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## ESSAY

### RECLAIMING THE LEGAL FICTION OF CONGRESSIONAL DELEGATION

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#### INTRODUCTION

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.<sup>1</sup> When the Supreme Court presented this fiction as a justification for judicial deference in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,<sup>2</sup> critics argued that it was both false and fraudulent. First, they argued that the fiction misperceives how Congress behaves. Congress is unlikely to intend a delegation of interpretive authority to an agency when it leaves statutory ambiguity.<sup>3</sup> If anything, Congress

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<sup>1</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 865 (1984); see also Lon L. Fuller, *Legal Fiction 1* (1967) (describing legal fictions as “conceits of the legal imagination”); Eben Moglen & Richard J. Pierce, Jr., *Sunstein’s New Canons: Choosing the Fictions of Statutory Interpretation*, 57 *U. Chi. L. Rev.* 1203, 1212 (1990) (noting that statutory interpretation, like other areas of the law, is pervaded by legal fictions); Peter J. Smith, *New Legal Fictions*, 95 *Geo. L.J.* 1435, 1449–64 (2007) (identifying new legal fictions across areas of the law, including statutory interpretation).

<sup>2</sup> 467 U.S. at 837.

<sup>3</sup> See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *Tex. L. Rev.* 113, 197–98 (1998) (pointing to the Administrative Procedure Act (“APA”) as evidence that Congress likely intended for courts to exercise independent judgment on interpretive questions); Cynthia R. Farina, *Statutory Interpretation and the Bal-*

is likely to intend for courts to exercise independent judicial judgment under such circumstances.<sup>4</sup> Second, critics contended that the fiction misrepresents what the Court is doing. The Court does not care about whether Congress intended to delegate interpretive authority in any particular instance.<sup>5</sup> Rather, the Court applies an across-the-board presumption of congressional delegation triggered by statutory ambiguity.<sup>6</sup> The fact that the Court moved away from an across-the-board presumption in *United States v. Mead Corp.*, requiring a more particularized inquiry into legislative intent,<sup>7</sup> has not dampened these criticisms. Scholars continue to argue that the Court's fiction is both false and fraudulent.<sup>8</sup> As a result, these scholars have felt free to disregard the role of

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ance of Power in the Administrative State, 89 Colum. L. Rev. 452, 471 (1989) (arguing that Congress's use of "equally expansive language in statutory schemes committed to judicial oversight . . . seem[s] to undermine any notion" that agencies are preferred over courts to "interpret[] broad statutory mandates"); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 995 (1992) (pointing to background understandings and the provisions of the APA that may undermine the presumption that Congress intends ambiguous language to be interpreted by agencies rather than the courts); Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 468 (1987) (noting that *Chevron* does not accurately reflect congressional intent since "[t]he APA—the basic charter governing judicial review and *Chevron* itself—was born in a period of considerable distrust of agency activity" and recent indications of congressional intent also suggest "that Congress favors a relatively aggressive judicial role").

<sup>4</sup> See supra note 3 and accompanying text.

<sup>5</sup> See Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. Rev. 1271, 1285 (2008) ("[T]he assumption 'that silence or ambiguity confers that kind of interpretative authority on the agency is unacceptable, for it assumes the very point in issue and thus fails to distinguish between statutory ambiguities on the one hand and legislative delegations of law-interpreting power to agencies on the other . . .'" (quoting *CSX Transp. v. United States*, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting)) (internal quotation marks omitted)).

<sup>6</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (noting that *Chevron* established "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant").

<sup>7</sup> 533 U.S. 218, 232–33 (2001).

<sup>8</sup> See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 203 (2001) (labeling the fiction "fraudulent"); Criddle, supra note 5, at 1302 (labeling the fiction a "trope"); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 Admin. L. Rev. 735, 753 (2002) (labeling the fiction a "bad farce"); Mark Seidenfeld, *Chevron's Foundation*, 86 Notre Dame L. Rev. 273, 311 (2011) (labeling the fiction "unsupportable").

congressional delegation in the debate over the best allocation of interpretive authority between courts and agencies.<sup>9</sup>

In this Essay, I argue that these critics have been proceeding on a fiction about a fiction. They have misread (1) how Congress behaves and (2) what the Court is doing. First, with regard to legislative behavior, I show that there is empirical and theoretical research supporting the notion that Congress *does* attend to the delegation of interpretive authority when it chooses particular language.<sup>10</sup> This work calls into question, and provides reason to doubt, the claim that Congress does not think about the delegation of interpretive authority at all or in the way that the Court imagines. It also provides reason to believe that the basic presumption of congressional delegation is well grounded. Furthermore, it provides reason to assume that an express delegation of regulatory authority generally carries an implied delegation of interpretive authority. Critics of the Court's framework have not sufficiently credited this work or the view that it suggests.

After providing a sense of how Congress is delegating interpretive authority both in general and in particular statutes, I then address judicial practice to demonstrate that the Court is neither as inventive nor incorrect as critics contend. Political scientists have shown what Congress cares about when it delegates regulatory au-

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<sup>9</sup> See, e.g., Barron & Kagan, *supra* note 8, at 204 (arguing that the Court should consider who issued the interpretation within the agency when allocating interpretive authority); Criddle, *supra* note 5, at 1273 (arguing that the Court should consider diverse, pluralistic views).

<sup>10</sup> See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 *Stan. L. Rev.* 627, 641 (2002) (“[I]t is not unusual for competing factions of Congress to ‘agree to disagree’ in the drafting of a statute” and seek resolution by another institution.); Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 *Vand. L. Rev.* 363, 369–70 (2010) [hereinafter Lemos, *Consequences*] (noting that “Congress often opts for legislation that addresses [a] problem generally but leaves the most contentious details unresolved,” thereby “delegating the ultimate decision to an agency”); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 *S. Cal. L. Rev.* 405, 434 (2008) [hereinafter Lemos, *The Other Delegate*] (stating that Congress intends to delegate interpretive authority to agencies); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. Rev.* 575, 596 (2002) (interviewing legislative staffers who confirm that legislators use deliberate ambiguity to obtain consensus, intending to influence subsequent agency interpretations).

thority, and their sense is consistent with the Court's sense.<sup>11</sup> When the Court applies a presumption of congressional delegation of interpretive authority, it makes a connection between interpretive authority and regulatory authority that closely tracks Congress's design choices. So, too, when the Court conducts a particularized inquiry into congressional delegation of interpretive authority, it relies on factors that closely track Congress's design choices. The Court has been doing a decent job of imagining how Congress, as a political institution, would think about the delegation of interpretive authority. Meanwhile, critics perhaps have been too fixated on legal values to properly appreciate the Court's pragmatic view of Congress.

