
RECENT REGULATION

STATUTORY INTERPRETATION — PATIENT PROTECTION AND AFFORDABLE CARE ACT — INTERNAL REVENUE SERVICE INTERPRETS ACA TO PROVIDE TAX CREDITS FOR INDIVIDUALS PURCHASING INSURANCE ON FEDERALLY FACILITATED EXCHANGES. — Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (to be codified at 26 C.F.R. pt. 1).

As part of its effort to extend health coverage, the Patient Protection and Affordable Care Act¹ (ACA) provides for the establishment of statewide exchanges for the purchase of private health insurance and authorizes refundable tax credits to qualified purchasers.² Due to political disagreements and obstacles to implementation, many states have been reluctant to create these insurance exchanges.³ In order to provide coverage options for purchasers in these reluctant states, the ACA requires the Secretary of Health and Human Services (HHS) to create federally facilitated exchanges for states that do not establish their own exchanges.⁴ However, the text of the ACA appears to authorize premium tax credits only for individuals purchasing insurance on an exchange established by a state.⁵ Recently, the Internal Revenue Service (IRS) promulgated a final rule interpreting the ACA to authorize the same tax credits for individuals obtaining coverage through a federally facilitated exchange.⁶ While the debate surrounding this rule has largely concentrated on whether the text and legislative history support the IRS's interpretation, the political saliency and economic impact of the rule may provide an opportunity for a reviewing court to clarify the limits of the major questions exception to the doctrine of judicial deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁷

¹ Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified in scattered sections of the U.S. Code).

² See 26 U.S.C. § 36B(b) (2006 & Supp. V 2011) (defining a “premium assistance credit”).

³ See Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 5, 2012, at A17, available at <http://www.nytimes.com/2012/08/05/us-us-officials-brace-for-huge-task-of-running-health-exchanges.html>.

⁴ 42 U.S.C. § 18041(c) (2006 & Supp. V 2011).

⁵ See 26 U.S.C. § 36B(b)(2)(A) (specifying the amount of the tax credit based on the cost of the plan the taxpayer “enrolled in through an Exchange established by the State under [section] 1311”).

⁶ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (to be codified at 26 C.F.R. pt. 1) [hereinafter 2012 Final Rule].

⁷ 467 U.S. 837 (1984). Under the *Chevron* doctrine of judicial deference, courts look first to “whether Congress has directly spoken to the precise question at issue,” *id.* at 842, and second, “if

In order to provide a competitive marketplace for the purchase of private health insurance, section 1311 of the ACA provides for the creation of health insurance exchanges by 2014.⁸ These new exchanges will facilitate the commercial coverage expansion by “select[ing] health insurance carriers that offer qualified health plans and support[ing] consumers in selecting such products.”⁹ For eligible consumers¹⁰ with incomes up to 400% of the federal poverty level, the ACA supports the purchase of health insurance by providing refundable tax credits to cover the lesser of either (1) the monthly premiums for a plan obtained through an exchange or (2) the difference between the price of the second-lowest-cost “silver” plan¹¹ and a statutorily defined premium contribution from the taxpayer’s household income.¹² Shortly after the ACA’s passage, the Congressional Budget Office (CBO) predicted that by 2019, twenty-nine million individuals would purchase coverage through an exchange, with nineteen million estimated to receive tax credits.¹³

Section 1401 of the ACA, which adds § 36B to the Internal Revenue Code, specifies the value of tax credits available for individuals purchasing insurance on “an Exchange established by the State under [section 1311 of the ACA].”¹⁴ Section 1311 requires that “[e]ach state shall, not later than January 1, 2014, establish an American Health Benefit Exchange”¹⁵ If the Secretary of HHS determines by January 1, 2013, that a state will fail to establish an exchange meeting the ACA’s requirements, section 1321 of the ACA provides that “the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate such Exchange within the State and the Secretary shall take

the statute is silent or ambiguous with respect to the specific issue, whether the agency’s answer is based on a permissible construction of the statute,” *id.* at 843.

⁸ 42 U.S.C. § 18031(b)(1).

⁹ Rosemarie Day & Pamela Nadash, *New State Insurance Exchanges Should Follow the Example of Massachusetts by Simplifying Choices Among Health Plans*, 31 HEALTH AFF. 982, 982 (2012); see also 42 U.S.C. § 18031(d)(4) (establishing minimum requirements for exchanges).

