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Foreword--King v. Burwell Symposium: Comments on the Commentaries (and on Some Elephants in the Room)

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When the Editors of the Pepperdine Law Review asked me to pen a response commentary to the essays submitted for their symposium on the *King v. Burwell* case, I agreed only with some reluctance. As some readers of this symposium volume may already be aware, I took an academic leave during the time period extending from the summer of 2010 to the summer of 2012 to accept a position at the Treasury Department's Office of Tax Policy. The portfolio of my Treasury position included the Regulations for Internal Revenue Code § 36B (Section 36B)—the Regulations that were being challenged in the *King v. Burwell*[1] case. I must thus clarify at the outset that nothing I write in this response commentary should be taken as indicative of the views of the Treasury Department, the Obama Administration, or anyone other than myself.

The thrust of my response commentary will be to praise the submitted essays for their excellence and insightfulness, but to suggest that the submitted essays nonetheless might benefit from focusing more on the role of the political mobilization that resulted in the *King v. Burwell* dispute.

The essays submitted for this symposium volume largely concentrate on the implications of the *King v. Burwell* decision for the future of *Chevron* deference, both in tax and non-tax contexts. Accordingly, Professor Johnson's essay argues that *Chevron* deference "is now receding in tax"[2] and that, more generally, we are now seeing the *Chevron* doctrine's "fall in tax and elsewhere; a fall in substantive significance, although perhaps not frequency of citation."[3]

Professor Johnson argues persuasively, yet some of the other submitted essays express greater uncertainty about the implications of the *King v. Burwell* decision for the future of *Chevron* deference. For instance,

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

2. Steve R. Johnson, *The Rise and Fall of* Chevron *in Tax: From the Early Days to* King *and Beyond*, 2015 PEPP. L. REV. 19 (2015).

3. *Id.* at 26.

Professors Hoffer and Walker argue that it remains to be seen "whether the Chief in *King v. Burwell* intended to cause a sea change in administrative law or was thinking like a tax lawyer and crafting a major questions doctrine that is good for tax only."[4]

Notably, Professor Lederman, Mr. Dugan, and Professor Hickman all see a divergence between Chief Justice Roberts and some of the other Justices on what the future of *Chevron* deference should be. Lederman and Dugan discuss the prior disagreement between the Chief Justice and Justice Scalia in the earlier case of *City of Arlington v. FCC*,[5] concluding that the *King v. Burwell* decision may signify that "Chief Justice Robert's 'massive revision' to *Chevron*, decried by Justice Scalia in *City of Arlington*, may be gaining traction" and that "[i]t will be interesting to see how the doctrine evolves in the coming Terms."[6] Along similar lines, Professor Hickman agrees that the *King v. Burwell* decision is a product of Chief Justice Robert's goal of revising the *Chevron* doctrine.[7] However, Professor Hickman argues that "it is unlikely that a majority of the Court agrees wholeheartedly with Chief Justice Roberts's preferred view of *Chevron*'s scope."[8] Nevertheless, Professor Hickman wonders whether lower courts might be influenced by the *King v. Burwell* decision and so give less deference to Treasury regulations in future cases.[9] This concern is expressed even more strongly by Professor Aprill, who predicts (with regret and with hope that her prediction will prove to be in error) that the *King v. Burwell* decision will embolden the Tax Court in particular to give less deference to Treasury Regulations going forward.[10]

Professor Aprill's concern is amplified by her view that "[t]he Supreme Court in *King v. Burwell* gave no guidance as to when a law involves issues of such economic or political significance that judicial, rather than administrative, interpretation is needed."[11] As Professors Hoffer and Walker explain, the *King v. Burwell* decision "broke new ground in administrative law, ruling that *Chevron* deference does not apply to questions such as this

4. Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 46 (2015).

5. Leandra Lederman & Joseph C. Dugan, King v. Burwell*: What Does it Portend for* Chevron*'s Domain?*, 2015 PEPP. L. REV. 72, 79–80 (2015).

6. *Id.* at 81.

7. *See* Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 57–58 (2015).

8. *Id.* at 53; *see also id.* at 66–67.

9. *Id.* at 70–71.

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

11. *Id.* at 17.

one that are of 'deep economic and political significance.'"[12]

Ultimately, then, what does this new limitation to *Chevron* deference mean or stand for? In particular, what might constitute a question of "deep economic and political significance" so that *Chevron* deference might not apply under this new limitation?

I view myself as a tax lawyer and a scholar of tax law and policy, not as a Court watcher. I will thus refrain from making predictions about the future of the Supreme Court's *Chevron* jurisprudence. Nevertheless, it seems to me that there are some metaphorical "elephants in the room"—that is, under-analyzed aspects of the *King v. Burwell* dispute that likely shaped the decision and that may influence its future impact.

Without question, I found all of the submitted Essays to be excellent, and I learned a great deal from their thoughtful commentary. Yet I remain doubtful that the *King v. Burwell* decision is best understood as part of a larger battle over the nature of *Chevron* deference in general, rather than, instead, as a particularized response to a highly political challenge to the signature legislative achievement of the Obama Administration.

