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Deference and Fiction: Reforming Chevron's Legal Fictions After *King v. Burwell*

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And to tell the truth, the quest for their 'genuine' legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.[1]

The Kobold of the fiction often takes cruel vengeance upon those who pursue it.[2]

I. INTRODUCTION

In *King v. Burwell*,[3] the Supreme Court for the second time decided a fundamental challenge to the Patient Protection and Affordable Care Act (the ACA, also known as "Obamacare").[4] *King v. Burwell* involved whether a few words of the ACA referring to tax subsidies for those enrolled in an "Exchange established by the State" meant that a major component necessary for the function of Obamacare was available only in states that set up their own exchanges, exchanges being governmental agencies or nonprofits designed to provide one-stop shopping for health insurance.[5] If so, arguably those tax subsidies necessary for the functioning of Obamacare were unavailable in the vast majority of states that instead relied on federal exchanges.

An important element of the Court's decision was its determination whether to defer, in the interpretation of those crucial words, to a regulation promulgated by the Treasury Department and the IRS that stated that an exchange for the purposes of the ACA's tax subsidies included both those established and operated by the states as well as those created and run by the federal Department of Health and Human Services (HHS). The Court was forced to address whether it should defer to the agencies' interpretation of the provision of ACA in question pursuant to *Chevron U.S.A. v. Natural Resources Defense*

1. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.
2. Rudof von Jhering, *quoted in* 13 PIERRE DE TOURTOULON, MODERN LEGAL PHILOSOPHY SERIES 383 (Martha McC. Read trans., 1922).
3. 135 S. Ct. 2480 (2015).
4. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
5. Amy E. Sanders, Note, *A Gap in the Affordable Care Act: Will Tax Credits Be Available for Insurance Purchased Through Federal Exchanges?*, 66 VAND. L. REV. 1259, 1262 (2013) (noting that the exchanges "facilitate the purchase of qualified health plans, acting as a central portal for consumers to find and compare health insurance options").

Council, Inc.[6] The Court found that the key passage of the ACA was ambiguous, which normally, under *Chevron*, would trigger deference to the interpretation proffered by Treasury and the IRS. Instead, however, the Court held that, pursuant to what is known as *Chevron* Step Zero,[7] the deference normally mandated by *Chevron* was not appropriate, and the Court determined for itself the meaning of the disputed language of the ACA.[8]

This Article uses *King v. Burwell* as a lens to analyze the *Chevron* doctrine and the Step Zero exceptions to it, as well as the extensive legal fictions that form the basis for *Chevron* and *Chevron* Step Zero. This Article argues that even though the Court reached the same result in *King v. Burwell* that it would have employing deference to Treasury and the IRS's determination, the stare decisis and, hence, binding effect of the Court's decision was much greater without such deference. *King v. Burwell* displays the muddle and disarray exhibited by the *Chevron* and Step Zero fictions and the challenges courts have in applying them. Worse yet, *King v. Burwell* adds further confusion to the Step Zero exceptions to *Chevron* deference and makes them more readily available without clear rules for the application of Step Zero, rendering the *Chevron* doctrine an even more erratic, unpredictable, inchoate, and dubious system of determining court deference to agency interpretation.

Much of this confusion stems from the misuse in the *Chevron* doctrine of its multiple legal fictions, a misuse that stems in part from the modern lack of understanding of the purpose and utility of legal fictions, their dangers and how they should be used properly to avoid those hazards. While legal fictions were, through the 1930s, the topic of much scholarly interest and debate, study of them dropped dramatically following the 1930s. Only recently has scholarly interest in the use and misuse of legal fictions resurfaced. This Article revisits the scholarship from the past, as updated and renewed by modern study of legal fictions, to determine the lessons such scholarship teaches about how legal fictions should be used. Applying those lessons to the *Chevron* doctrine indicates where the *Chevron* fictions have gone awry and how they can be fixed and reformulated to achieve a more functional, effective, and understandable deference doctrine.

Part II of this Article describes the chaotic passage of the ACA and how that chaos contributed to legislation that melded together disparate versions that left conflicting language and unanswered questions. It describes how the ACA was built on interlocking provisions, including the granting of tax subsidies to those who would have substantial

6. 467 U.S. 837 (1984).
7. Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).
8. King v. Burwell, 135 S. Ct. at 2488–89 (2015).

difficulty otherwise affording health insurance, which is the subject of *King v. Burwell*. Even though the model for the ACA had originally been proposed by a conservative think tank, the ACA was largely rejected by Republicans during and after its passage, and many states with Republican-controlled governorships, legislatures, or both refused to set up the state exchanges envisioned by the drafters of the ACA. Instead, their states used the exchanges created by HHS, federal exchanges that were envisioned as a back-ups should states not set up their own exchanges.

Part III of this Article discusses *King v. Burwell* and the challenge to the ACA. The plaintiffs were Virginia residents who did not want to purchase health insurance but argued that they were being forced to do so in violation of the express terms of the ACA because of the IRS's misinterpretation of the provision that tax subsidies would be available in exchanges "established by the State." Because Virginia used a federal exchange, plaintiffs argued, tax subsidies should not have been made available to them, and because the cost of their health insurance would exceed 8% of their income, they should have been exempted by the ACA from the individual mandate that they buy insurance.

In Part IV, this Article discusses *Chevron*'s delegation fiction and the exceptions to that delegation fiction collectively known as *Chevron* Step Zero.[9] The *Chevron* delegation fiction asserts in essence that where Congress leaves a gap or ambiguity in a statute that is administered by a federal agency, that gap or ambiguity constitutes an implicit delegation to that agency to use its interpretative powers to fill the gap or resolve the ambiguity. *Chevron* has two steps, with Step One being whether the statue in question resolves clearly or is ambiguous regarding the exact question that the agency interpretation seeks to resolve. Only upon a finding of ambiguity does a court reach Step Two, determining whether the agency's interpretation is a permissible one and hence should be followed by the court. *Chevron* Step Zero is a collection of exceptions to the *Chevron* delegation doctrine, based on the idea that in some cases courts should determine even before Step One that the *Chevron* delegation fiction should not be applied in those cases. Some aspects of *Chevron* Step Zero are also built on fictional determinations about whether Congress would have wanted the *Chevron* delegation doctrine to apply.

Part V discusses the application of *Chevron* in *King v. Burwell*, first in the lower courts and then by the Supreme Court. Although the *Chevron* doctrine seemed to loom large in the determination of plaintiffs' challenge to the ACA, the Supreme Court made quick and terse work of the *Chevron* issue, holding with little discussion or explana-

9. *Id.*

tion that, because Congress would not have wanted the IRS to make this kind of decision, this case was not one for the IRS.[10] The Court based that conclusion on the importance of the question, in terms of how central it was to the functioning of the ACA, the billions of dollars involved, and the millions of people that could be affected.[11]

The Court based its analysis on two cases that do not seem to support its argument. The Court's argument seems contradicted by the express delegation language contained in the ACA and by other court decisions interpreting similar delegation language. Perhaps more surprisingly, the Court did not discuss whether, in absence of *Chevron* deference, the interpretation by Treasury and the IRS deserve *Skidmore* deference, a lesser form of deference that instructs courts to examine the value of the agency's determination without being bound to defer to it.

Part VI of this Article discusses the fictional basis of *Chevron* and Step Zero and how those doctrines fly in the face of the Administrative Procedure Act (APA). While some argue that *Chevron* acts as a background against which Congress can legislate, the available evidence indicates that it acts only weakly as a feedback loop, and that the ambiguity in legislation often is no actual indication of intent by Congress that courts defer to federal agencies to resolve that ambiguity. This section also discusses the challenges created by *Chevron*'s linking stare decisis to ambiguity, such that courts cannot prevent future contradictory reinterpretation of the statute at issue by the agency unless courts find either that the statute is not ambiguous, locking in the court's determination of the statute's meaning, or find that pursuant to some form of Step Zero the agency's interpretation does not merit *Chevron* deference. This dilemma prevents courts from both giving *Chevron* deference to the reasonable interpretation of agencies and also locking in that meaning where there is a need for a final decision that outweighs the benefits of the agency reinterpreting the statute in the future. I propose what I call "sticky deference," which would be giving *Chevron* deference to agency interpretation of an ambiguous statute, but at the same time determining that despite that deference, the interpretation must be so fixed so that subsequent agency reinterpretation could not change it. Courts should be allowed to determine the stickiness of their decisions without having to alter their decisions on ambiguity or Step Zero to support stare decisis.

Part VII examines the history, development and definitions of legal fictions, how they were used in Roman law and survived and spread in English common law. It reviews the scholarly battles over the values and dangers of legal fictions, and how they can be used beneficially in

10. *Id*.
11. *Id.* at 2489.

the first stages of a legal system, but hold great dangers if their use persists, especially by jurists who do not recognize the fictional nature of the rules they apply or the underlying rationale for those fictions. Legal fictions can create new law or amend existing law and thus are useful tools where the creation or amendment of law is difficult.

Where challenging barriers prevent the creation or amendment of statutory or common law, necessary legal developments must take place almost surreptitiously through the work of legal fictions. In more sophisticated legal systems, however, the primary purpose of legal fictions is dogmatic rather than creative, to sort, understand, and apply legal rules rather than create them. In legal regimes permitting appropriate statutory change, legal fictions are most useful as intellectual tools to help jurists, attorneys, and others to group similar legal concepts together, and in doing so, better understand those related concepts and develop tools to manipulate them, all the while cognizant of the fictional nature of the grouping.

Part VIII discusses the lessons taught by legal scholars about legal fictions and then applies those lessons to the fictions underlying the *Chevron* doctrine. It demonstrates how the *Chevron* fictions violate many of the strictures and admonishments created by scholars of legal fiction taught over the decades and centuries. *Chevron* fictions are not transparent to judges, who from their decisions typically appear to use them without displaying meaningful understanding of their fictional nature. There is almost no discussion by courts of the fictional nature of the *Chevron* delegation or the fictional aspects of Step Zero. Instead of discussing the *Chevron* fiction clearly and in a straightforward manner, the Supreme Court only hints at it, discussing implicit delegation and discussing what Congress would want or not want. This lack of transparency in the *Chevron* fictions has lead the Court astray from the underlying policies that *Chevron* itself indicated as its rationale. Scholars of legal fictions have noted that they were useful as scaffolding in the creation of the legal edifice but serve to obscure the structure once the building is done. The Court in its post-*Chevron* decisions has allowed the scaffolding of the *Chevron* fiction not only to obscure the building itself but even to overwhelm it.

Part VIII concludes by proposing how reforming *Chevron*'s legal fictions could fix the mess and confusion of *Chevron*. If those legal fictions were used only sparingly for the creation of law, and more typically and rigorously for the grouping and classification of law, then the form of *Chevron* doctrine would not only be more ordered, but also the policy bases for that doctrine would regain their primacy in determining the rules and boundaries of *Chevron* doctrine. Furthermore, judges would be more aware that they are employing mere fiction and so would seek to apply more directly those underlying policy rationales. The fictions would be useful to aid in the understanding and

use of deferral doctrine, but would no longer cause judges blindly to follow the dictates of the fictions. Furthermore, by allowing courts to delink *Chevron* deference and the stare decisis effects of their decisions, courts would be free to defer to agency interpretation while at the same time preventing future contradictory agency reinterpretation when necessary.

II. THE TUMULTUOUS PASSAGE OF THE AFFORDABLE CARE ACT

King v. Burwell promised to be one of the most important cases of the Supreme Court's 2015 term, with the ACA,[12] President Obama's signature health care plan, at risk of being eviscerated.[13] The plaintiffs, seeking to dismantle the ACA, asked the Supreme Court to focus on a few words of the massive ACA, namely those specifying that federal tax credit subsidies for the low-income to purchase health insurance coverage under the ACA were available for such coverage purchased through an "Exchange established by the State under section 1311" of the ACA.[14] According to plaintiffs, these words meant that tax credit subsidies were not available for anyone in the thirty-four states that had declined to set up their own exchanges and where instead the Department of Health and Human Services set up federal exchanges for those states.[15]

The ACA was designed to reform the health insurance market in the United States by employing three "fundamental and interlocking" provisions.[16] First of all, the ACA forbids insurers from considering the health and preexisting conditions in the determination of whether to cover,[17] how much to charge the potential insured,[18] or both. Mandated coverage, the cost of which is not dependent on the health of the insured, is crucial to achieve the ACA's goal of near universal health insurance coverage. Otherwise, insurance companies could merely refuse to cover or substantially increase premiums for those more likely

12. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
13. Eric J. Segall & Jonathan H. Adler, King v. Burwell *and the Validity of Federal Tax Subsidies Under the Affordable Care Act*, 163 U. PA. L. REV. ONLINE 215, 216 (2015) ("On March 4, 2015, in *King v. Burwell*, ideologically driven plaintiffs will once more ask the Justices to dismember President Obama's signature legislative achievement.").
14. Brief for Petitioners at 18, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114), 2014 WL 7386999, at *18.
15. Brief for Appellants at 7, *King*, 135 S. Ct. 2480 (No. 14-114), 2014 WL 882811, at *7.
16. Segall & Adler, *supra* note 13, at 217 ("From the moment the ACA was first introduced in Congress, the entire legislation relied on three fundamental and interlocking ideas.").
17. 42 U.S.C. § 300gg-1 (2012).
18. *Id.* § 300gg.

to need substantial care because they have unhealthy habits, preexisting conditions, or a family history of certain illnesses.[19] The second key provision of the ACA is the requirement that every person either purchase or obtain at least minimum essential health insurance or, failing that, pay a penalty to the Internal Revenue Service.[20] This provision, the individual mandate, is made necessary by the first provision, as it prevents people from waiting to buy insurance until they become ill and need care.[21] Doing so would allow them to be free riders on the system, obtaining the greatest benefit of insurance, which is the possibility of coverage for treatment of major illnesses, without paying for insurance while healthy.[22]

The third key provision, which was the subject of *King v. Burwell*, is granting tax subsidies to the substantial number of Americans who would have significant financial difficulty purchasing health insurance.[23] These tax subsidies not only render insurance more universally available by making it affordable but are also necessary for the mandate to be effective. Without subsidies, the cost of health insurance would be prohibitive for many. Under the ACA, those whose insurance costs exceed 8% of their income are not subject to penalty for failing to obtain health insurance.[24] Also, drawing in healthy, younger insured Americans contributes to the financial stability of the health insurance market. If health insurers were forced to ignore preexisting conditions while lower-income individuals were not given premium subsidies, the result could be a death spiral, a vicious circle of rising premiums caused by too few healthy persons buying insurance with the resulting increased premiums causing even fewer healthy persons to buy insurance.[25]

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19. Deborah R. Farringer, *Keeping Our Eyes on the Prize: Examining Minnesota as a Means for Assuring Achievement of the "Triple Aim" Under the ACA,* 38 HAMLINE L. REV. 177, 197 (2015).
20. 26 U.S.C. § 5000A (2012).
21. Elizabeth Weeks Leonard, *The Fragility of the Affordable Care Act's Universal Coverage Strategy*, 46 U. TOL. L. REV. 559, 567 (2015) ("Those requirements [requiring coverage for those with preexisting conditions without additional cost], however, present a significant adverse selection problem because individuals could wait until they become sick to purchase coverage, thereby reducing the quantum of low-risk individuals paying premiums into the pool to balance out the cost of providing care to high-risk individuals.").
22. David S. Schwartz, *Presidential Politics as a Safeguard of Federalism: The Case of Marijuana Legalization*, 62 BUFF. L. REV. 599, 608 (2014).
23. *See generally* 42 U.S.C. §§ 18081–18082 (2012).
24. 26 U.S.C. § 5000A(e) (2012).
25. *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, CONGRESSIONAL BUDGET OFFICE 19 (Nov. 30, 2009), http://www.cbo.gov/ftpdocs/107xx/doc10781/11-30-Premiums.pdf [https://perma.unl.edu/MUM8-X6RW] (arguing that subsidies and the individual mandate would reduce the adverse selection that would occur with the bar on considering preexisting conditions when determining rates or coverage).

Originally, the model for the ACA had been proposed by conservatives as an alternative to more liberal models, such as a single-payer plan or a public option.[26] The individual mandate-based vision of health care reform was also preferred by Republicans over the employer-mandate version of health care reform proposed in 1993 (also known as "HillaryCare" for its chief proponent, then-First Lady Hillary Clinton).[27] A rough outline of the ACA with an individual mandate was drafted in 1989 by some in the Heritage Foundation.[28] A similar version was implemented in Massachusetts, signed by then-Governor Mitt Romney, who famously said, "we got the idea of an individual mandate . . . from [Newt Gingrich], and [Newt] got it from the Heritage Foundation."[29] The ACA was based in large part on the Massachusetts model, and President Obama and senior White House officials sought advice from health care advisors who had taken a significant role in shaping the Massachusetts plan.[30] Even as late as 2009, Republican senator Charles Grassley stated, "there is a bipartisan consensus to have an individual mandate."[31] However, in time for

26. Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius*,* 93 B.U. L. REV. 1, 10 (2013) (finding that a single-payer plan would mandate that medical payments be made by a single governmental entity, by and large removing private insurance companies from the health insurance business). *See generally* Susan Adler Channick, *Will Americans Embrace Single-Payer Health Insurance: The Intractable Barriers of Inertia, Free Market, and Culture*, 28 LAW & INEQ. 1, 16 (Winter 2010) (arguing that a public-option plan would allow a Medicare-like public plan to compete with private insurers in the health insurance market); Corrine Propas Parver, *National Health Care Reform: Has Its Time Finally Arrived?*, 5 J. HEALTH & BIOMEDICAL L. 207, 215 (2009).

27. Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn It Later*, N.Y. TIMES (Feb. 14, 2012), http://www.nytimes.com/2012/02/15/health/policy/health-care-mandate-was-first-backed-by-conservatives.html.

28. Stuart M. Butler, *Assuring Affordable Health Care for All Americans*, HERITAGE FOUND. (Oct. 1, 1989), http:// www.heritage.org/research/lecture/assuring-affordable-health-care-for-all-americans [https://perma.unl.edu/7736-H76Q]. The Heritage report justifies the individual mandate by saying that it "is based on two important principles. First, that health care protection is a responsibility of individuals, not businesses. . . . Second, it assumes that there is an implicit contract between households and society, based on the notion that health insurance is not like other forms of insurance protection." *Id.*

29. Avik Roy, *The Tortuous History of Conservatives and the Individual Mandate*, FORBES (Feb. 7, 2012, 3:32 PM), http://www.forbes.com/sites/aroy/2012/02/07/the-tortuous-conservative-history-of-the-individual-mandate/.

30. Michael Isikoff, *White House Used Mitt Romney Health-Care Law as Blueprint for Federal Law*, MSNBC (Oct. 11, 2011, 6:05 AM), http://www.msnbc.msn.com/id/44854320/ns/politics-decision_2012/t/ [https://perma.unl.edu/K5BT-TGC8].

31. Ezra Klein, *The Republican Turn Against Universal Health Insurance*, WASH. POST (June 30, 2012), http://www.washingtonpost.com/news/wonkblog/wp/2012/06/30/the-republican-turn-against-universal-health-insurance/ [https://perma.unl.edu/9SJJ-E782].

the 2012 election, the Republican party changed its collective mind on the wisdom of this form of universal coverage, and Republicans in Congress opposed it both as a matter of public policy and party doctrine.[32]

The passage of the ACA in 2010 was rushed and completed without Republican support, as "not a single Republican in either the House or the Senate voted for the most far reaching piece of domestic legislation in forty-five years."[33] Five different congressional committees worked on drafts of the legislation, and their multiple drafts were merged fitfully into one draft.[34] The Senate passed what many considered a rough draft of the bill that would be cleaned up, removing redundancies and ambiguities, as the House passed its own version, the chambers of Congress negotiated their differences, and the bill went through the Conference Committee stage.[35] After the August 25, 2009 death of Senator Edward Kennedy, however, Democrats in the Senate had fewer than the 60 votes they needed to defeat a filibuster and so could not easily negotiate changes to the Senate bill in order to pass an amended bill. Instead, the House passed the Senate bill, and then Congress employed the budget reconciliation process, which required only a simple majority to pass the ACA.[36] Using the reconciliation process meant that any changes to the Senate bill were strictly limited and had to "meet the arcane and rigorous restrictions of reconciliation."[37] As a result, many drafting errors remained in the bill, including, for example, the provision of three separate and distinct sections 1563.[38]

Congressional Republicans railed bitterly against the bill, claiming it was unconstitutional and accusing Democrats of refusing to negotiate for ideological reasons.[39] After the ACA was passed, its opponents

32. Alberto R. Gonzales & Donald B. Stuart, *Two Years Later and Counting: The Implications of the Supreme Court's Taxing Power Decision on the Goals of the Affordable Care Act*, 17 J. HEALTH CARE L. & POL'Y 219, 247 (2014) ("The issue of universal healthcare itself became particularly relevant and controversial in the 2012 election cycle, and in spite of the President's re-election many Republicans continue to oppose the Act as a matter of policy and political doctrine.").

33. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 276–81 (2011).

34. Abbe R. Gluck, *Why Health Lawyers Must Be Public-Law Lawyers: Health Law in the Age of the Modern Regulatory State*, 18 J. HEALTH CARE L. & POL'Y 323, 326 (2015).

35. *Id.* at 327.

36. Pamela S. Karlan, *Foreword: Democracy and Disdain, The Supreme Court 2011 Term*, 126 HARV. L. REV. 1, 45 (2012).

37. David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873, 877 (2014).

38. King v. Burwell, 135 S. Ct. at 2492 (noting tartly, "The Affordable Care Act contains more than a few examples of inartful drafting.").

39. Huma Khan, *Obama Signs Health Care Bill Today as GOP Challenges Constitutionality*, ABC NEWS (Mar. 23, 2010), http://abcnews.go.com/GMA/HealthCare/

sought to defeat it both politically and in the courts. Republicans ran successfully against the ACA in the 2010 midterm elections and, according to one poll, more than 70% of voters said that their midterm vote that year was a message about the ACA with a majority opposing it.[40] Republicans not only retook the House of Representatives, but also took over a majority of state legislatures, making the biggest gain in both areas that any party has made since 1938.[41] By gaining control of the House, Republicans also gained the power to block legislative fixes to the ACA and so, in any court challenge, Obamacare had to stand or fall on its original, rushed legislation. To express Republican antipathy for Obamacare, the House has held over sixty votes to repeal it.[42]

III. *KING V. BURWELL* AND THE CHALLENGE TO THE ACA

While many opponents of the ACA objected to it on the grounds that it constituted excessive limitation of economic liberty and individual freedom in health care decision making, the litigation against the ACA has proceeded primarily on other grounds.[43] In the first ACA case to reach the Supreme Court, *National Federation of Independent Business v. Sebelius* (*NFIB*),[44] plaintiffs argued that the ACA was invalid not because of its infringement of individual liberties, but rather because it violated the structure of the Constitution by exceeding the powers of Congress under the Commerce Clause of Article I.[45] In *NFIB*, the Supreme Court held that while the individual mandate could not be enforced pursuant to Congress's power under the Commerce Clause, it was permissible as a tax under Congress's taxing powers.[46]

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obama-sign-health-care-bill-law-republicans-challenge/story?id=10176898 [https://perma.unl.edu/7WMJ-F9QS].

40. David Lauter, *Obamacare Was a Secondary Issue in Election, Republican Poll Finds*, L.A. TIMES (Nov. 7, 2014, 4:00 AM), http://www.latimes.com/nation/politics/politicsnow/la-pn-obamacare-election-20141107-story.html [https://perma.unl.edu/S9MD-892N].

41. Dan Balz, *The GOP Takeover in the States*, WASH. POST (Nov. 13, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/13/AR2010111302389.html [https://perma.unl.edu/M6LS-H926].

42. S.M., *How Obamacare Has Been Attacked in Court*, ECONOMIST: ECONOMIST EXPLAINS (Mar. 23, 2016, 4:08 PM), http://www.economist.com/blogs/economist-explains/2016/03/economist-explains-19 [https://perma.unl.edu/TD8M-CAWV].

43. Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Nonfundamental Liberties*, 64 FLA. L. REV. 639, 642 (2012).

44. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

45. Moncrieff, *supra* note 43, at 642.

46. *NFIB*, 132 S. Ct. at 2608 ("The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause.").

Unlike the constitutional argument in *NFIB*, *King v. Burwell* focuses on a strictly statutory issue, namely whether the ACA's tax subsidies for lower income health insurance purchasers are available in states that did not set up their own exchanges but instead rely on federal exchanges.[47] The ACA, in section 1401, added § 36B to the Internal Revenue Code, authorizing federal tax credit subsidies to make health insurance more affordable. Section 36B(b)(2)(A) provides that tax subsidies are available to insured taxpayers covered by qualified health plans "which were enrolled in through an Exchange established by the State . . . ."[48] Section 36B seems expressly to address tax subsidies for state exchanges, not federal exchanges. Although *King v. Burwell* appears to focus on a strictly statutory issue, some have noted the constitutional implications of the plaintiffs' challenges, including how far the Obama administration can "interpret" the underlying statute without violating the Constitution's separation of powers and staying within the boundaries of the President's constitutional authority.[49]

This disputed language in § 36B seems to be the result of the merging of versions of ACA bills from two separate Senate committees, one requiring states to set up state exchanges, and another that "explicitly envisioned state and federal exchanges, and clearly made subsidies available in both cases."[50] In other words, it appears that both versions of the bill provided for tax subsidies in all fifty states, but did so in different ways, one solely through state exchanges and the other through a potential mix of federal and state exchanges.[51] An analysis of the ACA based on documents from the respective committees and interviews of "staffers directly involved in the drafting of the statutes" concluded that the language regarding state exchanges arose from the less than perfect meshing of two versions of the bill rather than from any intent that tax subsidies be denied to those in states with a fed-

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

48. 26 U.S.C. § 36B(b)(2)(A) (2012).

49. Ronald D. Rotunda, King v. Burwell *and the Rise of the Administrative State*, 23 U. MIAMI BUS. L. REV. 267, 280 (2015) ("The assertion of a Presidential power or an agency power to amend, unilaterally, or to suspend statute raises significant questions. If the President has absolute discretion to ignore laws that he prefers not to exist, the Constitutional limits of Presidential authority have the restraining power of air.").

50. Greg Sargent, *Senate Documents and Interviews Undercut 'Bombshell' Lawsuit Against Obamacare*, WASH. POST (July 29, 2014), https://www.washingtonpost.com/blogs/plum-line/wp/2014/07/29/senate-documents-and-interviews-undercut-bombshell-lawsuit-against-obamacare/ [https://perma.unl.edu/HQV2-AVCP].

51. *See generally* Mark Seidenfeld, *Tax Credits on Federally Created Exchanges: Lessons from a Legislative Process Failure Theory of Statutory Interpretation,* 99 MINN. L. REV. HEADNOTES 101, 111–17 (2015) (providing a detailed analysis of the legislative history of the ACA).

eral exchange. [52] At the time, most involved in the process seem to have considered state exchanges to be the prime conduit for health insurance, with federal exchanges a perhaps not-too-important fallback.[53]

Republicans' vehement opposition to the ACA made the federally operated exchanges much more important, however, as the majority of states declined to set up state exchanges. Only thirteen states, along with the District of Columbia, initially set up their own exchanges.[54] Another three states set up a "federally-supported exchange," relying on the technical infrastructure of the federal exchanges, which may receive the same treatment as a state-based exchange.[55] Among the Republicans who campaigned against Obamacare and in the states that are politically hostile to the ACA, there has been little inclination to set up state exchanges.[56] Governors can block the implementation of a state exchange all by themselves, as HHS has required that state declarations setting up state exchanges be signed by the governors themselves.[57] As of January 13, 2017, twenty-eight states still relied on federally facilitated marketplaces.[58]

The claim that the disputed language might bar tax subsidies in states with federal exchanges was first noted by employment benefits attorney Tom Christina, who told a December 2010 gathering of "conservative lawyers and activists" that he had "noticed something peculiar in the tax-credit section" of the already-passed law, namely, according to him, that "there will be no tax credits for taxpayers who

52. Sargent, *supra* note 50; *see* Jonathan Cohn, *One More Clue that the Obamacare Lawsuits Are Wrong*, NEW REPUBLIC (July 28, 2014), http://www.newrepublic.com/article/118867/email-house-aide-undermines-halbig-lawsuit-obamacare-subsidies [https://perma.unl.edu/Y4LQ-DDBS].

53. Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX: J. L.-MED. 119, 148-149 (2013) ("The congressional debate over the PPACA and its antecedents correspondingly emphasized state-run Exchanges over federal Exchanges.").

54. Dan Mangan, *States Shuttering Obamacare Exchanges, but Should They?* CNBC (July 22, 2015, 3:11 PM), http://www.cnbc.com/2015/07/22/states-shuttering-obamacare-exchanges-but-should-they.html [https://perma.unl.edu/2ADP-WPWG].

55. Josh Blackman, *The Legality of Executive Action After* King v. Burwell, 16 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 8, 8 (2015).

56. Nicholas Bagley, David K. Jones & Timothy Stoltzfus Jost, *Predicting the Fallout from* King v. Burwell*—Exchanges and the ACA,* 372 NEW ENG. J. MED. 101 (Jan. 8, 2015), http://www.nejm.org/doi/full/10.1056/NEJMp1414191 [https://perma.unl.edu/D3LC-UGYY].

57. Bridget A. Fahey, *Health Care Exchanges and the Disaggregation of States in the Implementation of the Affordable Care Act*, 125 YALE L.J. FORUM 56, 60 (2015).

58. The Henry J. Kaiser Family Foundation, *State Health Insurance Marketplace Types, 2017* (Jan. 2017), http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/ [https://perma.unl.edu/52EB-MFAH].

live in non-capitulating states."[59] Even with the concerted opposition to Obamacare, it appears that it took months after its passage for anyone to conceive of the argument that because of the "four previously unnoticed words" ("established by the state") tax subsidies were not available in states with federal exchanges.[60]

The Department of the Treasury and the Internal Revenue Service attempted to head off any successful litigation based on the disputed language, using the authority and mandate granted to the Secretary of the Treasury in § 36B(g) of the Internal Revenue Code. That section provides that the Secretary "shall prescribe such regulations as may be necessary to carry out the provisions of this section."[61] Treasury therefore was not only allowed to prescribe those regulations—it was mandated to do so by statute where necessary.

On August 17, 2011, Treasury and the IRS published a notice of proposed rulemaking, with the proposed rules stating that "an exchange" under the tax credit provisions of the ACA would have the same meaning as in 45 C.F.R. § 155.20, which states, "Exchange means a governmental agency or non-profit entity . . . regardless of whether the Exchange is established and operated by a State (including a regional Exchange or subsidiary Exchange) or by HHS." [62] The IRS held a public hearing and received comments. An analysis of those comments found that only two comments referred to this issue, both arguing that tax subsidies should not be available except in exchanges established by the states.[63] The IRS determined that, because "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" and because "the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges," the final IRS regulations should retain the definition of "exchange" that allowed taxpayers in federal exchanges to qualify for tax subsidies.[64]

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59. David G. Savage, *Obamacare Case Began when Conservative Lawyer Saw Possible Flaw in Law*, L.A. TIMES (March 3, 2015, 5:12 PM), http://www.latimes.com/business/la-fi-court-case-origins-20150304-story.html [https://perma.unl.edu/LXM2-JNUP].

60. Adam Liptak, *Lawyer Put Health Act in Peril by Pointing Out 4 Little Words*, N.Y. TIMES (March 2, 2015), http://www.nytimes.com/2015/03/03/us/politics/in-four-word-phrase-challenger-spied-health-care-laws-vulnerability.html.

61. 26 U.S.C. § 36B(g) (2012).

62. Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931-01, 50,940 (Aug. 17, 2011) (noting that in § 1.36B-1(k), "Exchange has the same meaning as in 45 CFR 155.20.").

63. Sanders, *supra* note 5, at 1277.

64. Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377-01, 30,378 (May 23, 2012).

The petitioners in *King v. Burwell* were four Virginia residents who did not want to buy health insurance and who argued that, because Virginia has a federally-operated exchange, they were not eligible for tax subsidies as, according to their lawsuit, Virginia did not have an exchange established by the state.[65] Because they claimed they were not eligible for tax subsidies, the plaintiffs argued that the cost of health insurance would exceed 8% of their income and so, pursuant to the ACA, exempt them from the requirement of purchasing health insurance.[66] However, they asserted, the IRS's interpretation of the tax credit language would make them eligible for tax subsidies, as the exchange in Virginia would then constitute a "an Exchange established by the State" and so the IRS's interpretation would force them to purchase health insurance that they do not want.[67] The trial court granted defendant's motion to dismiss,[68] and the Fourth Circuit affirmed.[69] In a similar case decided two hours earlier, *Halbig v. Burwell*, a three-judge panel of the District of Columbia Circuit found that such tax subsidies were available only in state-run exchanges, and not those federally operated.[70]

If the Supreme Court had found that tax subsidies were not available in states that had not set up their own exchanges, the effect would have been immediate and likely disastrous. Millions were predicted to lose their health insurance.[71] If healthy families left the marketplace because they could not afford insurance without subsidies and were not required to purchase it because their incomes were too low, the pool of those in non-group insurance would be older and less healthy, and insurance companies would have to raise their premiums in recognition of the higher costs associated with this more expensive pool. One study estimated that 8.2 million would lose their health insurance coverage and that premiums would go up by 35%, and other esti-

65. Complaint at ¶ 6, King v. Sebelius, 997 F. Supp. 2d 415 (E.D. Va., Sept. 16, 2014) (No. 3:13-cv630), 2013 WL 11104282.

66. King v. Burwell, 135 S. Ct. 2480, 2487 (2015).

67. *Id.* at 2488.

68. King v. Sebelius, 997 F. Supp. 2d 415 (E.D. Va. 2014).

69. King v. Burwell, 759 F.3d 358, 363 (4th Cir. 2014).

70. Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014); *see also* Oklahoma *ex rel.* Pruitt v. Burwell, 51 F. Supp. 3d 1080 (E.D. Okla. 2014) (No. 6:11-CV-00030), 2014 WL 4854543 (agreeing with *Halbig* that tax subsidies should not be provided for those in federal exchanges).

71. Bordelon et al., Leavitt Partners, The Stage is Set: Predicting State and Federal Reactions to *King v. Burwell* 1 (2015), http://leavittpartners.com/wp-content/uploads/2014/08/2015-01-The-Stage-is-Set-Predicting-State-and-Federal-Reactions-to-King-v-Burwell.pdf [https://perma.unl.edu/WT9Z-MGXC] ("A cornerstone of the law is in question and there is a very real possibility that nearly five million citizens enrolled through the federal marketplace may lose access to subsidized coverage.").

mates of premium increases were even higher. [72] Some predicted that states with federal exchanges could go into a partial or full "death spiral," where insurance premiums go up because fewer healthy and more sick purchase insurance, and then the increased premium cost itself drives more healthy insured to drop their coverage, which would raise rates even more.[73] Rates could have gone up so much as to effectively shut down the market.[74]

There would have been few good options to fix such a result. States could conceivably have scrambled to set up state exchanges to replace the federal exchange, though the transition could have been costly and messy and could have taken more time than the Supreme Court ruling might have provided to states. States that had refused to set up exchanges could have legislatures or governors still unwilling to set up such exchanges, even when failing to do so could threaten their health insurance availability statewide.[75] Furthermore, there is some question whether state exchanges set up after a 2014 deadline in the ACA would count as state exchanges for all purposes under the Act.[76] The Obama administration could have attempted to deem that some federal exchanges constitute state exchanges where the state cooperates in aspects of the exchange, though this "deeming" would likely have run into its own legal challenge.[77]

Of course, in theory Congress could revise Obamacare in response to any Supreme Court decision, though with a Republican Congress intent on dismantling the ACA and a Democratic president determined to preserve it, it is difficult to imagine a successful negotiation of an alternative version, especially before the 2016 presidential election. The election of Donald Trump has made the future of Obama-

72. *Compare* Linda J. Blumberg et al., *The Implications of a Supreme Court Finding for the Plaintiff in* King vs. Burwell: *8.2 Million More Uninsured and 35% Higher Premiums*, ROBERT WOOD JOHNSON FOUND. & URBAN INST. (Jan. 2015), http://www.rwjf.org/en/library/research/2015/01/the-implications-of-a-supreme-court-finding-for-the-plaintiff-in.html [https://perma.unl.edu/83QM-UQFM], *with* EVAN SALTZMAN & CHRISTINE EIBNER, RAND CORP., THE EFFECT OF ELIMINATING THE AFFORDABLE CARE ACT'S TAX CREDITS IN FEDERALLY FACILITATED MARKETPLACES (2015), http://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR980/RAND_RR980.pdf [https://perma.unl.edu/4BFX-JVME] (estimating that 6 million would lose insurance and unsubsidized individual premiums would increase by 47%).

73. Robert F. Graboyes, *What If Obamacare Loses?*, U.S. NEWS & WORLD REP. (March 9, 2015, 4:20 PM), http://www.usnews.com/opinion/economic-intelligence/2015/03/09/an-anti-obamacare-ruling-in-king-v-burwell-could-trigger-death-spirals [https://perma.unl.edu/TST5-GVK4].

74. *Id.*

75. Nicholas Bagley & David K. Jones, *No Good Options: Picking up the Pieces After* King v. Burwell, 125 YALE L.J. FORUM 13, 22 (2015).

76. *Id.* at 16–18.

77. *Id.* at 20–21.

care uncertain, as many Republicans vow to repeal as much of it as they can, though parts may survive such appeal.[78]

IV. *CHEVRON* AND "STEP ZERO"

A. The *Chevron* Doctrine

Because the IRS and Treasury had already issued regulations that interpreted the provisions at issue in *Burwell* and purported to resolve the question at issue, it was clear throughout the *Burwell* litigation that a crucial issue would be whether and how to apply the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[79] *Chevron* is perhaps the most important case in American administrative law and essentially sets out a roadmap, albeit a confusing one, of whether and when courts should defer to a federal agency's interpretation of a statute. Before *Chevron*, courts would defer to agency interpretation of a statute when Congress expressly delegated the authority to an agency's power to fill a gap in a statute.[80] Otherwise, agency interpretation, "while not controlling," could, under the standard set forth in *Skidmore* v. *Swift & Co.*, guide a court based on the agency's "body of experience and informed judgment," but this is a mere power to persuade, and the persuasiveness "will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ."[81]

Chevron's great change was to declare that congressional delegation of interpretative authority to agencies could be implicit and derived from mere ambiguity in the statute, a fictional delegation granting agencies the power to interpret statutes they oversee where there are gaps in those statues.[82] As the Court later explained in *National Cable & Telecommunication Ass'n v. Brand X Internet Services*, "'[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.' . . . *Chev-*

78. Kelsey Snell & Mike DeBonis, *Why Obamacare is Unlikely to Die a Swift Death,* WASH. POST (Jan. 2, 2017), https://www.washingtonpost.com/powerpost/gops-obamacare-repeal-will-require-more-chisel-than-hammer/2017/01/02/3fbec222-d127-11e6-9cb0-54ab630851e8_story.html?utm_term=.17d66c2648f1 [https://perma.unl.edu/7DW7-SDCY]

79. 467 U.S. 837 (1984).

80. The Court in *Chevron* noted:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 843–44.

81. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

82. Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1, 14 (2015).

ron's premise is that it is for agencies, not courts, to fill statutory gaps."[83]

The Court in *Chevron* noted specific policy reasons for courts to defer to agencies, such as the greater political accountability of agencies and the Executive Branch,[84] as well as the expertise and experience of agencies charged with administering the statute at issue.[85] Legal scholars have proposed other rationales for such deference, including political responsiveness, deliberative rationality, and national uniformity.[86]

The *Chevron* opinion, however, rests on the legal fiction that Congress, by leaving a gap or ambiguity in a statute, evinces an intent to delegate to the administering agency the power to fill in that gap.[87] The Court in *Chevron* did not find any evidence of this implied delegation either in that case or generally, but merely created it out of whole cloth, even though Justice Stevens, the author of the opinion, seemingly did not intend to create a novel legal fiction but rather to "merely [confirm] existing law."[88] As both Justices Breyer and Scalia have discussed in separate law review articles, this implication of delegation is an important legal fiction newly created by the Supreme Court in *Chevron*.[89]

Chevron requires a two-step process to determine whether courts should defer to agency interpretation of law. In Step One, the court first must ask whether the law itself is ambiguous, or in the words of

83. 545 U.S. 967, 981–82 (2005) (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996)).

84. *Chevron,* 467 U.S. at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices. . . .").

85. *Id.* ("Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.").

86. *See,* e.g., Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1275 (2008) (arguing that the delegation fiction should be "pierced" and that deference should be based on "five core factors: (1) congressionally delegated authority, (2) agency expertise, (3) political responsiveness and accountability, (4) deliberative rationality, and (5) national uniformity").

87. *Chevron,* 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 91 (2000) ("Insofar as *Chevron* instructs lower courts to treat a statutory ambiguity as an implicit delegation of interpretive authority, it is widely understood to rest on a fiction.").

88. Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 743 (2007).

89. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Scalia, *supra* note 1, at 516.

the case, "whether Congress has directly spoken to the precise question at issue."[90] If the statue is unambiguous, then no deference by the court to an agency interpretation is necessary, since "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[91] Courts must reject agency interpretations "which are contrary to clear congressional intent."[92] During their Step One analyses, courts should employ "traditional tools of statutory construction" to determine whether the statute is ambiguous.[93] If a court finds that the statute is ambiguous in *Chevron* Step One, then the court should proceeds to Step Two of *Chevron*, where "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[94]

It would be difficult to overstate the importance of *Chevron*, as it dramatically realigned the respective powers of the courts and federal agencies. While traditionally judges had understood, pursuant to *Marbury v. Madison*,[95] that the job of the judiciary was to state what the law was, *Chevron* asserted that, where the law is embodied in a statute supervised by a federal agency, often instead it is the agency's job to state what the law means, and the courts should merely defer to the agency's interpretation of the law. *Marbury* had asserted the right of the courts not only to invalidate acts of Congress as unconstitutional, but also to assert some judicial control over the Executive Branch by enforcing certain statutory obligations of administrative officials.[96] The *Marbury* vision of courts stating "what the law is" in the face of contrary agency interpretation had already been significantly diminished pre-*Chevron* by numerous court decisions granting agencies lesser forms of deference.[97] Still, as Cass Sunstein noted, *Chev-*

90. *Chevron*, 467 U.S. at 842.

91. *Id.* at 842–43.

92. *Id.* at 843 n.9.

93. *Id.* ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). There is significant debate about "which ambiguities should signal a delegation of lawmaking authority." Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1006 (2015).

94. *Chevron*, 467 U.S. at 843.

95. 5 U.S. (1 Cranch) 137 (1803).

96. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 3–4 (1983).

97. In his seminal article which suggested the contours of deference to agency interpretation and which was written immediately before *Chevron*, Monaghan stated, "Marshall's grand conception of judicial autonomy in law declaration" in *Marbury* "seemed to condemn the now entrenched practice of judicial deference to administrative construction of law." *Id.* at 2.

ron "has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state."[98]

Chevron's reach can be seen in the fact that it has been cited by more than 15,000 other cases and by more than 11,000 law review and journal articles since its 1984 publication.[99] *Chevron* has been called the "third most cited Supreme Court case in history,"[100] "the most cited (and perhaps debated) administrative law decision of all time," [101] and "one of the most important constitutional law decisions in history."[102] *Chevron* is so often discussed in the legal academy that there is even a small cottage industry of scholarship referring to *Chevron* scholarship as a "cottage industry."[103]

B. *Chevron* Step Zero

There are important limits to the *Chevron* doctrine, though those limits are fuzzy and ill-defined. The Supreme Court has lurched about, trying to determine limitations of *Chevron*, where despite gaps in legislation agencies sought to fill, courts should not defer to agency interpretation and so should not apply the two steps of *Chevron*. The question of whether the *Chevron* framework should even apply comes before the two steps of *Chevron*, and so the determination of this issue is referred to as "*Chevron* Step Zero," a term invented by Merrill and Hickman,[104] made popular by an influential law review article by Sunstein,[105] and even adopted informally by the Court it-

98. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990).

99. A WestlawNext search on April 28, 2017 indicated that *Chevron* has been cited by 15,072 cases and 11,003 law review and journal articles. Naturally, more citing cases and law review articles are added on a regular basis.

100. Gluck, *supra* note 34, at 341.

101. WILLIAM F. FUNK & RICHARD H. SEAMON, EXAMPLES & EXPLANATIONS: ADMINISTRATIVE LAW 275 (4th ed. 2012).

102. Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997).

103. 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, 1123 (2008); Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 924 (2008); Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1, 2 (1996); Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 340 (2007); Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 495 (2014); David A. Schlesinger, Comment, Chevron *Unlatined: The Inapplicability of the Canon Noscitur A Sociis Under Prong One of the* Chevron *Framework*, 5 N.Y.U. ENVTL. L.J. 638, 647 (1996).

104. Merrill & Hickman, *supra* note 7, at 836.

105. Sunstein, *supra* note 7. Sunstein acknowledges that he got his "Step Zero" title from Merrill and Hickman. *Id.* at 191, n.19.

self.[106] Merrill and Hickman define Step Zero as "the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo."[107] While many different issues can come into play at Step Zero, "Step Zero analysis tends to focus on two factors: 'whether Congress delegated to the agency power to act with the force of law;' and whether the agency exercised 'such authority in adopting the interpretation at issue.'"[108]

These Step Zero limitations are important for several reasons. Without them, the implicit delegation of gap-filling interpretive powers to administrative agencies would be too broad and would constitute a massive (and unintentional) transfer of power by the courts to those agencies.[109] Also, the Court has concluded that there are circumstances where an administrative agency should not be accorded *Chevron* deference but still some weight should be given to its interpretation of a statute it administers, leading to the survival of the lesser *Skidmore* deference.[110] Given that there are multiple deference possibilities, some test must determine which to accord an agency determination, and that determination is another aspect of Step Zero.[111]

Some Step Zero tests seem firmly grounded in the Constitution or congressional intent. For example, one court noted as a Step Zero test: "whether the agency is *Chevron*-qualified, meaning whether the agency involved is the agency charged with administering the statute . . . ."[112] *Chevron* applies only to statutes that the agency involved administers.[113] According to the Supreme Court, "A precondition to deference under *Chevron* is a congressional delegation of administrative authority."[114] Thus, agencies are not owed *Chevron* deference for

106. Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 761 (2014) (noting multiple uses of this term by various justices and citing Transcript of Oral Argument at 6, 8, 11, 26, and 28); City of Arlington, Tex. V. FCC, 133 S. Ct. 1863 (2013).

107. Merrill & Hickman, *supra* note 7, at 836.

108. Christine Kexel Chabot, *Selling* Chevron, 67 ADMIN. L. REV. 481, 494 (2015) (quoting Kristen E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 537 (2014) (discussing United States v. Mead Corp., 533 U.S. 218, 226-27 (2001))).

109. Merrill, *supra* note 106, at 759 ("Taken literally, the idea that any gap or ambiguity is an implied delegation to an agency would represent a massive expansion of administrative authority.").

110. *Mead*, 533 U.S. at 234.

111. Merrill, *supra* note 106, at 759.

112. Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Ser., 58 F. Supp. 3d 1191, 1228 & n.9 (D.N.M. 2014).

113. The court in *Chevron* began its analysis stating, "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

114. Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990).

statutes of general applicability that happen to affect them. For example, because the Food and Drug Administration (FDA) is governed by the APA, rather than administering it, courts should not defer to the FDA's interpretation of the APA.[115] Other aspects of the Step Zero test are based on a fictional exception to the *Chevron* fiction that, in certain cases, the courts should assume, even without mention by Congress, that Congress would not want courts to render *Chevron* deference to agency interpretation even when faced with gaps or ambiguities in the statute.[116] Of course, creating fictional exceptions to the *Chevron* fiction is a recipe for even more confusion and makes it harder for courts to focus on the underlying policy considerations that should guide their decisions rather than on the fictions themselves.

