 135 S. Ct. at 2489.

actually an HHS definition that Treasury cross-references.²⁹ Moreover, just four years earlier, the Court announced—in another opinion written by the Chief Justice—that in the absence of justification, it was “not inclined to carve out an approach to administrative review good for tax law only.”³⁰

Furthermore, the Court’s statement that it was unlikely that Congress would have delegated this issue to the IRS was the Court’s second stated reason not to defer. The majority first stated, “Whether those credits are available on Federal Exchanges is . . . 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.”³¹ So, it seems clear that *King* was about more than which agency interpreted the statute.

Though the *King* Court’s departure from *Chevron* was atypical, it was not unprecedented. In *FDA v. Brown & Williamson Tobacco Corp.*, the Court affirmed the Fourth Circuit’s decision invalidating FDA regulations governing tobacco marketing on the ground that Congress had not delegated authority to the FDA to regulate in this area.³² As a result, the FDA’s efforts to restrict cigarette advertising were temporarily stymied, a development welcomed by the tobacco industry.³³ Writing for the Court, Justice O’Connor explained that while “agencies are generally entitled to deference in the interpretation of statutes that they administer,” in that case, Congress “clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.”³⁴ Such jurisdiction was “inconsistent with the intent that Congress . . . expressed in the [Food, Drug, and Cosmetic Act’s (FDCA)] overall regulatory scheme and in the tobacco-specific legislation that it . . . enacted subsequent to the FDCA.”³⁵

29. *See supra* note 14; text accompanying note 23.

30. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011) (Roberts, C.J., for the Court) (“The principles underlying our decision in *Chevron* apply with full force in the tax context.”).

31. *King*, 135 S. Ct. at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444, (2014)).

32. 529 U.S. 120.

33. *See* Linda Greenhouse, *High Court Holds F.D.A. Can't Impose Rules on Tobacco*, N.Y. TIMES (Mar. 22, 2000), <http://www.nytimes.com/2000/03/22/us/high-court-holds-fda-can-t-impose-rules-on-tobacco.html>.

34. *Brown & Williamson*, 529 U.S. at 125–26.

35. *Id.* at 126. The *Chevron* case stated that a court reviewing an agency determination “is confronted with two questions.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In the pre-*Mead* case of *Brown & Williamson*, before the idea of “*Chevron* Step Zero” had taken hold, see Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (coining that term), the majority purported to situate its analysis within *Chevron* Step One. However, the Court’s decision in *Brown & Williamson*—finding that the FDA lacked jurisdiction altogether with respect to tobacco—is quite different from the ordinary Step One case,

The *Brown & Williamson* Court articulated an exception to *Chevron* that precluded deference:

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.³⁶

The majority found that *Brown & Williamson* was "hardly an ordinary case," given the importance of the tobacco industry in the American economy, the FDA's history of restraint in this area, and the distinct regulatory scheme Congress had established for tobacco products.³⁷

Six years later, in *Gonzales v. Oregon*, the Court again declined deference to an agency interpretation.³⁸ In *Gonzales*, the Court reviewed an interpretive rule promulgated by the U.S. Attorney General, purporting to include drugs used for physician-assisted suicide among those substances subject to the federal Controlled Substances Act (CSA).³⁹ The Court found that the rule was not entitled to *Chevron* deference because Congress, through the CSA, had granted the Attorney General only the power to promulgate rules relating to registration and control of substance dispensing, not the power to denounce state-authorized medical standards.⁴⁰ The Court acknowledged that the CSA included ambiguous language susceptible to varying constructions.⁴¹ But as the Court explained, "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official."⁴² The Attorney General claimed "extraordinary authority,"⁴³ so his interpretation was not entitled to deference.

Perhaps *King* is simply of a piece with *Brown & Williamson* and *Gonzales*, the (relatively) rare case in which an agency acts without congressionally delegated authority: no delegation, no deference. But

where the Court determines whether a particular agency interpretation is consistent with Congress's unambiguous intent.

36. *Brown & Williamson*, 529 U.S. at 159.

37. *Id.* at 159–60; see also 7 U.S.C. § 1311(a) (2000) (repealed 2004) ("The marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.").

38. 546 U.S. 243 (2006).

39. *Id.* at 258, 275.

40. *Id.* at 257–58.

41. *Id.* at 258.

42. *Id.*

43. *Id.* at 262.

according to the Court, in *Brown & Williamson*, the FDA had *no authority* to regulate tobacco marketing, period;⁴⁴ in *Gonzales*, the Attorney General had *no authority* to invalidate state-authorized medical treatments, full stop.⁴⁵ By contrast, Treasury and the IRS presumably have substantial authority under the ACA to administer the Credit.⁴⁶ *King* is not a tale of an agency acting *ultra vires*, at least not in the traditional sense. So while *King* may be an “extraordinary case,” it is worth taking a step back to look at the larger context.

