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A Gap in the Affordable Care Act: Will Tax Credits Be Available for Insurance Purchased Through Federal Exchanges?

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NOTES

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I. INTRODUCTION

Millions of Americans rest assured that the Patient Protection and Affordable Care Act[1] ("ACA") provides tax credits for health insurance to individuals earning 100–400% of the federal poverty line.[2] The tax credits will be accessible through state insurance exchanges, also known as Marketplaces,[3] which are government-regulated organizations designed to create more competition in the health insurance industry.[4] But a gap in the unwieldy, two-thousand-plus-page statute—either a scrivener's error or an overlooked loophole—is raising questions about whether citizens in certain states are eligible for the tax credits. This "quirk" could be a serious blow to an already contentious healthcare-reform effort.[5]

The ACA, deemed constitutional by a divided Supreme Court in June 2012,[6] requires all residents of the United States to retain minimum essential health coverage and imposes a tax penalty for failure to do so.[7] The individual mandate, as this requirement is known, is softened by tax credits, or subsidies, made available to

1. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 42 U.S.C. & 26 U.S.C.), and the Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. Law 111-152, 124 Stat. 1029, are collectively referred to as the Patient Protection and Affordable Care Act.

2. In 2011, 100% was $22,350 and 400% was $89,400 for a family of four. Annual Update of the HHS Poverty Guidelines, 76 Fed. Reg. 3637–38 (Jan. 20, 2011). *See generally* U.S. DEP'T OF HEALTH & HUMAN SERVS., THE 2011 HHS POVERTY GUIDELINES (2011), *available at* http://aspe.hhs.gov/poverty/11poverty.shtml. Most of the nation's uninsured are low- or moderate-income; nine in ten fall below 400% of the federal poverty line. THE KAISER COMM'N ON MEDICAID & THE UNINSURED, FIVE FACTS ABOUT THE UNINSURED 1 (2011), *available at* http://www.kff.org/uninsured/upload/7806-04.pdf.

3. This Note uses the term "exchanges," as that is the language set out in the statute. As part of a rebranding effort, the Obama Administration started using "Marketplaces" in January 2013. Sam Baker, *Obama Officials Ditch 'Exchanges' in Rebranding of Healthcare Reform Law*, THE HILL (Jan. 20, 2013), http://thehill.com/blogs/healthwatch/health-reform-implementation/278105-obama-officials-ditch-exchanges-in-rebranding-of-healthcare-law.

4. *See infra* Part II; *see also* David M. Herszenhorn, *Explaining the 'Exchange': A Primer*, N.Y. TIMES (Sept. 15, 2009), http://prescriptions.blogs.nytimes.com/2009/09/15/explaining-the-exchange-a-primer/.

5. David Hogberg, *Oops! No ObamaCare Tax Credit Via Federal Exchanges?*, INVESTOR'S BUS. DAILY (Sept. 7, 2011, 6:40 PM), http://news.investors.com/Article/584085/201109071840/ObamaCare-Subsidy-Error-Found.htm.

6. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2572–75 (2012).

7. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1501(b), 124 Stat. 119 (2010) (to be codified at I.R.C. § 5000A); *Sebelius*, 132 S. Ct. at 2594, 2600.

eligible individuals purchasing insurance through one-stop-shop exchanges.[8] Either the state or federal government will establish an American Health Benefit Exchange in each state; however, the ACA, read literally, does not make tax credits available through federally established exchanges.[9] Was the omission of tax credits through federal exchanges intentional? Or is this a would-be amendment that slipped through the cracks of the massive bill—a manifestation of House Speaker Nancy Pelosi's infamous comment that "we have to pass this bill to find out what is in it"?[10]

The Internal Revenue Service ("IRS"), the agency charged with administering the tax credits, is looking beyond the seemingly plain text of the statute: in a final rule, the agency interpreted the statute as making tax credits available through both state *and* federal exchanges.[11] There are two important questions to ask regarding this interpretation: (1) Does the IRS have the authority to interpret the text in this way? (2) Who would have standing to challenge such a reading?

This Note explores these two questions and explains, from an advocacy standpoint, why traditional tools of statutory interpretation suggest that the IRS acted within its prescribed bounds in construing the statute broadly. Significantly, subsequent legislation shows that the agency is implementing the statutory scheme Congress envisioned. Part II outlines the state of health insurance prior to the changes instituted by the ACA, explains the role of the exchanges in healthcare reform, and details why Congress amended the statute to include the option of federal exchanges. Part III argues that large employers might have standing to challenge the IRS's rule because they would be injured by the statutory provision that grants tax credits to those who use federal exchanges. Part IV analyzes the gap in the statute by considering the plain text, the other provisions of the Act, the legislative history, and the postenactment legislation. Finally, Part V suggests the appropriate framework for judicial review of the current IRS rule; it walks through the two-step test found in *Chevron*

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8. ACA § 1401(a) (to be codified at I.R.C. § 36B(b)(2)).

9. *Id.*; § 1321(c); Hogberg, *supra* note 5.

10. David Freddoso, *Pelosi on Health Care: 'We Have to Pass the Bill So You Can Find Out What Is in It...,'* WASH. EXAMINER (Mar. 9, 2010), http://washingtonexaminer.com/blogs/beltway-confidential/pelosi-health-care-039we-have-pass-bill-so-you-can-find-out-what-it039.

11. Treas. Reg. §§ 1, 602 (2012) (stating via final regulation that statutory language, purpose, and structure support the IRS interpretation); Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 17, 2012) (final regulations); Treas. Reg. § 1.36; 45 C.F.R. § 155.20 (2011); 76 Fed. Reg. 50,934, 50,940 (Aug. 17, 2011) (adopting in a proposed rule the same definition for "exchange" as in 45 C.F.R. 155.20, which includes exchanges established by the federal government under § 1321(c) of the ACA); *see also* Hogberg, *supra* note 5.

v. Natural Resources Defense Council, the controlling case requiring deference to an agency's statutory interpretation,[12] by asking whether the statute is ambiguous and whether the IRS interpretation is reasonable. Answering both these questions in the affirmative, this Note concludes that a court will likely defer to the IRS interpretation of the statute.

II. BACKGROUND ON THE AFFORDABLE CARE ACT AND EXCHANGES

The ACA, amended by the Health Care and Education Reconciliation Act of 2010 ("HCERA"), seeks to improve the navigability of the health insurance marketplace.[13] Pursuant to this legislation, an exchange in each state will facilitate the purchase of qualified health plans, acting as a central portal for consumers to find and compare health insurance options.[14] Given projections that premiums in the health insurance market will rise as a result of the ACA, the tax credit, which reduces out-of-pocket premium costs for certain individuals, is integral to acceptance of and compliance with the individual mandate.[15] Those who do not, or cannot, comply with the individual mandate will face a tax penalty.[16] However, section 1401 of the ACA, which adds section 36B to the Internal Revenue Code ("IRC"), establishes that tax credits for the purchase of health

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12. 467 U.S. 837 (1984).

13. *E.g.*, ACA §§ 1103, 1201, 1311(b) (to be codified in scattered sections of 42 U.S.C.); Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. Law 111-152, § 2301, 124 Stat. 1029. For a brief history of the politics of enacting the ACA, see Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA* 5–7 (Case Legal Studies Research Paper No. 2012-27, 2012), *available at* http://ssrn.com/abstract=2106789.

14. ACA § 1311(d)(2) ("An Exchange shall make available qualified health plans to qualified individuals and qualified employers."); 42 U.S.C. § 18021 (2010). *See generally Health Insurance Exchange Establishment Grants Fact Sheet*, HEALTHCARE.GOV (Jan. 20, 2011), http://www.healthcare.gov/news/factsheets/2011/01/exchestannc.html.

15. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to the Honorable Evan Bayh, U. S. Senate (Nov. 30, 2009) [hereinafter Elmendorf Letter] (including as an attachment AN ANALYSIS OF HEALTH INSURANCE PREMIUMS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (2009)), *available at* http://www.cbo.gov/ftpdocs/107xx/doc10781/11-30-Premiums.pdf; *see also* Peter Suderman, *CBO: Senate's Health Care Reform Bill Would Cause Individual-Market Insurance Premiums to Rise*, REASON MAG. (Nov. 30, 2009), http://reason.com/blog/2009/11/30/cbo-senates-health-care-reform (discussing the likely increase and the CBO Report).

16. ACA § 1501(b) (to be codified at I.R.C. § 5000A). The penalty is capped at the lesser of (1) the national average premium for qualified health plans offered through exchanges or (2) the sum of monthly penalty amounts (the greater of a flat dollar amount of about $2,100 or 2.5% of income). ACA § 10106(b); HCERA § 1002(a).

insurance will be available only to those who purchase through an exchange.[17]

Although an early draft of the ACA was worded in such a way to compel each state to establish an exchange, the statute as enacted gives states the flexibility to elect not to establish an exchange: section 1321(c) provides that the Secretary of Health and Human Services shall run a federal exchange in a state that opts out.[18] However, the current tax credit provision (section 1401) does not reflect this change.[19] That is, tax credits for state residents are only available if the state elects to create an exchange; state residents do not get the tax benefit if the exchange in their state was established by the federal government. As a result of this discrepancy, lower-income individuals in states electing not to establish an exchange will be required, under the individual mandate, to buy insurance without the tax credits meant to help make coverage more affordable.

This Part first discusses the reasons behind the push for healthcare reform and then considers how useful the exchanges might be in achieving the goal of affordable insurance. Next, it explains why Congress chose the scheme that gives states the option to establish an exchange or allow the federal government to take the reins and discusses how the textual conundrum in section 1401 came to be. Lastly, this Part lays out the IRS's approach to interpreting the tax credit provision.

A. Exchanges and Affordability

> *"The Exchanges play important roles as advocates of insurance affordability, as administrators of cost-sharing reduction subsidies, and as gateways to other public programs."*
>
> — Timothy Stoltzfus Jost[20]

At the core of the ACA is the requirement that every American citizen have health insurance beginning in 2014. This shift to a "culture of coverage" is a dramatic departure from the pre-ACA state of affairs: 49.9 million Americans (over 16% of the population) were

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17. ACA § 1401(a) (to be codified at I.R.C. § 36B(b)(2)).

18. *Id.* § 1321(c).

19. *See infra* Part II.C.

20. TIMOTHY STOLTZFUS JOST, HEALTH INSURANCE EXCHANGES AND THE AFFORDABLE CARE ACT: KEY POLICY ISSUES 30 (2010).

uninsured in 2010,[21] and millions more were underinsured.[22] Lack of insurance not only affects financial well-being,[23] it also increases the likelihood of poor health outcomes.[24] For example, it is estimated that continuous health coverage could decrease premature mortality rates of uninsured adults by up to 25%. Further, healthcare can be seen as "at least a partial public good"—infection, for example, can have a broad population effect.[25] The uninsured may delay treatment or not receive it at all, increasing the chance that infection will spread.[26] In this way, lack of health insurance "threatens the health of not only the uninsured . . . but everyone else as well."[27]

Ill-fated proposals for a national health insurance scheme have appeared on the federal agenda for over a half century, alongside proposals for federal programs to control healthcare costs.[28] President Carter was one of a handful who took on the challenge, setting forth a hospital rate-setting program that was rejected by Congress.[29] President Clinton proposed a national "managed competition" program that allowed for both regulatory and free-market elements in a national insurance framework—this was also rejected by Congress.[30]

The recent momentum for change could be attributed in part to the decline in private health insurance as a benefit of employment, which resulted in the increasing cost consciousness of healthcare

21. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 23 (2011).

22. WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 196 (2009).

23. The uninsured pay an average thirty-five percent of costs out-of-pocket and are often charged higher amounts than the insured pay for care. Twenty-seven percent of the uninsured report having used up all or most of their savings on medical bills. THE KAISER COMM'N ON MEDICAID & THE UNINSURED, *supra* note 2, at 6.

24. THE KAISER COMM'N ON MEDICAID & THE UNINSURED, THE UNINSURED AND THE DIFFERENCE HEALTH INSURANCE MAKES 2 (2008), *available at* http://www.kff.org/uninsured/upload/1420-10.pdf. Uninsured adults are less likely to receive preventative care and are four times more likely to delay or forgo needed care than the insured, which increases the likelihood of hospitalization for avoidable conditions. *Id.* Insurance leads to better clinical outcomes for ailments including diabetes, cardiovascular disease, and HIV infection. *See* COMM. ON THE CONSEQUENCES OF UNINSURANCE, INSTITUTE OF MEDICINE, CARE WITHOUT COVERAGE: TOO LITTLE, TOO LATE 57 (2002) (discussing how uninsured patients with these chronic illnesses experienced worse clinical outcomes).

25. PARMET, *supra* note 22, at 208–09.

26. *Id.*

27. *Id.*

28. *See* KENNETH R. WING, THE LAW AND THE PUBLIC'S HEALTH 143 (6th ed. 2003); *see also, e.g.*, Hospital Cost Containment Act of 1979, H.R. 2626, 96th Cong.; Health Security Act, H.R. 3600, 103rd Cong. (1993).

29. WING, *supra* note 28, at 143.

30. *Id.*

consumers.[31] The weak economy further compounded the rate of underinsurance and the increasing percentage of those lacking private insurance.[32] At the same time, a worrisome escalation in national healthcare spending caused the Congressional Budget Office ("CBO") to project that healthcare spending will reach 30% of gross domestic product in a quarter century and half of gross domestic product within seventy-five years.[33]

To reverse the trend toward underinsurance or lack of insurance, the ACA requires individuals to carry "minimum essential coverage." Making coverage mandatory discourages healthy individuals from staying out of the market completely, pushing back against adverse-selection problems. Adverse selection is the tendency for less healthy (higher-cost) patients to obtain insurance coverage while healthier (lower-cost) patients buy elsewhere or do not enter the market at all. Ultimately, for an insurance scheme to succeed, it must capture a sufficiently large share of healthy participants so that it can offset the costs of covering the higher-cost individuals.

The minimum-essential-coverage requirement is satisfied by obtaining insurance through a government program such as Medicaid or the Children's Health Insurance Program, or by purchasing (1) employer-sponsored insurance,[34] (2) insurance through an exchange, or (3) insurance directly from an insurer in the individual market.[35] The CBO and the Joint Committee on Taxation expect that the ACA will increase the number of nonelderly Americans with health insurance by about thirty-two million in 2016 and about thirty-four million in 2021.[36]

31. *See generally* THE KAISER COMM'N ON MEDICAID & THE UNINSURED, *supra* note 24 (discussing the decline in employer-provided health insurance).