¹⁰ See BERNADETTE FERNANDEZ & THOMAS GABE, CONG. RESEARCH SERV., R41137, HEALTH INSURANCE PREMIUM CREDITS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA) 1–3 (2010), available at http://www.ncsl.org/documents/health/HealthInsurancePremiumCredits_in_PPACA.pdf (describing eligibility requirements).

¹¹ Insurance plans on an exchange must provide at least minimum essential health benefits. See 42 U.S.C. § 18021(a)(1). The plans conform to defined levels of coverage: bronze, silver, gold, or platinum. See *id.* § 18022(d)(1).

¹² See 26 U.S.C. § 36B(b)(2) (2006 & Supp. V 2011). The contributions rise on a sliding scale as incomes grow relative to the federal poverty level. See *id.*

¹³ FERNANDEZ & GABE, *supra* note 10, at 1 (citing Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives 9, 21 (Mar. 20, 2010), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf>).

¹⁴ 26 U.S.C. § 36B(b)(2)(A).

¹⁵ 42 U.S.C. § 18031(b)(1).

such actions as are necessary to implement such other requirements.”¹⁶ Nevertheless, the ACA defines the term “Exchange” as “an American Health Benefit Exchange established under section [1311].”¹⁷

The IRS issued a proposed rule clarifying that individuals would be eligible for tax credits by purchasing insurance through an exchange established under either section 1311 or section 1321.¹⁸ During the notice-and-comment period, the IRS responded to concerns that the text of the ACA did not authorize tax credits for purchasers on federally facilitated exchanges by noting that “neither the Congressional Budget Office score nor the Joint Committee on Taxation technical explanation of the Affordable Care Act discusse[d] excluding those enrolled through a Federally-facilitated exchange.”¹⁹

In May 2012, the IRS promulgated a final rule confirming its proposed rule by interpreting the term “Exchange” to “refer[] to a State Exchange . . . and [a] Federally-facilitated Exchange.”²⁰ In support of its interpretation, the IRS referenced the “statutory language of section 36B and other provisions of the Affordable Care Act.”²¹ The IRS also pointed to “relevant legislative history,” while noting that its regulation “is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.”²²

After the IRS promulgated the rule, legal commentators debated whether the rule would receive *Chevron* deference.²³ Arguing against such deference, Michael Cannon of the Cato Institute and Professor Jonathan Adler contended that the text of the ACA unambiguously limits tax credits to individuals purchasing insurance on an exchange established by a state.²⁴ Cannon and Adler reasoned that Congress, by

¹⁶ *Id.* § 18041(c)(1).

¹⁷ *Id.* § 300gg-91(d)(21).

¹⁸ See Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (proposed Aug. 17, 2011).

¹⁹ Letter from Douglas H. Shulman, Comm’r, Internal Revenue Serv., to David Phil Roe, U.S. House of Representatives (Nov. 29, 2011), available at http://roe.house.gov/uploadedfiles/irs_response_to_letter_on_ppaca_exchange.pdf. Commissioner Shulman also alluded to statutory language supporting his interpretation. See *id.*

²⁰ 2012 Final Rule, *supra* note 6, at 30,378 (emphasis omitted). The rule also finalized other definitions relating to premium tax credits, clarified several eligibility requirements including some elements of the minimum essential coverage provision, explained the methods for computing the premium tax credits, and resolved issues regarding advance credit payments and information reporting. *Id.* at 30,377–85.

²¹ *Id.* at 30,378.

²² *Id.*

²³ See JENNIFER STAMAN & TODD GARVEY, CONG. RESEARCH SERV., LEGAL ANALYSIS OF AVAILABILITY OF PREMIUM TAX CREDITS IN STATE AND FEDERALLY CREATED EXCHANGES PURSUANT TO THE AFFORDABLE CARE ACT 6–10 (2012), available at <http://www.ncsl.org/documents/health/LegAnalPTC.pdf>.

