RECENT CASES

CIVIL LAW — FEDERAL FUNDING OF HUMAN EMBRYONIC STEM CELL RESEARCH — D.C. CIRCUIT VACATES DISTRICT COURT'S PRELIMINARY INJUNCTION OF FEDERAL FUNDING FOR RESEARCH USING HUMAN EMBRYONIC STEM CELLS. — *Sherley v. Sebelius*, 644 F.3d 388 (D.C. Cir. 2011).

Congress frequently attaches policy riders to appropriations legislation. This controversial practice has drawn scholarly and judicial criticism as suboptimal policymaking.[1] Congress enacted one such rider, the Dickey-Wicker Amendment,[2] in 1996 to prohibit the federal government from funding research that destroys human embryos, prompting a multidecade effort by administrations of both parties to cabin the rider's potentially broad impact and continue certain types of medical research. Recently, in *Sherley v. Sebelius*,[3] the D.C. Circuit vacated a preliminary injunction that would have prevented the federal government from funding research involving human embryonic stem cells (hESCs) under Dickey-Wicker.[4] The court deferred to the federal agency's restrictive interpretation of "research" and supported its conclusion by noting that Congress's annual reenactment of the policy rider implied congressional acquiescence in the agency's interpretation.[5] By relying on the bare fact of reenactment, the court misapplied binding precedent and discounted compelling characteristics of policy riders that counsel against such a rote approach.

Prompted by fears of future scientific research on human embryos,[6] Congress enacted the Dickey-Wicker Amendment as a policy rider in the 1996 omnibus appropriation bill, providing in relevant part that "[n]one of the funds made available by [the appropriation] may be used for . . . research in which a human embryo or embryos are destroyed."[7] Congress has reenacted Dickey-Wicker in each successive appropriation without substantive change.[8] Scientists first derived hESCs from human embryos using private funds in late 1998,[9] and the Department of Health

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[1] *See, e.g.*, Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 457–58 ("[T]he appropriations process may not be conducive to sound substantive policymaking for a variety of institutional reasons.").

[2] Balanced Budget Downpayment Act, Pub. L. No. 104-99, § 128, 110 Stat. 26, 34 (1996).

[3] 644 F.3d 388 (D.C. Cir. 2011).

[4] *Id.* at 390.

[5] *Id.* at 395–96.

[6] *See id.* at 390.

[7] Balanced Budget Downpayment Act § 128, 110 Stat. at 34.

[8] *Sherley*, 644 F.3d at 396. When *Sherley* was decided, Congress had not passed a budget for fiscal year 2011, and Dickey-Wicker was being carried forward by continuing resolution. *See id.* at 392.

[9] Nicholas Wade, *Primordial Cells Fuel Debate on Ethics*, N.Y. TIMES, Nov. 10, 1998, at F1.

and Human Services (HHS) informed the National Institutes of Health (NIH) in early 1999 that Dickey-Wicker's "prohibition on the use of funds . . . for human embryo research would not apply to research utilizing [hESCs] because such cells are not a human embryo."[10] President George W. Bush similarly permitted funding for then-extant hESC lines created by researchers using private funds,[11] and under instruction from President Barack Obama,[12] the NIH adopted new guidelines in 2009 through rulemaking that expanded the set of hESC lines qualifying for federal research funding.[13]

Researchers of adult stem cells Dr. James Sherley and Dr. Theresa Deisher sought to enjoin the NIH from funding any research involving hESCs under the new guidelines.[14] The district court granted the researchers' motion for a preliminary injunction, ruling, inter alia, that the plaintiffs had a substantial likelihood of success on the merits[15] because Congress's unambiguous use of the broad term "research" in Dickey-Wicker clearly "encompasses *all* 'research in which' an embryo is destroyed, not just the 'piece of research' in which the embryo is destroyed."[16] The court engaged in the traditional two-step *Chevron* analysis, in which courts ask at Step One "whether Congress has directly spoken to the precise question at issue"[17] and defer at Step Two to "reasonable" agency interpretations of ambiguous statutes.[18] Because hESC

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[10] Memorandum from Harriet S. Rabb, Gen. Counsel, Dep't of Health & Human Servs., to Harold Varmus, Dir., Nat'l Insts. of Health, Federal Funding for Research Involving Human Pluripotent Stem Cells 1 (Jan. 15, 1999), *available at* http://news.sciencemag.org/scienceinsider/Implementing New Federal hESC Research Policy.pdf. The NIH formally ratified this opinion in its Guidelines for Research Using Human Pluripotent Stem Cells, 65 Fed. Reg. 51,976 (Aug. 25, 2000).