If, under Step Zero, agency determinations are not given *Chevron* deference, then pursuant to *Christensen v. Harris County*[117] and *United States v. Mead Corp.*,[118] they should still generally be eligible for *Skidmore* deference, a much weaker form of deference.[119] Under *Skidmore*, the deference courts give an agency determination "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."[120] In other words, under *Chevron* deference, agencies are primary arbiters of the meaning of statutes they administer, so long as their interpretations are reasonable. Under *Skidmore* deference, agencies may persuade courts with their reasoning, process, and consistency, but courts retain the ability to overrule even reasonable agency decisions where courts are not persuaded by the agencies.

Professor Strauss perhaps best explained the difference between *Skidmore* and *Chevron* deference by explaining that *Chevron* deference provides agencies with a defined space in which they are free to interpret and reinterpret statutes, as their policies change, and courts should not interfere with those changing policy reinterpretations.[121] *Skidmore*, on the other hand, merely adds weight to the agency's in-

115. Sunstein, *supra* note 7, 208–09.
116. The fictional basis of the Step Zero exceptions to *Chevron* will be discussed in section VIII.A.
117. Christensen v. Harris Cty., 529 U.S. 576, 586 (2000).
118. United States v. Mead Corp. 533 U.S. 218 (2001).
119. *Id.* at 234; *Christensen*, 529 U.S. at 1663. *See also* Michael P. Healy, *Reconciling* Chevron*,* Mead*, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1 (2011) (discussing the review standards used by courts for agency determinations).
120. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
121. Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and* Skidmore *Weight*," 112 COLUM. L. REV. 1143, 1145 (2012) ("'*Chevron* space' denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority.").

terpretation, and the amount of weight to be added is dependent on how well the agency conducts and justifies that interpretation.[122]

Step Zero analyses can be broken down to process concerns and substance concerns. Regarding process concerns, the court asks whether Congress authorized and the agency employed sufficiently formal process in reaching its interpretation of the statute to justify *Chevron* deference. Regarding substance concerns, the court queries whether the substance of the agency's interpretation determination indicates that Congress would not have intended courts to defer to that agency's interpretation in this issue, regardless of the sufficiency and formality of the agency's process in finalizing that interpretation.

Justice Breyer's decision for the Court in *Barnhart v. Walton* gave some indication of the factors, some substantive, some procedural, to be examined in a court's Step Zero analysis.

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[123]

In Breyer's list, careful consideration by the agency is a process concern, and one which the agency can deal with through its actions. The "interstitial nature of the legal question, the related expertise of the Agency, the importance of the question, the complexity of that administration"[124] are all substance questions, such that agencies cannot fix problems even through additional process.

First to Step Zero process questions. One issue the court has wrestled with is how the formality of an agency's decision making affects the deference to be given to its statutory interpretation. In *Christensen*, the Court found that "an interpretation contained in an opinion letter[,] . . . like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do[es] not warrant *Chevron*-style deference," unlike "for example, a formal adjudication or notice-and-comment rulemaking . . . ."[125] Formal rulemaking and notice-and-comment rulemaking are, of course, the two primary methods the APA mandates agencies employ to issue regulations.[126] *Christensen* seemed to indicate that informal

122. *Id.* ("'Skidmore [sic] weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority.").

123. Barnhart v. Walton, 535 U.S. 212, 222 (2002).

124. *Id.*

125. Christensen v. Harris Cty., 529 U.S. 576, 586 (2000).

126. Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1424 & n. 44 (2012).

agency interpretations should not be granted *Chevron* deference, leaving the courts to apply mere *Skidmore* deference standards,[127] but the court soon threw such a bright-line rule into disarray.

In *Mead*, the Court also seemed to aver that "force of law" might depend on the formality of process the agency used or was required by statute to use, such that when Congress "provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement" with force of law, "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law . . . ."[128] However, as if to muddy the waters, the court also noted that "as significant as notice-and-comment is in pointing to *Chevron* authority . . . we have sometimes found reasons for *Chevron* deference, even when no such administrative formality was required and none was afforded."[129] The Court cited *NationsBank of N.C., N.A.*, where it upheld *Chevron* deference to an opinion letter of a Senior Deputy Comptroller of the Comptroller of the Currency.[130] So, while "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings" is "a very good indicator of delegation [by Congress] meriting *Chevron* treatment,"[131] it apparently might not be sufficient, and might not even be necessary. Still, in general, "if agencies have been given power to use relatively formal procedures, and if they have exercised that power, they are entitled to *Chevron* deference."[132]

The courts have not been entirely clear as to why the formality of procedure required of and employed by agencies should determine whether to grant *Chevron* deference. One basis is the legal fiction that courts can assume congressional intent to delegate decision making from its decision to require formal procedure by the agency. Sunstein posits that notice-and-comment rulemaking and formal adjudication foster "fairness and deliberation" by "giving people an opportunity to be heard and offering reasoned responses to what people have to say."[133] Using the formality of an agency's decision making at Step Zero forces agencies to decide which they would rather have: a quick, informal decision that would likely not be granted *Chevron* (but likely *Skidmore*) deference and so could be easily overturned by a court, versus a much more labor-intensive decision-making process that must include notice and the right to be heard and the necessity to provide

127. *See Christensen*, 529 U.S. at 588.
128. United States v. Mead Corp., 533 U.S. 218, 230 (2001).
129. *Id.* at 230–31.
130. NationsBank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 263–64 (1995).
131. *Mead*, 533 U.S. at 229.
132. Sunstein, *supra* note 7, at 214.
133. *Id.* at 225.

reasons for the decision, but one which leads to much greater deference by the courts.[134]

Agency determinations can fail at Step Zero regardless of the formality of process the agency is entitled to employ or did in fact employ, however, as there are also substantive aspects of Step Zero completely separate from process concerns. A primary substantive Step Zero exception is that of "major questions," the idea that Congress would not delegate fundamental aspects of law to the supervising agency without being clear that it is doing so. In *Whitman*, the Court stated this almost poetically: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[135]

Justice Breyer explained, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[136] For example, in *FDA v. Brown & Williamson Tobacco Corp.*, the court refused to defer to the FDA's attempt to assert the authority to regulate tobacco.[137] The FDA had interpreted its authorizing statute to give it power to include tobacco among the "drugs" and "devices" it could regulate.[138] The Court rejected this interpretation, finding that Congress's long history of not granting the FDA explicit powers to regulate tobacco constituted evidence that it did not intend to do so. The Court added that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[139] The "major questions" exception to the *Chevron* delegation fiction is itself a fiction, of course, as courts merely determine whether Congress theoretically would have intended such delegation.

As others have noted, the "major question" test at Step Zero is fraught with problems, both theoretical and practical.[140] As should be unsurprising for a fictional exception to the *Chevron* fiction, there are many unresolved issues in the "major questions" element of Step Zero.

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134. *Id.* at 225–26.

135. Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001). Loshin and Nielson state that "despite the voluminous literature on *Chevron*, the elephants-in-mouseholes doctrine has not been identified or taken seriously as a doctrine." Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 21 (2010). In other words, elephants in mouseholes may be the dogs that did not bark.

136. Breyer, *supra* note 89, at 370.

137. 529 U.S. 120 (2000).

138. *Id.* at 126.

139. *Id.* at 160.

140. See Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1919 n.138 (2016) ("The major questions canon has never been invoked to constrain an agency's procedural choices, as opposed to its substantive statutory interpretation, and thus is barely relevant anyway.").

First is the difficulty in defining what questions are major.[141] The rarity of courts finding major questions makes their study difficult, because "like a pickled monster, the rare and freakish major question exception may make a dubious case study."[142] The Court has done little to define or state rules for determining what constitutes a "major question" justifying avoidance of *Chevron* deference.[143] Is the dollar amount at issue determinative? Or is it how large the issue looms in the agency's work, so that what might seem minor to a large agency would be major to a smaller one? Alas, "[a]ttempts to interpret when and how courts will rely upon the major questions line of cases become murky when considering the limited instances when the Court has invoked the doctrine, and the cases whose facts would seemingly present major questions but the courts decline to rely on the doctrine."[144] Sunstein notes that there is no reason that the size of the question should undermine the notion that agencies have more expertise and political accountability than courts, and agencies should be able to apply those attributes as effectively in major questions as in minor ones.[145] Moncrieff argues that the issue should not be whether the question is "major" but rather whether the agency appears to interrupt the status quo and interfere with "ongoing congressional bargaining" in an area where Congress remains "actively interested."[146] Armstrong argues that an important aspect of the "major question" issue is whether the agency is using its delegated interpretive power in a self-interested attempt to increase the size of its own regulatory jurisdiction.[147]

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141. Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 618 (2008) ("[T]here must necessarily be some threshold—some magnitude of importance, or sensitivity, or majorness of policy questions—that triggers nondelegation concerns. But no one actually knows where that threshold lies.").

142. Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2199 (2016).

143. Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 451 (2016) ("Similar to previous decisions relying on the doctrine, the *Burwell* opinion did not explain the bounds of the major questions inquiry, providing little guidance for future applications.").

144. *Id.* at 465.

145. Sunstein, *supra* note 7, at 232 ("At first glance, there is no reason to think that the considerations that animate *Chevron* do not apply to large questions. . . . The agency's expertise is certainly relevant to answering that question. And to the extent that issues of value are involved, it would appear best to permit the resolution of ambiguities to come from a politically accountable actor rather than the courts.").

146. Moncrieff, *supra* note 141, at 621.

147. Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 261 (2004) ("In these concluding paragraphs, the Court rejected the agency's assertion of jurisdiction precisely because it represented an exercise in self-aggrandizement far beyond the scope of authority Congress likely intended to delegate to the agency.").

The "major question" exception to *Chevron* deference has been directly called into question by the Court itself. For example, in *Barnhart v. Walton*, the Court averred that "the importance of the question to administration of the statute" is actually a factor in favor of granting *Chevron* deference, rather than against it.[148] The most major questions would therefore deserve the greatest deference.

In *City of Arlington v. FCC*, the Court faced directly the issue of whether questions of an agency's jurisdiction were necessarily so important (and prone to agency bias) that courts should not defer to an agency's interpretation.[149] The Court seemed to drive a stake into the heart of the "major question" doctrine, stating, "we have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme."[150] While *City of Arlington* specifically concerned agency jurisdiction, its direction to focus exclusively on whether the agency strayed beyond its statutory authority seems to imply that the significance and importance of the question should not determine whether to grant *Chevron* deference.

V. THE APPLICATION OF *CHEVRON* IN *KING V. BURWELL*

A. *Chevron* and the Lead-Up to *King v. Burwell*

Before the Supreme Court heard oral arguments in *King v. Burwell*, it seemed clear that an important issue would be whether and how much deference to grant Treasury and the Internal Revenue Service, which had issued regulations purporting to define the meaning of "Exchange established by the State" to include federal and state exchanges, not just those which states had set up and operated themselves. Treasury and the IRS had followed notice-and-comment procedure to promulgate those rules, likely at least in part to obtain as much deference as possible from any court that would rule on the meaning of those words.[151] The level of deference could well have determined the outcome of the case, and hence the fate of Obamacare, as deferring to the IRS regulations would have upheld the interpretation they contained.

148. Barnhart v. Walton, 535 U.S. 212, 222 (2002). Seidenfeld notes, "If *Mead* is confused, the Supreme Court's later decision in *Barnhart v. Walton* is downright perverse when viewed with a focus on congressional intent. *Barnhart* used factors that the Court had previously identified as relevant under the doctrine of *Skidmore* deference to decide whether *Chevron* applied." Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 280–81 (2011).

149. City of Arlington v. FCC*,* 133 S. Ct. 1863 (2013).

150. *Id.* at 1872.

151. Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 56 (2015).

The lower courts had been mixed in their rulings on whether to defer to the IRS's interpretation of the statute.[152] One district court in Virginia found that plaintiffs should lose at both Step One and Step Two of *Chevron*.[153] The court found that there was no ambiguity in the statute, stating "While on the surface, Plaintiffs' plain meaning interpretation of section 36B has a certain common sense appeal, the lack of any support in the legislative history of the ACA indicates that it is not a viable theory."[154] The district court further found that plaintiffs should lose even if they had made it to *Chevron*'s Step Two, as even if there were ambiguity in the statute, the agency's interpretation was not unreasonable.[155] A D.C. district court found that the statute unambiguously allowed tax subsidies in both federal and state-operated exchanges, stating "In sum, the Court finds that the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges."[156] Because it found no ambiguity in the statute, that district court did not consider whether the IRS's interpretation was reasonable under Step Two.

At the court of appeals stage, the circuits split. The D.C. Circuit found that the plain meaning of the ACA mandated that tax subsidies were available only in state-operated exchanges, not federal exchanges, with no significant legislative history to the contrary.[157] The court stated that "the government offers no textual basis . . . for concluding that a federally-established Exchange is, in fact or legal fiction, established by a state." [158] On the same day, the Fourth Circuit found that the ACA was ambiguous on the crucial issue, noting that the "the defendants have the stronger position, although only slightly."[159] Finding the ACA ambiguous, the court proceeded to *Chevron* Step Two and concluded that the IRS's interpretation of the statute was "sensible," and so should be afforded deference. [160] The court also cast aside the plaintiffs' argument that aspects of the ACA were administered by HHS and therefore the IRS's interpretation should not be granted deference. The court noted that "the relevant

152. In addition to the district court cases described herein, a similar action challenging the validity of tax subsidies was pending in Indiana and survived a motion to dismiss. *See* Indiana v. IRS, 38 F. Supp. 3d 1003 (S.D. Ind. 2014).
153. King v. Sebelius, 997 F. Supp. 2d 415 (E.D. Va. 2014).
154. *Id.* at 431.
155. *Id.* at 432.
156. Halbig v. Sebelius, 27 F. Supp. 3d 1, 25 (D.D.C. 2014).
157. Halbig v. Burwell, 758 F.3d 390, 412 (D.C. Cir. 2014).
158. *Id.* at 402.
159. King v. Burwell, 759 F.3d 358, 369 (4th Cir.), *cert. granted*, 135 S. Ct. 475 (2014).
160. *Id.* at 375 ("It is thus entirely sensible that the IRS would enact the regulations it did, making *Chevron* deference appropriate.").

statutory language is found in 26 U.S.C. § 36B, which is part of the Internal Revenue Code and subject to interpretation by the IRS" and additionally "the Act clearly gives to the IRS authority to resolve ambiguities in 26 U.S.C. § 36B."[161] Before certiorari was granted by the Supreme Court, another district court weighed in, this time in Oklahoma. That court found the DC Circuit's *Halbig* decision convincing and held that, in tax credit cases, there was no "wiggle room" for finding ambiguity because tax subsidies must be stated with "clear and unambiguous language."[162]

Surprisingly, in the hearing before the Supreme Court, *Chevron* arguments received short shrift with two notable exceptions. Justice Kennedy remarked that the size of the issue in dollars of potential tax subsidies indicated that courts rather than the federal agency should make the decision regarding the meaning of the ACA, potentially reviving the "major questions" doctrine.[163] Justice Roberts pointed out a significant pitfall to the government relying on *Chevron* to defend Obamacare, asking if the government relied on *Chevron*, and if "you're right about *Chevron*, that would indicate that a subsequent administration could change that interpretation?" The Solicitor General argued that a subsequent administration "would need a very strong case under step two of the *Chevron* analysis that that was a reasonable judgment in view of the disruptive consequences."[164] The Solicitor General's argument, however, seems to contradict the concept of "*Chevron* space," the idea that a court granting *Chevron* deference to an agency interpretation does not restrict subsequent contradictory agency interpretations.[165] Instead, that argument shows the peril of mandating *Chevron* space for such important issues, as permanently unfettered agency discretion could lead to wildly swinging interpretative changes as presidential administrations change, and such changes would be most problematic in areas that require stability, like health insurance.

B. *King v. Burwell* and *Chevron* Step Zero

In its ruling, the Supreme Court made quick work of the *Chevron* issue. The Court first recited the usual two-step *Chevron* analysis for

161. *Id.*
162. Oklahoma *ex rel.* Pruitt v. Burwell, 51 F. Supp. 3d 1080, 1091 (E.D. Okla. 2014), *appeal held in abeyance*, No. 14-7080, 2014 U.S. App. LEXIS 24498 (10th Cir. Nov. 19, 2014), *cert denied*, No. 14-586, 2015 U.S. LEXIS 773 (Jan. 26, 2015).
163. Kennedy stated, "But it seems to me a drastic step for us to say that the Department of Internal Revenue and its director can make this call way or the other when there are, what, billions of dollars of subsidies involved here? Hundreds of millions?" Transcript of Oral Argument at 74, *King*, 135 S. Ct. 2480 (No. 14-114) [hereinafter *King* Oral Argument].
164. *Id.* at 76.
165. *See generally* Strauss, *supra* note 121.

deferring to agency interpretation in the face of statutory ambiguity, then immediately cited *FDA v. Brown & Williamson* for the proposition that "[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[166] With this, the Court announced that it considered this to be a Step Zero case.

The Court's explanation of why this was a Step Zero "extraordinary case" is itself extraordinarily terse.

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.[167]

In the context of this challenge to Obamacare's tax subsidies, the Court's description of congressional intent is almost a non sequitur and the Court's decision virtually *ipse dixit*. It seems clear that Congress did not contemplate this challenge to the ACA, as even Obamacare's foes took months to notice that they could base a challenge on the text at issue. Justice Breyer, when writing about a different case, stated, "Congressional silence here meant what congressional silence usually means: *not* that Congress intended [the agency] to decide a question of law, but that Congress *never thought about* the question."[168] Most likely, members of Congress assumed that tax subsidies would be available in all states and so had no wish or intent concerning whether this question would be assigned to the IRS or to the courts. Seidenfeld noted, "[T]here are good reasons to believe that Congress was unaware of the potential question regarding tax credits on federally created Exchanges." [169]

From Congress's failure, in its tumultuous passage of the ACA, expressly to assign the authority to determine this specific and in all likelihood unforeseen question, it is difficult to derive the implication that Congress did not wish courts to defer to Treasury's and the IRS's interpretation of the statute. Indeed, the statute includes the type of delegation of rulemaking authority to Treasury that generally leads to *Chevron* deference, as the relevant section of the ACA states that "[t]he [Treasury] Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section . . . ."[170] As the

166. King v. Burwell, 135 S. Ct. 2480 (2015) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
167. *Id.* at 2489 (citations omitted).
168. Breyer, *supra* note 89, at 376.
169. Seidenfeld, *supra* note 51, at 126.
170. 26 U.S.C. § 36B(g) (2012).

Fourth Circuit had noted, "This clear delegation of authority to the IRS relieves us of any possible doubt regarding the propriety of relying on one agency's interpretation of a single piece of a jointly-administered statute." Congress clearly intended to give Treasury the interpretive power to resolve ambiguities in this section of the ACA. There seems to be no basis for the Court's claim that while Congress would want the IRS to resolve ambiguities causing small problems, Congress would want the IRS, and hence Treasury, to be powerless to resolve ambiguities that could cause catastrophic problems.

The cases the Court cites for its discussion provide little support for its conclusion.[171] *Utility Air Regulatory Group v. EPA* concerned a *Chevron* Step Two question (Is the agency's interpretation permissible?) rather than a Step Zero question (Should *Chevron* deference even apply?).[172] In *Utility Air*, the Court was faced with a decision by the EPA to regulate greenhouse gases based on a new reading of the Clean Air Act. The Court found that the EPA's interpretation was not permissible, stating, "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."[173] There, the Court also noted that even the EPA admitted that its new interpretation of a long-standing statute would render that statute "unrecognizable to the Congress that designed it."[174] Merrill explained, "In other words, the Court was engaging in boundary maintenance through an aggressive application of Step Two."[175] The Court in *Utility Air* appears to have found, therefore, that the agency's novel reading of an old statute in a way that it knew Congress would not have recognized was impermissible under *Chevron*'s Step Two, as it was the substance of the interpretation and

171. Cory R. Liu, Chevron's *Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391, 404–05 (2016) (arguing that those cases cited differ from Court's decision in *King* "because they purported to follow the *Chevron* framework while examining the magnitude of the statute's policy implications. By contrast, King addressed the separate question of whether *Chevron* even applied in the first place—the question of *Chevron's* domain or *Chevron* Step Zero.").

172. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014). In *Utility Air*, the Court began its analysis asking, "We first decide whether EPA permissibly interpreted the statute . . . ." *Id.* at 2439; *see also* Emily Hammond, Chevron*'s Generality Principles*, 83 FORDHAM L. REV. 655, 663 (2014) ("It is perhaps curious that the Court announced this interpretation at Step Two, rather than Step One; after all, Step One is primarily directed at determining whether Congress intended to delegate interpretive authority to the agency with regard to the precise question at issue.").

173. *Utility Air,* 134 S. Ct. at 2444 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

174. *Id.*

175. Merrill, *supra* note 106, at 756.

the clash between the agency's interpretation and the structure and design of the statute that rendered it impermissible.[176]

Here, by comparison, the IRS and Treasury were handed a brand-new statute that had been hurriedly crafted by Congress and were given the thankless and inevitable task of creating regulations to fill in and resolve the many gaps and inconsistencies in the legislation. If there was one piece of legislation that Congress should have predicted and expected the federal agencies to have gaps to fill through regulations, it would have been the ACA. But rather than even consider the substance of the IRS's interpretation, the Court decided that the size of the issue prevented the Court from deferring to the IRS's interpretation.

When the Court stated that it was unlikely that Congress would have intended to delegate this decision to the IRS, "which has no expertise in crafting health insurance policy of this sort,"[177] it cited *Gonzales v. Oregon*,[178] but did not seem to follow the analysis used in that case. In *Gonzales*, the Court refused to grant *Chevron* deference to an interpretive rule issued by the Attorney General pursuant to the Controlled Substances Act (CSA).[179] That rule had declared the use of controlled substances to aid suicide is unlawful under the CSA, notwithstanding the permission granted in Oregon's Death with Dignity Act. The Court began its analysis by noting how limited the delegation of authority to the Attorney General was in the CSA, namely that he can "promulgate rules relating only to 'registration' and 'control,' and 'for the efficient execution of his functions' under the statute."[180]

The Court in *Gonzales* compared this limited delegation with more general delegation authority giving "broad power," such as when Congress delegated to the Federal Communications Commission (FCC) the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the [Communications Act of 1934]."[181] This broad delegation of authority to the FCC is almost identical to the ACA's delegation of authority to Treasury, which states, "The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this sec-

176. *Utility Air,* 134 S. Ct. at 2442. *But see* Kevin O. Leske, *Major Questions about the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 (2016) (arguing that *Utility Air* does constitute an application of the "major questions" doctrine).

177. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

178. Gonzales v. Oregon, 546 U.S. 243 (2006).

179. *Id*. at 268 ("Since the Interpretive Rule was not promulgated pursuant to the Attorney General's authority, its interpretation of 'legitimate medical purpose' does not receive *Chevron* deference." (citation omitted)).

180. *Id.* at 245 (citation omitted).

181. *Id.* (quoting 47 U.S.C. § 201(b)).

tion . . . ."[182] The Court in *Gonzales* also noted that this is the language Congress employs precisely when it wants to delegate to an agency broad authority over a statute, saying, "When Congress chooses to delegate a power of this extent, it does so not by referring back to the administrator's functions but by giving authority over the provisions of the statute he is to interpret."[183] While on a facile level, the IRS regulating issues of health insurance appears similar to the Attorney General regulating physician assisted suicide, the two cases are very different in that the CSA strictly limited the Attorney General's interpretive powers, whereas the ACA gives Treasury and the IRS broad powers in the section at issue in this case.