²⁴ See Michael Cannon & Jonathan Adler, *The Illegal IRS Rule to Expand Tax Credits Under the PPACA: A Response to Timothy Jost*, HEALTH AFF. BLOG (Aug. 1, 2012, 10:52 AM),

denying tax credits to purchasers in states without a state-established exchange, intended to create an incentive for the states to establish exchanges.²⁵ Professor Timothy Jost argued that the IRS interpretation is reasonable and should receive deference.²⁶ Jost argued that when section 1321 authorized the Secretary to establish “such Exchange within the State,”²⁷ “Congress meant the ‘required exchange’ mandated by section 1311.”²⁸ He further contended that the ACA’s reconciliation bill,²⁹ which explicitly requires federally facilitated exchanges to report information regarding advance premium tax credits,³⁰ and the contemporaneous CBO analysis³¹ confirm that Congress intended for tax credits to be available to purchasers on both state-established and federally facilitated exchanges.³²

After a hearing, members of the House Committee on Oversight and Government Reform adopted the logic of Cannon and Adler, characterizing the IRS’s reasoning as “flawed and misleading.”³³ The Committee requested that the IRS produce “all documents and communications between IRS employees and employees of the White House Executive Office of the President . . . referring or relating to the . . . rule.”³⁴

<http://healthaffairs.org/blog/2012/08/01/the-illegal-irs-rule-to-expand-tax-credits-under-the-ppaca-a-response-to-timothy-jost>. See generally *IRS: Enforcing ObamaCare’s New Rules and Taxes: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (2012) [hereinafter *Cannon & Adler Testimony*] (written testimony of Michael F. Cannon and Professor Jonathan H. Adler).

²⁵ See generally *Cannon & Adler Testimony*, *supra* note 24.

²⁶ See Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent with the Affordable Care Act’s Language and History*, HEALTH AFF. BLOG (July 18, 2012, 7:27 PM), <http://healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history>. See generally *The Role of the Internal Revenue Service in Health Reform: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (2012) [hereinafter *Jost Testimony*] (written testimony of Professor Timothy Stoltzfus Jost).

²⁷ 42 U.S.C. § 18041(c)(1) (2006 & Supp. V 2011).

²⁸ Jost, *supra* note 26.

²⁹ Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified in scattered sections of the U.S. Code).

³⁰ See 26 U.S.C. § 36B(f)(3) (2006 & Supp. V 2011) (requiring “[e]ach Exchange . . . or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c)” to report “[t]he aggregate amount of any advance payment of [a tax] credit”).

³¹ See CONG. BUDGET OFFICE, AN ANALYSIS OF HEALTH INSURANCE PREMIUMS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 23–25 (2009), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10781/11-30-premiums.pdf>; see also *Jost Testimony*, *supra* note 26, at 5 (noting that the CBO analysis “assumed that premium tax credits would be available in all states”).

³² See *Jost Testimony*, *supra* note 26, at 2–5.

³³ Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, et al., to Douglas H. Shulman, Comm’r, Internal Revenue Serv. (Aug. 22, 2012), available at <http://oversight.house.gov/release/oversight-committee-asks-irs-to-explain-recent-rule-that-expands-obamacares-reach-in-a-way-not-authorized-in-law>.

³⁴ *Id.*

Due to its political implications and economic consequences, the IRS rule may provide a useful opportunity for a reviewing court to clarify the major questions exception to *Chevron*. In several cases since 2000, the Supreme Court has refused to defer to an agency interpretation on politically or economically significant questions. This line of cases does not establish a clear test for determining whether a question is “major.” As a result, it is unclear whether the IRS rule fits the mold of a major question.

The Court appeared to craft a major questions exception to *Chevron* in *FDA v. Brown & Williamson Tobacco Corp.*³⁵ In *Brown & Williamson*, the Court concluded at the first step of its *Chevron* analysis that Congress clearly did not grant the Food and Drug Administration (FDA) the authority to regulate tobacco, despite the expansive statutory language cited by the FDA to support such authority.³⁶ In its searching inquiry for congressional intent, the Court cautioned that “there may be reason to hesitate before concluding that Congress has intended such an implicit delegation”³⁷ on “major questions.”³⁸

One hook for the major questions exception appears to be the economic significance of the determination. The Court demonstrated the breadth of the FDA’s asserted authority in *Brown & Williamson* by noting that the “[tobacco] industry constitut[es] a significant portion of the American economy.”³⁹ The Court compared⁴⁰ the FDA’s regulation of tobacco to the question at issue in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,⁴¹ in which the Court held that the Federal Communications Commission could not use its limited authority to “modify” tariff requirements to restructure the tariff system by requiring filings only for AT&T.⁴² The *Brown & Williamson* Court reasoned that, “[a]s in *MCI*, . . . Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁴³

The political context of an agency interpretation has given the Court additional pause. The *Brown & Williamson* Court noted that

³⁵ 529 U.S. 120 (2000). Despite some disagreement over the Court’s meaning, several authors view *Brown & Williamson* as creating a major questions exception to *Chevron*. See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 912–13 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 240–42 (2006).