[11] *See* George W. Bush, *Stem Cell Science and the Preservation of Life*, N.Y. TIMES, Aug. 12, 2001, at WK13.

[12] *See* Removing Barriers to Responsible Scientific Research Involving Human Stem Cells, Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 11, 2009).

[13] *See* Nat'l Insts. of Health, Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32,170, 32,173 (July 7, 2009). The NIH distinguished between "the derivation of stem cells from an embryo that results in the embryo's destruction, for which Federal funding is prohibited [under Dickey-Wicker], and research involving hESCs that does not involve an embryo nor result in an embryo's destruction, for which Federal funding is permitted." *Id.*

[14] Sherley v. Sebelius, 686 F. Supp. 2d 1, 3 (D.D.C. 2009). The district court granted the government's motion to dismiss for lack of standing, *id.*, but the D.C. Circuit reversed under a "competitor standing" theory and remanded, Sherley v. Sebelius, 610 F.3d 69, 75 (D.C. Cir. 2010).

[15] Sherley v. Sebelius, 704 F. Supp. 2d 63, 72 (D.D.C. 2010). The district court also found that the other factors pertinent to a preliminary injunction — irreparable harm, balance of equities, and public interest — weighed in favor of granting the preliminary injunction. *Id.* at 72–73.

[16] *Id.* at 71 (quoting Balanced Budget Downpayment Act, Pub. L. No. 104-99, § 128(2), 110 Stat. 26, 34 (1996); Memorandum in Support of Defendants' Motion to Dismiss, and in Opposition to Plaintiffs' Motion for Preliminary Injunction at 31, *Sherley*, 704 F. Supp. 2d 63 (No. 1:09-cv-01575-RCL)).

[17] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[18] *Id.* at 843–44.

research "necessarily depends" on derivation of hESCs from a human embryo and destruction of that embryo, the court reasoned, it "is clearly research in which an embryo is destroyed."[19] The court concluded at Step One that Dickey-Wicker "spoke[] to the precise question at issue" and thereby foreclosed the possibility of deference at Step Two.[20]

The D.C. Circuit vacated the preliminary injunction.[21] Writing for the panel, Judge Ginsburg[22] held that the plaintiffs were "unlikely to prevail" on the merits because the NIH's narrow interpretation of "research" merited deference under *Chevron*.[23] At Step One, Judge Ginsburg found that "[t]he definition of research is flexible enough to describe either a discrete project or an extended process," rendering Dickey-Wicker "at best . . . open to more than one possible reading."[24] Moreover, Judge Ginsburg reasoned, "[t]he use of the present tense" in Dickey-Wicker "strongly suggests it does not extend to past actions," like prior hESC derivation with private funds, and instead prohibits federal funding of derivation only of new hESCs.[25] At Step Two, Judge Ginsburg determined that the NIH had "implicitly but unequivocally" interpreted "research" narrowly in its opinions and rulemakings that found hESC research not to violate Dickey-Wicker.[26] The NIH's interpretation merited *Chevron* deference because, although it might have the odd implication of counting mechanical hESC derivation as "research," it would still make "at least as much sense as . . . treat[ing] the one-off act of derivation as though it had been performed anew each time a researcher . . . uses" the resulting hESCs.[27] Judge Ginsburg noted that the statutory text surrounding "research" — "in which" embryos "are" destroyed, rather than "for which" they "were" destroyed — further supported the interpretation's reasonableness.[28]

Considering an additional factor in the Step Two reasonableness analysis, Judge Ginsburg noted that "Congress has reenacted Dickey-Wicker unchanged year after year 'with full knowledge that HHS has been funding [hESC] research since 2001.'"[29] The plain fact of reenactment, Judge Ginsburg reasoned, "provides 'further evidence . . . [Congress] intended the Agency's interpretation, or at least

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19 *Sherley*, 704 F. Supp. 2d at 71.

20 *Id.* at 70.

21 *Sherley*, 644 F.3d at 390.

22 Judge Ginsburg was joined by Judge Griffith.

23 *See Sherley*, 644 F.3d at 390.

24 *Id.* at 394.

25 *Id.*

26 *Id.* at 395.

27 *Id.* at 396.