First, the Justices do not all agree on the scope of *Chevron's* domain. The Chief Justice has expressed concern about agency aggrandizement under *Chevron*. For instance, he dissented vigorously from Justice Scalia's holding in *City of Arlington v. FCC* that agency interpretations concerning the scope of their own jurisdiction are entitled to deference.⁴⁷ Joined by Justices Kennedy and Alito, Roberts described his disagreement with the majority as “fundamental” and “easily expressed: A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference.”⁴⁸

By contrast, Justice Scalia ordinarily is a strong advocate for *Chevron* deference.⁴⁹ Writing for the *City of Arlington* majority, he characterized the Chief Justice's dissent as proposing “a massive revision of our *Chevron* jurisprudence,” writing that no case has ever held that “a general conferral of rulemaking or adjudicative authority [is] . . . insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field.”⁵⁰

Perhaps *King* is the next stage of Chief Justice Roberts's “massive revision” of *Chevron*. However, it is worth noting that Justice Scalia did not argue that *Chevron* analysis applied in *King*, even to deny deference at Step One. His argument focused instead on statutory interpretation: “Under all

44. See *supra* notes 34–35 and accompanying text.

45. See *supra* note 40 and accompanying text.

46. See I.R.C. § 36B(g) (2012) (“The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section . . .”).

47. 133 S. Ct. 1863, 1874–75 (2013).

48. *Id.* at 1877 (Roberts, C.J., dissenting). Chief Justice Roberts may not be the only Justice with reservations about *Chevron*. At oral argument in *King*, Justice Kennedy mused that while statutory ambiguity would normally prompt deference, “it seems . . . a drastic step . . . to say that the Department of Internal Revenue and its director [sic] can make this call one way or the other when there are, what, billions of dollars of subsidies involved here?” Transcript of Oral Argument at 74, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

49. See, e.g., *City of Arlington*, 133 S. Ct. 1863 (Scalia, J., for the majority); *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

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

the usual rules of interpretation . . . the Government should lose this case.”⁵¹ *King* seems therefore to be more than a mere pawn in a general dispute among the Justices about the breadth of the *Chevron* doctrine.

King should also be considered in light of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, a case addressing agency reinterpretations.⁵² Had the *King* Court invoked *Chevron* to rule for the government, Treasury—perhaps prompted by a future Administration—would have been free to revise the regulation in question to limit the Credit to purchasers on State exchanges.⁵³ Presumably such a revision would have been entitled to deference.⁵⁴ In *Brand X*, the Court stated that “[o]nly a judicial precedent holding that [a] statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”⁵⁵ *King* adds a wrinkle to *Brand X*, because the *King* Court found that Section 36B was ambiguous.⁵⁶ But the effect of the *King* Court’s rejection of the ordinary *Chevron* framework is to foreclose the agency reinterpretation that *Brand X* allows. Ultimately, the *King* analysis threads a very narrow needle: because the statute is ambiguous, its reference to State Exchanges need not be interpreted literally, yet because *Chevron* does not apply, agency interpretations that conflict with the Court’s interpretation of the statute are precluded.

IV. CONCLUSION

The *King* majority’s analysis is initially puzzling because the Court could have reached the same pro-ACA result by simply applying *Chevron*. Moreover, it seems odd that the Court based its analysis on a doctrine (derived from *Brown & Williamson*) that frees courts from assuming *implicit* congressional delegations when, in fact, the statute contains an apparent *explicit* delegation.

Ultimately, *King* may not be just extraordinary but *sui generis*, a “wrecking ball” case that could have destabilized an important social program had the Court reached a different result. But *King* may also suggest

51. *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting).

52. 545 U.S. 967 (2005).

53. Gernstein, *supra* note 20.

54. *See id.* (noting that, during oral argument in *King*, Chief Justice Roberts asked about the possibility of agency reinterpretation); *cf.* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009) (recognizing that an agency may implement a policy change so long as the “new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency believes it to be better” (emphasis omitted)).

55. *Brand X*, 545 U.S. at 982–83.

56. *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

that our one-time expectations regarding judicial deference to agency interpretations may require reevaluation. Chief Justice Roberts's "massive revision" to *Chevron*, decried by Justice Scalia in *City of Arlington*,⁵⁷ may be gaining traction. It will be interesting to see how the doctrine evolves in the coming Terms.

57. See *supra* note 50 and accompanying text.