The ACA not only gives Treasury and the IRS powers to prescribe regulations in the section at issue, it also indicates a desire by Congress that Treasury and HHS work together in administering the ACA. For example, the ACA requires the HHS Secretary "in consultation with the Secretary of the Treasury," to establish a program of advance notification of income eligibility and advance payments of subsidies to health care plans.[184] According to the notice of proposed regulations, "The Departments of Health and Human Services and Treasury are working in close coordination to release guidance related to Exchanges, in several phases."[185] As evidence of their close cooperation, the notice states that HHS and Treasury are collaborating on numerous tasks, including "a Request for Comment relating to Exchanges," an "Initial Guidance to States on Exchanges," and "proposed regulations on the application, review, and reporting process for waivers for State innovation."[186]

Treasury and the IRS coordinated the regulation at issue here with HHS regulations, producing definitions of the statutory term "Exchange" that were made consistent by Treasury's regulation cross-referencing the HHS definition of "Exchange" and its inclusion of federally facilitated exchanges.[187] Since the passage of the ACA, Treasury and the IRS have worked cooperatively with HHS to answer many questions left by the ACA.[188] Nor is it unusual for Treasury

182. 26 U.S.C. § 36B(g) (2012).
183. *Gonzales*, 546 U.S. at 265.
184. 42 U.S.C. § 18082 (2012); *see also* 26 U.S.C. § 36B(g)(1) (2012) (requiring Treasury to issue regulations for "coordination of the credit" allowed by § 36B, the "program for advance payment of the credit" administered by HHS).
185. Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,932 (Aug. 17, 2011) (to be codified at 26 C.F.R. pt. 1).
186. *Id.*
187. *See* 26 C.F.R. § 1.36B-1(k) (2014) ("Exchange has the same meaning as in 45 CFR § 155.20.").
188. Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1731 (2014) ("Since the ACA's enactment, Treasury and the IRS have worked with HHS and the Department of Labor (Labor) to draft regulations that, among other things, accommodate religious organizations that object to mandatory con-

and the IRS to work with HHS on health care issues, as they previously did with health coverage requirements under ERISA, "regulations concerning the length of hospital stays for new mothers and their newborn infants" and parity for "mental health and substance abuse disorder benefits provided by group health plans . . . ."[189] However, the Court ignored the role of HHS in working with Treasury and the expertise HHS could provide. As Gluck notes, "[T]he IRS piggybacked off of HHS's interpretation—something the Court never mentions."[190]

The Court also ignored the longstanding policy of granting deference where agencies are handed a new set of laws to supervise and have to make immediate and contemporaneous interpretations of those laws in order to set up the program at issue.[191] As the Court had previously noted, "A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent."[192] Further, the IRS's interpretation of tax issues in the tax code it administers is generally subject to *Chevron* deference.[193]

The Court portrays the Obamacare question as merely whether the IRS or the courts are better able to interpret the underlying statute.[194] However, this portrayal ignores the fact that IRS and Treasury worked with HHS and also that the President has broad oversight over federal agencies.[195] The courts should recognize the

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traceptive coverage; elaborate the extent to which group health plans are precluded from denying coverage to individuals with preexisting health conditions; and identify ways in which health insurance providers may or may not offer incentives for participating in wellness programs.").

189. *Id.* at 1733.

190. Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 94 (2015).

191. Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

192. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) *questioned on other grounds by* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

193. *Mayo Found.*, 131 S. Ct. at 713.

194. Lederman and Dugan note that the regulation at issue in *King v. Burwell* was promulgated by the Treasury Department, not the IRS, and note that "the Supreme Court, Fourth Circuit, and Eastern District of Virginia each referred to it as an 'IRS Rule'" as did plaintiffs, while defendants insisted correctly it is a Treasury regulation. Leandra Lederman & Joseph C. Dugan, King v. Burwell*: What Does It Portend for* Chevron*'s Domain?*, 2015 PEPP. L. REV. 72, 73 & n.7 (2015).

195. Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 564 ("[F]ederal agencies are embedded in some fashion in the executive branch, in ways that create political accountability that is more direct than that of federal courts. Federal agency heads are clearly subject to the political supervision of the President or his "administration" in some fashion. . . .").

President's ability to coordinate the actions of multiple federal agencies working in the same area, a coordination power that in some cases provides some justification for *Chevron* deference.[196] Here, it is reductive and inaccurate to suggest that only the IRS was involved. Worse yet, by bluntly stating that this is no case for the IRS, the Court ignored that the statute in question required Treasury to "prescribe such regulations as may be necessary to carry out the provisions of this section . . . ."[197] And so by tersely insisting that this is not a case for the IRS, the Court reveals the central flaw of Step Zero and its fictional exception to *Chevron* deference, how its fictional nature, ill-defined and unfettered from actual congressional intent, has allowed it to become a rule and doctrine-free zone where courts can, based on little evidence or policy analysis, announce that they should be freed of deferring to the agency's decision.

C. *King v. Burwell* and *Skidmore* Deference

Perhaps the most surprising aspect of the Court's deference decision is that, not only did it deny *Chevron* deference to the IRS's interpretation of the statute, it also utterly failed even to discuss whether deference was owed to the IRS regulations under the *Skidmore* standard. The Court merely announced that "[t]his is not a case for the IRS."[198] The Court thus ignored whether in the absence of *Chevron* deference, *Skidmore* deference should be applied. By failing to discuss *Skidmore* deference, the Court effectively denied *Skidmore* deference, though it did so without stating its rationale.[199] While it had for a time been unclear whether *Skidmore* deference survived the *Chevron* decision, the Court in *Mead* made clear that it did.[200] As noted by Claire Kelly, "*Mead* offered *Skidmore* as the 'no *Chevron*' consolation prize."[201] *Mead* held that even if agency interpretations "do not fall within *Chevron*," that does not "place them outside the pale of any deference whatever."[202] Healy noted, "*Mead* established that *Chevron* review only applies when defined requirements are met and held that

196. Peter M. Shane, Chevron *Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 695 (2014) ("The White House is uniquely positioned atop the executive branch to spot coordination problems among agencies. I thus propose below that *Chevron* deference might sometimes be deployed with a welcoming eye to presidential involvement, but only when problems of coordination arise.").

197. 26 U.S.C. § 36B(g) (2012).

198. King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

199. Chabota, *supra* note 108, at 503.

200. United States v. Mead Corp., 533 U.S. 218, 232–35 (2001).

201. Claire R. Kelly, *The* Brand X *Liberation: Doing Away with* Chevron*'s Second Step as well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 196 (2010) (citation omitted).

202. *Mead*, 533 U.S. at 234.

so-called *Skidmore* deference applies when *Chevron* deference does not apply."[203]

Given that the level of deference courts should grant an agency interpretation under *Skidmore* depends on "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," [204] had the Court applied *Skidmore*, it should likely have found that the IRS's regulation at issue was worthy of at least some deference. While the IRS generally may not have great expertise on health insurance issues, here, the IRS worked closely with HHS and with the White House in crafting a regulatory framework for ACA, as rule drafters at Treasury and the IRS "met regularly with White House officials, who were closely monitoring the drafting of the regulations . . . ."[205] The resulting regulations went through the notice-and-comment procedures. Arguably, the IRS could have done a significantly better job explaining its rationale for these regulations, such as explaining the policy rationale, but it did offer some explanation.[206]

At the very least, the Court could have conducted a *Skidmore* analysis to determine how much, if any, deference to grant the IRS's interpretation. Professor Murphy explained, "*Skidmore* . . . represents a judgment that courts will produce better statutory constructions if they avail themselves of agency 'help' by engaging agency reasoning in a thoughtful manner."[207] Yet, the Court refused to engage agency reasoning in even the most perfunctory manner, but instead seems to have sweepingly decided, in the course of its Step Zero analysis, that the IRS's interpretation was worth no deference whatsoever. The Court seems to have applied Step Zero to *Skidmore* as well as *Chevron* deference, though without discussion. And so, Treasury and the IRS, which worked closely with HHS in setting up the ACA regulatory regime and then conducted a full notice-and-comment procedure for their regulatory decision, were completely ignored by the Court as it made a decision which could break or save Obamacare. Instead, the

203. Healy, *supra* note 119, at 1–2.

204. Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

205. Lisa Rein, *Six Words Might Decide the Fate of Obamacare at the Supreme Court*, WASH. POST (March 1, 2015), http://www.washingtonpost.com/politics/why-six-words-might-hold-the-fate-of-obamacare-before-the-supreme-court/2015/03/01/437c2836-bd39-11e4-b274-e5209a3bc9a9_story.html [https://perma.unl.edu/726S-WW62].

206. Sanders, *supra* note 5, at 1303 ("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.").

207. Richard W. Murphy, *A "New" Counter*-Marbury: *Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1 (2004).

Court made its own way to reach the same conclusion that the IRS and Treasury had, but without deferring to their guidance.[208]

By refusing to defer to the IRS, the Court in essence ignored the entire Executive Branch in making its decision. Because Congress had granted the Secretary of the Treasury rulemaking authority for the tax credit aspect of the ACA, and the Court decided that the IRS was not up to snuff on interpreting tax credit aspects of the ACA, the entire Obama administration was shut out of the final decision for this important aspect of Obama's signature legislation. *Chevron* can be viewed as a mandate to allow the Executive Branch sway in interpreting administrative statutes. *King v. Burwell* may be viewed as an anti-*Chevron*, such that, in important cases and where the Court is unimpressed by the agency delegated to administer the statute, courts can simply ignore the clear congressional delegation of interpretive power to an agency, disregard the agency's interpretation, and substitute the courts' own interpretation at will.

After finding that "we cannot conclude that the phrase 'an Exchange established by the State under [Section 18031]' is unambiguous,"[209] the Court's majority opinion essentially agreed with the IRS's interpretation of that portion of the statute. Scalia in his dissent did not dispute the refusal to grant the IRS deference. Instead, Scalia considered the disputed language of the statute unambiguously to apply only to exchanges established by the states, and not federal exchanges, and so he would not have deferred to the IRS for a completely different reason.[210]

One might think that the Court's refusing to grant the IRS deference, but then reaching the same conclusion as that of Treasury and the IRS, likely makes any defects in its deference analysis relatively harmless in the case itself. And perhaps the terseness of its deference discussion was an attempt to minimize any harm that the analysis might cause. The Court's decision, however, has arguably damaged the functioning of the ACA, given that Congress delegated to the Secretary of the Treasury the power to make regulations regarding tax subsidies and the Court ruled that at least some of Treasury and the IRS's regulations pursuant to that delegation hold no weight with the Court. While the Court's decision was based on the "major question" doctrine, many of the issues involved in such a massive program as the ACA will inevitably require answering questions with huge amounts of money and many insured at issue. Treasury and the IRS could continue to issue regulations pursuant to the ACA's congressional delegation, but each regulation that is aimed at health insurance will have a shadow cast over it, a shadow that working with HHS

208. *King v. Burwell,* 135 S. Ct. 2480, 2496 (2015).
209. *Id.* at 2493 (citation omitted).
210. *Id.* at 2497 (Scalia, J., dissenting).

does not seem to dispel. Congress could itself dispel this shadow by making a clearer expression of delegation of interpretive authority to Treasury and the IRS, but given the notable hostility to the ACA by Republicans and the current make-up of Congress, it is unlikely to engage in this kind of minor fix to make Obamacare function more effectively.

VI. HOW *CHEVRON*'S FICTIONS LEAD TO *CHEVRON*'S CONFUSION

]A. The Fictional Basis of *Chevron*

Many have commented on the fictional nature of the *Chevron* delegation,[211] including several Supreme Court Justices, either during or before their tenure on the court.[212] *Chevron* employs the fiction that

211. Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1876 (2015) ("But it is hard to find anyone who does not consider congressional delegation a fiction."); John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1932 (2015) ("Yet whatever the background legislative understanding about deference and delegation may once have been, it would be facetious for judges today to treat the availability of deference as a question of genuine legislative intent."); Chabota, *supra* note 108, at 507 ("Step One of *Chevron*, however, addresses this concern using a legal fiction. The test assumes Congress intended to grant an agency primary interpretive authority whenever a statute it administers is ambiguous or silent."); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 562 (2009) ("Perhaps, then, it is no wonder that a wide range of legal scholars have characterized the congressional delegation rationale for *Chevron* as a fiction."); Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2009 (2011) ("The framework for judicial review of agency statutory interpretation rests on a legal fiction: Congress intends to delegate interpretive authority to federal agencies whenever it fails to resolve clearly the meaning of statutory language.") Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 613 (2014) ("[I]n contrast to most of the other interpretive rules, there is widespread agreement about *Chevron*'s source: the Court created the doctrine."); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 749 (2002) ("*Chevron* deference revolves around the fiction of a congressional delegation . . . ."); Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2590 (2006) ("In *Chevron*, the Court replaced that case-by-case inquiry with a simple rule, to the effect that delegations of rule-making power implicitly include the power to interpret ambiguities. But as Justices Breyer and Scalia have independently emphasized, this is a legal fiction; usually the legislature has not expressly conferred that power at all.").

212. Breyer, *supra* note 89, at 370 ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction."); Scalia, *supra* note 1, at 517 ("In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."); David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*,

any gap in a statute administered by an agency constitutes an implicit delegation of interpretive power to federal agencies.[213] Then-Professor Kagan and Professor Barron stated, "Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court's view of how best to allocate interpretive authority."[214] Moglin and Pierce describe how *Chevron*'s implicit delegation is a fiction based on fictional policy. They argue not only that the implicit delegation is itself a fiction, but also fictional is the idea that "the politically accountable President will control those policy decisions Congress has declined to make through his control over the agencies."[215] They note dryly, "In this political environment, Congress rarely 'intends' to give the President greater policymaking power."[216] Manning recently asserted, "In no opinion has the Court premised its application of *Chevron* on the existence of legislative history suggesting that Congress preferred or disfavored a deferential approach under a given organic act."[217] Congress could clearly make its intent regarding court deference to agency interpretation but chooses rarely to do so.[218]

The fictional nature of the *Chevron* delegation is hard-wired into the *Chevron* decision itself. First, the Court notes that where Congress has "explicitly left a gap for the agency to fill," then the delega-

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2001 SUP. CT. REV. 201, 224 n.85 (2001) (citing Breyer's observation on the fiction of *Chevron*).

213. Sunstein, *supra* note 7, at 193, 223–28 ("Any reading of congressional instructions on the deference question is inevitably fictive; it is not a matter of finding something actual and concrete."); *see also* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1249 (2007) ("*Chevron* relies on an admittedly fictional presumption that Congress chose an agency rather than the courts to be the primary interpreter of a given statutory scheme."); Seidenfeld, *supra* note 148, at 278 ("By most accounts, Congress does not directly address the question of which institution—agency or court—is authorized to fill gaps or resolve ambiguities in the vast majority of regulatory statutes. In that sense, congressional intent about interpretive primacy is a fiction."); Merrill, *supra* note 106, at 759 ("Even *Chevron*'s most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction."); William R. Andersen, *Against* Chevron*—A Modest Proposal*, 56 ADMIN. L. REV. 957, 963 (2004) ("Few believe, however, there is any actual intentional delegation in these cases—we are dealing instead with a convenient fiction.").

214. Barron & Kagan, *supra* note 212, at 212.

215. Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1212–13 (1990) ("Both premises are fictional in most cases.").

216. *Id.* at 1213.

217. Manning, *supra* note 211, at 1932.

218. Barron & Kagan, *supra* note 212, at 212 ("Although Congress can control applications of *Chevron*, it almost never does so, expressly or otherwise; most notably, in enacting a standard delegation to an agency to make substantive law, Congress says nothing about the standard of judicial review.").

tion of authority is express and clear.[219] "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit," the Court states, and that word "implicit" reveals the fiction of congressional delegation where Congress never explicitly mandated it.[220] Upon finding a gap in the statute, courts should assume that Congress intended to delegate the gap-filling to the agency, even if there is no evidence that such intent exists. Why Congress left the gap is unimportant. Whether Congress intentionally left a gap because it intended the agency to work out the details, or instead because it did not consider the question at issue, or because it was unable to decide the question, courts should act as if Congress intended gaps to signify delegation of interpretive power to agencies, because, the Court notes, "For judicial purposes, it matters not which of these things occurred."[221] With these words, the Court acknowledges the fiction.

As many have argued, the *Chevron* delegation of interpretive power seems to fly directly in the face of the APA. [222] Section 706 of the APA requires "the reviewing court" to "decide all relevant questions of law," and "interpret constitutional and statutory provisions . . . ."[223] Patrick Smith has noted that the APA does not condition its mandate that judges "interpret . . . statutory provision[s]" on whether there exists an agency interpretation.[224] Sunstein agrees, stating, "In terms of the standard sources of law, *Chevron*'s fiction is not at all easy to defend. As noted, the text of the APA appears to contemplate independent review of judgments of law."[225] Sunstein further points out that if Congress, in passing the APA, had wanted it to include anything like *Chevron* deference, surely someone would have stated as much during the extensive debates during the APA's creation.[226]

The *Chevron* decision itself fails even to mention the APA, as if not to puncture the fiction it created.[227] *Chevron* seems to require courts

219. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).
220. *Id.* at 844.
221. *Id.* at 865.
222. *See generally* Patrick J. Smith, Chevron*'s Conflict with the Administrative Procedure Act,* 32 VA. TAX REV. 813 (2013) (arguing that the conflict between *Chevron* and the APA's requirement that courts interpret statutes is unlikely to result in the Supreme Court's overruling *Chevron* but should induce courts to engage in more robust analysis in each *Chevron* step); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, (1998) (arguing *Chevron* appears to violate the APA).
223. 5 U.S.C. § 706 (2012).
224. Smith, *supra* note 222, at 819.
225. Sunstein, *supra* note 211, at 2590.
226. *Id.*
227. In discussing *Chevron*, Sunstein notes, "Strikingly, the Court did not discuss the language or history of the APA." *Id.* at 2586.

to violate the express provisions of the APA in order to mandate deference nowhere discussed in the APA. As Eskridge and Baer state, "Nowhere does the APA suggest that courts are required to defer to agency interpretations of law. If *Chevron* is a revolution, it is one seeking to overturn the APA as well as almost two centuries of constitutional understandings."[228]

Some have argued that *Chevron*'s delegation does not violate the APA because courts following *Chevron* do still interpret the law, but merely do so through the *Chevron* lens, and that deferring to an agency's interpretation constitutes interpretation. Under this argument, "the court *does* interpret the statute de novo; the court just finds that the statute gives the agency the power to make the rule of decision."[229] However, an interpretation that *Chevron* forces on courts seems hardly a free de novo decision by those courts.

Some have argued that, while the *Chevron* delegation may have started as a fiction, because Congress has acquiesced to it, that acquiescence has imbued *Chevron* with an element of genuine congressional intent. For example, Barnett discusses how Congress, in the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank), regarding banking reform, directly addressed *Chevron* versus *Skidmore* deference.[230] Dodd–Frank included an express elimination of *Chevron* deference for the decisions of the Office of the Comptroller of the Currency (OCC) regarding the preemption of state regulation of banks and replaced it with what is essentially *Skidmore* deference.[231] Barnett argues that this express mandate of *Skidmore* deference demonstrates that Congress is aware of *Chevron* deference and that "Dodd-Frank suggests that Congress does in fact have intent as to interpretive primacy, generally accepts judicial deference to agency interpretations and the *Chevmore* regimes, and uses *Chevron* as a background norm when drafting."[232]

The history of Dodd–Frank and the congressional response to the financial crisis of 2008, caused in part by the rogue operations of subprime lenders given freedom from state law by the preemption decisions of the OCC and the Office of Thrift Supervision (OTS), as well as

228. Eskridge & Baer, *supra* note 103 at 1160.

229. Duffy, *supra* note 222, at 198.

230. 12 U.S.C. § 25b(c) (2012).

231. In their review of the OCC's determinations to preempt state law, courts are mandated to "assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." 12 U.S.C. § 25b(b)(5)(A) (2012). This is in essence *Skidmore* deference. Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 VA. L. & BUS. REV. 301, 359 (2012).

232. Barnett, *supra* note 82, at 6–7.

the paucity of other examples of express codification of *Chevron* or *Skidmore* deference standards, arguably demonstrates the opposite, however. By preempting state regulation of federally regulated banks, the federal OCC and OTS stopped states from reining in the excesses and bad lending of those banks and their affiliates.[233] The push-back by states against such aggressive preemption was enormous, with fifty states' attorneys general sending a letter opposing such preemption, and they were joined by state bank regulators and members of Congress,[234] as well as numerous academics[235] and consumer advocates.[236] Rather than demonstrating that Congress uses *Chevron* as a "deference norm" when drafting legislation, Dodd–Frank is a rare example of Congress addressing deference, and so indicates only that Congress can be pushed actively to consider deference standards by dire circumstances and sustained advocacy for a specific deference standard.

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233. *See generally* Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 CHAP. L. REV. 171, 173–74 (2011).

234. Letter from the National Association of Attorneys General (Oct. 6, 2003), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2009/OCC%20Comments100603.pdf [https://perma.unl.edu/2BFH-FBTZ]. Eager & Muckenfuss noted in 2004, "State response to the OCC has been swift and forceful. In comments on the OCC rules, in litigation, and in Congressional oversight hearings, state bank regulators, state attorneys general, groups, and members of Congress have decried the effects of these rules on the dual banking system and federalism and questioned the wisdom and authority of the OCC." Robert C. Eager & C. F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. BANKING INST. 21, 21–24 (2004) (citations omitted).

235. *See, e.g.*, Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 HARV. J.L. & PUB. POL'Y 981 (2006); Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 AM. U. L. REV. 515, 543 (2007); Elizabeth R. Schlitz, *Damning* Watters*: Channeling the Power of Federal Preemption of State Consumer Banking Laws*, 35 FLA. ST. U. L. REV. 893 (2008); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection,* 23 ANN. REV. BANKING & FIN. L. 225, 247–53 (2004).

236. Multiple consumer advocacy groups and advocates also opposed such preemption. *See* Letter to the Office of the Comptroller of the Currency (Oct. 6, 2003), http://www.responsiblelending.org/media-center/press-releases/archives/CRL-OCC-signon100603.pdf [https://perma.unl.edu/HD2J-R8NZ]; Margot Saunders & Alys Cohen, *Federal Regulation of Consumer Credit: The Cause or the Cure for Predatory Lending?* (Harvard University Joint Ctr. for Hous. Stud., Working Paper No. BABC 04-21, March 2004), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/babc_04-21.pdf [https://perma.unl.edu/8VGW-WKE5]; Edmund Mierzwinski, *Preemption of State Consumer Laws: Federal Interference Is a Market Failure,* 6 N.Y. ST. B. ASS'N GOV'T L. & POL'Y J. 6 (2004), http://www.pirg.org/consumer/pdfs/mierzwinskiarticlefinalnysba.pdf [https://perma.unl.edu/B4CB-CUDP].

Empirical work on what drafters of legislation consider regarding delegation doctrine indicates that congressional staffers may be aware of *Chevron*, but that knowledge does not indicate acquiescence that would justify *Chevron*'s fiction. A small study based on interviews with staffers for the Senate Judicial Committee responsible for legislative drafting indicated that, while they may know of the *Chevron* doctrine and other canons of construction, such canons did not loom large in the drafting of legislation.[237]

A larger study found that, while there is a feedback loop on *Chevron* in that many of those staffers responsible for drafting legislation know of the *Chevron* doctrine, that loop is only partial and does not support the fiction that Congress implicitly delegates. Gluck and Bressman surveyed 137 congressional staffers from multiple committees and found that many staffers knew of *Chevron* and the possibility that agencies would fill in the gaps left in statutes, but that this knowledge was only one of several causes of ambiguity in statutes, such as "lack of time," "the complexity of the issue," and "the need for consensus."[238] They note that "most of our respondents told us that their knowledge of *Chevron* does not mean that they intend to delegate whenever ambiguity remains in finalized statutory language. Instead, they told us that, although ambiguity sometimes signals intent to delegate, often it does not, and *Chevron* is not a reason that drafters leave statutes ambiguous."[239] *Chevron*'s primary effect on the staffers seems to be forcing them to think about the level of specificity required in a statute and to push for more specificity when they want an agency to perform in a certain way.[240] Gluck and Bressman conclude, "*Chevron* is a feedback canon that does not well approximate how Congress drafts."[241] In other words, *Chevron* is a mere "judicial construction" and a fiction.[242]

237. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600–01 (2002) ("By and large, however, staffers did not view canons as a central factor in drafting legislation nor did there appear to be any systematic mechanism or practice for anticipating which canons might be applied in construing a particular term in a bill." (citations omitted)).

238. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 997 (2013).

239. *Id.* at 996.