In the end, I demonstrate that the fiction of congressional delegation is an ordinary one. It is a fiction only in the sense that the Court is not searching for actual legislative intent but is imputing legislative intent. After *Chevron* and before *Mead*, the Court imputed legislative intent from statutory ambiguity. With *Mead* and continuing forward, the Court examines other indications in the statutory context and the legislative history, asking whether Congress reasonably intended to delegate interpretive authority.<sup>12</sup> The Court often makes similar moves in other contexts when determining the meaning of statutory language. Specifically, it considers what Congress might reasonably have intended as to the meaning of the language, looking at the statutory text, statutory context, and legislative history.<sup>13</sup> This sort of fiction is reflective of a general shift away from a search for actual legislative intent that occurred

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<sup>11</sup> See, e.g., David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 *Cardozo L. Rev.* 947, 950 (1999) ("[L]egislators will delegate those issue areas where the normal legislative process is least efficient relative to regulatory policymaking by executive agencies."); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 *J.L. Econ. & Org.* 243, 246 (1987) [hereinafter *McCubbins et al., Administrative Procedures*] (asserting that Congress designs administrative procedures to facilitate legislative monitoring and influence of agency action under broad statutes); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. Rev.* 431, 442 (1989) [hereinafter *McCubbins et al., Structure and Process*] (same).

<sup>12</sup> See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *Mead*, 533 U.S. at 230.

<sup>13</sup> See *infra* note 192 (citing illustrative cases).

after the Legal Realist movement.<sup>14</sup> For some, it has specific roots in the Legal Process School.<sup>15</sup> Justice Breyer is the leading advocate for this sort of fiction, but he is not the only one who embraces it.<sup>16</sup>

The fiction of congressional delegation is not without weaknesses, though they are not the ones that critics by and large have been pressing. For example, to the extent that the fiction leads the Court to use a standard-based approach and rely on non-textual sources, it is subject to the standard critiques of those practices.<sup>17</sup> Thus, Justice Scalia chastised the Court in *Mead* for swapping *Chevron's* clean rule for “th’ol’ ‘totality of the circumstances’ test,”<sup>18</sup> but critics of the fiction generally have not reprised the rules/standards debate or the legislative history debate. They have instead argued that the fiction is not worth taking seriously. If the fiction is not as they believe, their arguments would benefit from further reflection.

In other writing, I have argued that the fiction serves an important normative value, tethering the Court’s framework to separation of powers by ensuring that Congress retains a role in lawmaking.<sup>19</sup> I have addressed ways of clarifying the contours of the fiction

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<sup>14</sup> See Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 870, 872 (1930) (casting doubt on whether Congress, a multi-member body, has a single, collective intention and whether a court possesses the tools to recover that intention).

<sup>15</sup> See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (proposing that courts interpret statutes by attributing a reasonable intention to Congress).

<sup>16</sup> See Stephen Breyer, *Active Liberty* 88 (2005) (“At the heart of a purpose-based approach stands ‘the reasonable member of Congress’—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem.”); *id.* at 88–98 (describing Supreme Court decisions implicating this approach); Stephen Breyer, *Making Our Democracy Work: A Judge’s View* 98–102 (2010) (making similar arguments); Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 198 (2006) (noting that Justice Breyer, while still on the Court of Appeals, assessed congressional delegation in a particularized manner based on “what a sensible legislator would have expected given the statutory circumstances” (quoting *Mayburg v. Sec’y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984) (internal quotation marks omitted))).

<sup>17</sup> See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 29–37 (1997) (discussing and rejecting judicial reliance on legislative history).

<sup>18</sup> *Mead*, 533 U.S. at 241 (Scalia, J., dissenting); see also *id.* at 245 (further contending that the test would cause “protracted confusion” among lower courts because of the “utter flabbiness of the Court’s criterion”).

<sup>19</sup> See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum. L. Rev. 1749, 1790–91 (2007).

to minimize the confusion that it has wrought among lower courts.<sup>20</sup> I have also described ways of extending the fiction to address a problem implicit in the Court's framework, specifically that courts can use the traditional tools of statutory construction to find a clear statutory meaning despite signs that Congress intended to delegate interpretive authority to the agency.<sup>21</sup>

My intention is not to reargue these points here. The concern of this Essay is more fundamental: by believing that the fiction is worse than it is, critics have had license to disregard the role of congressional delegation in evaluating how to allocate interpretive authority between courts and agencies. My argument brings the question of how to allocate interpretive authority between courts and agencies back to how Congress designs statutes. Critics can still argue that other considerations should prevail in the final analysis, but they must confront legislative interests head on.

This Essay proceeds in four parts. Part I describes the Supreme Court decisions that established the fiction. In these decisions, the Court transitioned from an across-the-board presumption of congressional delegation to a particularized analysis under certain circumstances. Part II describes the criticisms of the fiction. After *Chevron*, the critics launched a two-part attack: (1) Congress does not think about the delegation of interpretive authority in the way that the Court does, and (2) the Court does not actually care about whether Congress intends to delegate interpretive authority to the agency in any particular instance. Even though the Court changed the framework in *Mead* to get a closer read of legislative intent, the criticisms remained largely the same. Part III demonstrates the weaknesses of these persistent criticisms. First, there is direct evidence in the work of legal scholars that supports the Court's picture of legislative behavior. Second, there is indirect evidence in the work of political scientists that supports the Court's tools of statutory construction. This evidence shows that the fiction is neither false nor fraudulent, contrary to scholarly belief. Part IV addresses the "true" character of the fiction, arguing that the fiction is no different in kind from the one that the Court applies more

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<sup>20</sup> See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443, 1448 (2005).