32. THE KAISER COMM'N ON MEDICAID & THE UNINSURED, *supra* note 2, at 7.

33. CONG. BUDGET OFF., THE LONG-TERM OUTLOOK FOR HEALTH CARE SPENDING (2007), *available at* http://www.cbo.gov/ftpdocs/87xx/doc8758/11-13-LT-Health.pdf; *cf.* Elmendorf Letter, *supra* note 15, at 6 (discussing a similar rise in health insurance premiums).

34. Nearly 160 million people under age sixty-five obtain health coverage through the workplace. Jennifer Haberkorn, *Health Policy Brief: Employers and Health Care Reform*, HEALTH AFF., 1–2 (Mar. 9, 2011), http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=42.

35. *See* Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1501(b), 124 Stat. 119 (2010) (to be codified at I.R.C. § 5000A).

36. *CBO's March 2011 Estimate of the Effects of the Insurance Coverage Provisions Contained in the Patient Protection and Affordable Care Act (Public Law 111-148) and the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152)*, CONG. BUDGET OFF. (Mar. 18, 2011), http://www.cbo.gov/sites/default/files/cbofiles/attachments/HealthInsuranceProvisions.pdf. About 95% of legal nonelderly residents will have insurance coverage in 2021, compared with a projected 82% in the absence of the ACA. The 2010 level was 83%. Douglas W. Elmendorf, *Testimony on Last Year's Major Health Care Legislation*, CONG. BUDGET OFF. (Mar. 30, 2011), http://www.cbo.gov/publication/25155.

The expected increase in insureds might be attributable in part to an expected increase in employer-sponsored plans, which were responsible for the health coverage of nearly 160 million people under age sixty-five in 2010.[37] Although the ACA does not require employers to offer health insurance coverage to employees, it incentivizes doing so. Section 4980H imposes a nondeductible penalty on large employers (defined as an employer with fifty or more full-time employees) if any of their full-time employees qualify for and receive federal tax credits through an exchange.[38] In this "play or pay" system, the employer will face additional fines if the coverage offered to its employees is not comprehensive and affordable.[39] To be comprehensive, at least 60% of healthcare expenses must be covered;[40] to be affordable, coverage must cost less than 9.5% of the employee's household income.[41]

Featured in the Act's very title, this affordability theme runs throughout the ACA.

B. The Utility of Exchanges

Affordability of minimum essential coverage is crucial for public acceptance and success of the ACA reforms. Lower prices through competition is the basic premise of the one-stop-shop exchanges; these organized markets have been described as "[t]ravelocity for health insurance [where] . . . [t]he comparison shopping and bidding dynamics [exert] downward pressure on

37. Haberkorn, *supra* note 34, at 1–2 (citing KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2010 ANNUAL SURVEY (2010), *available at* http://www.changehealthcare.com/downloads/industry/Kaiser-2010-Benefit-Survey.pdf).

38. ACA § 1513 (to be codified at I.R.C. § 4980H); I.R.S. Notice 2012-58, 2012-41 I.R.B. 436; *see also* HINDA CHAIKIND & CHRIS L. PETERSON, CONG. RESEARCH SERV., R41159, SUMMARY OF POTENTIAL EMPLOYER PENALTIES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (ACA) (2010), *available at* http://www.shrm.org/hrdisciplines/benefits/Documents/EmployerPenalties.pdf. It is difficult for employers to reduce the risk of penalty, because they do not know the household income of employees. *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010: Hearing Before the Subcomm. on Health, Comm. on Energy and Commerce*, 112th Cong. 8 (2011) [hereinafter *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010*] (statement of Douglas W. Elmendorf, Director, Congressional Budget Office), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-healthcarelegislation.pdf.

39. A large employer who fails to meet these two requirements must pay a $3000 annual assessment for each employee who declines employer-sponsored insurance and instead obtains government-subsidized coverage through an exchange. ACA §§ 513, 1302(d), 1401, 2707; *see also* Haberkorn, *supra* note 34, at 2 (discussing the fee provision).

40. ACA §§ 1302(d), 2707.

41. *Id.* §§ 1513, 1401 (to be codified at I.R.C. § 36B(c)).

premiums."[42] Transparency provisions of the ACA will aid consumers as they peruse the figurative aisles of the exchanges, comparing health plans based on factors such as quality, access, and premiums.[43]

Early visions of the insurance marketplaces had the states designing their own exchanges, but the addition of section 1321 increased centralization. As a result, the structure of the exchanges will likely be similar across states.

According to the Department of Health and Human Services ("HHS"), the exchanges will set up a "level playing field" on which insurance companies can compete; they will offer consumers "a choice of health plans to fit their needs," and they will "give individuals and small businesses the same purchasing clout as big business."[44] The CBO projected that exchanges will reduce premiums for existing plans.[45]

Enrollment in health insurance plans is expected to increase as a result of the exchanges. The CBO estimated that, in 2021, approximately twenty-four million people will have purchased their own coverage through insurance exchanges,[46] and 81% of those individuals will have received tax credits,[47] with the average credit per subsidized enrollee being $7,080.[48] In its report on expected enrollees, the Kaiser Family Foundation estimated that, in 2019, exchanges will

42. Julie Rovner, *House, Senate View Health Exchanges Differently*, NPR (Jan. 12, 2010), http://www.npr.org/templates/story/story.php?storyId=122476051 (quoting Jon Kingsdale, executive director of the Commonwealth Health Insurance Connector Authority, a health insurance exchange in Massachusetts). *See generally* STATE HEALTH ACCESS DATA ASSISTANCE CTR., ROBERT WOOD JOHNSON FOUND., HEALTH INSURANCE EXCHANGES: IMPLEMENTATION AND DATA CONSIDERATIONS FOR STATES AND EXISTING MODELS FOR COMPARISON 8–10 (2010) (comparing Exchange models in Massachusetts, Utah, Connecticut, and Washington); Reed Abelson, *Health Insurance Exchanges: Will They Work?*, N.Y. TIMES (Oct. 5, 2009), http://www.nytimes.com/2009/10/06/business/06exchange.html?pagewanted=all&_r=0 (describing current lack of competition in health insurance market); *Establishing Health Insurance Exchanges: An Update on State Efforts*, KAISER FAMILY FOUND. (Nov. 2012), http://kff.org/healthreform/upload/8213.pdf (outlining structural options for Exchanges).

43. *See* Jon Kingsdale, *Health Insurance Exchanges – Key Link in a Better-Value Chain*, NEW ENG. J. MED. 2147, 2149 (2010) (describing transparency as the exchange's third major function).

44. Patient Protection and Affordable Care Act, Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866 (proposed July 2011) (to be codified at 45 C.F.R. pts. 155–56).

45. Elmendorf Letter, *supra* note 15.

46. *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010, supra* note 38 (citing CONG. BUDGET OFFICE, *supra* note 36); *see also* Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to the Honorable Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 20, 2010).

47. Elmendorf Letter, *supra* note 15.

48. *CBO's March 2011 Baseline: Health Insurance Exchanges*, CONG. BUDGET OFFICE (Mar. 18, 2011), http://www.cbo.gov/sites/default/files/cbofiles/attachments/HealthInsuranceExchanges.pdf.

provide insurance to sixteen million individuals who would otherwise be uninsured, 3.5 million who will lose their employer-sponsored insurance, and 1.5 million who previously had unaffordable employer-sponsored insurance.[49]

Although the Committee for Economic Development deemed the exchanges essential for successful healthcare reform, and although the concept has support across much of the political spectrum, state-level exchanges have "been an experiment with decidedly mixed results" in other reform efforts.[50] Many earlier attempts faltered because of problems with adverse selection, an issue the ACA tries to address with measures such as requiring that plans inside and outside the exchanges play by the same rules.[51] Also, the ACA aims to increase participation in the exchanges by making them the *only* means by which to access the tax credits.[52] Beyond shopping and checkout, the exchanges are responsible for handling the applications for tax credits and cost-sharing reductions offered by the federal government.[53]

C. The Addition of Federal Exchanges as a Safety Net

Under the Commerce Clause of the U.S. Constitution, the federal government holds some authority to regulate insurance, but it is an area in which federal and state powers overlap. Early drafts of the ACA envisioned that states would establish exchanges under

49. KAISER FAMILY FOUND., A PROFILE OF HEALTH INSURANCE EXCHANGE ENROLLEES 2 (2011), *available at* http://www.kff.org/healthreform/upload/8147.pdf.

50. JOST, *supra* note 20, at 2–3. Another concern is that exchanges may discourage states from experimenting with alternative ways of achieving the same policy goals. Jonathan H. Adler, *Cooperation, Commandeering, or Crowding Out?: Federal Intervention and State Choices in Health Care Policy*, 20 KAN. J.L. & PUB. POL'Y 199, 220 (2011).

51. *E.g.*, Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1001, 124 Stat. 119 (2010) (banning lifetime or annual dollar limits on coverage); *id.* § 1201 (prohibiting exclusions for preexisting conditions); *id.* § 10103 (requiring plans to permit participation in approved clinical trials and to cover routine patient costs of participation); *see also* CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, CMS-9989-P2, PRELIMINARY REGULATORY IMPACT ANALYSIS: PATIENT PROTECTION AND AFFORDABLE CARE ACT; ESTABLISHMENT OF EXCHANGES AND QUALIFIED HEALTH PLANS (CMS-9989-P) AND STANDARDS RELATED TO REINSURANCE, RISK CORRIDORS AND RISK ADJUSTMENT (CMS-9975-P) 10 (2011), *available at* http://cciio.cms.gov/resources/files/cms-9989-p2.pdf (finding that ACA provisions will work against adverse selection); TIMOTHY STOLTZFUS JOST, THE COMMONWEALTH FUND, HEALTH INSURANCE EXCHANGES IN HEALTH CARE REFORM: LEGAL AND POLICY ISSUES 27–28, 38 (2009); JOST, *supra* note 20, at 3–6.

52. *But see Initial Guidance to States on Exchanges*, HEALTHCARE.GOV, http://www.healthcare.gov/law/resources/regulations/guidance-to-states-on-exchanges.html (last visited Feb. 25, 2013) (stating that tax credits and insurance reforms will reduce but not eliminate potential for adverse selection).

53. ACA § 1411 (to be codified at 42 U.S.C. § 18081).

section 1311(b)(1). However, despite the great flexibility that comes from decentralization of exchange implementation and enforcement,[54] the provision's mandatory language—"[e]ach state *shall* . . . establish an American Health Benefit Exchange"[55]—ran afoul of the Constitution's anti-commandeering principle. In accordance with the framework of concurrent sovereignty,[56] Congress may not "commandeer[ ] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program."[57] Congress may, however, use positive or negative incentives to encourage states to adopt a legislative program, as long as the scheme is not deemed coercive, among other constitutional constraints.[58]

To address the problem posed by section 1311(b)(1), Congress added section 1321(c), which allows a state to choose not to establish an exchange and provides that in such a case the federal government will establish an exchange instead.[59] States that default to a federal exchange have two structural options: (1) the federal government can run the exchange (which will still require support from state personnel), or (2) the state can divide responsibilities in a more flexible "partnership" arrangement, where the state takes on customer-service and plan-management roles while the federal government manages the more technical parts of the exchange.[60]

The addition of federal exchanges as a safety net changed state exchanges from a requirement to an option, restoring the provision's

54. A decentralized system allows for a better "fit" between a state's policies and preferences of local residents; variations in demographics and socioeconomic conditions can alter the ideal insurance policy for a jurisdiction. Adler, *supra* note 50, at 202–03; *see also* Kingsdale, *supra* note 43, at 2149. Decisions by the state will include how many Exchanges to support and how to make the Exchanges financially sustainable. *See* STATE HEALTH ACCESS DATA ASSISTANCE CTR., *supra* note 42, at 1.

55. ACA § 1311(b)(1) (to be codified at 42 U.S.C. § 18031).

56. Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ("[T]he States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

57. Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981); *see also* New York v. United States, 505 U.S. 144, 161 (1992).

58. *See* South Dakota v. Dole, 483 U.S. 203, 206–08 (1987) (stating that imposing conditions on receipt of federal funds is permissible to achieve "broad policy objectives," and outlining five potential restraints on conditional spending); *see also* Adler, *supra* note 50, at 209–12 (explaining restraints on conditional spending).

59. ACA § 1321(c). HHS must establish a federally operated Exchange in states opting out or if HHS determines on or before January 1, 2013 that the state has failed to take actions necessary to implement the requirements of ACA. *Id.*

60. CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, CTRS. FOR MEDICARE & MEDICAID SERVS., GENERAL GUIDANCE ON FEDERALLY-FACILITATED EXCHANGES (2012), *available at* http://cciio.cms.gov/resources/files/FFE_Guidance_FINAL_VERSION_051612.pdf; *see also* Nicole Fender Fisher, *State-Federal Partnership Health Insurance Exchanges: The Great Unknown*, FORBES, Dec. 17, 2012, at 3–5.

constitutionality. To make this change complete, Congress should have amended the intertwined sections of the ACA, but there was never any update to the provision at issue in this Note—the tax credit provision in section 1401. Through section 1401 of the ACA, which amends section 36B of the IRC, Congress created a refundable premium tax credit. It made this tax credit available through state exchanges established under section 1311—with no mention of section 1321(c)'s federal exchanges. The question is whether the omission was purposeful—perhaps it was meant as an incentive for states to set up exchanges or perhaps it was a mistake.

As of December 2012—the initial deadline for states to notify the federal government of their intent to set up exchanges—only eighteen states and the District of Columbia had submitted proposals to the HHS for approval.[61] The potential lack of tax credits in the thirty-two remaining states (which will likely default to federal exchanges or opt for partnership exchanges) is a sleeper issue set to wake with a vengeance. But the IRS is trying to take care of the issue before it awakens.

D. The IRS Interpretation

The IRS is responsible for developing the regulatory framework under which exchanges will administer the premium tax credits to eligible insureds, pursuant to section 36B of the IRC. The statute directs the agency to make tax credits available for applicable taxpayers "enrolled through an Exchange established by the state under 1311."[62] However, the final rule promulgated by the IRS in May 2012 extends the availability of tax credits to those participating in the federal exchanges established under section 1321 of the ACA.[63]

This interpretation was questioned relatively early in the rulemaking process by Utah Senator Orrin Hatch, a member of the

61. *See State Decisions for Creating Health Insurance Exchanges, as of February 15, 2013*, KAISER FAMILY FOUND., http://www.statehealthfacts.org/comparemaptable.jsp?ind=962&cat=17 (last visited Feb. 26, 2013); *Status of State Health Insurance Exchange Implementation*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 20, 2013), http://www.cbpp.org/files/CBPP-Analysis-on-the-Status-of-State-Exchange-Implementation.pdf.