28 *Id.*

29 *Id.* (quoting Nat'l Insts. of Health, Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32,170, 32,173 (July 7, 2009)).

understood the interpretation as statutorily permissible.'"[30] The court applied a presumption that Congress adopts an agency's interpretation when it reenacts a statute without substantive change, but it did not inquire specifically into Dickey-Wicker's legislative history.[31]

Judge Henderson dissented, arguing that the court "need go no further than *Chevron* step one here because the plain meaning of the Amendment is easily grasped": it precludes funding hESC research because it is research in which human embryos are destroyed.[32] Because hESC research is "a systematic inquiry" whose "first [step] . . . is the derivation of stem cells from the human embryo," thus "destroy[ing] the embryo," the "succeeding sequences of hESC research" are similarly "banned by the Amendment."[33] Judge Henderson noted that Congress rationally "chose broad language . . . to make the ban as complete as possible" because in 1996 it had "scant knowledge about the feasibility/scope of hESC research" in the future.[34] Judge Henderson added that "it is of little moment that the Congress has reenacted the Amendment unchanged every year since 1996,"[35] because "the law is plain."[36] Where an agency's interpretation contravenes the plain meaning of statutory language, she argued, reenactment is irrelevant because the *Chevron* inquiry does not proceed beyond Step One.[37]

Although the majority and dissent hotly contested the meaning of "research," they engaged only very briefly on a major issue beyond the text: the inference of congressional acquiescence from Dickey-Wicker's continual reenactment in light of the NIH's interpretation. The majority uncritically assumed the reenactment-acquiescence doctrine's applicability. While the dissent challenged the doctrine's relevance in the face of clear statutory meaning, it did not criticize the majority's doctrinal approach. Regardless of the propriety of the outcome, the *Sherley* court misapplied precedent by not searching for an affirmative congressional intent to acquiesce. Even more problematic was the court's misuse of the doctrine in the policy rider context, where procedural shortcomings render riders particularly poor indicators of congressional intent, even at *Chevron*'s permissive Step Two reasonableness inquiry.

The Supreme Court has long recognized the existence of a reenactment-acquiescence doctrine: the "implied legislative recognition and approval of the executive construction of the statute" through subsequent

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[30] *Id.* (omission in original) (quoting Barnhart v. Walton, 535 U.S. 212, 220 (2002)).
[31] *See id.* at 396–97.
[32] *Id.* at 400 (Henderson, J., dissenting).
[33] *Id.* at 401.
[34] *Id.*
[35] *Id.* at 404.
[36] *Id.* (quoting Brown v. Gardner, 513 U.S. 115, 121 (1994)).
[37] *See id.*

congressional reenactment.[38] In the early twentieth century, this doctrine was particularly "strong," and "an agency interpretation [could] become legally binding solely because Congress ha[d] reenacted the relevant statutory provision without explicitly rejecting the agency's view."[39] In recent years, however, the Court has cautioned that "[a]lthough we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care,"[40] such as when the breadth of congressional debate on the subject makes it "hardly conceivable that Congress — and in this setting, any Member of Congress — was not abundantly aware of what was going on."[41] Lower courts, including the D.C. Circuit,[42] have consistently followed the Court's lead and heightened the evidentiary showing of congressional intent that triggers acquiescence.[43]

The majority in *Sherley*, however, misapplied the doctrine, citing the Supreme Court's opinion in *Barnhart v. Walton*[44] for the proposition that mere congressional reenactment provides additional evidence that Congress endorses an agency's interpretation.[45] In *Barnhart*, the Court not only noted that "Congress has frequently amended or reenacted the relevant provisions without change" but also identified legislative history that explicitly supported the agency's interpretation.[46] That legislative history was part of what "provide[d] further evidence . . . that Congress intended the Agency's interpretation."[47] The *Sherley* majority misapplied *Barnhart* and the modern reenactment-acquiescence doctrine by failing to follow the Court's use of legislative history to establish congressional intent. Absent a showing of "Congress' unequivocal acquies-

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[38] Nat'l Lead Co. v. United States, 252 U.S. 140, 146 (1920); *see also* Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . .").

[39] Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1288 n.286 (2007).

[40] Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 169 (2001).

[41] *Id.* at 169 n.5 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 600–01 (1983)) (internal quotation marks omitted); *see also* Brown v. Gardner, 513 U.S. 115, 120–22 (1994) (rejecting a congressional-acquiescence argument in part because "congressional discussion preceding reenactment makes no reference to" the agency's interpretation, *id.* at 121).