<sup>21</sup> See Lisa Schultz Bressman, *Chevron's Mistake*, 58 Duke L.J. 549, 575-76 (2009).

generally in statutory interpretation. Thus, critics have no special reason to reject the fiction and have felt too free to depart from it in evaluating the proper allocation of interpretive authority between courts and agencies.

## I. THE LEGAL FICTION

In this Part, I set forth the decisions that established the legal fiction of congressional delegation. In *Chevron*, the Court held that Congress intends to implicitly delegate interpretive authority to an agency whenever it fails to resolve the meaning of statutory language.<sup>22</sup> The Court did not actually inquire into whether Congress intended to delegate interpretive authority in a particular instance but created an across-the-board presumption based on statutory ambiguity.<sup>23</sup> It departed from that presumption in *United States v. Mead Corp.*<sup>24</sup> and *Barnhart v. Walton*,<sup>25</sup> conducting a particularized inquiry into whether Congress intended to delegate interpretive authority with “the force of law.” It conducted a particularized inquiry in other important decisions as well.<sup>26</sup> Thus, the Court started with an across-the-board presumption of legislative intent and transitioned to a particularized inquiry under certain circumstances.

### A. *The Presumption*

In *Chevron*, the Court established a two-step test for courts to apply when reviewing agency interpretations of the statutes that those agencies administer.<sup>27</sup> The first step asks courts to determine whether “Congress has directly spoken to the precise question at issue.”<sup>28</sup> If the statute is clear, then that meaning controls.<sup>29</sup> But if

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<sup>22</sup> 467 U.S. at 842–44.

<sup>23</sup> *Id.*

<sup>24</sup> 533 U.S. 218, 226–27, 237–38 (2001) (recognizing that judicial deference is not appropriate unless Congress intends an agency to issue an interpretation with “the force of law”).

<sup>25</sup> 535 U.S. 212, 222 (2002).

<sup>26</sup> See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

<sup>27</sup> 467 U.S. at 842–43.

<sup>28</sup> *Id.* at 842–43 & n.9.

<sup>29</sup> *Id.* at 842.



the statute is ambiguous, the second step instructs courts to defer to the agency's interpretation as long as that interpretation is "reasonable."<sup>30</sup> The Court justified judicial deference primarily on a theory of congressional delegation: Congress intends to delegate interpretive authority to the agency whenever it fails to resolve the meaning of particular statutory language.<sup>31</sup> The Court offered numerous reasons why Congress might intend for agencies rather than courts to fill gaps in regulatory statutes, such as capitalizing on agency expertise, lack of legislative foresight, or to obtain consensus on an issue while allowing divergent coalitions to "take their chances" on a favorable resolution at the administrative level.<sup>32</sup> But the Court did not ask whether Congress intended to delegate interpretive authority based on any of these reasons in a particular instance. Instead, it created a presumption of congressional delega-

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<sup>30</sup> *Id.* at 843–44.

<sup>31</sup> *Id.* The Court wrote:

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. 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. 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.

*Id.* (internal citations and quotation marks omitted). The Court also premised judicial deference on a theory of agency expertise and political accountability. *Id.* at 865 (noting that agencies possess more expertise than courts for handling regulatory schemes that are "technical and complex" and for reconciling the "competing political interests" that regulatory decisions often involve, that agencies are more accountable to the people than courts "not directly but through the Chief Executive," and that "it is entirely appropriate for this political branch of Government to make such policy choices").

<sup>32</sup> *Id.* at 865. The Court stated:

Congress intended to accommodate both [statutory] interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body 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; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.

*Id.*

tion that purportedly applied across the board, triggered by a finding of statutory ambiguity.

The presumption never actually applied entirely across the board. In *Martin v. Occupational Safety and Health Review Commission*, the Court departed from the presumption because it had no other choice.<sup>33</sup> The case involved the Occupational Health and Safety Act of 1970 (“OSH Act”), a so-called split-enforcement statute.<sup>34</sup> Most regulatory statutes combine rulemaking, enforcement, and adjudicative powers in a single agency.<sup>35</sup> The OSH Act grants both the Secretary of Labor and the Occupational Safety and Health Review Commission certain powers.<sup>36</sup> It directs the Secretary to set workplace health and safety standards through the notice-and-comment rulemaking process.<sup>37</sup> In addition, the Secretary is authorized to enforce those standards by issuing a citation and assessing a monetary penalty if she determines after investigation that an employer has violated a standard.<sup>38</sup> The OSH Act grants the Commission, a three person body appointed by the President and confirmed by the Senate, adjudicatory functions that are triggered if an employer wishes to contest a citation.<sup>39</sup>

The Court could not apply a presumption based on statutory ambiguity to determine the allocation of interpretive authority between the two agencies. It therefore conducted a particularized inquiry of congressional delegation. The Court examined the inferences that could be drawn about legislative intent from the statutory context and the legislative history.<sup>40</sup> It focused on the “historical familiarity and policymaking expertise” of the Secretary, finding her in a better position to interpret her own rules and the statute.<sup>41</sup> Because these factors would lead Congress to prefer an agency to a court, they would also lead Congress to prefer one

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<sup>33</sup> 499 U.S. 144 (1991).

<sup>34</sup> *Id.* at 147, 151.

<sup>35</sup> *Id.* at 151.

<sup>36</sup> *Id.* at 147.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 147–48.

<sup>40</sup> *Id.* at 152 (“infer[ring] from the structure and history of the statute . . . that the power to render authoritative interpretations of OSH Act regulations is a ‘necessary adjunct’ of the Secretary’s powers to promulgate and to enforce national health and safety standards” (internal citation omitted)).

<sup>41</sup> *Id.* at 152–53.

agency (that is, the Secretary) over the other (that is, the Commission).<sup>42</sup> In the legislative history, the Court found confirmation for its view of the Secretary's expertise, as well as evidence that Congress intended to hold a single actor responsible for formulating the OSH standards and ensuring that they are effectively implemented.<sup>43</sup> The Court also drew a connection between express rule-making authority and implied interpretive authority. Because the Commission lacked rulemaking authority, the Court declined to find that Congress intended to delegate interpretive authority to the Commission.<sup>44</sup> Rather, Congress intended to delegate only "nonpolicymaking adjudicatory powers" to the Commission.<sup>45</sup> Thus, the Court recognized almost from the beginning that an across-the-board presumption could not always work, and it began to sketch the contours of a more particularized inquiry.