62. ACA § 1401 (to be codified in I.R.C. § 36B(b)(2)(A)). "Applicable taxpayer" is defined as a taxpayer whose household income is 100–400% of the federal poverty line. *Id.*

63. Treas. Reg. §§ 1, 602 (2012) (final regulation). A taxpayer is eligible for the credit for a taxable year if the taxpayer is an applicable taxpayer and the taxpayer or a member of the taxpayer's family (1) is enrolled in one or more qualified health plans through an Exchange established under section 1311 or 1321 of the Affordable Care Act (42 U.S.C. 13031 or 42 U.S.C. 18041) and (2) is not eligible for minimum essential coverage other than coverage in the individual market. Prop. Treas. Reg. § 1.36, 76 Fed. Reg. 50,934 (Aug. 17, 2011).

U.S. Senate's Committee on Finance. Hatch wrote to the Secretary of the Treasury Department and the IRS Commissioner in December 2011, expressing his concern that the interpretation was an "excessive use of regulatory authority" and explaining the textual anomaly as "the result of the highly partisan nature by which the ACA was pushed through Congress."[64]

Professor James Blumstein describes the IRS rule as a "double-edged sword" based on its expansion of benefits to those who qualify for tax credits administered through federal exchanges and its potential to impose penalties on employers in states that elect not to establish an exchange.[65]

The agency has not been deterred by the criticism of its proposed rule.[66]

III. THE ROAD TO THE COURTHOUSE

Critics of the IRS rule may complain, but, given the Agency's refusal to change its stance between its writing of the proposed rule and its issuance of the final rule, it appears that the only effective venue in which to challenge and change the interpretation will be the courthouse. The State of Oklahoma took the lead on the issue: Attorney General Scott Pruitt filed a complaint challenging the validity of the rule in September 2012.[67] But, it is not clear whether this complaint—or other potential challenges from large employers or citizens in states that have opted out—will even be heard; standing is the first hurdle to be cleared, and tax issues place unique locks on the courthouse doors.

Usually standing is established by showing injury, causation, and redressability.[68] Lack of injury is one problem for some potential plaintiffs; as a general rule, there is no standing for a taxpayer to

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64. Letter from Sen. Orrin G. Hatch, S. Comm. on Finance, to Timothy Geithner, Treasury Secretary, and Douglas Shuman, IRS Comm'r (Dec. 1, 2011) [hereinafter Hatch Letter], *available at* http://finance.senate.gov/newsroom/ranking/release/?id=6c2ea7e8-2a57-451c-8e02-f066e8ff92f7.

65. *Hearing Before the H. Subcomm. on Ways and Means*, 113th Cong. 4 (2012) [hereinafter Blumstein Testimony] (statement of James F. Blumstein, University Professor of Constitutional Law and Health Law & Policy).

66. Prop. Treas. Reg. § 1.36, 76 Fed. Reg. at 50,940 (Aug. 17, 2011); *see* Hatch Letter, *supra* note 64; *infra* Parts IV.A. and VI.A.

67. Amended Complaint for Declaratory and Injunctive Relief, Oklahoma *ex rel.* Pruitt v. Sebelius, No. 11-CIV-00030-RAW (E.D. Okla. Sept. 19, 2012), *available at* http://www.oag.state.ok.us/oagweb.nsf/0/ac5276feb11b775586257a7e006f7025/$FILE/Amended%20Complaint%20(File%20Stamped).pdf.

68. *See* Allen v. Wright, 468 U.S. 737, 751–52 (1984) (discussing the standing doctrine).

contest a tax benefit conferred upon someone else.[69] This means that citizens in states that have elected not to establish an exchange will lack standing to challenge the regulation.

Furthermore, the Anti-Injunction Act of 1867 precludes courts from enjoining the collection of a tax until after it has been assessed.[70] A potential plaintiff must wait until a tax takes effect to challenge the law, since there will not be an injury as a result of the law until that point.[71] Trying to jiggle the courthouse door locks, a potential plaintiff might look for the key in the June 2012 Supreme Court opinion on the constitutionality of the ACA. The Court characterized the penalty imposed under the individual mandate as a "tax," but it pointed out that the statute describes the payment as a "penalty."[72] The Court rooted its decision not to apply the Anti-Injunction Act in Congress's choice of label.[73] However, unlike the penalty imposed under the individual mandate, the penalty imposed on employers is described in the statute as an "assessable payment" and a "tax," keeping the Anti-Injunction Act bar intact.[74]

Large employers, however, may bypass these standing problems—they can show injuries resulting from the IRS rule extending tax credits to enrollees of both state and federal exchanges.[75] The source of their injuries is the tax imposed if they do not offer health insurance to an employee and that employee receives a premium or cost-sharing subsidy through an exchange, and this potentially large injury could indeed be very strong motivation to sue.[76] This is the type of argument Oklahoma's Attorney General Scott Pruitt presented in his filing. He asserted that the Final Rule will negatively impact the State's competitive business environment and

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69. *See, e.g.*, Al-Kim, Inc. v. United States, 650 F.2d 944, 947 (9th Cir. 1979) ("Neither the Internal [Revenue] Code nor the decisions of this court support any right of third parties to contest the merits of a tax assessment. . . . 'A tax assessment may not be collaterally attacked.' "); *see also* Peter Suderman, *No Insurance Subsidies Through ObamaCare's Federal Health Exchanges?*, REASON MAG. (Sept. 8, 2011), http://reason.com/blog/2011/09/08/are-federally-run-health-excha.

70. Anti-Injunction Act of 1867, 26 U.S.C. § 7421 (2006).

71. *Id.*

72. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012).

73. *Id.*

74. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1513, 124 Stat. 119 (2010) (to be codified at I.R.C. § 4980H).

75. *See* Adler & Cannon, *supra* note 13, at 5, 64–67.

76. ACA § 1513 (to be codified at I.R.C. § 4980H). Employers are not required to offer coverage, but if they do it must be affordable, as defined by ACA § 1401 (to be codified at I.R.C. § 36B(c)(2)(C).

its ability to attract and retain employers.[77] It remains to be seen whether a court will allow the case to move forward.

This Part outlines possible effects of the penalty on employees and employers before explaining how large employers, the parties who are most likely to have standing, might structure a legal argument against the IRS rule when it comes into operation.

A. Effect of the ACA on Employment-Based Insurance

Employment-based health insurance is currently the primary source of coverage for Americans, and as such, it is a key building block of the ACA. In 2010, 69% of all U.S. employers offered coverage to employees,[78] a figure the ACA aims to increase in part by assessing taxes on companies that decline to do so.[79]

Predictions about the impact of the "play or pay" mandate vary, but critics suggest it will result in employers dropping coverage (precisely what the penalty is designed to discourage), partly because making the tax payment might be less expensive than continuing to offer coverage.[80] On the other hand, health insurance might be viewed in some workplaces as integral to overall compensation—necessary to attract talented employees in a competitive labor market.[81] Regardless of whether compensation comes in the form of a combination of wages and benefits or simply wages, the market will arguably keep employee compensation steady.[82]

A 2011 survey found that among companies of all sizes currently offering health insurance to employees, 76% intend to continue doing so in January 2014, when the penalty provisions take effect.[83] It is also telling to look to Massachusetts, where the rate of employer-sponsored coverage increased 3% from 2006 to 2009, after 2006 health-reform legislation imposed changes similar to those in the ACA.[84]

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77. Amended Complaint, *supra* note 67.

78. *See* Haberkorn, *supra* note 34, at 1.

79. There are also incentives for small employers: those with less than twenty-five employees and whose average annual salary is less than $50,000 can get tax credits on employee health premiums, available for two years. ACA § 1421(a) (to be codified at I.R.C. § 45R) (as amended by HCERA § 10105, Pub. L. No. Law 111-152, 124 Stat. 1029 (2010)).

80. THE KAISER COMM'N ON MEDICAID & THE UNINSURED, *supra* note 24.

81. Linda Blumberg et al., *Why Employers Will Continue to Provide Health Insurance: The Impact of the Affordable Care Act*, 49 INQUIRY 116 (2012).

82. *Id.*

83. Haberkorn, *supra* note 34, at 3. The same survey found that twenty-eight percent of companies not currently offering benefits would begin to do so in January 2014. *Id.*

84. *Id.* at 5.

Beginning in 2014, employers meeting the fifty-employee threshold will be subject to a tax penalty of up to $2,000 per employee[85] for failing to offer "qualified" (comprehensive and affordable)[86] health insurance coverage to full-time employees and their dependents, but *only if* an employee purchases coverage through an exchange with the assistance of a federal tax credit. The ultimate effect of the ACA on large employers may be uncertain, but there is no doubt it will be significant.

B. Finding an Injury

Large employers can find their sticking point in the text of section 36B of the IRC by making the plain-text argument outlined in Part IV: a subsidy is not provided for where the individual purchases insurance through a federal exchange. The tax assessment, found in section 4980H(a) of the IRC, is triggered if "at least one full-time employee . . . has been certified to the [large] employer under section 1411 as having enrolled . . . in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid."[87] Section 1411(a)(2) prescribes the procedures for determining eligibility for exchange participation and outlines criteria for premium tax credits (available under ACA section 1401, which amends section 36B) and reduced cost sharing (available under ACA section 1402).[88] A strict reading of section 36B does not make tax credits available through federal exchanges since section 1401 does not mention the federal exchanges provided for under section 1321. This means that a large employer fined for not offering coverage could challenge the fine by asserting that its employee received the tax credit in error. This eligibility issue would provide judicial opportunity to review the IRS rule.[89]

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85. The penalty will be imposed for each full-time employee but, for the purposes of calculating the assessable payment, thirty employees will not be counted. No payments will be assessed for part-time workers. The monthly penalty assessed in 2014 will be equal to the number of employees minus thirty, multiplied by 1/12 of $2,000. This rate will be adjusted annually. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, §§ 1513, 1401, 124 Stat. 119 (2010) (to be codified at I.R.C. § 36B(c)); Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. Law 111-152, § 1003, 124 Stat. 1029.

86. *See supra* Part II.A. Employers who offer coverage that does not quality must pay a $3000 annual assessment. ACA §§ 1513, 1401 (to be codified at I.R.C. § 36B(c)).

87. *Id.* § 1513(a) (to be codified at I.R.C. § 4980H(a)).

88. *Id.* § 1411(a)(2) (to be codified at 42 U.S.C. § 18081).

89. *See* David Hogberg, *Companies Could Challenge ObamaCare Employer Fines*, INVESTOR'S BUS. DAILY (Sept. 16, 2011, 5:46 PM), http://news.investors.com/Article/585053/201109161746/ObamaCare-Goof-On-Firm-Fines-.htm (quoting Tim Jost, professor at Washington and Lee University Law School).

The penalty imposed when an employee is eligible for reduced cost sharing, however, is trickier to maneuver. Reduced cost sharing is allowed for an "eligible insured" falling within the range of 100–400% of the federal poverty line.[90] As defined by section 1402, an eligible insured is someone in the individual market who uses an exchange to enroll in a certain level of qualified health plan (health plans are divided into gold, silver, bronze, and platinum levels, along with catastrophic plans).[91] The definition does not differentiate between state and federal exchanges. Also within section 1402, however, is a prohibition on reduced cost sharing "with respect to coverage for any month unless the month is a coverage month with respect to which a *credit* is allowed to the insured . . . *under section 36B*."[92] If tax credits are not available through federal exchanges under section 36B of the IRC, then cost sharing is prohibited. Carried through to its logical conclusion, a strict textual interpretation of section 36B means that an individual enrolled in an exchange established under section 1321 of the ACA does not qualify for either a tax credit or reduced cost sharing.

Section 1402(f)(1) of the ACA verifies this reading of the statute; it expressly gives any term used in section 1402 the same meaning it is given in section 36B of the IRC.[93] Significantly, the term "coverage month," used in section 1402(f)(2), is defined under section 36B(c)(2).[94] Under this controlling definition, "coverage month" means that, as of the first day of the month, an individual is insured by virtue of being "enrolled in" a qualified health plan offered "through an Exchange *established by the State under section 1311*."[95] Therefore, only coverage plans offered through state-run exchanges can fall into a "coverage month" in which a tax credit is available. This confirms that individuals enrolled in a federally run exchange established under section 1321 do not qualify for reduced cost sharing.

All roads lead back to section 36B. Careful parsing of the intertwined sections suggests that a large employer in a state with a federal exchange should not be subject to a section 4980H penalty because an employee receiving a subsidy or cost-sharing reduction under a federal exchange will not trigger the liability imposed under section 4980H. If required to pay the penalty, an employer whose

90. ACA § 1402(b) (to be codified at 42 U.S.C. § 18071).

91. *Id.*; 42 U.S.C. § 18022 (2010).

92. ACA § 1402(f)(2) (to be codified at 42 U.S.C. § 18071) (emphasis added).

93. *Id.* § 1402(f)(1) (to be codified at 42 U.S.C. § 18071).

94. *See infra* Part V.A.

95. ACA § 1401(a) (to be codified at I.R.C. § 36B(c)(2)(A)) (emphasis added).

employees receive tax credits or reduced cost sharing through a federal exchange would suffer harm from the IRS rule, thereby meeting the injury and causation prongs of standing. A large employer in such a position would have both standing and motivation to challenge the scope of the IRS rule that makes tax credits available through federal exchanges.[96]

IV. THE APPROACH: HOW A REVIEWING COURT COULD UPHOLD THE IRS RULE

The IRS decisionmaking process will be subject to scrutiny only if the rule is challenged in court.[97] If it relies on arguments proposed in this Note, the Agency will present a strong case for *Chevron* deference, likely persuading a reviewing court that the IRS rule is an appropriate, permissible reading of section 36B(b)(2)(A).[98]

This Part begins by outlining the process the IRS used to arrive at its final rule, pointing out that the Agency was aware of the problems caused by the statutory gap before solidifying its interpretation. It then discusses why tax regulations are unique. Next, it explains the basics of the *Chevron* framework for judicial review of agency action, which a court will use to address a challenge to the IRS's interpretation of section 36B(b)(2)(A) as allowing for tax credits through both state and federal exchanges.