[42] *See* Bismullah v. Gates, 551 F.3d 1068, 1074 (D.C. Cir. 2009) ("Legislative inaction is not probative" without "'overwhelming evidence' that Congress considered and failed to act upon the 'precise issue' . . . ." (quoting Rapanos v. United States, 547 U.S. 715, 750 (2006); *Bob Jones Univ.*, 461 U.S. at 600)); Morales-Izquierdo v. Gonzales, 486 F.3d 484, 493 (9th Cir. 2007) (similar); Butterbaugh v. U.S. Dep't of Justice, 336 F.3d 1332, 1342 (Fed. Cir. 2003) ("[C]ourts are loath to presume congressional endorsement unless the issue plainly has been the subject of congressional attention.").

[43] *See, e.g.*, Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency, 537 F.3d 1006, 1022 (9th Cir. 2008) ("[T]he standard for a judicial finding of congressional acquiescence is extremely high.").

[44] 535 U.S. 212 (2002).

[45] *Sherley*, 644 F.3d at 396.

[46] *Barnhart*, 535 U.S. at 220.

[47] *Id.*

cence"[48] based on evidence that members of Congress were aware of relevant circumstances when they reenacted Dickey-Wicker, the court should not have held that mere reenactment implied acquiescence to the NIH's interpretation.

The court's application of the doctrine absent any showing of congressional intent was particularly troublesome in this case because the legislation at issue was a policy rider. Because of shortcomings in the congressional procedures used to enact them, policy riders are especially indeterminate expressions of congressional intent. To improve congressional procedures, courts should hesitate to find acquiescence absent particularly compelling evidence of such intent.

Despite their potential utility for congressional supervision of agency action,[49] appropriations riders are generally recognized as suboptimal vehicles for policymaking.[50] Often introduced in response to emotionally charged issues,[51] appropriations riders bypass relevant authorizing committees and instead become law in the abbreviated appropriations process that "provid[es] little opportunity for thoughtful deliberation"[52] in comparison with the normal authorization procedure.[53] Because of these well-known shortcomings, courts apply a canon of construction that interprets riders narrowly,[54] and Congress itself has rules disfavoring policymaking through appropriations.[55]

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[48] Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167 (2001).

[49] *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 85 (2006) (explaining that Congress uses riders "to supervise the execution of the laws in a very direct and particularized way" by "prohibit[ing] the expenditure of funds" on a "specific regulatory activity").

[50] *See* Devins, *supra* note 1, at 457–59; Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2668 (2003) ("Using the appropriations process is not the best way to make . . . decision[s]" and is therefore "discouraged by congressional rule and judicial decision . . . .").

[51] *See* Devins, *supra* note 1, at 464. For example, the Hyde Amendment, first passed in 1976, prohibits federal funding for certain abortions. *See* Harris v. McRae, 448 U.S. 297, 302 (1980).

[52] Devins, *supra* note 1, at 458; *see also id.* at 465 n.58.

[53] *See* Beermann, *supra* note 49, at 88–89 (Riders "often fly below the political radar, placed in the bill by a few connected members of Congress and voted on by members who may not even be aware of their presence in the bill" or who may "face a great deal of pressure to vote in favor of the bill . . . . Riders are thus viewed in some circles as a method for Congress to dodge responsibility for its legislative actions." (footnote omitted)).

[54] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 474 (1989); s*ee also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) (noting that "repeals by implication" are disfavored particularly when "the subsequent legislation is an *appropriations* measure" (quoting Comm. for Nuclear Responsibility v. Seaborg, 463 F.2d 783, 785 (D.C. Cir. 1971) (emphasis added)) (internal quotation mark omitted)).

[55] *See, e.g.*, RULES OF THE HOUSE OF REPRESENTATIVES, 112th Cong., R. XXI(2)(b) (2011), *available at* http://rules.house.gov/Media/file/PDF_112_1/legislativetext/112th Rules Pamphlet.pdf ("A provision changing existing law may not be reported in a general appropriation bill . . . ."); *see also* Devins, *supra* note 1, at 458 ("House and Senate rules" separating lawmaking from appropriating "are a sensible means of ensuring that congressional decisionmaking is deliberate and systematic."); Garrett, *supra* note 50, at 2669 (observing that "dividing authorization bills from appropriations measures is supposed to" empower "substantive committees" in policymaking).