### *B. The Particularized Inquiry*

Despite the Court's initial announcement in *Chevron* of an across-the-board presumption, it has conducted a more particularized inquiry in two circumstances: (1) when there is evidence that the issue is too significant to delegate and (2) when the agency uses a less-than-formal interpretive method. The Court could have technically applied the presumption in both of these circumstances. Because it did not, both are moderations of *Chevron*.

#### *1. Too-Big-to-Delegate Questions*

In *Food and Drug Administration v. Brown & Williamson Tobacco*, the Court departed from the presumption of congressional delegation because it was unwilling to infer a delegation of authority over certain questions based on mere statutory ambiguity.<sup>46</sup> The Food and Drug Administration ("FDA") issued a regulation inter-

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<sup>42</sup> Id. at 152.

<sup>43</sup> Id. at 153.

<sup>44</sup> Id. at 158–59.

<sup>45</sup> Id. at 154.

<sup>46</sup> 529 U.S. 120, 159–60 (2000). The Court has applied the too-big-to-delegate doctrine in other cases. See, e.g., *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (holding that the authority to eliminate a central feature of the Communications Act was too significant for Congress to have intended to delegate to the Federal Communication Commission through statutory ambiguity).

preting the words of the Food, Drug and Cosmetic Act (“FDCA”) to include tobacco products, including cigarettes, and imposing regulations on such products.<sup>47</sup> The Court held that Congress had not granted the FDA jurisdiction over tobacco products.<sup>48</sup> As a technical matter, it held that the statute was clear on this point,<sup>49</sup> but the language was not clear. Instead, the Court inferred legislative intent from a series of later-enacted statutes. These statutes were tobacco-specific and none of them granted jurisdiction to the FDA or indeed granted any agency the authority to regulate tobacco pervasively.<sup>50</sup> The Court also found a poor fit between tobacco and FDA jurisdiction. Another statute guaranteed the continued marketing of tobacco, yet the FDA was obligated to ban any unsafe product, and it had determined that tobacco was unsafe.<sup>51</sup> On the basis of this particularized analysis, the Court concluded that Congress had not intended to delegate authority over tobacco to the FDA.<sup>52</sup> It said that the statute was clear, but the only clarity that the Court found was on the delegation question.

If there was any doubt on this point, the Court confirmed its concern for delegation by stating that some questions were simply too significant to support an inference of delegation based on statutory ambiguity.<sup>53</sup> The FDA had “asserted jurisdiction to regulate an industry constituting a significant portion of the American economy” and a product with “its own unique place in political history.”<sup>54</sup> The magnitude of the assertion made it unlikely that Con-

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<sup>47</sup> *Brown & Williamson*, 529 U.S. at 127 (reporting the FDA’s determination that nicotine is a “drug” within the meaning of the FDCA because it “affect[s] the structure or [a] function of the body” (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,631, 45,208 (Aug. 28, 1996))) (internal quotation marks omitted); *id.* (reporting that cigarettes are “combination products” for the delivery of those effects (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,396)).

<sup>48</sup> *Id.* at 156, 161.

<sup>49</sup> *Id.* at 156, 160–61.

<sup>50</sup> *Id.* at 137–38, 156 (collecting statutes).

<sup>51</sup> *Id.* at 137 (citing 7 U.S.C. § 1311(a) (1994)).

<sup>52</sup> *Id.* at 156, 161.

<sup>53</sup> *Id.* at 159.

<sup>54</sup> *Id.*

gress had silently intended to delegate interpretive authority to the FDA.<sup>55</sup>

The Court applied the too-big-to-delegate doctrine again in *Oregon v. Gonzalez*,<sup>56</sup> performing an even more particularized analysis than it had in *Brown & Williamson*. The Attorney General issued an Interpretive Bulletin interpreting the federal criminal drug laws to restrict physician-assisted suicide in the wake of a state law permitting the practice.<sup>57</sup> The Court held that Congress would not have intended to delegate interpretive authority to the Attorney General over this issue.<sup>58</sup> Although the Court could have simply attacked the form in which the interpretation appeared as in *Mead*, it instead found that the issue was too significant for Congress to have delegated through mere statutory ambiguity.<sup>59</sup> As in *Martin*, Congress had not delegated rulemaking authority to the Attorney General, and the Attorney General lacked “historical familiarity and policymaking expertise.”<sup>60</sup> The Attorney General had no experience with the regulation of physician-assisted suicide or the restriction of controlled substances.<sup>61</sup> Rather, the Attorney General was responsible for the non-policymaking aspects of the federal drug laws, including the registration and marketing of controlled substances.<sup>62</sup> As in *Brown & Williamson*, the Court examined the history of physician-assisted suicide, noting that “Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.”<sup>63</sup> The magnitude of the debate made it all the more likely that Congress did not

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<sup>55</sup> Id. at 160.

<sup>56</sup> 546 U.S. 243 (2006).

<sup>57</sup> The Oregon Death with Dignity Act, Or. Rev. Stat. § 127.800–995 (2003); *Gonzales*, 546 U.S. at 253–54 (noting that the Attorney General determined that physician-assisted suicide was not a “legitimate medical purpose” for which physicians might dispense and prescribe controlled substances under the Controlled Substances Act and its regulations (internal quotation marks omitted)).

<sup>58</sup> *Gonzales*, 546 U.S. at 267.

<sup>59</sup> Id. at 268.

<sup>60</sup> Id. at 266 (quoting *Martin*, 499 U.S. at 153).

<sup>61</sup> Id. at 269.

<sup>62</sup> Id. at 259 (quoting 21 U.S.C. § 821 (Supp. V 2000)).