240. *Id.*

241. *Id.*

242. Barron & Kagan, *supra* note 212, at 212.

B. *Chevron*'s Stare Decisis Muddle and the Need for "Sticky Deference"

One reason the Court may have chosen not to defer to agency interpretation in *Burwell* is concern that giving any deference to the IRS's interpretation would leave open the possibility that a new administration could reinterpret the phrase "an Exchange established by the State" and refuse to grant tax subsidies in states with a federally operated exchange.[243] Had the Court applied *Chevron* deference, a later court could grant *Chevron* deference to new, contradictory agency interpretation given the space for reinterpretation that current *Chevron* doctrine mandates.[244]

Chevron created tension between its fictional deference and the principle of stare decisis.[245] Stare decisis regarding statutory interpretation has been considered an especially strong doctrine, described as "super strong stare decisis," with courts locked into previous decisions with the idea that "once a court speaks on a statutory matter, it is up to Congress, in the interest of legislative supremacy, to decide how to react."[246] However, courts could not insist on the binding nature of their own decisions while at the same time deferring to subsequent agency interpretation. Working out the relationship between *Chevron* deference and stare decisis has been vexing, given the fictional nature of *Chevron* deference. If Congress explicitly stated in a statute that courts should defer to agency interpretation of that statute, it would be clear that the agency would still be free to reinterpret that state even after a court had followed a previous interpretation. Subsequent courts would, pursuant to the statute, be required to follow, within reason, subsequent agency reinterpretation.[247]

The effect of stare decisis in the face of subsequent court reinterpretation is not as clear for fictional deference. In the 1990 case *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, involving a longstanding statute, the Interstate Commerce Act, the Court had refused to grant *Chevron* deference to an agency interpretation that would have overturned century-old court doctrine, stating, "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency later

243. Gluck, *supra* note 190, at 71–72 ("Deference to the agency would have meant that a future IRS could have changed the rule at issue in *King*: such a holding would have kept the *King* debate alive, and the ACA's future would have continued to be in doubt.").

244. Strauss, *supra* note 121, at 1145 ("'*Chevron* space' denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority.").

245. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

246. Gluck, *supra* note 211, at 626.

247. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

interpretation of the statute against our prior determination of the statute's meaning."[248] The Court noted that Congress had not overturned its long-standing interpretation and so declined "to revisit it ourselves" despite the new agency interpretation.[249]

In 1996, the Court further buttressed stare decisis against changing agency interpretation in *Neal v. United States*,[250] concerning what deference to grant to the United States Sentencing Commission regarding the method to calculate the weight of LSD. After noting the limits to the Commission's powers and the confusing nature of its statutory interpretation, the Court held that it did not need to determine what deference to afford the Commission because the Commission's interpretation contradicted the Court's previous ruling, and while the Commission may change its interpretation of statute, the Court does "not have the same latitude to forsake prior interpretations of a statute."[251] The Court presented itself as shackled to precedent and unable to respond to changing agency interpretation because, "[w]ere [the Court] to alter [its] statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."[252] Rather than presenting the issue as who should decide, the Court or the agency, the Court presented both as helplessly shackled by stare decisis through a "simple, mandatory rule."[253]

The Court dramatically altered the relationship between *Chevron* deference and stare decisis in the 2005 *Brand X* case.[254] In *Brand X*, the Ninth Circuit had refused to grant *Chevron* deference to agency interpretation, a refusal based on that court's previous contradictory interpretation of the statute at issue and the court's previous decision based on that interpretation.[255] The Ninth Circuit noted that its previous decision had not included a finding of ambiguity and absent such a finding found that no deference need be granted to the agency's change in policy.[256] Under the Ninth Circuit's decision, then, so long as courts do not expressly find a statute ambiguous, their own judicial

248. Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990).
249. *Id.* The holding in *Maislin* was subsequently followed but not extended or clarified by the Court in Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). See discussion of this point in Paul A. Dame, Note, *Stare Decisis,* Chevron*, and* Skidmore*: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 WM. & MARY L. REV. 405, 422 (2002).
250. 516 U.S. 284 (1996).
251. *Id.* at 295.
252. *Id.* at 296.
253. Pierce, *supra* note 102, at 2251.
254. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
255. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1131 (9th Cir. 2003).
256. *Id.* ("Furthermore, while we never explicitly stated in *Portland* that our interpretation of the Act was the only one possible, we never said the relevant provisions of the Act were ambiguous.").

interpretation of that statute would have the effect of freezing the court's interpretation and preventing the agency from later changing it.

In *Brand X*, the Supreme Court turned that argument around and held that because the Court of Appeal had not directly found the statute unambiguous, the agency was still free to reinterpret the statute, and the agency's new reinterpretation could still be awarded *Chevron* deference.[257] The Court held that because "the agency remains the authoritative interpreter (within the limits of reason)" of the statutes it administers, it should remain free to reinterpret that statute even after a court has signed off on the agency's previous interpretation.[258] Only if a court finds the statute unambiguous, and thus not open to agency interpretation on that point, does the court's decision prevent future agency reinterpretation.[259] As Justice Scalia wrote in a later concurring decision, "In cases decided pre-*Brand X*, the Court had no inkling that it must utter the magic words 'ambiguous' or 'unambiguous' in order to (poof!) expand or abridge executive power, and (poof!) enable or disable administrative contradiction of the Supreme Court."[260] As Slocum noted, "Courts attempting to conduct the Brand X [sic] analysis will find daunting the challenges of attempting to determine whether the earlier court asserted that its construction was the only reasonable one and if its discussion was a holding or dicta."[261]

Even providing *Skidmore* deference regarding Obamacare would put the Supreme Court in an awkward situation if a subsequent Republican administration attempted to issue regulations that would forbid tax subsidies in states without a state operated exchange. In the inevitable litigation, the new administration's advocates could trumpet that the Court deferred to the previous administration's interpretation, so why not to the new one? *Skidmore* deference could, theoretically, lead to the same weak stare decisis as *Chevron* deference, and a subsequent court might be swayed by a new interpretation by an agency of an ambiguous statute where the previous judicial determination was based on *Skidmore* deference. The Court seems to have addressed the tension between stare decisis and *Skidmore* defer-

257. *Brand X*, 545 U.S. at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

258. *Id.* at 983.

259. *Id.* at 982.

260. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1846 (2012) (Scalia, J., concurring in part and concurring in the judgment).

261. Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 846 (2010).

ence only in dicta in *Brand X*, stating, "[T]he court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable)."[262] Furthermore, "lower courts appear to have held uniformly that stare decisis trumps an agency interpretation of an unclear statute unless and until the agency issues regulations to the contrary that earn *Chevron* deference."[263]

Academics, however, are not so sure. Hickman and Krueger note that "*Skidmore* deference shares the same tension with stare decisis as C*hevron* previously did," and argue that it might be wise to resort to *Skidmore* deference in the face of conflicting courts of appeals decisions.[264] Professor Galle might go further, having expressed the belief that "it is inevitable that there soon will be a *Brand X* for the *Skidmore* doctrine. Given the disadvantages of complete inflexibility for courts, agencies, and the public, and the sheer doctrinal complexity of determining which of the courts' hundreds of pre-*Chevron* decisions should be subject to *Brand X*, the Supreme Court will face enormous pressure to treat both forms of deference similarly."[265] Others disagree.[266] However, a future ruling that *Skidmore* deference allows agencies to reinterpret Obamacare despite stare decisis would throw the Court's Obamacare decision into question were it to rely on *Skidmore* deference.

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262. *Id.* at 983; *see also* Ryan H. Nelson, *Sexual Orientation Discrimination under Title VII after* Baldwin v. Foxx, 72 WASH. & LEE L. REV. ONLINE 255, 271 (2015) (citing Kenneth A. Manaster, *Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation,* 74 FORDHAM L. REV. 1963, 2006 (2006) ("Accordingly, the Court seems to be acknowledging, albeit in passing, judicial power to articulate 'binding law' on the basis of ambiguous statutes in some cases.")).

263. Nelson, *supra* note 262, at 271.

264. Hickman & Krueger, *supra* note 213, at 1304–05 (2007) ("Likewise, one can imagine that an agency might attempt to resolve a disagreement in the courts of appeals over a particular interpretation question by issuing an official, thoroughly considered but nonbinding notice of its intent to adopt one of the competing, reasonable interpretations. Perhaps the courts would be wise in deferring under *Skidmore* to the agency's application of its expertise in such situations rather than insisting rigidly upon adherence to judicial precedent absent notice-and-comment rulemaking.").

265. Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2001 n.285 (2008).

266. Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L.J. 1, 41–42 (2011) ("In contrast, lesser standards of deference do not demand that a court give up its prerogative to discern the 'best' interpretation of a statute. For example, under *Skidmore* deference, an agency interpretation receives deference only to the extent that it has the 'power to persuade.'"); Slocum, *supra* note 261, at 845 ("It is uncertain, but may be unlikely, that an authoritative agency interpretation that is eligible for *Skidmore*, but not *Chevron*, deference can displace a judicial interpretation that was made in the absence of an agency interpretation.").

Furthermore, if the Court had decided *King v. Burwell* based on *Skidmore* deference, a subsequent court could potentially reach a different decision if it found that *Chevron* deference were warranted. Bressman noted, "*Brand X* concerned a prior judicial interpretation issued in the absence of any agency interpretation, rather than one issued in the presence of an agency interpretation that merits *Skidmore* deference and not *Chevron* deference. But the holding in *Brand X* should apply to the latter as well as the former."[267]

The hazard of any deference, therefore, could be the instability of a "final decision" on Obamacare by the Supreme Court that could be later overturned by agency reinterpretation under a different presidential administration. Where a court rules based on *Chevron* deference, as noted by Strauss, "it decides the case but does not fix statutory meaning."[268] To immunize its decision from subsequent "overruling" by agency reinterpretation that would be entitled to *Chevron* deference, a court would need to find that the terms of the statute are unambiguous, a high bar indeed.[269] This kind of instability would lead to "disruptive consequences," as noted by the Solicitor General during oral argument.[270] Imagine the challenges that insurance companies would face in planning for the future if tax subsidies could suddenly be deemed unavailable in half of the states.

King v. Burwell demonstrates the hazards of directly linking the stare decisis effect of a court's decision with a court's finding (or not) of ambiguity and the deference standard employed by the court. Scalia had noted the flaw this linkage caused when employed on decisions issued by pre-*Brand X* courts unaware of that linkage.[271] Those courts in all likelihood did not realize that they must find a statute unambiguous in order to convey strong stare decisis upon their resulting decision.

This problem survives even among courts that are aware of the *Brand X* linkage of stare decisis with ambiguity, however, as demonstrated by *King v. Burwell*. The Court was confronted with a clearly ambiguous statute, given that the exact text at issue seemed to refer to tax subsidies available in exchanges that states had set up, while the entire model of Obamacare indicated that those tax subsidies must be available in both federal and state exchanges. Under *Brand*

267. Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1467 n.157 (2005).
268. Strauss, *supra* note 121, at 1169.
269. *Id.* at 1172 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").
270. Oral Argument in *King*, *supra* note 163, at 76.
271. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1846 (2012) (Scalia, J., concurring in part and concurring in the judgment).

X, a finding of ambiguity mandates weak stare decisis (for *Chevron* deference), unless a Step Zero escape hatch can be found, but even *Skidmore* deference may cause stare decisis problems. Here, the Court apparently recognized the need for strong stare decisis to decide this question permanently so that Obamacare's stability could be assured, at least as to this issue. And so, the Court avoided deference entirely, and appeared compelled to ignore the valuable work that the IRS and Treasury had done in creating their regulation and analyzed the result de novo.

The linkage of strong stare decisis to unambiguity appears to be more a product of blindly following the fiction of delegation rather than a policy-based decision by courts. It would seem regularly beneficial to delink stare decisis and findings of ambiguity. Just as the *Chevron* doctrine needs an escape hatch so that courts can ignore its fictional deference where necessary, so too should there be an escape hatch for the evisceration of stare decisis for courts' decisions based on *Chevron*, where necessary. For example, courts should recognize the importance of creating a stable and permanent interpretation for ambiguous statutory language where the needs for permanence outweigh the benefits of providing *Chevron* space for reinterpretation.[272]

At the same time, a court might, in its decision, benefit by deferring to the agency's interpretation, based on the agency's expertise and effort in creating that interpretation. Courts recognizing this dilemma (finding that ambiguity threatens stare decisis for the resulting opinion) should be given a way to discern ambiguity, defer to agency interpretation in resolving that ambiguity, and still announce that the needs of permanence require that their decisions be given agency-proof stare decisis effect, rendering them immune to subsequent agency reinterpretation. *King v. Burwell* is such a case where the Court should have been able to render a permanent and agency-proof decision on the issue of tax subsidies, while still deferring to the considered interpretation offered by the IRS and Treasury, because Obamacare and the national health insurance system would be severely weakened by a Supreme Court decision that invited great and contradictory reinterpretations of this provision by subsequent administrations.

Skidmore deference leads to something very like this result but is dependent on finding a Step Zero escape hatch. It makes more sense to think of the policy behind different stare decisis regimes separately from the deference fictions so that the stare decisis results are not determined by the deference fictions unintended for that purpose. What is needed, therefore, is a form of "sticky deference," deference

272. This is not the same issue as whether there is a "major question," as the need for permanence may arise in smaller and larger questions.

that a court announces will have a stare decisis effect able to withstand changing agency interpretation despite a finding of ambiguity and one-time deference to agency interpretation. Once a court announces that it intends its decision to have sticky deference, agencies would no longer be free to reinterpret the ambiguous language at issue and the court's decision would be binding unless overruled by a higher court or overturned by Congress.

There are hazards to sticky deference, of course, and perhaps it should be used sparingly. Courts, if given the power to bind agencies to the courts' decisions, could well over-use that power, and so eviscerate the utility of *Chevron*'s mandate giving primacy in certain circumstances to agency over court interpretation. However, courts are free to do that already, using Step Zero, as the Court did in *King v. Burwell*, to avoid deference and agency reinterpretation altogether. Sticky deference would lead to the same result without the play-acting of finding a Step Zero rationale for strong stare decisis and would force courts to deal with the policy rationales for the stare decisis effect of their decisions directly while still deferring to agency interpretation where appropriate.

Sticky deference would work for stare decisis much like Step Zero should for *Chevron*. Where strong policy arguments dictate that the fiction of *Chevron* deference should give way, Step Zero allows courts to ignore the mandates of *Chevron* deference. Similarly, where strong policy arguments indicate that, even in the face of *Chevron* deference, future fictional deference should give way, courts should be free to insist on strong stare decisis for their decisions, and their decisions should be respected by future courts despite *Chevron*. A better understanding of legal fictions would help courts understand how to distinguish between an actual congressional delegation of interpretative power to agencies, which must be respected, and fictional *Chevron* delegation, thus allowing courts to craft distinct rules for each type of delegation

VII. LEGAL FICTIONS: THEIR FORGOTTEN HISTORY AND MISUNDERSTOOD USE

A. The History and Evolution of Legal Fiction

Chevron is built on interlocking legal fictions, even though legal fictions are little studied these days and the Supreme Court has shown little evidence that it has applied sufficient understanding of how legal fictions should operate in the construction and application of

Chevron fictions. Legal fictions, the "white lies" of the legal world,[273] have had a long and controversial existence, going back at least to Ancient Rome.[274] While Blackstone defended them in the 1760s, Bentham excoriated them in the late eighteenth and early nineteenth centuries.[275] Bentham is the most famous and likely the most vehement critic of legal fiction.[276] However, he was far from first and has hardly been alone in his condemnation. In 1656, in the *Examen Legum Angliae*, or *The Laws of England Examined by Scripture, Antiquity, and Reason*, an unnamed author averred "that all manner of pleadings and proceedings, both in law and equity, are stuffed with falsehood and lies."[277]

Perhaps as often as they have been attacked, legal fictions have also long been defended, not only for their utility but also for their intellectual delight. In 1841, one author rhapsodized, "To us . . . it is always a matter of extreme delight and refreshment to turn to those exquisite fictions which both adorn and simplify our law—mingling utility with sweetness, and tending to the noblest end to which poetry can devote itself—namely, to benefit mankind and render them happy."[278]

Legal fictions were a hot topic among legal scholars, especially in the nineteenth century, and then again in the 1920s and '30s.[279] They were actively discussed by such eminent legal scholars as Maine beginning in the 1860s, John Gray in 1909, and Roscoe Pound in the 1920s; C. K. Ogden and Lon. L. Fuller argued about Bentham, Vaih-

273. LON L. FULLER, LEGAL FICTIONS 5 (1967) (quoting VON IHERING, GEIST DES ROMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG 305 (6th ed. 1924)).

274. Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 COLUM. L. REV. 681, 690 (1951).

275. Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 5 (1990) ("Bentham was at one end of the spectrum in regard to the legal fiction. Not surprisingly, Sir William Blackstone was at the other. Blackstone came to the defense of the legal fiction in several passages of the *Commentaries*.") For Blackstone's discussion of legal fiction, see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 38 n.205 (1996).

276. Bentham's sharp and unrelenting criticism of legal fictions are scattered in many of his writings. For a history and excellent discussion of his vivid criticism of legal fiction and its relationship with his views of fiction in general, see Nomi Maya Stolzenberg, *Bentham's Theory of Legal Fictions—A "Curious Double Language,"* 11 CARDOZO STUD. L. & LITERATURE 223, 226–28 (1999).

277. Quoted in Oliver R. Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth?,* 7 HARV. L. REV. 249, 250 (1893).

278. *Legal Fictions*, 9 MONTHLY L. MAG. 172, 173 (1841).

279. Harmon, *supra* note 275, at 1, 11 ("The legal fiction did not remain a hot topic on the jurisprudential agenda throughout the nineteenth century. For some reason, interest cooled down until the 1920's when Roscoe Pound, John Chipman Gray, and Lon Fuller rekindled the dormant fires that Bentham had once so vigorously poked and prodded.").

inger, and legal fictions in the 1930s.[280] Fuller's noted series of articles on legal fictions, published in the 1930s, constituted the culmination of that era's fascination with the topic and is still considered the foremost authority on legal fictions.[281] Perhaps because Fuller's treatment of legal fictions seemed so complete and magisterial, scholarly interest in legal fictions dropped like a stone, as "interest in [legal fictions] withered and died, and virtually fell off the vine."[282]

Though there were sporadic explorations of the topic of legal fictions after Fuller's great work, the subject lay mostly fallow until fairly recently. For decades, writing about legal fictions seemed almost to require explaining or even apologizing for their continued existence because they are not currently held in high esteem, and one legal scholar stated that "the accusation of using a 'legal fiction' may have overtaken 'formalist' as the most ubiquitous and ill-defined of jurisprudential condemnations."[283] While the Supreme Court has increased its references to "legal fiction" starting in the 1970s, that increase appears to be most prevalent in concurring and dissenting opinions, indicating that the term is used to "indicate increased ambivalence about the defensibility of legal justification in general and certain justifications in particular."[284] In other words, the Supreme Court may employ legal fictions, but when it directly refers to legal fictions, one might assume that use typically is or implies criticism.[285]

In 1986, Soifer noted, "There is a widespread, albeit somewhat vague idea that Lon Fuller wrote quite intelligently about legal fictions a long time ago, but few in America seriously grapple with the

280. Maine discussed legal fiction in *Ancient Law*, as did Gray in *The Nature and Sources of Law*; Pound did as well in *Interpretations of Legal History*. *See* SIR HENRY SUMNER MAINE, ANCIENT LAW (1906); JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 30–38 (1909); ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 130–34 (1923). C.K. Ogden revived interest in Bentham's treatment of fiction in *Bentham's Theory of Fictions*. *See* C. K. OGDEN, BENTHAM'S THEORY OF FICTIONS (1932). Lon L. Fuller criticized Bentham's attacks on legal fictions in his important series of articles on legal fictions published in the 1930s and collected in FULLER, *supra* note 273.

281. L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363 (1930) (Part I in a three-part series); L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 513 (1931) (Part II); L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 877 (1931) (Part III). These three articles were collected in "only slightly altered form" according to the author and with a new introduction in FULLER, *supra* note 273.

282. Harmon, *supra* note 275, at 1.

283. Frederick Schauer, *Legal Fictions Revisited*, *in* LEGAL FICTIONS IN THEORY AND PRACTICE 113 (Maksymilian Del Mar & William Twining eds., 2015).

284. Karen Petroski, *Legal Fictions and the Limits of Legal Language*, *in* LEGAL FICTIONS IN THEORY AND PRACTICE, *supra* note 283, at 144–45.

285. *Id.*

use and abuse of legal fictions."[286] As if having to defend his interest in them, Soifer added that "a powerful claim can be made that legal fictions attract little attention today precisely because they so dominate American law. Post-realist lawyers, scholars, and judges concede that legal fictions are the tools of our legal trade."[287] In 1990, Harmon asked, almost plaintively, about legal fictions, "Why would anyone want to write, or read for that matter, an article about a formerly hot topic? For historical insight perhaps."[288]

Since 1980, however, we have seen a dramatic increase in interest about and reinvigoration of the topic of legal fiction.[289] Legal fictions have been extensively discussed in articles on the legal determination of death,[290] taxes,[291] grand jury independence,[292] Native American legal history,[293] law as specialized language,[294] slavery,[295] copyright law,[296] diplomatic protection,[297] immigration law,[298] corporations,[299]

286. Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 872 (1986) (citations omitted).
287. *Id.* at 876.
288. Harmon, *supra* note 275, at 1.
289. *See, e.g.*, R.A. Samek, *Fictions and the Law*, 31 U. TORONTO L.J. 290 (1981); Kenneth Campbell, *Fuller on Legal Fictions*, 2 LAW & PHIL. 339 (1983); Soifer, *supra* note 286, at 871; Bruce Ziff, *The Rule Against Multiple Fictions*, 25 ALTA. L. REV. 160 (1987); J.H. BAKER, *Legal Fictions*, *in* THE LAW'S TWO BODIES 33 (2001).
290. R. Alta Charo, *Dusk, Dawn, and Defining Death: Legal Classifications and Biological Categories*, *in* THE DEFINITION OF DEATH 277 (Stuart J. Youngner, Robert M. Arnold & Renie Schapiro eds., 1999); Seema K Shah, Robert D Truog & Franklin G Miller, *Death and Legal Fictions*, 37 J. MED. ETHICS 719, 719 (2011); Seema K. Shah, *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, 48 U. MICH. J.L. REFORM 301, 322 (2015); Seema K. Shah & Franklin G. Miller, *Can We Handle the Truth? Legal Fictions in the Determination of Death*, 36 AM. J.L. & MED. 540, 561 (2010); Robert D. Truog, *Defining Death: Getting it Wrong for All the Right Reasons*, 93 TEX. L. REV. 1885, 1910 (2015).
291. John A. Miller, *Liars Should Have Good Memories: Legal Fictions and the Tax Code*, 64 U. COLO. L. REV. 1 (1993); *see also* Dana R. Irwin, *Removing the Scaffolding: The QTIP Provisions and the Ownership Fiction*, 84 NEB. L. REV. 571, 586 (2005) (discussing the ownership fiction); Walter C. Cliff & Benjamin J. Cohen, *Collateral Fictions and Section 482*, 36 TAX LAW. 37, 37 (1982) (examining "the extent to which legal fiction should govern the tax consequences of transactions" and the criteria to establish collateral fictions).
292. Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 33–55, (2004).
293. Hope M. Babcock, *The Stories We Tell, and Have Told, About Tribal Sovereignty: Legal Fictions at Their Most Pernicious*, 55 VILL. L. REV. 803 (2010); Jen Camden & Kathryn E. Fort, *"Channeling Thought": The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77 (2009).
294. Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501 (2015).
295. CHRISTINA ACCOMANDO, "THE REGULATIONS OF ROBBERS" (2001).
296. Alina Ng Boyte, *The Conceits of Our Legal Imagination: Legal Fictions and the Concept of Deemed Authorship*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 707 (2014).
297. Annemarieke Vermeer-Künzli, *As If: The Legal Fiction in Diplomatic Protection*, 18 EUR. J. INT'L L. 37 (2007).

and capital punishment for those with an intellectual disability.[300] In addition, legal fiction itself has recently been the primary subject of significant scholarly work, covering legal fictions both historical[301] and modern.[302] In 2015, as if to demonstrate the renewed interest in legal fictions, an entire book of articles by a wide variety of international scholars was published, all focusing on different aspects of legal fictions.[303]

The intellectual history of legal fictions can be told by how scholars answer the following primary questions: (1) What is the definition and nature of a legal fiction? (2) When and in what forms are legal fictions generally useful or dangerous and how and why? (3) Why do they persist in the modern era and should they?