³⁶ See *Brown & Williamson*, 529 U.S. at 126–27.

³⁷ *Id.* at 159.

³⁸ *Id.* (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

³⁹ *Id.*

⁴⁰ *Id.* at 160.

⁴¹ 512 U.S. 218 (1994).

⁴² *Id.* at 231 (internal quotation marks omitted).

⁴³ *Brown & Williamson*, 529 U.S. at 160.

“Congress . . . ha[d] created a distinct regulatory scheme for tobacco products . . . and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area.”⁴⁴ Using similar reasoning, the Court in *Gonzales v. Oregon*⁴⁵ held that Congress could not have implicitly delegated authority to the Attorney General to “prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide.”⁴⁶ To illustrate the importance of the question, the Court observed the ongoing public debate surrounding physician-assisted suicide.⁴⁷

As part of its major questions analysis, the Court has considered two additional factors. First, in several cases, the Court has looked to whether the agency interpretation was “enactable.”⁴⁸ For example, the Court noted in *Brown & Williamson* that Congress had “squarely rejected proposals to give the FDA jurisdiction over tobacco.”⁴⁹ Likewise, the Court’s decision in *Oregon* may have been informed by an earlier, unsuccessful attempt to explicitly grant the asserted authority to the Attorney General through legislation.⁵⁰ Second, some lower court judges have found the major questions exception to be particularly appropriate when the agency is aggrandizing its own power.⁵¹ Support for this reading can be found in *Brown & Williamson*, in which the Court warned that the interpretation issued by the FDA might give it the authority to “ban cigarettes and smokeless tobacco entirely,”⁵² and in *Oregon*, in which the Court similarly referenced the breadth of the authority that the Attorney General would receive if the Court accepted his interpretation.⁵³

Despite a wealth of possibly determinative factors, the major questions exception has been a source of confusion because the Court has not articulated a consistent test for determining whether a question is

⁴⁴ *Id.* at 159–60.

⁴⁵ 546 U.S. 243 (2006).

⁴⁶ *Id.* at 249; *see also id.* at 275.

⁴⁷ *Id.* at 267–68.

⁴⁸ EINER ELHAUGE, STATUTORY DEFAULT RULES 104–06 (2008).

⁴⁹ *Brown & Williamson*, 529 U.S. at 159–60.

⁵⁰ *See Oregon*, 546 U.S. at 253; ELHAUGE, *supra* note 48, at 105–06. Another example of this rationale may be *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), which has been grouped with the major questions cases. *See, e.g.,* ELHAUGE, *supra* note 48, at 106–07; Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has It Mastered Chevron’s Step Zero?*, 3 VETERANS L. REV. 67, 98–104 (2011). In *Hamdan*, the Court refused to defer to the President’s interpretation regarding military commissions. *See* 548 U.S. at 593–95. According to Professor Einer Elhauge, the Court could not find a “reliable basis for concluding that the president’s . . . interpretation was likely to be enactable.” ELHAUGE, *supra* note 48, at 106.

⁵¹ *See AKM LLC v. Sec’y of Labor*, 675 F.3d 752, 765–66 (D.C. Cir. 2012) (Brown, J., concurring); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004).

⁵² *Brown & Williamson*, 529 U.S. at 159.

⁵³ *See Oregon*, 546 U.S. at 267–68.

“major.” Every major questions case has handled an issue of political or economic import, but it is not clear how the Court determines whether a question is significant enough to merit a less deferential standard of review.⁵⁴ While Professor Einer Elhauge finds in *Brown & Williamson* and *Oregon* “a clear conflict with legislative evidence of what was enactable,”⁵⁵ this enactability inquiry is similarly indeterminate. Congress considers many variations of legislative proposals, and it rejects some enactable provisions in larger packages while not considering other enactable provisions at all. Alternatively, some lower courts view the Court’s major questions cases as a refusal to grant deference when an agency “alter[s] the fundamental details of a regulatory scheme.”⁵⁶ However, courts must still determine which regulations are “fundamental.”⁵⁷ And even if the Court had developed such a test, it has yet to clarify whether any specific elements are necessary or if certain permutations are sufficient.