A. The Setup

Regulations promulgated pursuant to a grant of authority under a particular code section, rather than the general grant of authority in the IRC, are considered legislative.[99] Section 36B(g) of the

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96. *See* Jonathan H. Adler & Michael F. Cannon, Op-Ed., *Another ObamaCare Glitch*, WALL ST. J. (Nov. 16, 2011), http://online.wsj.com/article/SB10001424052970203687504577006322431330662.html (dismissing concerns that no party would have standing to challenge the rule by describing the penalty that employers must pay if their employees receive premium assistance as sufficient to constitute harm).

97. *See supra* Part III.

98. In addition to addressing the scope of authority issue, the IRS may point out that there is no interjurisdictional issue for money flowing from the federal purse through federal exchanges, so it was not necessary for Congress to specifically allocate funds for these tax credits in the text of the ACA.

99. *See* Ellen P. Aprill, *Muffled* Chevron*: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 55–56 (1996) (distinguishing legislative from interpretive regulations by describing the former as creating an entirely new law and the latter as clarifying existing laws). The Secretary of the Treasury Department has general authority to "prescribe all needful rules and regulations for the enforcement of [the I.R.C.]." I.R.C. § 7805(a) (2006). Generally, regulations promulgated under this general grant of authority are considered interpretative. The APA exempts

IRC gives the Secretary of the Treasury Department authority to issue regulations to carry out the provisions of section 36B.[100] Thus, regulations promulgated under section 36B(g) will be considered legislative. The Administrative Procedure Act ("APA") requires notice-and-comment procedures for this type of regulation.[101]

The IRS went through the proper rulemaking process, complying with APA standards for documents such as the proposed rule. In response to its solicitation for comments from interested persons, the agency received 241 comments.[102] Only two of these comments addressed the statutory gap that is the focus of this Note. One came from a representative of Texans Against Obamacare: "Congress did not delegate this discretion to the IRS. . . . No matter what rule the IRS comes up with, it absolutely cannot ever assume powers granted only to Congress by The People."[103] The other came from a citizen with similar concerns about the IRS interpretation.[104] The two comments not only raised eyebrows and questions about the limits of the Agency's authority, they also obligated the Agency to address its policy choice on the matter in its final rule.[105]

The authority of regulatory agencies is derived from delegation by the legislature. This authority is widely accepted as appropriate because an agency's combination of lawmaking and interpretive responsibility can be directed, checked, and controlled by political

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interpretive rules from notice-and-comment procedures. 5 U.S.C. § 553(b)(3)(A) (2006). The IRS takes the position that most regulations are interpretive, not legislative, yet routinely applies the notice-and-comment procedures required by the APA. Aprill, *supra*, at 57.

100. I.R.C. § 36B(g).

101. Administrative Procedure Act (APA), 5 U.S.C. § 553(b)–(c).

102. APA § 553(c) ("After notice . . . the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."); Prop. Treas. Reg. § 1.36, 76 Fed. Reg. 50,934, 50,940 (Aug. 17, 2011) (comments of Brian Clark, Texans Against ObamaCare, IRS-2011-0024-0003; Nicole Kaeding, IRS-2011-0024-0005), *available at* regulations.gov.

103. Prop. Treas. Reg. § 1.36, 76 Fed. Reg. at 50,940 (comment of Brian Clark, Texans Against ObamaCare, IRS-2011-0024-0003). The power to alter the tax code and spend money is vested in Congress. U.S. CONST. art. I, § 8, cl. 1.

104. Prop. Treas. Reg. § 1.36, 76 Fed. Reg. at 50,940 (comment of Nicole Kaeding, IRS-2011-0024-0005), *available at* regulations.gov.

105. *See* Indep. U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 852–53 (D.C. Cir. 1987) (describing the notice and comment rulemaking requirement that an agency issue a statement that elaborates the documents, which include "findings of fact and conclusions of law"); Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 337 (D.C. Cir. 1968) (explaining that the APA requires "that the agency, after considering the relevant matter received by it in response to its invitation of comments, 'shall incorporate in the rules adopted a concise general statement of their basis and purpose' "); *infra* Part VI.A.

branches of government.[106] An agency is confined by the power conferred by Congress, so its authority to issue regulations is as limited or extensive as the text of the statute.[107] Although this remains true for the IRS, the Supreme Court has singled out the Agency for its expertise. As articulated in *Bob Jones University v. United States*, those administering the tax laws have "very broad authority to interpret those laws."[108] In this case, section 36B(g) grants the Secretary of the Treasury Department the authority to issue regulations to implement section 36B by "prescrib[ing] such regulations as may be necessary to carry out the provisions of this section."[109]

B. Tax (Un)Exceptionalism

Tax regulations are unusual: they interpret a particularly complex and interwoven statutory scheme that is frequently amended by Congress.[110] Due to the complexity of tax regulations, a specialized Article I court hears most challenges to Treasury and IRS regulations. Therefore, a challenge to the IRS interpretation of the tax credit issue is likely to be heard by this Tax Court.

Although the standard of review for IRS regulations has varied over time, the Treasury is generally afforded a great deal of deference by courts.[111] The Supreme Court "has long recognized the primary authority of the IRS . . . in construing the [IRC]."[112] Its unique status is justified by the expertise needed to understand the complexity of the tax code and the Treasury's expansive authority.[113] In 2011, the

106. Jerry L. Mashaw, *Agency Statutory Interpretation*, *in* 2 ISSUES LEGAL SCHOLARSHIP, art. 9, at 9 (Daniel A. Farber ed., 2002) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)).

107. *See* APA § 558(b) ("A sanction may not be imposed or a substantive rule or order issued except within the jurisdiction delegated to the agency and as authorized by law.").

108. Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983).

109. I.R.C. § 36B(g) (2006). *See generally* Blumstein Testimony, *supra* note 65, at 2 (outlining institutional interests affected by the subsidy issue).

110. *See generally* Aprill, *supra* note 99, at 53 (emphasizing the voluminous and complex nature of tax regulations).

111. *Id.* at 77; *see also, e.g.*, *Chevronl*, 467 U.S. 837; Nat'l Muffler Dealers Ass'n, v. United States, 440 U.S. 472, 477 (1979) (explaining that courts are to presume deference, upholding interpretive tax regulations if reasonable, as determined by the plain language of the statute along with its origins and purpose). *But see* Cent. Pa. Sav. Ass'n v. Comm'r, 104 T.C. 384, 392 (1995) (suggesting that *Chevron* merely restated *National Muffler* standard "with possibly subtle distinctions as to the role of legislative history and the degree of deference to be accorded to a regulation").

112. *Bob Jones Univ.*, 461 U.S. at 596.

113. *See Chevron*, 467 U.S. at 865 ("The Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the

Supreme Court clarified the governing standard of review for tax regulations in *Mayo Foundation for Medical Education and Research v. United States*, rejecting tax exceptionalism by stating that the "principles underlying our decision in *Chevron* apply with full force in the tax context."[114] *Chevron* lays out the test the court applies when an agency's authority to make a specific rule is at issue, as it is here.

C. Judicial Review: The Framework

The *Chevron* two-step test, allowing reasonable agency interpretations as long as the statute has not clearly spoken to the issue,[115] is applied when Congress intended an agency's interpretations to carry the force of law and the agency makes a formal ruling with a "lawmaking pretense."[116] Here, the IRS gave notice, proposed regulations, and received public comment in anticipation of issuing final regulations. Its choice of notice-and-comment procedures not only provides a safe harbor[117] through which it can breeze through the *Chevron* Step Zero test articulated in *United States v. Mead Corporation*,[118] but also serves as a "significant sign" that the agency's rule merits *Chevron* deference.[119]

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regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.").

114. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011). The Court elaborated, "we are not inclined to carve out an approach to administrative review good for tax law only . . . we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.' " *Id.* (citing Dickinson v. Zurko, 527 U.S. 150, 154 (1999)).

115. Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417–18 (1992) ("If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable.").

116. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). In practice, however, the Court employs a "continuum of deference regimes." William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1090 (2008). Furthermore, Eskridge and Baer found that in 53.6% cases (from 1983 to 2005) the Court did not invoke any deference regime, instead "rel[ying] on ad hoc judicial reasoning of the sort that typifies the Court's methodology in regular statutory interpretation cases." *Id.* at 1090, 1099–1101.

117. *See Mead*, 553 U.S. at 229–30 ("We have recognized a good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking . . . ."); *id.* at 246 (Scalia, J., dissenting) (identifying the effect of the Court's ruling as creating "more-or-less safe harbors").

118. The *Mead* Court established the Step Zero test: *Chevron* deference is appropriate "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." *Mead*, 553 U.S. at 226–27. This inquiry does *not* turn on whether Congress' delegation of authority was general or specific. *Mayo*, 131 S. Ct. at 713–14.

119. *Mayo*, 131 S. Ct. at 714.

Chevron acknowledges that Congress may intend for an agency to fill gaps in regulatory statutes based on the agency's expertise—both the ability to handle "technical and complex" regulatory schemes and to reconcile "competing interests."[120] Indeed, because of its complexity, the ACA might be better described as a statute conferring authority on administrators to regulate conduct, rather than a statute that itself is a set of norms regulating conduct.[121] Congressional delegation of rulemaking authority determines who will make the many policy decisions required by the statute, and how they will do so.[122] A challenge to an agency's construction of a statutory provision cannot turn on the wisdom of a policy, instead, it can only ask whether the agency's choice is reasonable within the space created by Congress.[123]

According to Cass Sunstein, who served as Administrator of the White House Office of Information and Regulatory Affairs from 2009 to 2012, when agencies resolve statutory ambiguities it is "a question of policy as much as it is one of law . . . [and] agencies are uniquely well situated to make the relevant policy decisions."[124] Elaborating, Sunstein states that when the instructions of the legislature are unclear and thus do not resolve the regulatory problems, "[t]he resolution of the ambiguity calls for an inquiry into something other than the instructions of the enacting legislature."[125] Still, congressional intent, if any can be discerned, is crucial: a court will be "mindful of giving effect to broad statutory purposes or finely tuned legislative deals."[126]

Before progressing with the analysis of whether the IRS rule would pass the *Chevron* test, the regulatory structure of the ACA

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120. *See Chevron*, 467 U.S. at 844, 865 (speculating that Congress "consciously desired" the Agency to consider competing interests based on their unique level of expertise); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 561 (2009) (citing expertise as one of a variety of reasons that Congress may intend for agencies to "fill gaps" in regulatory statutes).

121. Gary S. Lawson, *Reviving Formal Rulemaking: Openness and Accountability for Obamacare*, THE HERITAGE FOUND. 2 (July 25, 2011), http://report.heritage.org/bg2585 ("Passing the bill did not tell us what is it in it; it simply began the process by which law under it will emerge."); *see also* THE FEDERALIST NO. 37 (James Madison) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular . . . adjudications.").

122. CURTIS W. COPELAND, CONG. RESEARCH SERV., R41180, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 2 (P.L. 111-148) (2010).

123. *Chevron*, 467 U.S. at 866

124. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2085–86 (1990).

125. *Id.*

126. Bressman, *supra* note 120, at 562.

should be highlighted. The structure is unusual in that over forty provisions require, permit, or contemplate rulemaking by federal agencies to implement the statute.[127] This fragmented delegation means that the various agencies will tackle different aspects of the larger health-reform effort, each drawing upon their institutional expertise.[128] Most regulatory schemes, in contrast, vest rulemaking, enforcement, and adjudicative powers in a single administrative agency.[129] Can *Chevron* deference apply when multiple agencies have authority to implement a statute?[130] The answer depends on the specifics of the statute: application of the doctrine makes the most sense when Congress explicitly delegates interpretive or legislative power to one specific agency.[131] By looking to what authority Congress intended to delegate to the agency, a reviewing court is essentially adhering to the logic of *Mead* Step Zero.[132]

The ACA presents a case of what Professors Freeman and Rossi deem "related jurisdictional assignment," meaning that Congress assigned "closely related but distinct roles to numerous agencies" in a larger regulatory regime.[133] The primary administrative authority responsible for implementing the ACA is the Secretary of

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127. CURTIS W. COPELAND, CONG. RESEARCH SERV., R41180, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 2 (P.L. 111-148) (2010); *see also* FTC v. Ken Roberts Co., 276 F.3d 583, 593 (D.C. Cir. 2001) ("[W]e live in 'an age of overlapping and concurring regulatory jurisdiction.' " (internal citation omitted)).

128. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1135 (2012) ("Fragmented delegations create situations in which different agencies possess the authority necessary to tackle different aspects of a larger problem.").

129. *See* Martin v. Occupational Safety & Health Review Comm'n., 499 U.S. 144, 151 (1991) (describing the most common regulatory regime as one that involves a single agency exercising rulemaking, enforcement, and adjudicatory powers).

130. *See* Thomas W. Merrill & Kristen E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 849 n.85 (2001) (explaining that, before *Chevron*, administration of a statute by multiple agencies was sometimes considered a reason for reduced deference, but that the Court has not yet resolved the issue under *Chevron*); William R. Weaver, Note, Chevron*'s Multiple Agency Problem: Why the Traditional Chevron Framework Is Inadequate for Judicial Review of Joint Rules Promulgated by Coordinated Agencies*, 67 VAND. L. REV. (forthcoming 2014).

131. *See generally* Daniel Lovejoy, Note, *The Ambiguous Basis for* Chevron *Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879, 901–13 (2002) (discussing role of *Chevron*'s doctrinal basis in deciding whether to defer).

132. *Id.* at 914; *see also* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 219–20 (suggesting that questions of shared jurisdiction are best approached using the Step Zero inquiry).

133. Freeman & Rossi, *supra* note 128, at 1145. The Americans with Disabilities Act ("ADA"), for example, delegates authority to issue regulations to various administrative authorities including the Equal Opportunity Employment Commission (implements Title I), the Attorney General (implements Title II), and the Secretary of Transportation (implements parts of Titles II and III). Lovejoy, *supra* note 131, at 907–08 (citing 42 U.S.C. §§ 12116, 12134(a), 12149(a) (2006)).

the HHS, though the Secretary does not have general authority over the entire statute. Section 1401 specifically grants authority to the Secretary of the Treasury to administer section 36B of the IRC.[134] A court will certainly keep the HHS and IRS roles distinct for the purposes of *Chevron* deference,[135] though interagency coordination may be desirable.[136] Since the Court has conclusively stated that *Chevron* is the appropriate framework for judicial review of IRS regulations and the IRS is operating under a specific grant of authority, the next Part analyzes the IRS rule under the *Chevron* two-step test.