A crucial area of dispute regarding the definition of legal fictions is whether the fact created or asserted must necessarily be false or, alternatively, might be true or at least possible. Fictions should be distinguished between those which assert no falsehood, such as the Roman *fictio*, which merely asserted in essence, "Treat X as if it were Y," and those that permit blatant, undisclosed falsehoods, such as English common law procedural fictions that allowed litigants to plead false facts that were treated as conclusively true. One must distinguish between open and honest fictions, the fictive nature of which is clear in their use, and concealed and dishonest fictions that hide the true facts and so evade review.

Any study of legal fictions should note which such fictions merely cure deficiencies in procedure, jurisdiction, or remedies, and which fictions make or change substantive law.[304] A procedural fiction is one

298. Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of the Legal Fiction in Immigration Law,* 11 CARDOZO L. REV. 51 (1989).

299. Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 781–82 (2005).

300. Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After* Penry v. Johnson, 35 AKRON L. REV. 327 (2002).

301. Ian MacLean, *Legal Fictions and Fictional Entities in Renaissance Jurisprudence*, 20 J. LEGAL. HIST. 1 (1999); Eben Moglen, *Legal Fictions and Common Law Legal Theory: Some Historical Reflections*, 10 TEL AVIV U. STUD. L. 33 (1990).

302. Nancy Knauer, *Legal Fictions and Juristic Truth,* 23 ST. THOMAS L. REV. 1 (2010); Peter Smith, *New Legal Fictions*, 95 GEO. L.J. 1435 (2007).

303. Schauer, *supra* note 283. This volume incorporated a collection of four articles previously published in the 2013 edition of the International Journal of Law in Context, a translation of a Hans Kelsen article from 1919, as well as an additional thirteen articles.

304. Jeremiah Smith, *Surviving Fictions*, 27 YALE L.J. 147, 154 (1917) ("In the past there have been two principal reasons for employment of fictions in law. First. To cure deficiencies in the law of procedure. Second. To conceal the fact that judges, by their decisions, are making or changing the substantive law.").

that treats a false or unproven allegation as fact for a procedural purpose, such as using a conclusive presumption to establish a fact necessary for a claim.[305] A remedial fiction is one used not to prove the underlying claim but rather to allow courts access to remedies that might be unavailable but for the fiction. Many equitable remedies, such as constructive trusts, constructive liens, quasi-contract, developed through legal fiction.[306] Jurisdictional fictions are those that allow a court to expand its jurisdiction while purporting to respect its jurisdictional limits. Other times, they are used to establish which courts could have jurisdiction for interests that have no exact physical location. Substantive fictions, which became more common in the nineteenth century, "move beyond fictions as mere pleading mechanisms . . . to recognize substantive doctrines based on fictions," such as implied contracts and the constructive delivery of gifts.[307] Obviously, there is much overlap between these aspects, as procedural fictions often serve to expand the limits of jurisdiction or remedial powers.[308]

There have likely been legal fictions as long as there have been lawyers. Legal fictions were common in Roman law, and the fictions employed there served as an inspiration and justification for their subsequent use in English common law and European law. Roman law required extensive use of legal fiction to function because Roman statutory law was very difficult to change and so required numerous work-arounds to amend law as societal and legal needs changed. Roman customary law had been codified in the Twelve Tablets in 451 B.C.E., at the insistence of plebeians who wanted the protection of written law.[309] Significant legislative change proved difficult. From the fifth to first centuries B.C.E., statutes could be passed by Roman assemblies, but those had to be called by magistrates. Such statutes additionally required approval by the Senate. As noted by Phillipson, "Given this structure, it is not surprising that the assemblies did not serve as the chief innovators during most of the Republic."[310] Civil Roman law was therefore characterized by rigid forms and narrow outlines, and legal fictions were used to adapt the rigid formulas to changing circumstances. "The concept of *fictio iuris* was understood

305. See FULLER, *supra* note 273, at 40–42 for a discussion of conclusive presumptions as fictions.

306. Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993, 1029 (2008).

307. Note, *Lessons from Abroad: Mathematical, Poetic, and Literary Fictions in the Law*, 115 HARV. L. REV. 2228, 2233 (2002).

308. Harmon, *supra* note 275, at 2 ("A procedural legal fiction . . . was usually employed to enlarge jurisdiction. Procedural legal fictions could also be used to extend substantive remedies.").

309. Louis J. Sirico, Jr., *The Federalist and the Lessons of Rome*, 75 MISS. L.J. 431 (2006).

310. *See* Donald E. Phillipson, *Development of the Roman Law of Debt Security*, 20 STAN. L. REV. 1230, 1231 (1968).

as a powerful instrument for the transformation and adaptation of the Ius Civile to new situations . . . ."[311]

Roman legal fictions were often created by a praetor, who acted as an administrator in the Roman judicial process. Roman legal actions had two stages, with the first being a hearing in front of a praetor to determine whether some aspect of Roman civil law was at issue and how such issue should be settled. Then, a trial was conducted by an iudex, a qualified layperson, with directions from the praetor.[312] Praetors found themselves faced with claimants who, though they seemed to have worthy claims, could not sue within the narrow confines of Roman statutory law, and so praetors created legal fictions stipulating that, contrary to the actual facts, the claimants satisfied the requirements of Roman law. Creating these legal fictions allowed praetors and the fictions they created "to aid, supplement, or correct *ius civile*."[313]

Roman law, while filled with legal fictions, was at least fairly transparent in its use, in that the Roman fictions were obvious from the grammar employed. Roman legal fictions typically did not require misstatements of fact, but rather allowed for judgments that were based on "assumptions contrary to fact" with the assumptions clearly marked as such.[314] Roman law had originally been created for use by and between Romans, creating unfairness and difficulty in disputes involving noncitizens.[315] Aliens could be treated as if they were citizens without anyone stating explicitly that they were so, however, with the fiction that they were to be treated as if they were citizens.[316] Birks notes the use of legal fiction allowed Roman law to change with the times, while still purporting merely to interpret the Twelve Tables.

Roman law was highly influential in the creation of civil law in Europe during the Middle Ages. A generation of legal scholars in the twelfth century, the Glossators, made great efforts to reconstruct Justinian's Code and to complete a full gloss of it, attempting to resolve its apparent contradictions. The Glossators attempted to clarify the use of the Roman *fictio* and how their use compared to mere presump-

311. Raymundo Gama, *Presumptions and Fictions: A Collingwoodian Approach*, *in* LEGAL FICTIONS IN THEORY AND PRACTICE, *supra* note 283.

312. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539, 1540 (1995).

313. Clifford Ando, *Fact, Fiction, and Social Reality in Roman Law*, *in* LEGAL FICTIONS IN THEORY AND PRACTICE, *supra* note 283, at 315.

314. Raphael Demos, *Legal Fictions*, 34 INT. J. ETHICS, no. 1, 1923, at 37, 39.

315. Simeon Baldwin, *A Legal Fiction with Its Wings Clipped*, 41 AM. L. REV. 38, 38 (1907).

316. Peter Birks, *Fictions Ancient and Modern*, *in* THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 86 (Neil MacCormick & Peter Birks eds., 1986).

tions.[317] The next great generation of Medieval jurists, the Commentators, sought to apply and adapt Roman law to their current situation, and so fill out their law.[318] One of the greatest of these was Bartolus de Sasoferrato, who helped create the modern conception of a corporation from the legal fiction that there was an entity distinct from the people who had created the entity, an idea he applied to the university. Bartolus argued that, while some claimed that the whole of the university differs not from the sum of its parts, "according to legal fiction they err. For a university represents a person, which is different than the scholars, or its members."[319] Legal fictions, therefore, are at the heart of the modern conception of the corporation.

As English common law developed, jurists often found the need to resort to legal fictions for the same reason Roman praetors had: to allow legal change while at the same time purporting to respect the unbending rules of old.[320] Judges used legal fiction to expand and adapt the use of hidebound procedures and also to change English substantive law. While the Roman praetors used legal fictions to circumvent the code contained in the Twelve Tablets, English judges used legal fictions to circumvent the precept that they did not make law, but rather merely discovered preexisting law that had long existed in custom or in nature.[321]

While modern law students may think of the English common law as judge-made law, the conception at the time of Blackstone was quite different. The common law was supposedly not the product of judicial decision, but rather the legal embodiment of English custom from time immemorial. Unlike statutory law, which gains its authority from that of its enactors, common law was thought to exist as an ancient and virtually unchangeable set of rules and "their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage . . . ."[322] In his influential *Commentaries*, Blackstone asserted, "[J]udges do not pretend to make a new law, but

317. Gama, *supra* note 311, at 350.

318. *Id.*

319. BARTOLUS OF SASSOFERATO, *Commentary on Dig. 48.19.16.10* (1653), *quoted in* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 781 (2005).

320. Knauer, *supra* note 302, at 13 ("According to Blackstone, judges and lawyers were 'obliged' to resort to fictions because otherwise the law was static.").

321. Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 774 (2004) ("Law was understood to preexist the act of judicial decision, and that was so even when the law was unwritten. To a considerable extent the law was understood to exist in custom, while others thought the law was also to be found in human and legal reason.").

322. 1 WILLIAM BLACKSTONE, COMMENTARIES *64.

to vindicate the old one from misrepresentation."[323] Maitland called this notion "[t]he legal fiction of the perfection of the English Common Law, the supposition that there is somewhere a code of perfect law, by means of which an English judge may supplement the statutes . . . ."[324] Blackstone even asserted the superiority of the unwritten common law over acts of Parliament, as if to further freeze the development of English law.[325]

Of course, this ancient, unchangeable common law presented problems for the English jurist similar to those faced by the praetor caused by the virtually unchangeable ancient Roman statutes. In both systems, legal fictions provided workarounds for fixed but no longer functional law.

The legal fictions of English law were far less transparent than Roman legal fictions in ways that caused too-little-remarked damage. Baker noted that, while legal fictions were useful to develop law, they did so in a surreptitious way, as legal fiction "works off the record, without overt legal reasoning, and therefore suppresses principle."[326] While a Roman fiction may require a praetor to treat a litigant as if he were a Roman citizen, though he is not, no actual misstatement of fact need be made and the fiction is obvious in the grammar of the form of action. English legal fiction, however, abounded in misstatement of fact, however, as it "appeared as a statement of fact; its fictitious character . . . [was] apparent only to the initiate."[327] Birks explained the difference between the Roman and English forms of legal fiction by stating, "[F]ictions behind a form of action are concealed falsehood. . . . On the other hand fictions in the form of action are neither concealed nor dishonest. . . . English pleading fictions are of the former kind, Roman of the latter."[328]

How unbelievable legal fictions could be in England and still be used can be seen in the famous legal fiction employed by the eminent Lord Mansfield when faced with a lawsuit brought by a British citizen against the governor of the Mediterranean island of Minorca, then under British Rule.[329] Fabrigas, the plaintiff and a resident of Mi-

323. *Id.* at *69.
324. Frederic William Maitland, 1 THE COLLECTED PAPERS OF FREDRIC WILLIAM MAITLAND 4 (H.L.A. Fisher ed., 1911), http://lf-oll.s3.amazonaws.com/titles/871/0242-01_Bk.pdf [https://perma.unl.edu/C5GT-ZJG2].
325. "[A]ll the perplexed questions . . . (which have sometimes disgraced the English, as well as other courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament[.]" Blackstone, *supra* note 322, at 10, *quoted in* Mark Carter, *'Blackstoned' Again: Common Law Liberties, the Canadian Constitution, and the Principles of Fundamental Justice*, 13 TEX. WESLEYAN L. REV. 343, 349–50 (2007).
326. Baker, *supra* note 289, at 55.
327. FULLER, *supra* note 273, at 36
328. Birks, *supra* note 316, at 86.
329. Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.).

norca, was imprisoned by Mostyn, the governor of Minorca and then exiled from the island. Fabrigas sued in a London court of common pleas and received a jury award in the astounding amount of 3000 pounds. Fabrigas had sued in England because suing in Minorca required the governor's permission, a permission unlikely to be extended as the governor himself was the defendant.[330] Mostyn appealed, based on the valid argument that the trial court's jurisdiction extended only to cases brought by London residents.[331]

To obtain jurisdiction by the King's Court, Fabrigas had alleged that Mostyn attacked him "at Minorca, (to wit) at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap . . . ."[332] Fabrigas needed both the truth and the fiction about where he had been attacked and imprisoned, because had he claimed only an assault and imprisonment in London, Mostyn could easily have disproved the claims, while if he alleged only Minorcan assault and imprisonment, there would be no jurisdiction.

Lord Mansfield upheld the use of this absurd fiction to provide jurisdiction, noting that otherwise the plaintiff would have no access to justice, and further explained how the plaintiff could rely on contradictory truth and legal fiction: "[W]hen it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose."[333]

English legal fictions, by their lack of transparency, allowed a dangerous evasion of appellate review, given that such appellate review was at the time typically restricted to the official legal record, which normally omitted and therefore concealed the legal fictions employed. Professor Daniel Klerman has theorized that this evasion of review was actually the purpose of many early English legal fictions, as lower courts eager to expand their jurisdiction used legal fictions to assert jurisdiction over the case or the person.[334] Because pre-Modern English courts depended on fee income, their jurists were motivated to expand their jurisdiction in order to obtain more cases and, accordingly, income. Legal fictions were thus deployed to claim that an event had occurred within the jurisdictional boundaries of the court,

330. Mansfield noted the unfairness of the governor's power, stating, "[T]o lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained." *Id.* at 1029.

331. Schauer, *supra* note 283, at 122.

332. *Mostyn*, 96 Eng. Rep. at 1022.

333. *Id.* at 1032.

334. Daniel Klerman, Legal Fictions and Appellate Review 2 (May 16, 2016) (unpublished manuscript).

or that the defendant had been arrested and bailed within such jurisdiction, thus giving the court jurisdiction.[335] This effort to increase their jurisdiction and hence their fees while evading appellate review explains the explosion of legal fiction in pre-Modern England, Klerman argues, and also explains why so many legal fictions benefit plaintiffs, who could typically choose their jurisdiction.[336]

B. The Evolving Definition of "Legal Fiction"

Since the Middle Ages, scholars have struggled to define "legal fiction," with some emphasizing its form and relation to truth or falsehood and others emphasizing its function. Harmon notes, "What is a legal fiction? None of the participants in the historical debate could agree. The problem was one of scope: what should be included in the definition."[337] A great difficulty in defining legal fictions comes from their ubiquity, how many different areas of law they permeate, and what different forms they take in those different areas.

While the Romans made extensive use of legal fictions, we have little record of Roman theoretical discussion of them. Our knowledge of the full extent of the use of legal fiction in Roman is limited by how little treatment of legal fiction in Roman civil procedure survives from antiquity.[338] Ando notes that Gaius, after discussing a specific legal fiction, made "clearly unsystematic remarks" about "fictions of another kind," but "provide[d] at best an ostensive definition." [339] Olivier argued, "It may therefore be deduced that Gaius understood by the legal fiction the incontestable, consciously false assumption of certain facts as the basis for a new action or rule of law. The same meaning can be deduced from a number of Digest texts." [340]

In their effort to explicate Roman law, Medieval jurists turned to the task of defining "legal fiction." Cinus of Pistoia (1270–1336) distinguished fiction from presumption by stating "*fictio est in re certa contraria veritati pro veritate assumptio*," labeling a fiction as the assumption to be true that which is known to be false.[341] Bartolus further noted that legal fictions are those assumptions made by law for specific legal consequence.[342] His disciple, Baldus, defined legal fiction as follows: "[F]iction is an assumption contrary to truth in a mat-

335. *Id.*
336. *Id.* at 9.
337. Harmon, *supra* note 275, at 2.
338. Ando, *supra* note 313, at 296 (noting that "only one extended treatment of fictions as foundational to Roman civil procedure is known to have been written in classical antiquity, namely, that occurring in the fourth book of Gaius's *Institutes*," and even that is missing a crucial page introducing the topic of fictions).
339. *Id.* at 297.
340. Pierre J.J. Olivier, Legal Fictions in Practice and Legal Science 9 (1975).
341. Gama, *supra* note 311, at 352.
342. *Id.* (attributing this to Bartolus and Baldo, Bartolus's disciple).

ter known with certainty; and it is to be noted that wherever something can be said properly to be asserted, or properly to exist, there is truth; and wherever something cannot be said properly to be asserted, or properly to exist, there is fiction."[343] With this definition, Baldus rooted legal fiction in the necessity of falsehood, or at least lack of known truth. This represented a turning away from the actual use of fictions in Roman law, which displayed their fictional nature in the language used and is perhaps unsurprising, because the setting of the Roman fictions, directions from the praetor to a iudex, were no longer extant, and so little discussion by the Romans on the theory and understanding of their use of legal fictions had survived.

Jeremy Bentham, the staunchest critic of legal fictions, provided a functional definition of legal fiction as a "wilful falsehood, having for its object the stealing of legislative power, by and for hands, which could not, or durst not, openly claim it—and, but for the delusion thus produced, could not exercise it."[344] Elsewhere, he provided a less savage definition focused on form, stating that for fiction "in the sense in which it is used by lawyers, understand a false assertion of the privileged kind, and which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true."[345]

Maine famously defined legal fictions by what he believed was their function rather than by their form. He stated, "I . . . employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."[346] As will be discussed further, Maine thought that legal fictions were more useful in primitive legal systems, though their necessity would decline with the historical development of the law, and his definition of legal fiction fit what he considered should be their appropriately declining use. [347]

In his classic treatise on legal fiction, Lon Fuller devoted an entire chapter to the topic, "What Is a Legal Fiction?" He noted that one must distinguish between a legal fiction and a lie by that fact that a lie is typically intended to deceive, while a legal fiction is not, though the fiction "may, perhaps, be held accountable as accomplice in a process of deception, but not as principal."[348] Fuller, in what is considered the

343. MacLean, *supra* note 301, at 1, 4.
344. JEREMY BENTHAM, *Preface Intended for the Second Edition of* THE FRAGMENT OF GOVERNMENT, *in* A COMMENT ON THE COMMENTARIES AND A FRAGMENT OF GOVERNMENT 509 (J.H. Burns & H.L.A. Hart eds., 1977).
345. JEREMY BENTHAM, CONSTITUTIONAL CODE XII, *quoted in* OGDEN, *supra* note 280, at cxvi.
346. MAINE, *supra* note 280, at 21–22.
347. Gerard N. Magliocca, *The Constitution Can Do No Wrong*, 2012 U. ILL. L. REV. 723, 728.
348. FULLER, *supra* note 273, at 7.

"now classic"[349] definition, defined a legal fiction as either "(1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."[350] Fuller recognized that his definition contains "two entirely discordant elements," both requiring falsity, but one focused on the user's consciousness of falsity, the other one the usefulness of that falsity.[351] And he cabins in his definition his beliefs about when fictions should be used: when they are useful, and when those involved understand their falsity and hence the fictive nature of their use.[352]

While Fuller's definition is oft-cited, it does not seem to recognize the practical use of legal fictions even where the party employing them knows that the matter asserted is or could well be true. A party may rely on an evidentiary legal fiction for something that the party knows is in fact true or probably true, where doing so would be easier and more certain than attempting to prove the purported fact.[353] For the same reason, a court would normally allow the use of many evidentiary fictions such as conclusive presumptions to speed a trial, even if the court knew or suspected that the assertion so presumed was in fact true.[354] The fact that a litigant may deploy a legal fiction or a court accept a fiction to establish legal authority for something that they know is or may well be true does not negate the existence or alter the fictional nature of the legal fiction.

A more modern view of legal fictions, therefore, should treat fiction as an "as if" proposition that does not depend on whether the assumption is literally true or false.[355] Instead, legal fictions merely treat a matter as true regardless of its truth or falsity. Ian MacLean avoids the issue of the actual or likely falsity of the presented proposition by defining legal fiction in the starkest formulistic terms. "Legal fiction is an operation which could summarily be expressed as follows: 'ex-

349. Knauer, *supra* note 302, at 5.

350. FULLER, *supra* note 273, at 9.

351. *Id.*

352. *Id.* at 10 ("A fiction becomes wholly safe only when it is used with a complete consciousness of its falsity.").

353. Campbell, *supra* note 289, at 343 ("There will be no need to call witnesses, produce documents, and so on.").

354. *Id.*

355. For a more robust discussion on "as if" propositions and their far-reaching importance in many areas of science, law, and other human intellectual endeavors, see H. VAIHINGER, THE PHILOSOPHY OF "AS IF" (C.K. Ogden trans., 1924). Altman argued that Vaihinger saw the dangers as well as utility in "As If" thinking: "Vaihinger notes that many disciplines, including law, rely on fictions—or acting 'as if' something known to be false were true. He saw that it is a nearly universal human tendency, in order to acquire the benefit of those fictions with a minimum of psychological stress, actually to come to believe them. This process Vaihinger called an ideational shift from fiction to dogma." Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 301 n.13 (1990).

tend to B a rule of law which applies to A by saying "B shall be deemed to be A.'"[356] This definition falls short, however, in that many legal fictions do not result in applying the same rule of law to B as to A. A constructive trust created by the court's equitable powers, for example, is treated so differently from an actual trust, that the rules governing it are addressed in the *Restatement of Restitution* rather than the *Restatement of Trusts*.[357] The usefulness of the constructive trust lies not in its direct extension of rules of trusts to constructive trusts but rather its analogizing constructive trusts to express trusts.[358]

Lind, by comparison, takes issue with the idea that legal fiction necessarily concerns an untruth, calling this the "falsehood tradition."[359] He argues, instead, that legal fictions are primarily statements that are true inside of the "linguistic journal systems within they originate and are used" but "would be a false proposition if asserted under different techniques of usage in a belief system or realm of reality other than law (e.g. everyday reality) . . . ."[360] As an example, Lind takes the legal fiction "the corporation is a person." Lind asserts that this is a correct statement within the law because "the term 'person' includes corporations within its extension."[361] Lind calls this interplay between the use of legal fictions in their "corrective background" and the extralegal meaning the same words would connote in a nonlegal system the "intersystemic conflict thesis" of legal fictions.[362]

Lind argues that legal fictions function effectively if applied within their legal context, so long as they "work satisfactorily as propositional claims of legal truth without harming or upsetting any accepted meanings or truths with which they collide."[363] However, even Lind's definition of legal fiction overstates the importance of falseness to a legal fiction, in that it requires that the fiction be false if stated in some nonlegal usage, and so does not adequately describe the legal fictions that happen to be true or those that fix some legal truth that

356. MacLean, *supra* note 301, at 1.

357. RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. e (AM. LAW INST. 2003) ("Except as a constructive trust establishes an express trust or arises out of an express trust or an attempt to create an express trust, the rules applicable to constructive trusts are not dealt with in this Restatement. These rules are more broadly dealt with in the Restatement of Restitution.").

358. Emily Sherwin, *Unjust Enrichment and Creditors*, 27 REV. LITIG. 141 (2007) ("Constructive trusts originated in equity courts, based on an analogy to express trusts in which one party holds title to property for the benefit of another.").

359. Douglas Lind, *The Pragmatic Value of Legal Fictions, in* LEGAL FICTIONS IN THEORY AND PRACTICE, *supra* note 283, at 101.

360. *Id.* at 93.

361. *Id.* at 94.

362. Lind, *supra* note 359, at 99.

363. *Id.* at 94.

is neither true nor false outside the confines of the law, as will be discussed.

The connection between legal fiction and falsity seems most tenuous when such fictions are applied to situations where the actual facts are in some way unknowable or are, to the extent they exist, the product of the legal fiction rather than the disproof of the legal fiction. For example, some consider brain death, the "irreversible cessation of all functions of the entire brain," to be a legal fiction, because it does not directly and necessarily correspond to complete death, when the heart stops beating and the body grows cold.[364] However, the concept of brain death is a legal construct, one that permits the legal harvesting of organs, rather than a biological concept, and so "brain death" if legally true cannot be said to be actually false.