<sup>63</sup> Id. at 249 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)) (internal quotation marks omitted).

intend to subtly delegate interpretive authority to the Attorney General.<sup>64</sup>

## 2. *Less-Than-Formal Procedures*

In *Mead*, the Court departed from the presumption of congressional delegation in the most significant way to date.<sup>65</sup> It was not faced with an issue that was too big to delegate, as in *Brown & Williamson*. Rather, it was faced with an interpretive method that was too informal to carry the force of law. The United States Customs Service sent a Ruling Letter to the Mead Corporation in which the agency interpreted its statute to impose a tax on a particular product that the Mead Corporation imported for sale.<sup>66</sup> The Court held that this interpretation was not entitled to the application of *Chevron* because Congress had not delegated authority to the agency to issue interpretations carrying the “force of law” through Ruling Letters.<sup>67</sup> The Court reached this conclusion after examining the character of the Ruling Letters and the conduct of the agency.<sup>68</sup> Ruling Letters do not reflect “fairness and deliberation” or “bespeak the legislative type of activity that . . . naturally bind[s] more than the parties to the ruling.”<sup>69</sup> Nor had the agency acted “with a lawmaking pretense in mind.”<sup>70</sup> It issued Ruling Letters at too great a rate (10,000 per year) from too many different offices (forty-six in all) for it to claim that such Letters carry the force of law.<sup>71</sup> On the basis of these individualized considerations, the Court held that the agency was not entitled to *Chevron* deference.<sup>72</sup> At best, the agency could earn a lesser form of judicial deference under *Skidmore v. Swift & Co.*<sup>73</sup>

In *Barnhart*, the Court conducted a particularized inquiry into another informal interpretive method using different factors than it

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<sup>64</sup> Id. at 267–68.

<sup>65</sup> See *Mead*, 533 U.S. 218.

<sup>66</sup> Id. at 225.

<sup>67</sup> Id. at 221, 226–27.

<sup>68</sup> Id. at 233.

<sup>69</sup> Id. at 230, 232.

<sup>70</sup> Id. at 233.

<sup>71</sup> Id.

<sup>72</sup> Id. at 234.

<sup>73</sup> Id. at 234–35; see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

had used in *Mead*.<sup>74</sup> Over a period of forty years, the Social Security Administration had included a certain interpretation in an Insurance Letter, a Disability Insurance State Manual, and a Social Security Ruling before issuing it in a notice-and-comment rule.<sup>75</sup> The Court first determined that the interpretation satisfied both conventional steps of *Chevron*.<sup>76</sup> It then found that the interpretation was entitled to judicial deference under *Chevron* even though it lacked procedural formality until shortly before litigation.<sup>77</sup> Performing a particularized analysis, the Court observed that the interpretation was of “longstanding duration,” which counts toward judicial deference, as does the “interpretive method used and the nature of the question at issue.”<sup>78</sup> In this case, the Court found that these factors and others supported an inference of congressional delegation:

[T]he 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.<sup>79</sup>

The Court has reinforced its particularized inquiry in other decisions.<sup>80</sup> Furthermore, it has held that the inquiry is valid even if a

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<sup>74</sup> *Barnhart*, 535 U.S. at 217.

<sup>75</sup> *Id.* at 219–20.

<sup>76</sup> *Id.* at 218–19.

<sup>77</sup> *Id.* at 221.

<sup>78</sup> *Id.* at 220, 222 (internal quotation marks omitted).

<sup>79</sup> *Id.* at 222.

<sup>80</sup> See, e.g., *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713–14 (2011) (finding that Congress delegated authority to issue interpretations of the Internal Revenue Code with the force of law to the Treasury Department and that such authority makes those interpretations eligible for *Chevron* deference); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173–74 (2007) (finding that Congress had delegated authority to issue interpretation of the Fair Labor Standards Act with the force of law to the Department of Labor). In *Mayo Foundation* and *Long Island Care*, the Court stated that *Chevron* applies “[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority.” *Mayo*

court has already issued an interpretation of an ambiguous statutory provision. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Court stated that an agency can effectively overrule a prior judicial interpretation of an ambiguous statutory provision as long as it possesses a delegation of interpretive authority and uses that authority to issue its own interpretation.<sup>81</sup> The fact that the court got there first does not deprive the agency of its delegated interpretive authority.

### 3. Routine Questions?

Some evidence suggests that the preference for a particularized inquiry may spread beyond the two limited circumstances of significant questions and non-formalized procedures. In *Zuni Public School District No. 89 v. Department of Education*, Justice Breyer extended the particularized inquiry of congressional delegation to a routine question—the sort that did not involve significant questions or informal procedures.<sup>82</sup> The Secretary of Education had issued an interpretation of a calculation provision of a federal education statute.<sup>83</sup> Basically, the statute allowed states to offset the costs of education with federal funds only if they “equalize[d] expenditures” among their public school districts.<sup>84</sup> To determine that a state had equalized expenditures, the Secretary must determine that the disparity in per-pupil expenditures among school districts does not exceed twenty-five percent, “disregard[ing]” school districts “with per-pupil expenditures” in the top and bottom fifth percent.<sup>85</sup> The Secretary had issued regulations, which it applied consistently for thirty years, calculating the upper and lower percentile cutoffs based not only on the number of districts (ranked by their per-pupil expenditures) but on the number of pupils in those districts.<sup>86</sup> If the Secretary had just considered the number of dis-

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*Foundation*, 131 S. Ct. at 714 (quoting *Long Island Care*, 551 U.S. at 173) (internal quotation marks omitted).

<sup>81</sup> 545 U.S. 967, 982–85 (2005).

<sup>82</sup> 550 U.S. 81, 93–100 (2007).

<sup>83</sup> See 20 U.S.C. § 7709(b)(2)(B)(i) (2006); *Zuni Pub. Sch. Dist.*, 545 U.S. at 86–87.

<sup>84</sup> See 20 U.S.C. § 7709(b)(2)(A) (2006).

<sup>85</sup> See *id.* § 7709(b)(2)(B)(i) (2006).