V. *CHEVRON* STEP ONE: MIND THE GAP

Existing under the constraints of the nondelegation doctrine, the primary role of an agency is to be a "faithful agent" of Congress, despite the location of agencies in the executive branch of government.[137] Because the Agency can act only within the limits Congress prescribes in its authority-conferring statute, the IRS is charged with interpreting section 36B to determine its task and the limits of its rulemaking authority.

Under *Chevron*, the court first asks "whether Congress has directly spoken to the precise question at issue," using the "traditional tools of statutory construction" to guide the inquiry.[138] An analysis of the IRS's decision to include federal exchanges in the IRS subsidy rule reveals section 36B(b)(2) is hardly as straightforward as it first seems. Several of the traditional tools applied in Step One of the inquiry weigh in favor of acknowledging the ambiguity inherent in the statute.

A. The Plain Text

The threshold question is whether the plain text of the statute is ambiguous. A court will find ambiguity only when a provision is

134. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1401(a), 124 Stat. 119 (2010) (to be codified at I.R.C. § 36B(g)).

135. *See* Gonzales v. Oregon, 546 U.S. 243, 262–63 (2006) (stating that ambiguous general authority will not be interpreted broadly when the statute contains specific grants of authority).

136. *See generally* Freeman & Rossi, *supra* note 128, at 1145–55 (discussing interagency dynamics, promoting interagency coordination, and calling for a departure from the single-agency focus of administrative law).

137. Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497, 502–03 (2005).

138. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 & n.9 (1984). *See generally* LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE 188–316 (2010) (exploring text-based and purpose-based tools of statutory interpretation at length).

"reasonably or fairly susceptible of different interpretations" or may have multiple meanings.[139]

Section 36B(b)(2) of the statute reads:

> The premium assistance amount determined under this subsection with respect to any coverage month is the amount equal to the lesser of—
>
> (A) the monthly premiums for such month for 1 or more qualified health plans offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent (as defined in section 152) of the taxpayer and which enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act, or
>
> (B) the excess (if any) of—
>
> (i) the adjusted monthly premium for such month for the applicable second lowest cost silver plan with respect to the taxpayer, over
>
> (ii) an amount equal to 1/12 of the product of the applicable percentage and the taxpayer's household income for the taxable year.[140]

Are the words of section 36B(b)(2)(A) susceptible to more than one meaning?[141] The plain language of section 36B(b)(2)(A) makes available a tax credit for certain taxpayers "enrolled through an Exchange *established by the state* under 1311."[142] To make tax credits available in states not electing to establish an exchange, the IRS expanded the statute, reading it to effectively say "an Exchange established under 1311 *or 1321*." Thus, the IRS stepped beyond the text when writing the proposed rule, inferring meaning outside of Congress's chosen words.

A cursory reading of section 36B(b)(2) suggests that the text might be understood another way, as it provides that the amount of the tax credit shall be the lesser of two options. Option one, section 36B(b)(2)(A), references state exchanges but is silent on the subject of federal exchanges.[143] The second option, section 36B(b)(2)(B), does not mention either section 1311 or section 1321 exchanges.[144] One might jump to the conclusion that the tax credit amount provided through federal exchanges will always be determined under section 36B(b)(2)(B).

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139. Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1196 (Del. 1992).

140. ACA § 1401 (to be codified in I.R.C. § 36B(b)(2)).

141. *See generally Chevron*, 467 U.S. at 843 (explaining that when a court constructs an agency's interpretation of a statute it must give effect to the unambiguously expressed intent of Congress); *Am. Motorists Ins. Co.*, 616 A.2d at 1196 (explaining that if a contract is clear and unambiguous then the parties will be bound by its meaning).

142. ACA § 1401 (to be codified in I.R.C. § 36B) (emphasis added).

143. *Id.*

144. *Id.*

However, a careful interpretation recognizes that the term "coverage month" modifies both 36B(b)(2)(A) and (B). This term, which is defined in section 36B(c)(2), requires enrollment in a qualified health plan offered "through an Exchange established by the State under section 1311."[145] Therefore, only coverage plans offered through state-run exchanges can fall into a "coverage month" in which a tax credit is available, so individuals enrolled in a federally run exchange established under section 1321 do not qualify for the tax credit.

This is where the critics of the IRS rule hang their hats.[146] If legislative purpose is expressed in *unambiguous* language, application of the plain-meaning rule bars courts from relying on legislative history to discern the meaning of the statute.[147] If the court ascertains through use of the traditional tools of statutory interpretation "that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[148] Critics also rely on the *expressio unius* canon (the mention of one thing is the exclusion of the other)[149] to argue that section 36B(b)(2)(A) only provides for tax credits through state exchanges.[150]

The IRS may counter these criticisms in various ways. To start, the IRS can support its position by highlighting the Supreme Court's assertion that ambiguity "is a creature not just of definitional possibilities but also of statutory context. That may be so even if statutory language is highly technical."[151] Admittedly, the plain meaning of the text is the most authoritative evidence—but a court will rarely come to a full stop without checking other contextual

145. *Id.*; *see also supra* Part III.B (explaining a large employer would have both standing and motivation to challenge the scope of IRS regulation that makes tax credits available through federal Exchanges).

146. *E.g.*, Blumstein Testimony, *supra* note 65.

147. *See* Adler & Cannon, *supra* note 12, at 55–59 (arguing against ambiguity). *See generally* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 39–42 (2008) (describing the plain meaning rule).

148. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843, n.9 (1984)).

149. *See* Barnhart v. Peabody Coal, 537 U.S. 149, 168 (2003) ("*[E]xpressio unius est exclusio alterius* only has force when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.").

150. *See* Blumstein Testimony, *supra* note 65, at 3, 5 (invoking *expressio unius est exclusio alterius* to argue "the ACA's granting of subsidies for income-qualified enrollees under state exchanges established under Section 1311 is to be construed not to grant comparable subsidies for income-qualified enrollees under federal exchanges established under Section 1321").

151. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 83 (2007) (internal citation omitted) (analyzing a statute that used technical statistical language); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) (analyzing statutory context to determine ambiguity); Brown v. Gardner, 513 U.S. 115, 118 (1994).

evidence.[152] In practice, courts often reach beyond the text, albeit inconsistently.[153] For example, in *California v. American Stores Co.*, the Court found the plain meaning of a provision of the Clayton Act to be clear, yet considered legislative history in its analysis.[154]

Continuing to analyze the plain text at issue, the IRS can emphasize that section 36B(b)(2)(A) does not *exclude* federal exchanges from the tax credit scheme. The *expressio unius* canon is not to be applied to infer deliberate exclusion of an item (here, the federal exchanges) by Congress when only *one* item is mentioned (here, the state exchanges).[155] The Court explained in *Barnhart v. Peabody Coal* that *expressio unius* "has force only when the items expressed are members of an 'associated group of series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[156]

Further, the canon is not to be employed "unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."[157] Thus, the canon's operation is further tempered by the Court's recognition that "as always, the soundness of [the canon's] premise is a function of timing."[158] Here, Congress drafted section 1401 of the ACA to provide for tax credits through state exchanges before it added section 1321 to sidestep commandeering concerns. The omission of federal exchanges from section 1401 was not intentional; common sense suggests that it resulted from drafting a mammoth statute in a way that was hardly chronological. The timeline shows that there was no "good reason" for Congress to consider adding federal exchanges to the text at the time of drafting, and the Court's precedent indicates that "if there was no reason to consider [the item],

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152. Eskridge & Baer, *supra* note 116, at 1090. *But cf.* William N. Eskridge Jr., *America's Statutory 'constitution,'* 41 U.C. DAVIS L. REV. 1, 38 (2007) (criticizing the court for following an "excessively mechanical" approach to agency deference by allowing plain text to trump agency interpretations that give effect to statutory purpose).

153. *Compare* Davis v. Mich. Dept. of Treasury, 489 U.S. 803, 808 (1989), *with* California v. Am. Stores Co., 495 U.S. 271, 285 (1990) (considering legislative history despite Court's belief that statutory language was unambiguous, because appellate court did so), *and* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543–44 (1940).

154. *California*, 495 U.S. at 285.

155. *See* Barnhart v. Peabody Coal, 537 U.S. 149, 168 (2003); BRESSMAN ET AL., *supra* note 138, at 218. *But see* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002) (stating the canon "depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded").

156. 537 U.S. at 168.

157. *Id.*

158. United Dominion Indus. v. United States, 532 U.S. 822, 836 (2001).

then its omission would mean nothing."[159] Therefore, the statutory text that specifically makes tax credits available through state exchanges should not preclude application of the provision to their federal counterparts.[160]

At this point, it is prudent to note the difference between construing a law charitably and rewriting it–exercising "will instead of judgment," as Alexander Hamilton put it.[161] There is potential danger that courts will take upon themselves the power to rewrite legislation—so that people may be governed by legislation in a form that elected officials never approved and that might be difficult to repeal.[162] A normative discussion about whether courts should engage in cleaning up sloppy statutory drafting is beyond the scope of this Note.

However, *Chevron* can allow for a certain amount of charitable construction. Going beyond a strict textualist reading gives effect to the Court's acknowledgement of the realities of the regulatory state as expressed in the text of the *Chevron* opinion: the power of an agency to implement and manage a congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[163] Accordingly, the inquiry should continue beyond the bare-minimum textual analysis.

B. The Broader Statutory Context

Looking to the statute as a whole,[164] a court might interpret section 36B(b)(2)(A) in the broader context of not only section 36B, but also the IRC and the ACA. Ambiguity is a matter of statutory

159. *Id.*

160. *Cf. Barnhart*, 537 U.S. at 163 ("[W]e draw a conclusion on the grounds of plausibility: if Congress had meant to set a counterintuitive limit on authority to act, it would have said more than it did . . . .").

161. Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2650–52 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("But we cannot rewrite the statute to be what it is not. Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute or judicially rewriting it." (internal quotations omitted)); THE FEDERALIST NO. 78 (Alexander Hamilton).

162. *See* Neal K. Katyal, *In Health Care Ruling, A Pyrrhic Victory*, N.Y. TIMES (June 28, 2012), http://www.nytimes.com/2012/06/29/opinion/in-health-care-ruling-a-pyrrhic-victory.html?_r=1& ("By opening new avenues for the courts to rewrite the law, the federal government may have won the battle but lost the war.").

163. 467 U.S. 837, 843 (1984).

164. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987) (stating that the court "look[s] to the provisions of the whole law, and to its object and policy," rather than a single sentence).

construct, not merely definitional possibilities.[165] In the effort to discern the purpose of a statute, meaning can be shaped by a statute's definitions, statement of purposes, relationship to other statutes, and overall structure. A court might find the same term or concept in a different context that clarifies the term's meaning, or it might find that the substantive effect of a potential definition is incompatible with the rest of the law.[166]

The title of an act or provision can shed light on meaning by providing an anchor of sorts in a statutory scheme. It can confirm an interpretation, but does not have controlling weight.[167] The title of section 36B, "Refundable Credit for Coverage Under a Qualified Health Plan," weighs in favor of finding ambiguity. It is not just state exchanges that deal with qualified health plans, but federal exchanges as well.[168] Had Congress intended to exclude federal exchanges from the section's application, it may have been more clear from the title.

Section 1321 provides another anchoring point: when the IRS's proposed rule is evaluated against this provision, one might understand that Congress intended the federal exchange to be interchangeable with those established by the states. Instead of saying that the Secretary will establish *an* exchange or *a federal* exchange if a state fails to establish its own, Congress said that the Secretary will establish "*such* Exchange within the State."[169] This can be read as equating federal exchanges to those established under section 1311.

Bolstering this argument is the fact that section 36B(b)(2)(A) is not the only place that the legislature referenced section 1311 alone, without section 1321. For example, exchanges established under section 1311 can collect social security numbers,[170] must inform individuals of Medicaid eligibility, and if the exchange determines an individual is eligible, must enroll that individual in Medicaid.[171] Further, the IRC was modified to note that the term "qualified

165. *See* Crandon v. United States, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

166. United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); *see also* McCarthy v. Bronson, 500 U.S. 136, 139 (1991) ("[S]tatutory language must always be read in its proper context.").

167. *See* Holy Trinity Church v. United States, 143 U.S. 457, 462 (1892); *see also* BRESSMAN ET AL., *supra* note 138, at 231–32 (explaining that titles can facilitate statutory interpretation but that they are not determinative).

168. *See* Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1301(a), 124 Stat. 119 (2010) (to be codified at 42 U.S.C. § 18021).

169. *Id.* § 1321(c); Suderman, *supra* note 69.

170. *Id.* § 1414(a) (to be codified at 42 U.S.C. § 405).

171. *Id.* § 1311(d)(4)(F) (to be codified at 42 U.S.C. § 18031).

benefit" does not include a section 1311 exchange plan.[172] None of these three provisions reference federal exchanges. Indeed, the *only* place in the ACA that refers to section 1321 exchanges, despite myriad references to section 1311 exchanges, is the information-sharing requirement in section 36B, which was added by postenactment legislation.[173] This is strong support for the argument that federal exchanges are meant to be a direct substitute for state exchanges—otherwise, the statute would be severely lacking in instruction on what the federal exchanges can and cannot do.

The omission of federal exchanges from section 36B can also be analyzed under the canon of statutory silence.[174] Congressional silence might intentionally rule out a particular understanding of the statute. Alternatively, it might indicate Congress believed nothing more needed to be said to effectuate its purpose, or it might suggest Congress did not consider the matter at all.[175] When a provision is viewed against the backdrop of the entire statute, silence may be audible.[176]

The omission of federal exchanges from the tax credit scheme established in section 36B(b)(2)(A) was probably not an intentional exclusion by Congress, and this becomes evident when the provision is analyzed in light of subsequent legislation.[177] It is likely that a decision of such significance to taxpayers would spur debate over the bill by their representatives. This suggests Congress did not consider the matter; most likely section 36B(b)(2)(A) was simply overlooked after section 1321 was added to the ACA.

However, it is important to note that intentional omission is also plausible. Congress might have left out federal exchanges from the tax credit scheme in order to incentivize the establishment of state exchanges.[178] The federal government clearly wants states to establish exchanges, as evidenced by the directive language in section 1311 ("*shall* . . . establish an Exchange")[179] that required the addition of section 1321 to sidestep violation of the anti-commandeering principle.

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172. *Id.* § 1515(a) (to be codified at I.R.C. § 125(f)(3)(A)).

173. *See infra* Part V.D.

174. YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 16 (2008).

175. *See* Burns v. United States, 501 U.S. 129, 136 (1991) (internal citations omitted).

176. Elkins v. Moreno, 435 U.S. 647, 666 (1978) (stating that the lack of reference to an immigrant's intent to remain a citizen of a foreign country is "pregnant" when contrasted with other sections of the "comprehensive and complete" immigration code).

177. *See infra* Part V.D.

178. *See* Adler & Cannon, *supra* note 12, at 41–42.

179. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1311(a), 124 Stat. 119 (2010) (emphasis added).

If tax credits are not available through federal exchanges, citizens will probably push for their state to run an exchange, creating internal political pressure. Scholar Jonathan Adler suggests that the statutory omission could be "an attempt made by members of Congress who were going to use everything short of unconstitutional compulsion to induce states to create Exchanges."[180] This approach is comparable to the threat imposed by the Clean Air Act: a state that fails to adopt a sufficiently strict pollution program will lose federal highway funds.[181]

Alternatively, some might argue that Congress delegated to the IRS the decision of whether to funnel tax credits through federal exchanges. In this way, Congress could avoid what would likely be a contentious issue, sidestepping or delaying the battle over availability of tax credits in order to obtain consensus on the bill.[182] Purposefully imposing ambiguity in the statute could have been a way to create uncertainty about the legislative median's position, which makes possible a more favorable outcome than a statute that explicitly withholds tax credits.[183] For example, Professor James Blumstein outlined a "plausible argument that the distinction between [federal and state exchanges] serves valid federalism and state autonomy goals."[184]

However, the "too big" doctrine points out that Congress does not "hide elephants in mouseholes."[185] The Court in *FDA v. Brown & Williamson Tobacco Corp.* relied on this principle when it interpreted the words "drugs" and "devices" in the Food, Drug, and Cosmetic Act,[186] deciding that the authority of the FDA to regulate tobacco products could not be found in its mandates to assure safety and to work toward public health goals. The Court reasoned that "Congress

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180. Hogberg, *supra* note 89.

181. Jonathan H. Adler, *The IRS Wants to Give Tax Credits for Health Insurance Purchases Beyond Those Provided for the ACA*, THE VOLOKH CONSPIRACY (Sept. 9, 2011, 11:43 AM), http://volokh.com/2011/09/09/the-irs-wants-to-give-tax-credits-for-health-insurance-purchases-beyond-those-provided-for-in-the-aca/ (referencing the Clean Air Act of 1963, 42 U.S.C. § 7401 (2006)).

182. *See* Bressman, *supra* note 120 (explaining why Congress might choose, strategically, to delegate certain issues).

183. *See* John R. Wright, *Ambiguous Statutes and Judicial Deference to Federal Agencies*, 22 J. THEORETICAL POL. 217, 218, 235 (2010).

184. Blumstein Testimony, *supra* note 65, at 5 ("Under the statutory terms of the ACA, states choose the proper balance between access to subsidies for medical insurance for its residents, on the one hand, and competitive advantage for its businesses, on the other hand . . . .").

185. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

186. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126, 129 (2000) (construing Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 321(g)–(h), 393).

could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[187]

Likewise, making tax credits available through federal exchanges is a major, fundamental issue with great economic and political significance. No other provision of the ACA indicates that Congress wanted to withhold tax credits from individuals purchasing health insurance through a federal exchange. It is unlikely that Congress would have made such a major move or delegated such interpretive authority to the IRS without expressly stating such an intention.[188] This analysis is comparable to that in *Church of Scientology of California v. IRS*, where the Court held that it was unlikely Congress adopted an amendment that would alter "the basic thrust" of the statute at issue without a description by the bill's sponsor to that effect and with such ready acceptance as it received.[189]

As a trump card, critics of the IRS rule may point out that the rule goes beyond conferring a benefit for social good—it simultaneously imposes a penalty on employers of the tax credit recipients. Unlike a tax credit that has a cost diffused among taxpayers who contribute to the common pot, the detriment of the tax penalty is laid directly on employers. The IRS finds strong footing, however, in the grant of authority found in section 36B(g): the Secretary of the Treasury "shall prescribe such regulations as may be necessary to carry out the provisions of this section."[190] By using notice-and-comment rulemaking procedures, the IRS afforded employers an opportunity to be heard and addressed their concerns.[191]

Ultimately, the ambiguous title of section 36B, the text of section 1321 equating federal exchanges with those established by the state, and the application of the "too big" doctrine all suggest ambiguity in the seemingly plain text of section 36B(b)(2)(A). Thus, the scale tips toward recognizing that Congress intended tax credits to be distributed through both federal and state exchanges.

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187. *Id.* at 160.

188. *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) (finding it highly unlikely that Congress would delegate to an agency the determination of whether an industry will be substantially rate-regulated).

189. Church of Scientology of Cal. v. IRS, 484 U.S. 9, 17–18 (1987) (describing this as a case in which the "dog . . . didn't bark").

190. I.R.C. § 36B(g) (2006).

191. *See* United States v. Mead Corp., 533 U.S. 218, 237–40 (2001) (Scalia, J., dissenting) (characterizing the majority holding as creating, in cases when congressional authorization is unclear, a practical "safe harbor" for agencies that use notice-and-comment rulemaking); *see also infra* Part VI.A.

C. Legislative History and Congressional Reports

Although reliance on legislative history is controversial,[192] there is "clear evidence that where *Chevron* is invoked, legislative history remains relevant to the two-step inquiry."[193] An empirical study found reference to or reliance on legislative history in over 60% of cases in which the Supreme Court applied *Chevron*.[194] Consistent with judicial acceptance of legislative history is scholar Jerry L. Mashaw's suggestion that "[i]n some instances only the skillful deployment of legislative history will permit agencies to fulfill their constitutional role as faithful agents in the statute's implementation."[195]

A search of multiple databases reveals the legislative record is sparse on the issue of applicability of tax credits to federal exchanges.[196] But, a letter from House members, the House and Senate bills, and postenactment reports from the CBO, all support a finding of ambiguity in section 36(b)(2)(A). This Section proceeds by examining each of these pieces of legislative history.

A letter from House members leads this analysis. In early 2010, a group of Democratic House members from Texas, a state vocally opposed to the health-reform bill, wrote to President Obama. They expressed concern that Texas would not establish a state exchange, leaving residents with no way to benefit from the ACA.[197] They urged the President to preserve the House approach (which included only a federal exchange, not state exchanges) in the final bill. These House members likely believed tax credits to be unavailable in states electing not to establish exchanges, as the plain text in the

192. *Compare* United States v. Great N. Ry., 287 U.S. 144, 154 (1932) ("In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history . . . ."), *with* Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

193. Eskridge & Baer, *supra* note 116, at 1091. *But see* Garcia v. United States, 469 U.S. 70, 76 n.3 (1984) (" 'Resort to legislative history is only justified where the face of the Act is inescapably ambiguous . . . .' " (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring))).

194. *See* Eskridge & Baer, *supra* note 116, at 1096–97, 1136 (reporting empirical findings and noting that 62.3% of cases applying *Chevron* reference some legislative history).

195. Mashaw, *supra* note 106, at 8. Mashaw then wonders how far this line of thinking should extend. *Id.*

196. The author searched the following databases on January 26, 2013: WestlawNext, FDsys: GPO's Federal Digital System, and THOMAS.

197. Rovner, *supra* note 42.

Senate bill and enacted legislation suggests.[198] Despite the awareness of these House members, the lack of debate on the availability of tax credits through federal exchanges pushes back toward a finding of ambiguity. The lack of debate makes it less likely that House members purposely excluded section 1321 exchanges from section 36B(b)(2)(A).

Next, the CBO's postenactment reports shed further light on Congress's understanding of how exchanges would operate. Analysis presented in a March 2011 report that considered the effects of insurance-coverage provisions of the ACA is one example.[199] The CBO report, which estimated the number of unsubsidized exchange enrollees from 2014–2021, either failed to recognize that some states might not establish an exchange or assumed the tax credits would be triggered anyway.[200]

Alongside the March 2011 CBO report, a blog post from CBO Director Douglas W. Elmendorf acknowledged, "[E]stimates depend on myriad projections of economic and technical factors, as well as on assumptions about the behavioral responses to federal policies by families, businesses, and other levels of government."[201] However, in the section of his statement before the House entitled "Uncertainty Surrounding the Estimates," he failed to mention uncertainty about the number of states establishing an exchange and how that might affect the number of people who might be eligible for tax credits.[202] If the CBO understood that states would lose access to tax credits for citizens by declining to establish an exchange, as some states already have, it seems this would have been a significant source of uncertainty

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198. *See* Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1401, 124 Stat. 119 (2010) (to be codified at I.R.C. § 36B) (directing the IRS to establish tax credits for taxpayers "enrolled through an Exchange established by the State under 1311" of the ACA).

199. *Health Insurance Exchanges: CBO's March 2012 Baseline*, CONG. BUDGET OFFICE (Mar. 13, 2012), http://www.cbo.gov/sites/default/files/cbofiles/attachments/43057_HealthInsuranceExchanges.pdf.

200. CONG. BUDGET OFFICE, *supra* note 199; CONG. BUDGET OFFICE, *supra* note 48; CONG. BUDGET OFFICE, *supra* note 36; Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to the Honorable Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 18, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf (scoring the premium tax credits assuming they would occur in every state); *see also* Timothy Stoltzfus Jost, *Yes, the Federal Exchange Can Offer Premium Tax Credits*, HEALTH REFORM WATCH (Sept. 11, 2011), http://www.healthreformwatch.com/2011/09/11/yes-the-federal-Exchange-can-offer-premium-tax-credits/ ("None of the CBO reports scoring the ACA suggest that premium tax credits would only be available though [sic] 1311 state exchanges and not through 1321 federal exchanges.").

201. Douglas W. Elmendorf, *Testimony on Last Year's Major Health Care Legislation*, CONG. BUDGET OFF. (Mar. 30, 2011, 12:25 pm), http://www.cbo.gov/publication/25155.

202. *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010*, *supra* note 38, at 9.

worthy of mentioning due to its potentially dramatic effects on government spending.

In the same March 2011 report, the CBO committed to update its estimates as various economic and technical changes occurred.[203] The CBO explained that new flows of spending created through the ACA, "such as outlays for the subsidies provided through the insurance exchanges," are tracked separately from provisions that affect existing flows of spending or revenues, such as Medicare outlays.[204] As individual states made it clear that they would not establish state exchanges, one would have expected the CBO to update its estimates on the amount the federal government would pay out in tax credits (a new flow of spending), but it has not done so.

Weighing against these initial conclusions from the March 2011 report, however, is an April 2011 cost estimate found in House Resolution 1213.[205] In this document, the CBO specifies that its estimate of the number of people receiving tax credits through the exchanges under the ACA is based in part on the assumption that most states will establish their own exchanges by 2014.[206] This assumption was unnecessary if tax credits will be available through both state and federal exchanges.

Legislative history and postenactment reports of the CBO tug in both directions, but these documents at least support the view that Congress probably did not purposely exclude federal exchanges from tax credits administered under section 1401.

D. Postenactment Legislation

Legislation that was enacted just four days after the ACA (the Health Care and Education Reconciliation Act of 2010) drives home the understanding that Congress intended taxpayers to be able to access credits through both state and federal exchanges.[207] The proper analysis begins with the *in pari materia* canon of construction. This canon aids in resolution of statutory ambiguities by recognizing that

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203. *Id. at* 10.

204. *Id.*

205. CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 1213: A BILL TO REPEAL MANDATORY FUNDING PROVIDED TO STATES IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT TO ESTABLISH AMERICAN HEALTH BENEFIT EXCHANGES 3 (2011), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12158/hr1213.pdf.

206. *Id.*

207. Health Care and Education Reconciliation Act of 2010 (HCERA) § 1004(c), Pub. L. No. Law 111-152, 124 Stat. 1029 (to be codified at I.R.C. § 36B(f)); *see* Jost, *supra* note 200 (arguing that Section 1004 of HCERA demonstrates congressional understanding that the "federal exchanges would administer premium tax credits").

statutes that are *in pari materia* (relating to the same subject) usually should be construed together.[208]

This canon is at its strongest when the statutes in question were enacted by the same legislative body at the same time.[209] For example, the Court employed the *in pari materia* canon in construing the Farm Loan Act, reading it together with the Revenue Act of 1916, which was enacted during the same congressional session.[210] In doing so, the Court explained that "[t]he later act can . . . be regarded as a legislative interpretation of the earlier act in the sense that it aids in ascertaining the meaning of the words."[211]

The Health Care and Education Reconciliation Act ("HCERA") of 2010 was enacted by the same Congress and during the same session as the ACA. Section 1004 of the HCERA amended section 36B(b)(f) of the ACA to require state *and federal* exchanges to report data on tax credits to the IRS.[212] Reading section 36B(b)(2)(A) together with section 1004 of the HCERA is probative of the meaning of the earlier statute and shows Congress envisioned that both state and federal exchanges would administer tax credits—just as the IRS prescribes in its final rule.[213]

Weighing against this argument is the presumption of intentionality when particular language is omitted in one section and included in another.[214] However, this presumption can be overcome. In *United States v. Wilson*, for example, the Court refused to find significance in the deletion of a reference to the Attorney General, explaining that the reference "was simply lost in the shuffle" of a

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208. *See* Wachovia Bank v. Schmidt, 546 U.S. 303, 315–16 (2006) ("[U]nder the *in pari materia* canon, statutes addressing the same subject matter generally should be read 'as if they were one law.' " (citations omitted)); BLACK'S LAW DICTIONARY 361 (3d ed. 2006); *see also* Erlenbaugh v. United States, 409 U.S. 239, 243–44 (1972) (providing a consistent description of the canon); BRESSMAN ET AL., *supra* note 138, at 232–35 (describing the *in pari materia* canon as within the category of "whole code canons").

209. *See Erlenbaugh*, 409 U.S. at 244 ("[T]he rule's application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time."); *see also* BRESSMAN ET AL., *supra* note 138, at 234 (discussing *Erlenbaugh v. United States*).

210. United States v. Stewart, 311 U.S. 60, 64 (1940).

211. *Id.*

212. HCERA § 1004(c) (to be codified at I.R.C. § 36B(f)). "Congress understood that tax credits would come through both state and federal Exchanges. . . . At the very least it creates an ambiguity in the law that the IRS can resolve through its rule-making power." Hogberg, *supra* note 89.