The requirement of falsity also creates an inherent contradiction for legal fictions, in that to be successfully employed, according to Fuller, legal fictions should be used with full knowledge of their falsity, but when they are used on a wide-spread basis with all understanding their falsity, their use no longer feels like the assertion of a counterfactual claim but rather the application of well-known legal doctrine. For example, constructive notice had long been thought a legal fiction, useful in cases where one even without actual notice should be deemed to have notice.[365] However, the widespread use and acceptance of this fiction has rendered it, in some eyes, non-fictional, a mere legal premise. As noted by Karen Petroski, for basic constructive knowledge doctrine,

> [N]otions that were once considered fictions have been so thoroughly absorbed into legal practice and discourse that they have become just another way of establishing the premises for a legal conclusion. Since this type of legal premise does not depend on the presentation of evidence in the traditional sense, it does not displace or conflict with the establishment of factual premises for a legal conclusion.[366]

This reclassification of constructive notice, however, ignores that legal fictions have, since Roman times, been used as a "means of establishing the premises for a legal conclusion" without presenting the evidence otherwise necessary for that legal conclusion. The Roman *fictio* of treating noncitizens as if they were citizens, for example, made proof of their citizenship irrelevant and in no way displaces or contradicts other factual elements involved in the dispute. And Nancy J. Knauer, another modern scholar of legal fictions, readily asserts that constructive trusts are a legal fiction, even though they too have

364. Shah, *supra* note 290, at 302.

365. Karen Petroski, *Fictions of Omniscience*, 103 KY. L.J. 477, 514 (2014–15) ("At one time, commentators had no hesitation in describing constructive notice doctrines as 'fictions.'") (quoting VEPA P. SARATHI, V.K. VARADACHARI'S LEGAL FICTIONS 30, 33, 83 (2d ed. 2012)).

366. *Id.* at 514.

been thoroughly absorbed into modern law, both statutory and judge-made.[367]

Even Fuller, who is universally cited as linking legal fiction inextricably to falsity, demonstrates that legal fiction should not require the assertion of a falsehood. In his discussion of conclusive presumptions, which he labels fictions, Fuller admits that the presumed fact might well be true. "Conceivably, the presumed fact may be present in reality in a case where the party to chooses to rely on the conclusive presumption, either because proof would be difficult or because he does not know whether the fact is present or not."[368] Falsity of the presumed fact therefore is not necessary for the legal fiction. Fuller attempts to avoid this problem by arguing, "But the conclusive presumption says, 'The presence of Fact X is conclusive proof of Fact A.' This statement is false, since we know that Fact X does not 'conclusively prove' Fact A."[369]

Fuller's argument fails, however, for two reasons. First, in some individual cases, Fact X could conclusively prove Fact A, and so in those cases the presumption as expressed by Fuller would no longer be false. Second, the conclusive presumption could be reformulated as "If Fact X, then whether Fact A is true or false is inconsequential and the legal result of Fact A will be applied in this case as if Fact A were true." This statement would be true and is a more accurate reflection of the result of the conclusive presumption.

That Fuller should not have required falsity for legal fictions is also demonstrated by a central point of his work on legal fiction. The application of fiction in reasoning is, to Fuller, the use of a "foreign element" as an instrument of thought that is useful to understand and possibly simplify the reasoning process. Fuller leaned heavily in his analysis of legal fiction on the general work on fictions of Hans Vaihinger, the great German theorist of fictions, who compared the use of fiction in thought generally to a mathematician simplifying the solution of an equation by inserting into it some new element, being careful to remove it before reaching the final result. Fuller notes as Vaihinger's precept for applying fictions, "*The fiction must drop out of the final reckoning.*"[370] Fuller gives as an example the legal fiction of a corporation as a person, which is useful so long as "we correct the error by extracting from the word 'person' (when it is applied to corporations) all those qualities and attributes not legally appropriate to the corporation."[371] Fuller even criticizes Vaihinger for asserting that this correction need not be done for legal fictions, noting that doing so

367. Knauer, *supra* note 302, at 12–13.
368. FULLER, *supra* note 273, at 41.
369. *Id*. at 41–42.
370. FULLER, *supra* note 273, at 117 (emphasis in original).
371. *Id.* at 118.

"can only be attributed to [Vaihinger's] lack of an intimate acquaintance with the legal fiction."[372]

If the fiction should be extracted from legal reasoning, however, it seems unnecessary that the faction include a falsity. Just as the mathematician need not care whether the number she inserts into an equation is positive, negative, or imaginary so long as the number is extracted eventually, it should also not matter whether the legal fiction contains a falsity because, true or false, the fiction should be extracted from the reasoning eventually. Vaihinger's "as if" reasoning should not depend on the truth or falsity of the foreign element inserted.

Legal fictions are better understood, then, not as treating falsities as if they were true, but rather as treating matters as if they were true, regardless of whether they are true or false, or whether their truth or falsity is unknown or even unknowable. A better definition of legal fiction would be: Legal fictions are a legal rule that, for a specific purpose, a matter has a set legal effect for which the truth or falsity of that matter is inconsequential. The fiction carries that matter outside of the realm of truth or falsity.

In this way, legal fiction is much like bullshit, as so well explained by philosopher Harry Frankfurt, in his magisterial treatise, *On Bullshit*.[373] Frankfurt wrestles with the relationship between misrepresentation and bullshit, noting that both disrespect the truth, but misrepresentation is made with a conscious flouting of truth, while for bullshit, it matters not whether it tells the truth.[374] Frankfurt says, "It is impossible for someone to lie unless he thinks he knows the truth. Producing bullshit requires no such conviction."[375] Similarly, legal fictions require no conviction about the truth, but merely about the result that the fiction produces. And yet, legal fictions have an important distinction from bullshit, fortunately. Bullshitters do not necessarily intend to deceive, just as those employing legal fictions do not necessarily intend to deceive. However, they have different motives. According to Frankfurt, "The fact about himself that the bullshitter hides . . . is that the truth-values of his statements are of no central interest to him; what we are not to understand is that his intention is neither to report the truth nor to conceal it."[376] Both those employing legal fictions and the bullshitter make statements with disregard for their truth or falsity. However, those using legal fictions should not be hiding their intention to disregard the truth, and in-

372. *Id.* at 117 n.48.

373. HARRY G. FRANKFURT, ON BULLSHIT (2005).

374. *Id*. at 51–52.

375. *Id.* at 55.

376. *Id.*

stead should be employing legally sanctioned and transparent methods to do so.

A great benefit of replacing falsity with "as if" for legal fictions is that it removes any requirement of a specific state of mind of the maker for a legal fiction. A litigant should be able to employ a legal fiction whether the litigant believes the fiction to be true or false, has no opinion on the subject, or mistakenly believes the fiction is true or mistakenly believes it is false. Fuller's requirement of falsity and his assertion that safe fictions are those realized and employed as false would cast legal fictions in doubt when used by those mistaken or ignorant of the truth or falsity of the matter. If this is taken literally, a court would have to determine whether the user of a legal fiction knew it was false before permitting that use.

The *Chevron* fiction, for example, would not function if awareness of falsity were required for its use. Whether Congress intended deference to agency interpretation in any given case may be false, as Congress may not even have considered whether to defer. It may be true, as Congress could be legislating with *Chevron* as a background understanding of what deference regime would apply. But, absent some explicit statement by Congress, demonstrating that truth or falsity could well be difficult or impossible, as it would require determining what intent, if any, Congress had—an enterprise fraught with factual and philosophical obstacles. Legal fictions may be most useful in instances like this, where the actual facts are unknowable but yet a determination still must be made.

C. The Utility and Dangers of Legal Fictions

Just as scholars have argued over the definition of legal fiction, so too, unsurprisingly, they have long disputed the benefits and hazards of legal fiction. The theoretical history of legal fictions and arguments over their utility and harms could be told as a hypothetical argument between Jeremy Bentham and Hans Vaihinger, seminal theoreticians of the proper use of fictions, as continued and expanded upon by their proxies and acolytes, C.K. Ogden and Lon Fuller, respectively.

Bentham, a political reformer, philosopher, and jurist, active in the late-eighteenth and early-nineteenth centuries, was legendary for his attacks on legal fiction. He stated, "In English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness."[377] And: "[T]he pestilential breath of Fiction poisons the sense of every instrument it comes near."[378] Bentham was equally remorseless in his attack on the architects of

377. JEREMY BENTHAM, 1 WORKS 92 (Bowring's ed., 1843), *quoted in* FULLER, *supra* note 273, at 2–3.

378. BENTHAM, *supra* note 344, at 411.

legal fictions, the attorneys who asserted them and the judges who allowed or employed them. Of the lawyers, he said, "Every criminal uses the weapons he is most practiced in the use of; the bull uses his horns, the tiger his claws, the rattle-snake his fangs, the technical lawyer his lies. Unlicensed thieves use pick-lock keys; licensed thieves use fictions."[379]

Bentham's ire at legal fictions was part of his greater antipathy for the English common law system and his desire to remake it through the process of codification.[380] Bentham condemned the common law as being locked in secret language and rules, inaccessible to the layman, and considered himself the "Luther of Jurisprudence" for his efforts to free the law from the mediation of lawyers.[381] As noted by Samek, "Bentham's real complaint surely is that fictions have been misused by the common law."[382]

Bentham's tool for breaking the shackles of common law was codification, by which he envisioned the law could be freed from its usurpation by judges, fully revealed, and regularized. Bentham hoped to replace "the obscurities, inconsistencies, and confusions of the common law, under which no one could be certain of their rights and duties and hence how to conduct themselves" with "clear, consistent, and comprehensible" codification.[383] His codification project helps explain his great contempt for legal fictions. In his efforts to convince others of the value of codification, he needed a symbol for the unfitness, even dishonesty of the common law system. What better symbol could there be than a legal tool that exhibits its untruthfulness in its very name?

Later legal scholars acknowledged Bentham's criticisms but by and large avoided his venom or his calls for the elimination of legal fictions. To defend legal fictions and their widespread use in English common law, scholars developed an ahistorical explanation of their usefulness in that legal regime. Maine focused on the usefulness of legal fiction, at least in more primitive legal systems, to allow judges to change the law without ostensibly doing so. Society progresses more rapidly than law, Maine asserted, and so law requires various

379. OGDEN, *supra* note 280, at cxvii.

380. For an overview of Bentham's extensive advocacy for codification, based on his criticism of the English common law system, see Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World,* 25 YALE J. INT'L L. 435, 476–81 (2000).

381. Robert A. Yale, *Bentham's Fictions: Canon and Idolatry in the Genealogy of Law*, 17 YALE J.L. & HUMAN. 151, 158 (2005).

382. Samek, *supra* note 289, at 298.

383. Philip Schofield, *The Legal and Political Legacy of Jeremy Bentham,* 9 ANN. REV. L. & SOC. SCI. 51, 63 (2013).

tools to catch up with society, namely legal fictions, equity, and legislation.[384]

Other scholars also argued that legal fictions were crucial building blocks of law when in a somewhat primitive state. Sheldon Amos in the 1870s considered legal fictions a valid, if sometimes dangerous tool to be used by judges to change the law while still deferring to the "imaginative reverence for old symbols and formalities . . . ."[385] Amos noted that judges often "deceive themselves by tricks practiced upon their own understandings," but concluded that because the "value of the new rule seems so obvious," but the difficulty of the "bold step of conscious legislation so insuperable, that the self-deception wins its way."[386]

Amos's analysis makes clear why Bentham railed against legal fictions, but in the era before codification, such fictions may have been considered necessary. Where legislation was ineffective but legal changes were still needed, legal fictions allowed judges to make those changes while still paying lip service to the great fiction of the common law that the judges were not "making law" but instead were merely announcing what had always been the law, though misunderstood or misapplied by earlier courts.[387] Gray held that legal fictions become unnecessary "as a system of Law becomes more perfect, and its development is carried on by more scientific methods," as the "better definitions and rules" thus produced render legal fictions dispensable.[388] Because the use of legal fictions need only be temporary, to Gray they "are scaffolding—useful, almost necessary, in construction—but, after the building is erected, serving only to obscure it."[389]

This view that legal fictions were used in primitive legal systems as building blocks of law, only to drop away once the law had been developed, does not seem to match the actual history of their use in the English common law system, as noted by Klerman. "Maine's view that legal fictions belong to the infancy of society, is flatly inconsistent with the chronology of English legal history. The most important legal fictions were invented between the fifteenth and seventeenth centuries. This was several centuries after the establishment of the English legal system . . . ."[390] Rather than being building blocks for primitive law, many English legal fictions developed when the law

384. MAINE, *supra* note 280, at 22.

385. SHELDON AMOS, THE SCIENCE OF LAW 55 (2d ed. 1875).

386. *Id.*

387. Michael Quinn, *Fuller on Legal Fictions: A Benthamic Prospective, in* LEGAL FICTIONS IN THEORY AND PRACTICE, *supra* 283, at 66.

388. GRAY, *supra* note 280, at 35.

389. *Id.*

390. Klerman *supra* note 334, at 8.

was already developed, employed by courts to increase their jurisdiction and hence fee income.[391]

Gray asserted that there were two forms of legal fictions, one being those "historic fictions" that were used in more primitive legal systems as the scaffolding to create new law while ostensibly preserving the forms of the old law.[392] The great danger of this form to Gray, quoting Maine, is that they are "the greatest of obstacles to symmetrical classification" as it is difficult to assess whether to sort the rule according to its actual or ostensible nature.[393] With the development of sophisticated methods of creating law, these historic fictions should fade away.

The other form of legal fiction, Gray asserts, following Jhering, are "dogmatic fictions," ones that do not create new law, but rather sort and arrange existing law and doctrines into easily understood and convenient forms by the fiction that disparate legal attributes are the same so that they can be sorted together.[394] Gray's example of such a dogmatic fiction is asserting as notice of a mortgage both constructive notice from the recording of the notice and actual notice.[395] While actual and constructive notice are very different, Gray notes that it is "convenient to treat the whole subject together," and so the fiction that constructive notice is treated as actual notice is a useful one. Gray warns, however, that while such dogmatic fictions are compatible even with advanced legal systems, "one should always be ready to recognize that the fictions are fictions, and be able to state the real doctrine for which they stand."[396]

Well after Bentham's passing, the United States went through a dramatic process of codification, with congressional approval of the U.S. Code in 1926–1927, extensive state adoptions of similarly arranged codes, and widespread state adoptions of the Uniform Commercial Code. [397] Success in the codification movement in the United States should have solved the problem that legal fictions were designed to circumvent. American courts no longer faced a hidebound and theoretically unchangeable common law, filled with ancient and often unworkable forms of action.

To a significant extent, use of fictions did subside with the increase of codification as "these New Rules . . . made sad havoc with the pleasing allegories that used to charm us of old."[398] Patterson, in 1953,

391. *Id.* at 10.
392. GRAY, *supra* note 280, at 30.
393. *Id.* at 35.
394. *Id.* at 36.
395. *Id.* at 36.
396. *Id.* at 37.
397. Dru Stevenson, *Costs of Codification,* 2014 U. ILL. L. REV. 1129, 1140 (2014).
398. MONTHLY L. MAG., *supra* note 278, at 176.

stated, "Fortunately these cruder fictions have been largely eliminated from modern law."[399] He also noted, "[S]ome [fictions] have limited and temporary usefulness for modern law."[400]

Still, legal fictions survived, justified in large part by philosophical explication of their importance to legal and other thought. If Bentham was the vitriolic voice against legal fictions, then German philosopher Vaihinger has been almost inadvertently their greatest theoretical defender. Vaihinger's masterpiece was his epic philosophical work *The Philosophy of "As If"* and, when it was published in English in 1925, it had an enormous effect on Western thinking about the use of fictions. Vaihinger argued that rational thought requires the constant use of fictional thinking because the human mind cannot apprehend the world directly and instead does so through fictional thinking, creating "mental structures" to apprehend and understand the world. "For Vaihinger, knowledge of the outside world all the way to the Kantian notion of the thing in itself was tainted by fictionalilty because our minds appropriated, assimilated, and constructed reality in a process of falsification."[401] Using fictions to understand difficult puzzles allows us to pass "through ever finer and subtler developments right up to the most difficult and complicated methods."[402]

To Vaihinger, then, fictions are not mere stratagems to deceive or to change hidebound rules. Instead, they are tools to think more clearly and completely than could be attained using only non-fictive thinking. Vaihinger covered legal fictions only briefly in his long volume, but recognized the danger of legal fictions and cautioned that they be used with care, stating, "In legal practice the employment of fiction may lead both to benefits and also the grossest forms of injustice, as when all women were treated as if they were minors."[403] Just as Bentham railed against legal fictions as part of a greater project, the codification of law, so too for Vaihinger legal fictions were only a small part of his own larger enterprise, which for Vaihinger was the defense of fictions as necessary, helpful, and unavoidable mechanisms for human thought generally, to be applied in almost all areas of human endeavor and thought.

The virtual philosophical duel over the use of fictions between Bentham and Vaihinger was carried on by C.K. Ogden and Fuller in the 1930s. Ogden had translated Vaihinger's great work, *The Philosophy of "As If"* in 1925, and then, as if in response, published a collection of

399. EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW § 3.26, at 293 (1953).

400. *Id.* § 4.32, at 416.

401. Gilber Leung, *Illegal Fictions*, *in* JEAN-LUC NANCY, JUSTICE, LEGALITY AND WORLD 84 (Benjamin Hutchens ed., 2012).

402. Vaihinger, *supra* note 355, at 12–13.

403. *Id.* at 148.

Bentham's writings on fictions in 1932.[404] Ogden "snatched Bentham's theory of fictions from the dustbin of history"[405] to claim for Bentham the primacy of his work on fictions, and even argued that the greatest defect in Vaihinger's work, its "failure to lay stress on the linguistic factor in the creation of fictions," had "already been taken by Bentham a century ago."[406]

Fuller, enamored of Vaihinger's philosophy, rejected Bentham's work on fictions in general and legal fictions in particular, as well as Ogden's work bringing forth both Bentham and Vaihinger. Fuller seemed determined to vanquish Bentham and leave the field clear for Vaihinger. Of Bentham's work in fictions, Fuller said, "[T]he neglect which posterity has bestowed on this part of Bentham's writings has been pretty thoroughly deserved. Bentham's turn of mind was inimical to the painstaking reflection demanded by these subjects."[407] Of Bentham on legal fictions, Fuller said, "Bentham nowhere shows more clearly his lack of fundamental insight than in his treatment of legal fictions." Fuller went so far as to criticize even Ogden's translation of Vaihinger, calling it "quite unsatisfactory" and, in his own book on legal fictions, supplying his own.[408] Fuller's esteem for Vaihinger can be seen by the fact that the last third of his great book on legal fictions is essentially an extended book review of Vaihinger's "*As If*."[409]

Vaihinger's theories of fiction clearly cast an immense philosophical shadow, especially on Fuller, in the 1920s and '30s, which, until recently, was the last time that legal scholars seriously and at length considered the topic of legal fiction.[410] To Fuller, the question was not whether legal fictions were beneficial or harmful, but whether they are unavoidable building blocks of legal reasoning, as useful to rational thought as analogies. Fuller stated, "The age of legal fiction is not over. We are not dealing with a topic of antiquarian interest

404. OGDEN, *supra* note 280.

405. Robert A. Yelle, *Bentham's Fictions: Canon and Idolatry in the Genealogy of Law*, 17 YALE J.L. & HUMAN. 151, 161 (2005).

406. OGDEN, *supra* note 280, at xxxii. Stolzenberg notes, "At one extreme, Ogden holds that it anticipates, and indeed surpasses, the linguistic theories of such celebrated twentieth-century philosophers as the German pragmatist, Vaihinger, whose turn-of-the-century *Philosophy of "As If"* ("Die Philosophie des Als Ob") briefly took the academy by storm . . . ." Stolzenberg, *supra* note 276, at 229.

407. L. L. Fuller, *Book Reviews*, 47 HARV. L. REV. 367, 367 (1933) (reviewing OGDEN, *supra* note 280).

408. FULLER, *supra* note 273, at 94 & n.3. Fuller used his own translations from the German, even though he admitted that they are "in some cases rather free." *Id.* at 2, 94 n.3.

409. Lon Fuller, *Is Fiction an Indispensable Instrument of Human Thinking?*, *in* FULLER, *supra* note 273, at 93.

410. Stolzenberg, *supra* note 276, at 231–32 ("Fuller associated this view with the Vaihinger As-If philosophy then in vogue—conveniently neglecting to mention both Bentham's adumbration of similar views, and Ogden's claim that Bentham deserves credit for articulating Vaihinger's theory of fictions better and first.").

merely. We are in contact with a fundamental trait of human reasoning."[411]

To Fuller, legal fictions often work by grouping disparate elements together, such as a corporation and a person, and working with them as though they were somehow one and the same and thus, "We call a corporation a person."[412] This operation, which Fuller borrows from Vaihinger, leads Fuller to an important conclusion that he, unlike Vaihinger,[413] applies to legal fictions. "*The fiction must drop out of the final reckoning.*"[414] This, for Fuller, is the crucial step in employing legal fictions, so significant that he calls the failure to do so "the original sin of human reasoning"[415] namely hypostatization, or the treating of a concept as a distinct reality.[416] A legal fiction is therefore the introduction of an intentional error into a system of legal thinking for a specific, useful purpose, with the intention of dropping it out from the final reckoning, and Fuller asserts that the legal fiction is "harmless" in its intended use within its specific system "because there it is subjected to the corrective effect of other elements in the same process."[417] However, if the legal fiction is wrenched from "its corrective background and given a value on its own account, the inevitable result is intellectual disaster."[418]

Fuller's work on legal fictions is notable not just because it is widely considered the most complete and significant ever completed about legal fictions but also because it provided a permanent justification for the existence and continued use of legal fictions even in the most sophisticated legal systems. For Maine and those who followed him, legal fictions were useful at the primitive states of legal systems, when legislatures were ill-equipped to create new law to address new situations and common law judges felt unfree to "make law." However, with the success of the codification movement, that great dream of Bentham, the need and hence use of legal fictions should have faded away. However, to Fuller, legal fictions were permanently necessary building blocks of legal thought as "a fundamental trait of human reason."[419]

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411. FULLER, *supra* note 273, at 94.
412. *Id.*
413. In one of his few criticisms of Vaihinger, Fuller states, "Vaihinger's own statement that such a correction is not necessary in the case of legal fictions can only be attributed to his lack of an intimate acquaintance with the legal fiction." *Id.* at 117, n.48 (citations omitted).
414. *Id.* at 117.
415. *Id.* at 118.
416. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (1996) (defining "hypostatize" as "to treat or regard (a concept, idea, etc.) as a distinct substance or reality").
417. FULLER, *supra* note 273, at 119.
418. *Id.*
419. *Id.* at 94.

By lodging the justification of legal fiction in Vaihinger's pragmatic philosophy, rather than in Maine's historical explanation, Fuller provided a rationale for the enduring existence of legal fictions and their continued creation. As scholarly interest in this subject died, Fuller's explanation for legal fictions faded to some extent from view, but still there remained the view that legal fictions had been explained and justified, though just how was no longer quite or widely understood.

VIII. REFORMING *CHEVRON*'S FICTIONS

A. Lessons About Legal Fictions and Their Application to the *Chevron* Fiction

After Fuller's great exegesis of legal fiction in the 1930s, scholarly work on this topic largely disappeared. As time passed, the understanding of the function of legal fictions faded, and they seemed as something that was understood once, were not as important as they once were, but still had been justified, though for reasons now not well understood. The lessons learned from studying legal fictions largely faded from view as well. And so when scholars and judges refer to the *Chevron* doctrine as "a legal fiction," it is not clear that they understand the import of that statement or what it tells us about how the *Chevron* doctrine should be constructed, applied, or changed. What follows then, is a set of the lessons that scholars of legal fictions have deduced from their study, and an effort to apply those lessons to the *Chevron* fiction.