<sup>86</sup> *Zuni Pub. Sch. Dist.*, 550 U.S. at 86–87.



tricts, New Mexico would not have qualified for a federal offset.<sup>87</sup> Under the Secretary's size-adjusted calculation, the state qualified for a federal offset and could use that offset to decide how to equalize school funding across the districts.<sup>88</sup>

Justice Breyer wrote that the Secretary was entitled to *Chevron* deference, but he expressly departed from the normal order of the two-step test to get there. Rather than starting with the clarity of the statutory language, he started with the particularized evidence of congressional delegation.<sup>89</sup> He noted that the issue was a highly technical one, the Secretary was involved in legislative drafting, and the Secretary had maintained a consistent position throughout.<sup>90</sup> According to Justice Breyer, all of these factors indicated that Congress intended to delegate interpretive authority to the Secretary.<sup>91</sup> The interpretation was also reasonable in light of the purpose of the statute, and because it was reasonable in light of the purpose, the language did not absolutely preclude it.<sup>92</sup>

Only Justice Ginsburg agreed with Justice Breyer's analysis. Justice Stevens concurred because he found the legislative history was "pellucidly clear" and favored the Secretary's interpretation.<sup>93</sup> Justice Kennedy, joined by Justice Alito, concurred because he found the statute ambiguous and the agency's interpretation reasonable.<sup>94</sup> But he expressed concern that inverting the steps of *Chevron* would elevate "agency policy concerns" over "the traditional tools of statutory construction."<sup>95</sup> Justice Scalia, joined by the remaining three Justices, dissented, relying on the literal language of the statute, which said "per-pupil expenditures," plain and simple.<sup>96</sup> Thus, no other Justice except perhaps Justice Ginsburg would take the particularized inquiry as far as Justice Breyer would. Nevertheless, Justice Breyer's approach still stands as a sort of testament to how far the doctrine has come in roughly two decades—from an across-

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<sup>87</sup> Id. at 88–89.

<sup>88</sup> Id.

<sup>89</sup> Id. at 90.

<sup>90</sup> Id.

<sup>91</sup> Id.

<sup>92</sup> Id. at 90–91.

<sup>93</sup> Id. at 106 (Stevens, J., concurring).

<sup>94</sup> Id. at 107 (Kennedy, J., concurring).

<sup>95</sup> Id.

<sup>96</sup> Id. at 113–16 (Scalia, J., dissenting) (internal quotation marks omitted).

the-board presumption to a particularized inquiry of congressional delegation under certain circumstances.

## II. THE SCHOLARLY CRITICISMS

In this Part, I set forth the scholarly criticisms of the Court's reliance on the notion of implicit congressional delegation. I demonstrate that, despite the transition from an across-the-board presumption to a particularized inquiry under certain circumstances, the scholarly criticisms have remained largely the same. They have simply shifted to a different playing field.

Critics essentially tell a two-part tale. First, Congress does not intend to delegate interpretive authority to an agency whenever it fails to resolve a statutory question. If anything, Congress intends for courts to exercise independent judicial judgment. Second, the Court does not actually care about whether Congress intended to delegate interpretive authority in any particular instance. It either applies a presumption triggered by statutory ambiguity or considers factors that have no bearing on congressional delegation. *Chevron's* fiction of congressional delegation is therefore both false and fraudulent. As a result, critics have disregarded it—just as, in their view, the Court has been free to do so—and followed their preferred position on how best to allocate interpretive authority between courts and agencies.<sup>97</sup>

### *A. Legislative Behavior*

Shortly after *Chevron* was decided, critics argued that congressional delegation was a legal fiction because Congress is unlikely to intend a delegation of interpretive authority to agencies when it leaves a statutory ambiguity. If anything, Congress is likely to intend for courts to exercise independent judicial judgment. As we shall see, critics offered a variety of reasons, so the argument took a variety of forms.

Critics first argued that congressional delegation is really an inference of legislative intent based on legislative silence, which is to say the failure of Congress to provide a different judicial deference

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<sup>97</sup> See, e.g., Criddle, *supra* note 5, at 1302 (advocating an interpretive framework based on diverse, pluralistic values).

rule.<sup>98</sup> But, they noted, legislative silence is always a questionable basis for an inference of legislative intent. As Professor Thomas Merrill stated, “in order to establish that Congress has mandated the practice of deference, the Court should be able to point to more than a debatable inference from congressional inaction.”<sup>99</sup>

Critics also offered a form of *expressio unius est exclusio alterius* argument—the mention of one thing precludes the inference of another.<sup>100</sup> Because Congress knows how to write explicit delegations of regulatory authority, it is unlikely to make implicit delegations of interpretive authority.<sup>101</sup> Put simply, Congress knows how to delegate when it wants to delegate.

Relatedly, critics rejected a kind of greater-includes-the-lesser argument. There was no general understanding before *Chevron* that Congress intended to implicitly delegate interpretive authority whenever it gave an agency the power to issue rules or regulations.<sup>102</sup> Some scholars suggested that a delegation of rulemaking authority only conveyed the power to issue procedural rules or interpretive rules rather than *Chevron*-style legislative rules.<sup>103</sup> Therefore, the greater delegation of general regulatory authority did not

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<sup>98</sup> Merrill, *supra* note 3, at 995 (“The strongest evidence in support of the Court’s presumption is the fact that Congress knows about the practice of judicial deference to agency interpretations and has not acted to prohibit it.”).

<sup>99</sup> *Id.* Professors Thomas Merrill and Kristen Hickman, although writing after *United States v. Mead Corp.*, 533 U.S. 218 (2001), make the point that “pre-*Chevron* case law generally provided that agency interpretations embodied in an exercise of a general rulemaking power were entitled to less deference than interpretations rendered pursuant to a specific grant of rulemaking power.” Thomas W. Merrill & Kristen E. Hickman, *Chevron’s Domain*, 89 *Geo. L.J.* 833, 871 n.212 (2001) (citing *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981); *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979)).

<sup>100</sup> See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (describing the *expressio unius est exclusio alterius* canon of construction).

<sup>101</sup> Duffy, *supra* note 3, at 199 (“Congress has no trouble writing express delegations to agencies when it wants.”); Merrill, *supra* note 3, at 995 (“The very practice of enacting specific delegations of interpretive authority suggests that Congress understands that no such general authority exists.”).