213. Treas. Reg. §§ 1, 602 (2012).

214. Russello v. United States, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

comprehensive statutory revision.[215] Similarly, in the case of section 36B(b)(2)(A), a commonsense reading overcomes the presumption that the omission signals the intentional exclusion of federal exchanges; it would be nonsensical to impose tax credit reporting requirements on exchanges not permitted to administer tax credits.

It is again illustrative to analogize to *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court recognized that subsequent legislation effectively ratified or confirmed the FDA's earlier repeated statements that it *lacked* authority to regulate tobacco.[216] In *FDA v. Brown*, Congress had affirmatively acted to address the issue of tobacco regulation, going beyond mere acquiescence to the FDA's interpretation by creating a regulatory scheme.[217] And again, in the case of section 36B(b)(2)(A), the effect of subsequent legislation on statutory interpretation is particularly potent because the same Congress enacted both the ACA and the HCERA.[218] Further, the IRS's proposed rule interpreting the ACA was issued months after the amendment by the HCERA, meaning the Agency could rely on the subsequent legislation to clarify congressional intent.

A counterargument is that a reporting requirement, such as HCERA section 1004, does not have the same economic significance as opening the federal purse to provide a tax credit, or as imposing a penalty on employers who do not comply with statutory requirements.[219] Because the Constitution grants the power to tax and spend to Congress alone,[220] legislators should be careful to clearly state their intent to delegate this power. A court might consider

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215. United States v. Wilson, 503 U.S. 329, 336 (1992).

216. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–56 (2000) (reviewing Congressional activity around tobacco regulation over a span of thirty-five years—including acts subsequent to the Federal Food, Drugs, and Cosmetics Act and consideration of proposals to give the FDA authority to regulate tobacco—and concluding that the FDA lacked such authority). Further support is drawn from the analogous case *United States v. Estate of Romani*, in which the Court harmonized the impact of two statutes on the government's power to collect delinquent taxes by noting that "actual measures taken by Congress provide a superior insight regarding its intent." 523 U.S. 517, 530–31, 534 (1998). The Court looked to a specific policy in a subsequent federal statute, allowing it to control construction of an earlier statute that had not been expressly amended. *Id.* at 530–31.

217. *Brown & Williamson*, 529 U.S. at 155–56.

218. *Cf.* United States v. United Mine Workers, 330 U.S. 258, 281–82 (1947) (refusing to rely on statements by senators made eleven years after enactment of the Norris-LaGuardia Act as authoritative guides to construction of the statute, in part because of changes in Senate membership).

219. *Cf.* Blumstein Testimony, *supra* note 65, at 7 (stating that the reporting requirement "[a]t most . . . demonstrates a misunderstanding of the provisions of the ACA").

220. U.S. CONST. art. I, § 8, cl. 1.

employing the avoidance canon, which requires construing a potentially ambiguous statute so as to avoid serious constitutional difficulties.[221]

However, in practice, one substantive canon drives agencies: "advance the interpretation that best advances the statutory purpose (so long as the statutory text can accommodate that interpretation)."[222] Ultimately, it seems likely that the strength of the *in pari materia* reading would persuade a court that the IRS is advancing the statutory purpose by implementing the exchange structure Congress envisioned. The many suggestions in the statute that federal exchanges would operate in much the same way as state exchanges creates sufficient space in the statute to accommodate this reading.

A second counterargument to applying the *in pari materia* reading is that Congress amended a separate section 36B provision, so its failure to amend the part relevant to the IRS's interpretation at that time indicates that it did not wish to do so. Failure to act may be useful if it can be shown that Congress considered and rejected a position.[223] Here, a search of legislative history does not show discussion of the tax credit issue during the process of enacting the section 36B amendments; Congress did not act to reject a proposal to include federal exchanges in the tax credit scheme. Thus, the argument emphasizing failure to act is weak.

The strongest support for the IRS's interpretation in its final rule comes from subsequent legislation. An *in pari materia* reading of the ACA and the HCERA sheds much light on congressional intent and facilitates an understanding of how Congress intended exchanges to operate. Further, common sense confirms the analysis, as it is absurd to impose a reporting requirement for tax credits that will not exist unless federal exchanges can distribute tax credits. The best way to explain the omission might be that it was an erroneous oversight.

E. Mere Scrivener's Error?

The ultimate exceptions to the general rule that the statutory text is the end of the interpretive inquiry are scrivener's errors or

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221. *See, e.g.* Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159, 172–74 (2001) (rejecting request for administrative deference by striking down the agency's interpretation under step one of *Chevron*, and reading the statute to avoid significant constitutional questions raised by the agency pushing the limits of congressional authority).

222. Eskridge & Baer, *supra* note 116, at 1201.

223. *See* Doe v. Chao, 540 U.S. 614, 622 (2004) (finding meaning in legislative history revealing Congress cut a specific portion of the statute).

readings that would produce an absurd result.[224] It is possible that a busy Congress will enact a drafting mistake, such as a typographical error, into law, so a degree of common sense must be employed.[225]

If faced with this argument, the IRS would carry the burden of showing that this is one of the rare, extraordinary cases where Congress almost surely could not have intended the result that flows from a strict, literal interpretation of the statute.[226] This safety valve of a canon requires that the most natural reading of the statute be not merely unlikely, but "so lacking in plausible justifications that it presses against the limits of established constitutional norms of rationality."[227]

Here, it is plausible (although, as this Note posits, not probable) that Congress intentionally excluded exchanges established under section 1321 from section 36B of the IRC in order to incentivize the establishment of state exchanges.[228] Bolstering the case against a scrivener's error is the fact that legislators did not merely neglect to reference section 1321 in section 36B(b)(2)(A), but specified that only certain taxpayers "enrolled through an Exchange *established by the state*" would be eligible for a refundable tax credit.[229]

The same line of reasoning—that Congress intended to incentivize states to establish exchanges through the withholding of tax credits—rules out application of the remedial-purposes canon, a doctrine that calls for remedial legislation to be construed broadly to

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224. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1981) (Scalia, J., concurring) (finding erroneous a literal reading of the word "defendant" in a statute that would produce an absurd result).

225. Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65–66 (2004) (Stevens, J., concurring); *see also, e.g.*, *id.* at 63–64 (relying on common sense in its determination of statutory ambiguity). For a contrary position, see Moses v. Providence Hosp. & Med. Ctrs., 561 F.3d 573, 583 (6th Cir. 2009), in which the Sixth Circuit Court of Appeals rejected the agency's interpretation of the Emergency Medical Treatment and Active Labor Act as contrary to the plain language of the statute. Instead, the Court held that the Act imposes an obligation on hospitals to treat a patient in order to stabilize his or her emergency medical condition, rather than merely admitting a patient in good faith, recognizing that Congress may not have intended this result. *Id.* at 580–82.

226. *See* United States v Ron Pair Enters., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " (quoting Griffin v. Oceanic Contractors, 458 U.S. 564, 571 (1982))).

227. John C. Nagle, *Textualism's Exceptions*, *in* 2 ISSUES LEGAL SCHOLARSHIP, *supra* note 106, art. 15 at 3 (citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 116 (2001)); *see also, e.g.*, United States v. Locke, 471 U.S. 84, 93–94 (1985) (refusing to find ambiguity in filing requirement of "prior to December 31," and upholding the literal construction of December 30).

228. *See supra* Part III.B.

229. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1401, 124 Stat. 119 (2010) (to be codified in I.R.C. § 36B(b)(2)(A)) (emphasis added).

effectuate its purposes.[230] The purpose of the ACA is not necessarily thwarted by the unavailability of tax credits through federal exchanges.

Because there exists a rational explanation for the omission, the IRS would have difficulty persuading a court that it is a scrivener's error—though it may well be that Congress simply overlooked section 36B(b)(2)(A) when it added section 1321.

F. Chevron *Step One: Conclusion*

A reviewing court may be persuaded by a plain-text argument, finding no ambiguity, and halt the inquiry after *Chevron* Step One.[231] Alternatively, it may use the canon of constitutional avoidance to vacate the rule, thereby dodging a challenge that only Congress can alter the tax code and spend money.[232] Section 36B(b)(2)(A) is the rare case, however, in which plain meaning should not be conclusive because "literal interpretation of [this] statute will produce a result demonstrably at odds with the intentions of its drafters."[233]

The reporting requirement imposed by section 1004 of the HCERA is most probative, as it makes sense only when both state and federal exchanges administer tax credits. In light of the HCERA tax credit reporting requirement, excluding federal exchanges arguably reaches the standard of "disturbingly unlikely" set in *Public Citizen v. United States Department of Justice*.[234] In *Public Citizen*, the Court reviewed the prior regulatory scheme and relied on materials such as legislative history to ascertain congressional intent: "[S]triv[ing] for allegiance to Congress' desires" in a case where the plain meaning of the word "utilize" in the Federal Advisory Committee Act would have been "outlandish" but not "absurd."[235]

230. YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 29–30 (2008) (discussing the rarely used remedial purposes canon).

231. *See, e.g.*, MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 234 (1994) (rejecting an agency interpretation that "may well be a better regime but is not the one that Congress established" by the plain words of the text); *cf. Locke*, 471 U.S. at 93–94 (upholding agency's literal construction of a statute that imposed a filing requirement of "prior to December 31"). Consider that the *agency* in *Locke* adhered to the text of the statute, and question why it felt constrained by the statute. *Locke*, 471 U.S. at 96.

232. *See supra* Part III.D. (explaining how a large employer could establish standing to challenge the IRS Rule).

233. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

234. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 453 n.9 (1989).

235. *Id.*

The IRS's interpretation of the ACA presents a similar situation. Because of the plausibility of the plain-text reading of section 36B(b)(2)(A), a literal interpretation does not rise to the level of absurdity. The postenactment legislation and the healthcare-reform statutory scheme as a whole are particularly probative of congressional intent to make tax credits available in all states.

Analyzing the broader statutory context, legislative history, and the effect of the HCERA reveals that the availability of tax credits through federal exchanges is not as clear as the plain text of section 36B(b)(2)(A) suggests. Finding ambiguity in section 36B means that *Chevron* Step Two is necessary to determine whether the IRS's interpretation is acceptable.

VI. *CHEVRON* STEP TWO: BEING REASONABLE

When the search effort reveals that a statute's meaning is unclear, the court will next ask whether the agency's interpretation is reasonable.[236] A court must act as a faithful agent of the statute and avoid immersion in political debate. The agency, on the other hand, is afforded more latitude in its interpretation, as it is able to rely more heavily on policy considerations and can pay attention to politics.[237]

The Court in *Mayo Foundation for Medical Education & Research v. United States* made clear that *Chevron* principles apply in the tax context and[238] stated that, in Step Two, it would uphold an agency rule unless it was "arbitrary and capricious" or "manifestly contrary to the statute."[239] Although scholars of administrative law

236. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984); *see also* Bressman, *supra* note 120, at 562 ("[C]ourts treat a lack of clarity as the exclusive proxy for interpretive delegation."); *cf.* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "). *But cf.* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 597–604 (2009) (suggesting that the two-step *Chevron* framework is an artificial division that creates a redundancy, and reframing the doctrine as a single inquiry).

237. *See* Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 416 (D.C. Cir. 1994) ("Review of an agency's construction of an ambiguous statute is review of the agency's policy judgments."); Mashaw, *supra* note 106, at 9 (explaining why an agency's "interpretive agenda" includes political and policy considerations that would be improper for courts to consider). Sensitivity to policy considerations and paying attention to politics boosts an agency's democratic legitimacy. *Id.*

238. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011); *see supra* Part IV.B.

239. *Mayo*, 131 S. Ct. at 711. *Mayo* did not completely clarify the relationship between Chevron Step Two and arbitrary and capricious review; when it applied *Chevron*, the *Mayo* Court upheld the regulations at issue because they were a "reasonable interpretation" of the statute. *Id.* at 714–16. For a discussion of judicial acceptance of the idea that "arbitrary and capricious" review is the same as *Chevron* review, see Bill Araiza, *More News From the World of*

have long debated the relationship between Step Two and arbitrary-and-capricious review under APA section 706(2)(A), the dominant view is that the two correspond.[240] Indeed, the *Mayo Foundation* court suggests that the two tests are different sides of the same coin.[241]

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court described the arbitrary-and-capricious test of APA section 706(2)(A), establishing what is known as "hard look" review.[242] The inquiry articulated in *Overton Park* is applied here to evaluate the process by which the IRS came to its final rule.

Under "hard look" review, the court must establish that the agency's decision is grounded in a record and must evaluate whether the agency's decision is reasonable.[243] The *Overton Park* Court stated that review must be "searching and careful," and it was careful to emphasize that a court "is not empowered to substitute its judgment for that of the agency."[244] It also made clear to agencies that they are required to give a reasoned explanation for their decisions and must explain their rejection of alternatives.[245]

This Part evaluates the IRS's process under the framework a reviewing court would likely employ. It walks through three steps: (1) asking whether the Agency acted within its scope of authority, (2) applying the standard of reasonableness articulated in section 706(A)(2) of the APA, and (3) considering whether the Agency adhered

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Chevron, PRAWFSBLAWG (May 22, 2012, 4:16 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/05/more-news-from-the-world-of-chevron.html.

240. The test for reasonableness was set out in *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983). *See infra* Part VI.A. Therefore, the question is whether Step Two's "reasonableness" test equates to the *State Farm* "reasonableness" test. An understanding that the two tests match "can be squared with *Chevron* itself and Supreme Court applications of *Chevron*, is consistent with if not required by general principles of administrative law, and is normatively attractive." M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Counsel, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 96–97 (John Fitzgerald Duffy & Michael E. Herz eds., 2005).

241. *Mayo*, 131 S. Ct. at 711–13; Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L.J. 151, 151–70 (2006) (overviewing "hard look" review under which courts use § 706's "arbitrary" and "capricious" review to "provid[e] a substantive judicial check on agency power").

242. 401 U.S. 402, 415 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977); *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173–74 (2007) ("Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination.").

243. Garry, *supra* note 241, at 156.

244. *Overton Park*, 401 U.S. at 415.

245. *See* Garry, *supra* note 241, at 156 (explaining the "two principle elements" of hard-look review).

to procedural requirements in its decisionmaking process. Next, it turns to the Agency's public explanations of its extension of tax credits to federal exchanges.