Put another way, I suspect that key to understanding the *King v. Burwell* decision are some highly political "elephants" in the room, and, to mix metaphors, some highly political "donkeys" in the room as well.

In this, I differ somewhat from Professor Grewal, whose essay questions why tax professors were not more engaged in analyzing the *King v. Burwell* dispute prior to the Supreme Court's decision (and this symposium on that decision).[13] I certainly agree with the main thrust of Professor Grewal's argument that tax professors should be more engaged in cases like this, especially seeing as the intersections of taxation and health care are likely to be a growth area over the coming decades.[14] However, I view the political nature of the *King v. Burwell* dispute as the primary explanation for tax professors' reticence, even though I agree with Professor Grewal's argument that this does not justify that reticence.[15]

The *King v. Burwell* dispute has sometimes been framed as a conflict between the literal wording of portions of section 36B and the broader structure and purpose of the Affordable Care Act. However, as Darien Shanske and I have argued previously, the literal wording of Section 36B is

12. Hoffer & Walker, *supra* note 4, at 40 (quoting King v. Burwell, 135 S. Ct. 2480, 2489 (2015)).

13. *See* Andy S. Grewal, King v. Burwell*: Where Were the Tax Professors?*, 2015 PEPP. L. REV. 48 (2015).

14. *See* David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms are Needed to Prevent Avoidable Costs to Low- and Moderate-Income Workers,* 65 TAX L. REV. 669 (2012) (discussing intersections of taxation and health care).

15. Grewal, *supra* note 13, at 51–53.

actually in accord with the government's position once it is recognized that the term "Exchange" is defined by the statute as a term of art.[16] Moreover, even were this not so, the Supreme Court has long held that the literal wording of terms in a provision of the Internal Revenue Code must give way when in strong tension with the provision's overall structure and purpose. As the Court wrote in the famous case of *Crane v. Commissioner*, taught in most introductory courses on tax law, "It was thought to be decisive that one section of the Act must be construed so as not to defeat the intention of another or to frustrate the Act as a whole. . . ."[17] Since the beginning days of the income tax, the Treasury Department has used its authority granted by Congress to "prescribe all needful rules and regulations for the enforcement of" the tax law[18] and has frequently issued Regulations pursuant to that authority that depart far more dramatically from the literal wording of Code provisions than was the case with Section 36B.[19]

Consequently, if the Treasury Department was correct in its view as to the structure and purpose of the disputed language of section 36B, then I do not think there can be any real doubt that Treasury had the authority to write its interpretation into the Section 36B Regulations. To hold otherwise would be to overturn the history of how the income tax laws have been administered in this country.

Of course, those who supported the challenge to the Treasury Department's Regulation espoused a different and competing view of the structure and purpose of the disputed language of Section 36B. This competing view understood Congress as having limited the availability of the premium tax credits to only States that established their own Exchanges and having done so for the purpose of coercing the States to establish their own Exchanges.

Without delving further into the nature and origins of these two competing visions, I think most commentators who followed the dispute would agree that the advocates of these competing visions grouped into two distinct camps that evolved to form two separate and incompatible epistemic communities. Accordingly, the debates between these two camps were then largely based on these camps having different worldviews and social

16. David Gamage & Darien Shanske, *Why the Affordable Care Act Authorizes Tax Credits on the Federal Exchanges*, 71 STATE TAX NOTES 229 (2014).

17. Crane v. Comm'r, 331 U.S. 1, 13 (1947).

18. I.R.C. § 7805(a) (2012).

19. For instance, consider the "check-the-box regulations" as discussed in Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185 (2004), or the regulations on the deductibility of education expenses as discussed in Jay Katz, *The Deductibility of Education Costs: Why Does Congress Allow the IRS to Take Your Education So Personally?*, 17 VA. TAX REV. 1 (1997).

networks rather than being based on more lawyerly analysis.

I suspect that it is for this reason that Chief Justice Roberts felt compelled to uphold the Treasury Department's Regulation without granting *Chevron* deference. If the Chief Justice agreed with the Treasury Department as to the purpose and structure of the disputed language of Section 36B (as I am confident that he did), then the only plausible interpretation of the disputed language is that premium tax credits should be available in all States. But deference to the Treasury Department could not be the reason for upholding this interpretation. After all, what if the Treasury Department had been controlled by the other epistemic community with its different worldview?

It is perhaps regrettable that the *King v. Burwell* decision did not better clarify what constitutes a question of "deep economic and political significance" for the purposes of *Chevron* deference. It now remains to be seen how this notion might evolve through future cases. The insightful essays in this symposium volume will undoubtedly help guide that future evolution. Nevertheless, I think we should keep in mind the special political nature of the *King v. Burwell* dispute. It might be that what ultimately made this a question of deep economic and political significance was not anything inherent to the content or subject matter of the disputed provision itself but rather was the political mobilization of epistemic communities around interpretations based on incompatible worldviews that occurred subsequent to the passage of the legislation.