<sup>102</sup> Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 *Yale J. on Reg.* 1, 45 & n.208 (1990) (observing that the understanding before *Chevron* may have been that the delegation of rulemaking power in organic statutes did not confer the authority to issue legislative rules and asserting that *Chevron* should be understood to reflect a departure from that understanding).

<sup>103</sup> *Id.*

include the lesser (but still significant) delegation of interpretive authority.

Critics also made the argument that imputing legislative intent to delegate is inconsistent with the Administrative Procedure Act (APA).<sup>104</sup> The APA, the umbrella statute that provides default procedural and judicial review provisions, suggests that Congress intended courts to exercise independent judicial judgment on questions of law. Consider Merrill: “[T]he one general statute on point, the Administrative Procedure Act, directs reviewing courts to ‘decide *all* relevant questions of law.’ If anything, this suggests that Congress contemplated [that] courts would always apply independent judgment on questions of law, reserving deference for administrative findings of fact or determinations of policy.”<sup>105</sup>

Professor John Duffy considered the relationship between congressional delegation and the APA at length. He disagreed with Merrill and others about the significance of the “questions of law” provision because, under *Chevron*, a “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.”<sup>106</sup> But Duffy objected to the *Chevron* approach on other grounds: “[t]he problem with the ‘implicit delegation’ view of *Chevron* is that it violates another provision of the APA,”<sup>107</sup> section 558(b), which forbids agencies from issuing “substantive rule[s] . . . except [(1)] within jurisdiction delegated to the agency and [(2)] as authorized by law.”<sup>108</sup> Duffy argued that implicit congressional delegation violates this “[o]ften overlooked” provision because it allows an agency to assert a “de facto rule-making power so long as only the first condition is satis-

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<sup>104</sup> Farina, *supra* note 3, at 471 (arguing that Congress’s use of “equally expansive language in statutory schemes committed to judicial oversight . . . seem[s] to undermine any notion” that agencies are preferred over courts to “interpret[] broad statutory mandates”); Sunstein, *supra* note 3, at 468 (noting that *Chevron* does not accurately reflect congressional intent since “[t]he APA—the basic charter governing judicial review and *Chevron* itself—was born in a period of considerable distrust of agency activity” and recent indications of congressional intent also suggest “that Congress favors a relatively aggressive judicial role”).

<sup>105</sup> Merrill, *supra* note 3, at 995 (quoting 5 U.S.C. § 706 (1988)).

<sup>106</sup> Duffy, *supra* note 3, at 198.

<sup>107</sup> *Id.*

<sup>108</sup> 5 U.S.C. § 558(b) (1994).

fied—the agency has . . . jurisdiction over the statute.”<sup>109</sup> For the phrase “authorized by law” to have force and effect as a limit on substantive rules, Congress must have envisioned that courts rather than agencies would interpret the relevant law.

Scholars also provide justifications for the APA’s preference for independent judicial judgment. As Professor Cass Sunstein argued, “Congress’s fear of agency bias or even abdication makes it most doubtful that the legislature has sought deference to the agency under all circumstances.”<sup>110</sup> Congress, aware of agency pathologies, sought a judicial check to counteract them.

After the Court decided *Mead*, one might have expected at least some of these criticisms to recede. The Court attempted to take a closer look at congressional delegation, determining what Congress intended in a particular instance. It was no longer relying on a blanket presumption of how Congress acts. Yet the criticisms continued and even intensified.

Professor David Barron and then-Professor Elena Kagan reflected that mood.<sup>111</sup> Writing in response to *Mead*, they asserted that Congress probably does not think about the delegation of interpretive authority at all, let alone in the way that the Court imagines.<sup>112</sup> Like Merrill and others, they focused on legislative silence, observing that Congress usually says nothing about the delegation of interpretive authority.<sup>113</sup> The question is what inference to draw from legislative silence on this issue:

To be sure, Congress’s usual silence on this matter may express agreement with a broad rule of deference to agency interpretations. But this explanation seems improbable given (1) Congress’s similar passivity on this issue prior to *Chevron*, and (2) Congress’s certain appreciation of variety in both administrative statutes and administrative decision-making processes. It is far more likely that Congress, unless confronting a serious problem

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<sup>109</sup> Duffy, *supra* note 3, at 198 (quoting Louis L. Jaffe, *Judicial Control of Administrative Action* 564 (1965)) (internal quotation marks omitted).

<sup>110</sup> Cass R. Sunstein, *Law and Administration After Chevron*, 90 *Colum. L. Rev.* 2071, 2090–91 (1990).

<sup>111</sup> Barron & Kagan, *supra* note 8, at 216 (arguing that the *Mead* Court actually “obscured the nature of the judicial task involved in defining *Chevron*’s domain”).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

in the exercise of some interpretive authority, simply fails to think about this allocation of power between judges and agencies.<sup>114</sup>

They had strong words for the Court's approach: "Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases."<sup>115</sup> Other scholars reprised the more moderate claim about legislative silence. Merrill, joined by Professor Kristin Hickman, maintained that legislative silence provides a weak foundation for congressional delegation.<sup>116</sup> Thus, legislative silence should not be dispositive.

Critics also reintroduced the other pre-*Mead* arguments. They argued in favor of an *expressio unius* understanding—that Congress knows how to write express delegations when it wants—and against a greater-includes-lesser understanding that a delegation of regulatory authority confers a delegation of interpretive authority.<sup>117</sup> Consider Merrill and Hickman: "At the time *Chevron* was decided, there was no established background understanding that a decision by Congress to confer general rulemaking or adjudicatory authority on an agency would be deemed a decision to transfer primary interpretational authority to the agency. If anything, the understanding was to the contrary."<sup>118</sup>

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<sup>114</sup> Id.

<sup>115</sup> Id. at 203.

<sup>116</sup> Merrill & Hickman, *supra* note 99, at 871 ("In addition, Congress has never acted to signal general disapproval of courts exercising independent review in matters of statutory interpretation."); see also Seidenfeld, *supra* note 8, at 278 (arguing that legislative silence is a weak indication of congressional delegation).