In light of these procedural shortcomings, the *Sherley* majority erred in applying the reenactment-acquiescence doctrine to Dickey-Wicker as if it were a standard statute.[56] Policy riders are unlikely to evince clear congressional intent. Moreover, because riders operate through annual appropriations and affect only those funds, Congress frequently reenacts policy riders annually to effect long-term policy changes.[57] Automatic annual reenactment makes policy riders particularly likely to inappropriately trigger the "strong" version of the reenactment-acquiescence doctrine unless courts remain vigilant in requiring a heightened showing of congressional intent. Absent evidence to the contrary, automatic annual *reenactment* of policy riders is like congressional *inaction* on standard statutes. The bare fact of automatic reenactment simply has no probative value as to congressional intent. Reenactment in *Sherley* should therefore have drawn the same judicial skepticism that congressional inaction routinely does.[58]

Courts generally invoke the reenactment-acquiescence doctrine along with other canons of construction to determine the *best* meaning of a statute.[59] That the *Sherley* majority instead employed the doctrine to find an interpretation merely *reasonable* at Step Two,[60] however, does not alleviate concerns about its doctrinal approach. First, Supreme Court practice is to demonstrate affirmative congressional intent to acquiesce, even at *Chevron* Step Two. *Barnhart* itself applied the doctrine in a Step Two reasonableness inquiry,[61] yet the Court still identified an affirmative congressional intent to acquiesce. Even in *Commodity Futures Trading Commission v. Schor*,[62] during the transition to the modern doctrine, the Court found the agency's interpretation reasonable at Step Two in part by citing evidence that "Congress explicitly affirmed" the interpretation.[63]

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[56] The majority, *Sherley*, 644 F.3d at 389, and the dissent, *id.* at 400 (Henderson, J., dissenting), both mentioned Dickey-Wicker's status as a policy rider only once, in their fact sections.

[57] *Cf.* Devins, *supra* note 1, at 465 ("[M]ost appropriations are reenacted every year . . . .").

[58] *See* Rapanos v. United States, 547 U.S. 715, 749 (2006) (plurality opinion) (noting the Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction"); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' . . . ." (quoting United States v. Wise, 370 U.S. 405, 411 (1962)); *cf.* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1405–09 (1988) ("The vagaries of the political process" obscure the meaning of congressional inaction. *Id.* at 1405.).

[59] *Cf.* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 45–47 (2008), *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf (identifying acquiescence and reenactment as canons of construction used to generate statutory meaning).

[60] *See Sherley*, 644 F.3d at 396 (reasoning that the bare fact of reenactment implies that Congress "at least understood the [NIH's] interpretation as statutorily permissible" (quoting Barnhart v. Walton, 535 U.S. 212, 220 (2002)) (internal quotation mark omitted)).

[61] *See Barnhart*, 535 U.S. at 219–20.

[62] 478 U.S. 833 (1986).

[63] *Id.* at 846.

Second, even at *Chevron* Step Two, Dickey-Wicker's status as a policy rider makes it particularly appropriate to require a heightened showing of affirmative congressional intent. The traditional justification for *Chevron* deference is congressional intent to delegate authority to interpret ambiguous statutory language.[64] As Justice Scalia has argued, however, such congressional intent is "merely . . . fictional."[65] The "strong" version of the reenactment-acquiescence doctrine, too, is a legal fiction insomuch as it presumes congressional intent without inquiry. To employ the "strong" version of the doctrine in the *Chevron* Step Two inquiry, then, is to layer fiction on top of fiction, to the detriment of clear legal reasoning.[66] This layering of fictions is particularly problematic where the empirical claims of congressional intent underlying the fictional presumption are weakest, as with policy riders enacted through the appropriations process.

Several prominent scholars and jurists have persuasively argued for replacing *Chevron*'s fictitious justification with the explicit and more realistic goal of improving policymaking.[67] Similarly, the *Sherley* majority might have self-consciously rejected the "strong" reenactment-acquiescence doctrine's fictional presumption and instead tried to improve congressional policymaking procedures.[68] A good first step would have been to acknowledge the suboptimal procedures used to enact (and automatically reenact) policy riders and to hold such reenactment irrelevant absent a showing of affirmative congressional intent, resting the outcome of the case on the otherwise substantial *Chevron* inquiry. Whether the suggested opinion would have prompted Congress to formally enact Dickey-Wicker is unclear and contingent on legislative preferences; it would, however, have put Congress on notice that courts consider the quality of enacting procedures when evaluating congressional intent. Instead, the court's rote application of the doctrine, premised on a fictitious assumption of intent, missed an opportunity to highlight policy riders' shortcomings and to nudge Congress toward better policymaking procedures in the future.

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[64] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (premising deference on delegation of interpretive authority); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (same).

[65] Scalia, *supra* note 64, at 517.

[66] *Cf.* Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1256 (1990) (identifying legal fictions as "obstacles to thought" and calling for "self-consciousness" in their use).

[67] *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

[68] *Cf.* Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 108 (1997) (noting that interpretive rules affect the legislative process); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1023–26 (1989) (arguing that public values, not congressional intent, animate doctrine).