*Massachusetts v. EPA*⁵⁸ may have further contributed to the confusion. In *Massachusetts*, the Court refused deference to the EPA’s determination that it could not regulate greenhouse gases.⁵⁹ Professor Abigail Moncrieff finds *Massachusetts* to be “fundamentally incompatible” with the major questions exception because, unlike *Brown & Williamson* and its progeny, the Court in *Massachusetts* forced an agency to act rather than refusing to approve a significant regulation.⁶⁰ However, the *Massachusetts* Court explicitly distinguished *Brown & Williamson*,⁶¹ and *Massachusetts*, like *Oregon*, may simply be seen as part of “an emerging trend of heightened judicial oversight of execu-

⁵⁴ See Sunstein, *supra* note 35, at 232–33. *Barnhart v. Walton*, 535 U.S. 212, 217 (2002), in which a regulation implicating eighty billion dollars over ten years received deference, may be informative. However, the regulation at issue in *Walton* saved money that the government would have spent, while the interpretations in *MCI* and *Brown & Williamson* dealt with government regulation of private industry. *Id.*

⁵⁵ ELHAUGE, *supra* note 48, at 104.

⁵⁶ *Oregon*, 546 U.S. at 267 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)) (internal quotation marks omitted); see also *Friends of the Earth v. EPA*, 346 F. Supp. 2d 182, 193 (D.D.C. 2004) (finding the regulation different from the one in *Brown & Williamson* because it did “not threaten Congress’ . . . regulatory scheme”), *rev’d and remanded*, 446 F.3d 140 (D.C. Cir. 2006).

⁵⁷ See *Oregon*, 546 U.S. at 290 (Scalia, J., dissenting).

⁵⁸ 549 U.S. 497 (2007).

⁵⁹ See *id.* at 534–35.

⁶⁰ Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 595 (2008). One could alternatively argue that aggrandizement of agency power is relative to congressional intent. Thus, *Massachusetts* might be consistent with an aggrandizement rationale for those commentators who believe the EPA was failing to fulfill a statutory obligation.

⁶¹ *Massachusetts*, 549 U.S. at 531 (reasoning that EPA jurisdiction over greenhouse gases would not lead to “extreme measures” similar to those measures in *Brown v. Williamson* and noting that *Brown & Williamson* relied on an “unbroken series of congressional enactments” to reveal congressional intent).

tive agency actions,” where the Court is “[s]uspicious of politically motivated administrative interpretation.”⁶²

Under some readings of the major questions exception, the IRS rule may be the type of determination to which a reviewing court may not grant *Chevron* deference. In each of the major questions cases, the Court was skeptical that Congress would implicitly delegate a significant determination.⁶³ Viewed in this light, a reviewing court may have difficulty believing that Congress, without a clear directive, intended to delegate the determination of whether millions of Americans may receive billions of dollars to purchase health insurance. This analysis may also lead to the conclusion that tax credits are fundamental to the regulatory scheme, as they make affordable coverage possible on the exchanges for lower-income Americans. And if courts are moving in the direction of more suspicion of agency actions in politically charged climates, a court might view the IRS rule and its opposition in the House of Representatives as similar to the political environments the Court encountered in *Oregon* and *Massachusetts*.

Conversely, the IRS rule does not appear to represent the type of aggrandizement at issue in *MCI* and *Brown & Williamson*. While the rules at issue in *MCI* and *Brown & Williamson* would have allowed *the interpreting agency* to alter fundamentally the regulation of an industry, the IRS interpretation gives *HHS* the authority to provide an exchange through which individuals may receive tax credits. Further, unlike in *Brown & Williamson* and *Oregon*, a court would be hard pressed to find evidence that a bill providing tax credits through federally facilitated exchanges was not enactable, particularly in light of the aforementioned CBO analysis, which assumed that tax credits would be available in all states.⁶⁴ And although this interpretation is at the center of a political controversy, the ACA and its exchanges represent a new, singular intervention, while the Court in *Brown & Williamson* pointed to a history of congressional bargaining after the enactment of the statute the FDA interpreted.⁶⁵

These competing views of the IRS rule and its placement within the major questions case law provide an impetus for a reviewing court to clarify the current state of the exception. That the IRS rule may receive deference under only some interpretations of the exception underscores the need for judicial clarity in this area.

⁶² Note, *Limits on Agency Discretion*, 121 HARV. L. REV. 415, 425 (2007); see also Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52.

⁶³ See Merrill & Hickman, *supra* note 35, at 912–13.

⁶⁴ See Jost, *supra* note 26.

⁶⁵ 529 U.S. 120, 148–55 (2000).