Perhaps the most important lesson emphasized time and time again is that legal fictions must be transparent and judges who use them should do so always cognizant that they are employing a fiction.[420] Bentham powerfully criticized the English legal fictions of his day as tricks employed by judges and litigants to circumvent the law, as the fictions of his day were not used in a transparent manner. Because the legal fictions employed by English trial courts were not apparent in the record, appellate courts had difficulty regulating and limiting the use of legal fictions, and so trial judges gained unsupervised power. By comparison, Roman legal fictions were grammatically obvious, taking an "as if" form so the fiction was apparent in the direction from the praetor.[421] De Tourtoulon noted that legal fictions "cannot falsify a process of reasoning . . . so long as one can calculate to what extent they represent real, and what extent imaginary, disposition."[422]

420. GRAY, *supra* note 280, at 37 ("[O]ne should always be ready to recognize that the fictions are fictions . . . .").
421. FULLER, *supra* note 273, at 36.
422. DE TOURTOULON, *supra* note 2, at 390.

The use of the *Chevron* fiction clearly violates this fundamental precept. As of the time of this writing, no federal or state case in America has used the term "*Chevron* fiction."[423] Discussions of *Chevron* and fiction in state and federal cases are few and sparse. [424] Two cases do have at least cursory mention that *Chevron* includes a fiction, though do little with that conclusion.[425] Scalia's dissent to *Mead* discusses a *Chevron*-related fiction, but Scalia is referring to the fiction embedded in *Mead* itself, the fiction that it is not changing the existing *Chevron* doctrine.[426] Fuller asserted that "fiction becomes wholly safe only when it is used with a complete consciousness of its falsity."[427] However, courts applying the *Chevron* fiction, even the Supreme Court, rarely display much evidence of consciousness of its fictional basis.

King v. Burwell constitutes an especially egregious example of a court employing numerous *Chevron*-related fictions without addressing how the fictional nature of the doctrine it employs may affect that application. First, the Court states, "This approach 'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.'"[428] While the word "implicit" signals that a fiction is being employed, it hardly does so directly. The Court quotes *FDA v. Brown and Williamson* for a fictional exception to the fiction of implicit congressional delegation: "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an im-

423. A Westlaw search performed on November 3, 2016, revealed no federal or state court case using the term "*Chevron* fiction."

424. Ironically, one of the Obamacare cases discussed "legal fiction" in the context of *Chevron*, but it was not the *Chevron* fiction the court discussed, but rather that it considered the claim that federal exchanges constituted state exchanges for the purposes of the ACA a "legal fiction." Oklahoma *ex rel.* Pruitt v. Burwell, 51 F. Supp. 3d 1080, 1089 (E.D. Okla. 2014).

425. Krzalic v. Republic Title Co., 314 F.3d 875, 878 (7th Cir. 2002) ("But realists, while acknowledging . . . that it is a fiction to suppose *Chevron* itself an interpretation of the statutes to which it applies or that the exercise of power by appointed officials is democratic merely because it is authorized by elected officials, will applaud the Supreme Court's recognition that the interpretation of an ambiguous statute is an exercise in policy formulation rather than in reading."); Coal. for Responsible Regulation., Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *10 (D.C. Cir. Dec. 20, 2012) ("*Chevron* deference operates on the assumption 'that a statute's ambiguity constitutes an implicit delegation,' but this tenuous fiction need not hold true in every situation.").

426. United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("[I]n order to maintain the fiction that the new test is really just the old one, applied consistently throughout our case law, the Court must make a virtually open-ended exception to its already imprecise guidance . . . .").

427. FULLER, *supra* note 273, at 10.

428. King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

plicit delegation."[429] The Court concludes its analysis by stating another fiction, "It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."[430] Note that the Court uses the conditional "would have," along with the word "unlikely," showing that the Court is dealing with speculative possibilities, not actual delegation or lack thereof. Worse yet, the Court's speculative possibility flies directly in the face of Congress's explicit delegation of decisions about tax subsidies to the IRS in the ACA itself.[431] Nowhere in *King v. Burwell* does the Court directly acknowledge the layers of fictions it is employing. Nor is the Court transparent in how it uses them and why.

Secondly, legal fictions should always be used with an awareness of their purposes and the reasons for their creation.[432] Where those purposes or reasons do not apply, the legal fictions should not be allowed. And so, judges must always be cognizant of the fictions they are employing, the purpose of those fictions, and their shortfalls. Mansfield noted that when legal fictions "are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."[433] Lord MacMillan urged against legal fictions "extended by a process of logical development which loses sight of their origin and carries them far beyond the reach of any such justification as they may have originally possessed." [434] Judges who know of a legal fiction, but not its original justification, may reason based on the fiction to arrive at holdings that the fiction does not justify and was never intended to reach. Pound noted that fictions are "deliberately made by known men to meet definite demands in concrete cases."[435] And so legal fictions should be limited to only the specific definite demands for which they were intended.

Chevron's use seems to violate this edict. The original *Chevron* decision carried with it the pragmatic justifications for the delegation fiction, such as Congress's intent to delegate authority to agencies to make "second-level policy decisions, the greater experience and expertise agencies should have to interpret statutes that they administer, and their greater political accountability through the President, especially compared to Article III judges, with their lifetime tenure."[436]

429. *Id.* at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159).
430. *Id*. at 2489.
431. See discussion of this point *supra* Part III.
432. GRAY, *supra* note 280, at 37 ("[O]ne should always . . . be able to state the real doctrine for which they stand."); *see also* FULLER, *supra* note 273, at 50–51. ("[F]ictions are to be applied in the light of the reasons back of them.").
433. Morris v. Pugh (1761) 97 Eng. Rep. (H.L.) 1242, 1243.
434. Radcliffe v. Ribble Motor Servs. Ltd. (1939) AC (H.L.) 215, 235.
435. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 131 (1923).
436. Angstreich, *supra* note 87, at 90–91.

However, as the Court in *Mead* emphasized the delegation doctrine almost to the exclusion of its original underlying rational, that fictional delegation "loses sight of its origin" and so can justify decisions unrelated to those policy bases. As Criddle notes, "[A]s a legal fiction of indeterminate content, *Mead* liberates the Court from having to ground its application of C*hevron* deference in any objectively verifiable criteria. . . . Far from enhancing judicial restraint and accountability, *Mead*'s flexible delegation inquiry enhances judicial discretion and conceals judicial policymaking."[437]

Arguably, Step Zero is the Court's method of piercing the *Chevron* fiction when its application would lead to injustice, a result scholars of legal fictions would likely applaud. However, rather than formulating Step Zero in a straightforward fashion as a way to disregard the *Chevron* fiction when its use conflicts with the policies that justify it, as noted above, most Step Zero applications are formulated as an additional set of fictions regarding when Congress would not want the *Chevron* fiction to be applied.

King v. Burwell shows how *Chevron*'s fiction and fictional exceptions can lead courts away from the original policies that could justify that fiction. Criddle argues that the core values justifying the *Chevron* fiction are: "(1) congressionally delegated authority, (2) agency expertise, (3) political responsiveness and accountability, (4) deliberative rationality, and (5) national uniformity."[438] Here, the Court ignores the express delegation to Treasury and IRS of matters covered in the section at issue, as well as the greater political responsiveness and accountability agencies in the Executive Branch have than Supreme Court Justices with a life appointment. The Court makes much of the IRS's lack of agency expertise, but it ignores the mandate that the IRS and Treasury work with HHS, which presumably has such expertise. While the Court might well argue it can engage in greater deliberative rationality than Treasury and the IRS, it ignores one of the strongest arguments for it deciding this matter rather than Treasury and the IRS, uniformity. Here, temporal uniformity, the uniformity of interpretation across a multitude of presidential administrations, could be crucial and is a reason for a binding Supreme Court, rather than a changeable Executive Branch, decision.[439] However, because the Court is dealing with the *Chevron* fiction rather than the underlying

437. Criddle, *supra* note 86, at 1314.

438. *Id.* at 1275.

439. Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1310 (2016) ("[I]t would make no sense to create a legal environment that would vary over time depending on whether Democrats—who strongly support the ACA—or Republicans—who strongly oppose the ACA—control the executive branch. The resulting vacillation in statutory interpretations would create uncertainty and chaos for citizens, insurance companies, and the agencies charged with responsibility to implement the statute.").

policies, that strong basis goes unremarked. The *Chevron* doctrine has been justifiably criticized for increasing "temporal inconsistency in interpretation of national statutes . . . ."[440] However, deference to the *Chevron* fiction seems to preclude the Court from addressing this major issue in its decision.

Losing sight of the fictional nature of the *Chevron* delegation doctrine has clouded courts' development of rules affected by *Chevron*, such as the stare decisis effect of court decisions based on deference. Without policy justification, stare decisis effect is tied to the level of deference, if any, granted to the agency's interpretation rather than to independent reasons for a binding court decision. Courts that discern a need for a strong stare decisis effect may feel compelled to find a Step Zero exit from *Chevron*, even if none seems appropriate. The courts may be refusing to defer to agency interpretation not because of any policy reason for non-deference but rather to avoid the weakening of stare decisis that such deferral could cause. In *King*, the Court appears to have misread the cases it relied on to reach a decision at Step Zero and then ostensibly ignored the work of Treasury and the IRS, perhaps in large part to settle the matter permanently. A greater understanding of the fiction of *Chevron* might allow the Court to disentangle the deference issue from the stare decisis issue and develop more rational policies for each.

Another lesson from Fuller on legal fictions was that they should be understood and recognized so that, at the end of the analysis the legal fiction could, Fuller insisted, be dropped from the final reckoning.[441] Far from being dropped from the final reckoning, the *Chevron* fiction has been expanding, with the Court adding layers of fictional exceptions to its central fiction. Courts should be making *Chevron* decisions with greater attention to the underlying values *Chevron* supports. Instead, the Court is strengthening and doubling down on the fictions. The Court's *Chevron* discussion in *King v. Burwell* is merely a string of fictions leading to a conclusion, with little discussion of the purposes or policies purportedly served by the *Chevron* fiction. The fiction is overwhelming the policy of the *Chevron* doctrine.

Courts should sparingly and cautiously use what Maine called the "historical fictions" and Fuller deemed "creative fictions" that create substantive law, always cognizant of the dangers of such judge-created law.[442] Even dogmatic fictions, useful to understand, categorize, and manipulate law, are "dangerous tools" if misused and "should never be used, as the historic fictions were used, to change the Law, but only for the purpose of classifying established rules, and one

440. *Id.* at 1297.

441. FULLER, *supra* note 273, at 117.

442. *Id.*

should always be ready to recognize that the fictions are fictions, and be able to state the real doctrine for which they stand."[443]

Applying Gray's analysis, we see that *Chevron* fiction served an initial useful function as a creative legal fiction. With the rise of the administrative state, the law needed to adapt to the complex regulatory statutes administered by federal agencies with their interpretive ability and expertise. However, the scaffolding of *Chevron* obscures the policy rationales that made its delegation of interpretation useful. At this stage in the development of *Chevron* jurisprudence, its fiction should be no longer used as a creative fiction, but rather as a dogmatic fiction, allowing courts to understand the various factors that would lead to delegation by grouping them under the fiction of congressional intent, while recognizing that *Chevron* delegation is a fiction and courts should always be "able to state the real doctrine" for which it stands.[444]

Unfortunately, the Court has not recognized the need to change *Chevron* fiction from a creative fiction to a dogmatic fiction, and continues to use it willy-nilly to create law. In *Mead*, the Court created a fictional exception to *Chevron*, which, as noted above, has led to great confusion. In *King v. Burwell*, the Court continues this creationist use of the *Chevron* fiction, announcing with terse and unconvincing reasoning, "This is not a case for the IRS."[445]

A final lesson to be drawn from previous analyses of legal fiction is that fiction should not be used where the result is confusion and where the fictions prevent courts from understanding or wisely using the law at issue. Maine stated, in discussing legal fictions, "I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order." [446] It is clear that the *Chevron* doctrine and its multiple, at times conflicting fictions, is a mess, and courts find it challenging, and so the entire doctrine calls out for reform.

B. How Reforming *Chevron*'s Legal Fiction Fixes the Mess of *Chevron*

While bitter battles continue over the worth of *Chevron* as a doctrine,[447] whether *Chevron* is even constitutionally permissible,[448] and

443. *Id.*
444. *Id.*
445. King v. Burwell, 135 S. Ct. 2480, 2489 (2015).
446. MAINE, *supra* note 280, at 32.
447. Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1797 (2010).
448. *See, e.g.,* Philip Hamburger, Chevron *Bias,* 84 GEO. WASH. L. REV. 1187, 1206 (2016) (arguing that the *Chevron* doctrine violates the duty of judges to exercise

whether it has led to real change in the amount of deference actually engaged in by courts,[449] most scholars seem to believe that *Chevron*, whatever its pros and cons, is a mess.[450] The mess began at the start, as Justice Stevens apparently thought he was merely restating a traditional analysis while at the same time caused one of the greatest changes in administrative law.[451] It is difficult to imagine that the result of such an inadvertent change would be tidy.

Even defenders of *Mead* as explicator of *Chevron* acknowledge the challenge *Chevron*'s application throws at judges.[452] Merrill identifies two sources for the confusion that *Mead* has caused. One source he identifies is how *Mead* combines the implicit delegation doctrine, which seems a hard-and-fast rule generally requiring deference in the face of statutory ambiguity, with what Merrill called a "*Skidmore*-ized" version of *Chevron*, which could satisfy Breyer's "need to consider multiple contextual factors in deciding how much deference to give to agency interpretations in any particular case."[453] The second source of confusion Merrill identifies is that Souter, who drafted the *Mead* opinion, seemed determined to demonstrate that the Court's earlier *Chevron* decisions somehow conformed to the *Mead's* new "threshold condition" for the application of *Chevron*, and in trying to leave that threshold condition flexible enough to explain all previous precedents, "left the threshold inquiry so flabby that even opinion letters might qualify in certain circumstances . . . ."[454]

To clean up the *Chevron* mess, it would be useful clean up the mess of the fictions by reforming them. This article is by no means the first to argue for such an effort. Anderson noted,

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independent judgment, the "most fundamental element of the office of a judge as established by Article III. Thus, when judges acquiesce in Chevron deference, they unconstitutionally abandon their very office as judges.").

449. Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 829 (2010) ("The most striking objective measure of the failure of *Chevron* is that it does not appear to have succeeded in substantially increasing the level of deference to agency statutory interpretation.").

450. *See, e.g., The U.S. Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 335, 395 (2007) (discussing how the Court "turned a routine statutory interpretation case into a *Chevron* mess by inverting the traditional *Chevron* analysis. . . .").

451. Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 557-58 (2012) ("Nor is there evidence that Justice Stevens himself regarded *Chevron* as having inaugurated any change in the way courts approach agency interpretations.").

452. Kristin E. Hickman, *supra* note 108, at 553 ("The justices' shifting rhetoric makes its adherence to and application of *Mead* seem much more fickle than it is and, further, is highly frustrating to lower court judges, litigants, and commentators who seek consistency in the Court's guidance.").

453. Merrill, *supra* note 106, at 767.

454. *Id.* at 767.

> There is nothing per se wrong with legal fictions; they have played a long and mostly honorable role in common law development. . . . [H]owever, the bewildering confusion in the decisions and the commentary suggests that the delegation fiction is not a useful tool—neither the occasions for invoking it nor its content when invoked are capable of clear statement.[455]

One method to clean up the mess of *Chevron*'s fictions is to eliminate them. One possibility for doing this is to merely overrule *Chevron* and take us back to the pre-*Chevron* case-by-case determinations.[456] However, such a "solution" would force courts to take a much more active role in patching holes in legislation involving an administrative agency, a role courts may be ill-equipped and loath to perform at this late date.

Alternatively, Congress could codify *Chevron* in some form, to have Congress explicitly state what level of deference courts should afford agencies and when. There are several possible ways to codify *Chevron*. The simplest, across-the-board method would be to merely amend the APA, probably at section 706, and instead to state explicitly the terms of courts deference to agencies. William Anderson has proposed such an amendment, and while it is fairly short and sweet, its brevity may cause as much confusion and turmoil as the confusing complexity of *Chevron* and its progeny.[457]

Another method would be for Congress, when it constructs statutes, to indicate in each statute when and how it would want courts to defer to agency decision. A model of such a proposal is the explicit limitation of deference to the OCC in Dodd–Frank, mandating that *Chevron* deference would not be applied and that instead the OCC would receive only *Skidmore* deference.[458] However, Dodd–Frank and Congress's explicit statutory determination of the deference to be given the OCC was a special case. As previously discussed, Congress had before it a history of preemption abuse by the OCC, which the OCC had protected from court review by demanding deference by courts. When Congress is enacting new statutes, it normally does not have such a history of deference abuse, and so would have less reason to determine explicitly the level of deference to be given and less information about what effects different levels of deference might have.

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455. Andersen, *supra* note 213, at 963–64.

456. Beermann, *supra* note 449, at 810–11 (proposing that *Chevron* merely be overruled).

457. Under Andersen's proposal, a court "may defer" where the agency's interpretation "(a) is authoritative, (b) significantly reflects relevant agency technical, political or other resources, (c) was formulated through a careful process, including providing those specially affected with an appropriate opportunity to participate in its formulation and (d) does not require the special weight of a judicial pronouncement and determine the meaning and applicability of the terms of an agency action." Andersen, *supra* note 213, at 964.

458. Barnett, *supra* note 82.

A third method of legislating deference through direct congressional action would be to have Congress, when it reauthorizes agencies, to conduct a review of all delegation to each agency and determine whether and to what extent such delegation makes sense, given the performance of the agency. Elizabeth Garrett, who proposed this option, noted, "In particular, Congress could assess the performance of each agency and judge whether it is the best entity to make the policy decisions inherent in interpreting vague or ambiguous statutory language."[459]

Of course, given the current gridlock in Congress, with congressional hearings often being more sound and fury than function, it is almost impossible to imagine Congress engaging in a thoughtful review process that results in a coherent allocation of decision-making power between courts and agencies. More likely, Congress would tend to have courts defer to agencies when the majority in Congress is of the same party as the president, but not defer when Congress would wish to block the power of a president of a different party.

Another, nonlegislative option would be for the Court to replace the legal fiction of congressional delegation with a set of core concerns, all of which must be satisfied for the agency to receive more than *Skidmore* deference. Criddle has proposed such a change, arguing that there are five core concerns implicated in court deference to agency interpretation of statutes: "(1) congressionally delegated authority, (2) agency expertise, (3) political responsiveness and accountability, (4) deliberative rationality, and (5) national uniformity."[460] While these criteria are parts of the legal fictions by which *Chevron* and its Step Zero exceptions are constructed, Criddle would eliminate the fictions and apply the concerns directly. "Where all of *Chevron*'s five core rationales are satisfied, federal courts should defer to agencies' flexible interpretations of ambiguous statutes."[461] If not all of the core rationales are satisfied, "courts should determine instead whether the agency's preferred interpretation is otherwise persuasive under *Skidmore*'s residual balancing test."[462]

The hazard of Criddle's proposal is how easy it would be for a court to find that at least one of these core concerns would be compromised by deference to an agency, and so the proposal could easily lead to the excessive limitation of deference, especially by self-interested courts. Further, the proposal does not seem to be presented as a balancing test, so that a very strong level of deliberative rationality by an agency may not compensate for a lack of national uniformity. Also, the Criddle test seems to be a conglomeration of disparate interests, and

459. Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2641 (2003).
460. Criddle, *supra* note 86, at 1275.
461. *Id.* at 1320.
462. *Id.*

courts may have trouble conceptualizing it without an underlying theme. A five-part test of wildly disparate elements may lead to court confusion and hence unpredictable results. Also, by explicitly naming five and only five recognized core concerns, Criddle's proposal could limit the development of law in response to new concerns or a court's flexibility in dealing with unusual facts or issues.

For all these reasons, replacing the delegation fiction with a fixed grid of five core rationales may prove problematic, and reviewing these problems shows the advantage of the *Chevron* delegation fiction, so long as the courts always understand that it is a fiction. One advantage of the delegation fiction, if used as a dogmatic rather than creative fiction, is that it provides a unifying theme to courts' deference inquiry, allowing courts to balance a multiplicity of factors that might affect the need for deference through the lens of the delegation fiction.

A better way to reform the *Chevron* fictions then, and what this article proposes, would be to treat the delegation fictions as dogmatic rather than creative fictions, to use them as a way of categorizing, understanding, and reasoning from the underlying policy arguments, rather than treating the legal fictions as justifications in and of themselves. In other words, the question, "Would Congress intend courts to defer?" should not be treated as a quest to determine Congress's intent where Congress has not provided evidence of that intent, because as Scalia noted, that would be a pointless, wild-goose chase. Instead, absent real evidence of congressional intent, the courts should ask whether and to what extent a rational Congress would intend courts to defer in the circumstance in question.

By acknowledging the delegation fiction and using it as a tool to be employed rather than a pointless quest for hypothetical congressional intent, courts would be using the delegation fictions the way that scholars of legal fiction such as Fuller and Gray understood as the proper method to employ fictions. Instead of pretending to divine, absent any evidence, whether Congress might or might not have intended courts to defer to federal agencies, courts should be using the legal fictions they have created to sort through and understand the policy implications of the possible deference decisions. They should treat the fictions as dogmatic fictions, with a clear understanding of their fictional nature, to understand and sort court-created rules and policies of deference.

In this way, the Court could separate stare decisis free from agency reinterpretation from a finding of unambiguousness. Using the tool of legal fictions in the method earlier scholars envisioned would enable the Court to reform its problematic deference regime. When courts discover ambiguity in a statute administered by an agency, under this proposal, they would no longer be required to engage in knee-jerk def-

erence to the agency unless they discover some perhaps fictional Step Zero rationale for not engaging in the *Chevron* Two-Step. Instead, they would acknowledge the fiction of the delegation doctrine directly, and use it to ask the underlying policy questions.

Instead of blindly following little understood fictions, courts would be seeking the answers to the pertinent policy questions. Has Congress given the agency the authority to engage in the kind of formalized rulemaking procedures that would lead the agency to make a thoughtful, informed determination? Has the agency appropriately used those procedures and explained its rationale? Is the agency likely to have particular expertise and/or institutional memory such that it is better able than a court to reach an appropriate interpretation? Is this a subject for which the greater political accountability of agencies makes them the better interpreters? Is there a need for stronger stare decisis such that the agency gets at most one free shot at a determination? Or, alternatively, is this the type of interpretation that agencies should be free to remake and revamp as administrations or the situation changes? Is there a need for national uniformity that a federal agency can provide? Is there an extreme need for temporal unity, so that a quick decision now is better than a more thoughtful decision later?

There is a plethora of factors that a court should consider and new factors may emerge, and the delegation fiction can help courts sort through all of these factors to decide whether to defer, and how "sticky" their deference decision should be. Using the delegation fiction as dogmatic fiction, a sorting mechanism that provides clarity, would give courts a more powerful tool to analyze deference than the difficult-to-understand-and-blindly-applied creative fiction *Chevron* now constitutes. And it would give the courts more leeway to weigh the different concerns against each other and to analyze new concerns and situations than would Criddle's core concerns method. In short, using legal fictions as they were intended would resolve much of the current mess that is *Chevron*.

IX. CONCLUSION

Legal fictions have been at the heart of law since Roman times, and it is clear that they are unlikely to go away any time soon. However, the damage that legal fictions do can be prevented, to a great extent, by understanding their function and dangers. In the modern era, too many who employ legal fictions have forgotten their intended use and purposes, and so suffer from the damages wrought by legal fictions created and employed without such knowledge and understanding. In the *Chevron* doctrine, the Supreme Court has dug itself into a nasty pit by first creating the fiction of the congressional delegation implicit in ambiguity in statutes administered by federal agen-

cies, then devising fictional exceptions to that central fiction. So long as the Court treats it not as a fiction but as an actual assumption about how Congress intends courts to defer, were Congress only to have an intent and to express it, the Court will have great difficulty in working itself out of the *Chevron* mess that it has created. As it creates more and more fictions to solve the problems that its initial fictions have caused, the Court loses further track of the underlying policy rationales that underpin its delegation doctrine.

Instead, the Court should boldly confront the fictions of *Chevron* and, by doing so, render them transparent and workable. The Court should treat them as dogmatic fictions, useful for categorizing the issues that make up *Chevron* and its Step Zero, not shackles to prevent reasoned decision-making. By understanding the *Chevron* fictions as fictions, the Court can remove the scaffolding with which it has obscured the structure of the law regulating judicial deference to agency interpretation.