A. Evaluating the Agency's Process

Under *Overton Park*, the court will first ask whether the specific IRS action was within the scope of statutory authority and whether the action was reasonably within the range of the Secretary's permissible choices.[246] Recall that the Secretary of the Treasury is guided and constrained by the language of section 36B(g): the Secretary can act to implement "such regulations as may be necessary to carry out the provisions of *this section*."[247] Looking to the title of section 36B, "Refundable Credit for Coverage Under a Qualified Health Plan," the task of the IRS is relatively narrow: the Agency is to consider tax credits. If section 36B(b)(2)(B) is understood as making the tax credit available through both federal and state exchanges, then arguably the addition of federal exchanges to section 36B(b)(2)(A) was necessary. Also, based on the ACA definition of "qualified health plan," the Agency's task is not limited to state exchanges. A qualified health plan is one that meets the certification criteria detailed in section 1311(c) or is "recognized by each Exchange through which such plan is offered," and these plans can even be offered directly from the issuer or through an agent rather than an exchange.[248] Thus, a "qualified health plan" is not confined to those issued through a section 1311 state exchange.

The reviewing court will next apply the standard of reasonableness set forth in the APA. A court must set aside agency actions and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[249] Requiring a "rational connection between the facts found and the choice made," the *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Company* Court announced the applicable rule: to meet the reasonableness condition, the agency may not rely on factors Congress did not intend for it to consider, nor can it completely fail to consider

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246. *Overton Park*, 401 U.S. at 415–16.

247. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1401(g), 124 Stat. 119, 218 (2010) (to be codified at I.R.C. § 36B(g)) (emphasis added).

248. ACA § 1301(a) (to be codified at 42 U.S.C. § 18021).

249. Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (2006); *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984) (stating that when Congress implicitly gives an agency authority to fill a gap, the standard is reasonability of agency interpretation).

an important aspect of the problem, offer an explanation contradicted by evidence before the agency, or offer an explanation that is so implausible that it cannot be attributed to agency expertise.[250]

After considering the comments it received, the IRS must give "a concise general statement" of the final rule's "basis and purpose" as part of the promulgated rule—a requirement which it met.[251] As the United States Court of Appeals for the District of Columbia explained, "such a statement should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to those issues as it did, particularly in light of the statutory objectives that the rule must serve."[252] The Secretary must go beyond cursory treatment of concerns raised during the comment process and avoid the temptation of relying on policies other than the objectives specified in the ACA.[253]

An agency must be careful to "show its work." Even if a court, after analyzing the rule under Step One of *Chevron*, agrees that the IRS's interpretation of section 36B(b)(2)(B) is one possible meaning, it cannot save the rule by supplying reasoning the Agency itself did not give.[254] Absent agency reasoning, the statutory text represents the beginning and end of interpretation. In essence, the final rule needs to have been written ever mindful of the possibility of judicial review.

The IRS used 153 words to address the issue of including federal exchanges in its tax credit arrangements.[255] It is questionable

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250. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

251. APA § 553(c); *see also, e.g.*, Indep. U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 851–55 (D.C. Cir. 1987) (holding that a rule promulgated by the Secretary of Transportation was arbitrary and capricious because of failure to comply with § 553's "concise general statement" requirement).

252. *Indep. U.S. Tanker Owners Comm.*, 809 F.2d at 852; *see also* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 161–63 (11th ed. 2011) (discussing the *Independent U.S. Tanker Owners Commission* case).

253. *Indep. U.S. Tanker Owners Comm.*, 809 F.2d at 853–54. The court expects a candid discussion from the Secretary if conditions make it impossible to meet all objectives explicit in the Act. *Id.* at 854 n.4.

254. Chevron, U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837, 843 (1984); *cf.* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 1005 (2007) (comparing *Chevron*, 467 U.S. 837, with SEC v. Chenery Corp., 318 U.S. 80, 95 (1943)) ("[A] court should not defer to an agency's construction of a statute at Chevron Step Two unless the agency embraced that construction at the time it acted, not merely in litigation."). If the court does not demand explanation of the IRS's reasoning but *disagrees* with the wisdom of application of tax credits to federal Exchanges, it may not substitute its own judgment for that of the agency. *See Chevron*, 467 U.S. at 844 (stating that an agency's interpretation of its own statute trumps a court's when that statute is ambiguous); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (same), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

255. *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (defending IRS interpretation of 26 U.S.C. § 36B as codified at 26 C.F.R. § 1.36B-5 (2012)).

whether this was cursory treatment or whether the IRS believed the issue to be entirely without merit. In relevant part, it reads:

> The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.[256]

Given the two relevant comments submitted[257] and the various possible constructions of the statute, the IRS had to explain why it believed it permissible to reach beyond the plain text of the statute. It supported its decision to include federal exchanges in the tax credit scheme by referring generally to other provisions in the ACA that support its reading.[258] However, the Agency would have been wise to discuss these provisions with specificity and to highlight the clear vision of the health insurance overhaul Congress expressed through the reporting requirement of the HCERA.[259] Additionally, the IRS could have articulated that its reading is necessary for the Secretary to accomplish the task of providing tax credits for coverage under all qualified health plans. Citing other provisions in the ACA that support its interpretation was probably the bare minimum the IRS had to do to give its reading a chance of surviving *Chevron* Step Two. The Agency could have offered more insight into its thought process, but since it offered *something*, its reading is not deficient on this ground.

Lastly, the court will ask whether an agency followed the necessary procedural requirements.[260] Notice-and-comment rulemaking is an appropriate process for this legislative rule, as it gives interested parties an opportunity to participate by offering comments; the Agency met the requirements of notice-and-comment rulemaking.[261]

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256. *Id.*

257. *See supra* Part IV.A.

258. *Id.*

259. *See supra* Part V.D (detailing the reporting requirement).

260. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971). *But see* Astrue v. Capato, 132 S. Ct. 2021, 2034 (2012) (listing ways in which an agency regulation can be challenged, as set out in *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001), but omitting the "procedurally defective" language listed in *Mead*); Araiza, *supra* note 239.

261. See the Administrative Procedure Act (APA), 5 U.S.C. § 553 (2006), for an overview of the notice-and-comment rulemaking procedures.

An agency is not required by statute to offer a lengthy explanation of its decision, but it should supply reasoning sufficiently detailed to permit judicial review.[262] After receiving the two relevant comments, the IRS could have put more thought into its treatment of the issue—but its reasoning is probably not so inadequate that it frustrates effective judicial review.[263] At least the Agency's reference to the "language, purpose, and structure" of section 36B and the ACA gives a reviewing court something to work with.[264]

Generally, the reasonableness inquiry under *Chevron* Step Two operates as a low bar; at this step a court is likely to defer to the agency's interpretation.[265] Here, the IRS has a strong argument that its interpretation is reasonable, because of Congress's requirement that exchanges established under sections 1311 *and* 1321 report data on tax credits.

B. The Agencies Speak

An agency administrator's public explanation might add little to a court's analysis in the context of a traditional, one-agency statute. However, the ACA's fragmented delegation provides the opportunity for multiple agencies to offer conflicting or confirming interpretations.

Before issuing its final rule, the IRS publicly defended its proposed rule, responding to a letter from twelve members of Congress that criticized the Agency's position.[266] IRS Commissioner Douglas Shulman stated:

> The statute includes language that indicates that individuals are eligible for tax credits whether they are enrolled through a State-based Exchange or a Federally-facilitated Exchange. Additionally, neither the Congressional Budget Office score nor the Joint

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262. Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (stating that the court should limit its judicial review to the administrative record already in existence); Nat'l Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 701 (2d Cir. 1975). Agencies have the ability to gather and analyze information about the costs and benefits of possible statutory interpretations, affording *them* a vantage-point of expertise superior to that of the court. *See generally* Note, Chevron *and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594 (2010) (arguing for *Chevron* deference distinction between the Court's use of discretion-constraining canons and discretion-channeling canons).

263. *See Camp*, 411 U.S. at 142–43 (holding that the proper standard of review for agency decisions is whether the agency's decision, in light of the extant administrative record, was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law").

264. 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 & 602 (final regulations)).

265. *See generally* Chevron, U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837 (1984) (outlining two-step deference regime).

266. Letter from Rep. David P. Roe, et al., to Douglas Shuman, IRS Commissioner (Nov. 4, 2011), *available at* http://roe.house.gov/UploadedFiles/Letter_to_IRS_Commissioner_regarding_tax_credits_under_PPACA_-_11.03.11.pdf.

Committee on Taxation technical explanation of the Affordable Care Act discusses excluding those enrolled through a Federally-facilitated Exchange.[267]

The agency with the broadest, birds-eye view of the ACA—the HHS—lacks the authority to promulgate regulations implementing section 36B. However its understanding of the statute as a whole gives it a unique vantage point from which to opine on the proper construction. In a question-and-answer document about exchanges, the Agency addressed the issue:

> The proposed regulations issued by the Treasury Department, and the related proposed regulations issued by the Department of Health and Human Services, are clear on this point and supported by the statute. Individuals enrolled in coverage through either a State-based Exchange or a Federally-facilitated Exchange may be eligible for tax credits, including advance payments. Additionally, neither the Congressional Budget Office score nor the Joint Committee on Taxation technical explanation discussed limiting the credit to those enrolled through a State-based Exchange.[268]

Though not dispositive, a court might consider the synergies of the combined expertise of multiple agencies.[269] *Chevron*'s expertise rationale seems particularly strong here given the complexity of the IRC and the sheer size of the ACA.

C. Chevron *Step Two: Conclusion*

The IRS's final rule presents a strong case for *Chevron* deference.[270] In light of the broader statutory context, the unclear legislative history, the very clear subsequent legislation, and the

267. Letter from Douglas H Shuman, IRS Commissioner, to Rep. David P. Roe (Nov. 29, 2011), *available at* http://roe.house.gov/UploadedFiles/IRS_Response_to_letter_on_PPACA_Exchange.pdf.

268. *State Exchange Implementation Questions and Answers*, CENTERS FOR MEDICARE & MEDICAID SERVS., 8 (Nov. 29, 2011), http://cciio.cms.gov/resources/files/Files2/11282011/exchange_q_and_a.pdf.pdf.

269. *See* Gersen, *supra* note 132 (suggesting that when multiple agencies share the responsibility of implementing a statute, all of them might have more expertise than the courts). Merrill and Hickman suggest employing *Skidmore* deference if the statutory interpretation of affected agencies conflicts, enforcing the interpretation with the greatest power to persuade. Merrill & Hickman, *supra* note 130, at 895–96.

270. If a reviewing court determines that *Chevron* deference is not warranted in this case, the IRS may still receive a degree of deference under *Skidmore*, based on the agency's power to persuade. *See* Skidmore v. Swift, 323 U.S. 134 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). The court will consider factors such as the thoroughness of the agency's decision, its logic, and the degree of expertise the agency brings to the issue. *Id.* at 139–40. Here, the Internal Revenue Code is an extremely complex statute, so the expertise of the IRS would likely be a very strong consideration. *See also* Christensen v. Harris Cnty., 529 U.S. 576, 586–87 (2000) (affirming that *Chevron* and *Skidmore* remain two distinct doctrines). *See generally* Merrill & Hickman, *supra* note 130, at 853–64 (discussing *Chevron* and *Skidmore* as two separate deference regimes).

inapplicability of *expressio unius*, a court would likely deem the plain text ambiguous.

One additional principle weighs in favor of the IRS. Rather than leaving the issue to "the vagaries of the legislative process . . . courts will sometimes prefer the certainty of an agency's rule."[271] If a court employs strict textualism in this case, Congress will have to amend the statute to make tax credits available through federal exchanges—a process a court might want to avoid for a variety of reasons.[272] The process of corrective amendment can be lengthy and time consuming.[273] And, given the political climate, Republican Congressmen may be unwilling to approve a "fix" of the statute, even if an amendment would merely clarify their original understanding and intent.[274] With the alternative being a cumbersome legislative route, a court may be more inclined to acknowledge the IRS's expertise and reasonableness.

The challenges inherent in punting to Congress increase the likelihood that a court will accept the rule, request a supplemented record, or remand to the Agency, instead of completely vacating the rule.[275] An agency is to implement a statute in a way that best advances the statutory purpose, as long as the text can accommodate the agency's interpretation.[276] The purpose of section 1401 is to provide tax credits for coverage under a qualified health plan, and the ultimate purpose of the ACA is to ensure all Americans have access to affordable health insurance.[277]

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271. Wright, *supra* note 183, at 235.

272. *See* Hatch Letter, *supra* note 64 ("[I]f the wording and effect of section 36B should somehow be different, then legislation is the appropriate means of changing section 36B."); *cf.* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372–73 (1994) (suggesting that there is "an inverse relationship between the rise of textualism and the waning of *Chevron*"). *But see* United States v. Haggar Apparel Co., 526 U.S. 380 (1999) (addressing what is required to overcome the presumption in favor of *Chevron* deference, and suggesting the presumption is strong).

273. YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008).

274. Suderman, *supra* note 69.

275. Instead of vacating a regulation, a court may choose to demand a supplemented explanation through either affidavits or testimony. Camp v. Pitts, 411 U.S. 138, 143 (1973).

276. Eskridge & Baer, *supra* note 116, at 1201.

277. *See generally* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008) ("A cardinal rule of construction is that a statute be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.").

VII. CONCLUSION

Ensuring all Americans have access to affordable, comprehensive health insurance is the paramount purpose of the ACA. Exchanges are integral to the statute's healthcare-reform strategy because they make federal tax credits and cost-sharing reductions available to those who need financial assistance in order to comply with the individual mandate.

Congressional silence on the availability of tax credits through exchanges established by the Secretary under section 1321(c) creates ambiguity in the statute, which is amplified by conflicting legislative history and postenactment legislation. A court applying *Chevron* will likely find ambiguity and deem the IRS interpretation to be reasonable in light of the HCERA requirement that both state and federal exchanges must report tax credit data.

Resolution of this issue is unlikely to be swift. Congress could choose to fill in or clarify the gap, but corrective amendment can be a lengthy process. A judicial ruling on this "elephant in a mousehole" must necessarily wait until 2014, when a large employer fined under section 4980H can contest the regulations. When the time comes, a reviewing court will in all probability defer to the IRS's construction of the statute, as it is "disturbingly unlikely" that Congress intended the results that flow from a strict, literal reading[278]—a reading that would leave residents of many states, all subject to the ACA's individual mandate, unable to access the tax credits promised to them to make their mandated insurance coverage affordable.

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278. *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 453 n.9 (1989) ("Nor does it strike us as in any way 'unhealthy,' or undemocratic to use all available materials in ascertaining the intent of our elected representatives, rather than read their enactments as requiring what may seem a disturbingly unlikely result, provided only that the result is not 'absurd.' " (citations omitted)).

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