<sup>117</sup> 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, 797–98 (2010) ("[E]xcept in those situations in which Congress explicitly delegates interpretive authority to an agency . . . there is little reason to believe that ambiguity signals congressional intent to delegate interpretive authority to the administering agency and not to the reviewing court."); Criddle, *supra* note 5, at 1285 (referencing the argument).

<sup>118</sup> Merrill & Hickman, *supra* note 99, at 871 & n.212 (citing decisions in which the Court refused to imply a delegation of interpretive authority to the Internal Revenue Service based on an explicit delegation of regulatory authority to the agency in the Internal Revenue Code); see also Beermann, *supra* note 117, at 810–11 (describing the pre-*Chevron* understanding reflected in the tax cases).

Critics once again asserted the argument that congressional delegation is inconsistent with the APA.<sup>119</sup> The APA suggests that Congress intended to impose an independent judicial check on agency interpretation. To explain why, Professor Jack Beermann picked up where Sunstein left off in addressing Congress's perception of agencies, arguing that "Congress does not usually view agencies as trusted partners, but rather views them as competing entities that need to be kept in line."<sup>120</sup> Especially because agencies are often dominated by the President, Beermann continued, it is unlikely that Congress would simply allow them to run the shop unattended.<sup>121</sup>

In sum, *Mead* may have changed the Court's interpretive framework to better calibrate legislative intent, but it did not alter the criticisms of congressional delegation. Scholars have continued to argue often more vociferously than before that the notion of implicit congressional delegation is a legal fiction because it reflects a false picture of legislative behavior. But these criticisms comprise only half of the story, as the next Section shows.

### B. Judicial Practice

When *Chevron* was decided, critics contended that the Court applied a legal fiction because it did not actually inquire into whether Congress intended to delegate interpretive authority in any particular instance.<sup>122</sup> Rather, it applied an across-the-board

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<sup>119</sup> Beermann, *supra* note 117, at 788 ("The most startling thing about *Chevron* initially is that it appears inconsistent with the APA's judicial review provisions."); Criddle, *supra* note 5, at 1285–86 ("Critics of the congressional delegation theory have argued persuasively that Congress expressly disclaimed any such intent to delegate interpretive authority in the Administrative Procedure Act . . . by directing reviewing courts to 'decide all relevant questions of law.'" (quoting 5 U.S.C. § 706 (2000))); Seidenfeld, *supra* note 8, at 278–79 (arguing that congressional delegation is inconsistent with the APA's judicial review provision).

<sup>120</sup> Beermann, *supra* note 117, at 799.

<sup>121</sup> *Id.*

<sup>122</sup> *CSX Transp. v. United States*, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) ("[T]hat silence or ambiguity confers that kind of interpretative authority on the agency is unacceptable, for it assumes the very point in issue and thus fails to distinguish between statutory ambiguities on the one hand and legislative delegations of law-interpreting power to agencies on the other." (quoting Clark Bye, *Judicial Review of Administrative Interpretations of Statutes: An Analysis of Chevron's Step Two*, 2 Admin. L.J. 255, 261 (1989))) (internal quotation marks omitted); Peter L.

presumption of congressional delegation triggered by statutory ambiguity. Although *Mead* defeated this claim by introducing a particularized inquiry into congressional delegation under certain circumstances, the criticism only shifted to a new playing field. Critics began to argue that the Court does not actually inquire into whether Congress intends to delegate interpretive authority in particular instances because it considers factors that bear no relation to that determination.<sup>123</sup>

In *United States v. Mead Corp.*, the Court focused on whether the interpretive method promotes the same sort of “fairness and deliberation” as do procedures like notice-and-comment rulemaking or formal adjudication and whether it “bespeak[s] the legislative type of activity that would naturally bind more than the parties to the ruling.”<sup>124</sup> The Court also considered whether the agency set out with “a lawmaking pretense in mind.”<sup>125</sup> In *Barnhart v. Walton*, the Court emphasized the “longstanding duration” of the interpretation, “the interpretive method used,” and “the nature of the question at issue,” supplemented by a list of more specific factors.<sup>126</sup>

Looking at this hodgepodge, critics found no connection to congressional delegation. As Barron and Kagan wrote, the Court considers factors that reflect “[its] view of how best to allocate interpretive authority,” such as procedural formality or agency deliberation.<sup>127</sup> Merrill made a similar point when he suggested that

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Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1120 (1987) (“*Chevron* appears to reach this conclusion [that mandatory deference is required] as a general imperative of judicial behavior, unconnected to congressional wishes reflected in any given law.”).

<sup>123</sup> Barron & Kagan, *supra* note 8, at 219–20.

<sup>124</sup> 533 U.S. at 230, 232.

<sup>125</sup> *Id.* at 233.

<sup>126</sup> 535 U.S. at 220, 222 (internal quotation marks omitted) (relying on “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”).

<sup>127</sup> Barron & Kagan, *supra* note 8, at 212; see also Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 371 (1986) (“Using these factors as a means of discerning a hypothetical congressional intent about ‘deference’ . . . allows courts to allocate the law-interpreting function between court and agency in a way likely to work best within any particular statutory scheme.”). Justice Breyer has since defended the fiction as best promoting “the Constitution’s democ-



the Court is considering “policy arguments” for judicial deference when looking at the agency’s “historical familiarity” with the issue and its “policymaking expertise.”<sup>128</sup> On Professor Evan Criddle’s account, the Court is using its delegation fiction “to reach outcomes consistent with *Chevron*’s consensus-based approach,” with a focus on political accountability, “deliberative rationality,” and “national uniformity.”<sup>129</sup> Professor Mark Seidenfeld remarked that “the Court’s reliance on factors unrelated to actual congressional intent [is] best explained by positing that, despite the language in *Mead* focusing on actual intent, *Mead* really depends on constructive congressional intent about whether the agency should get interpretive primacy.”<sup>130</sup>

These scholars and others debated which factors the Court ought to emphasize, particularly when the factors conflict. For example, Barron and Kagan argued that the Court ought to prioritize political accountability over procedural formality, which leads them to propose an ingenious method for determining whether a particular interpretation is accountable enough to merit judicial deference.<sup>131</sup> Criddle advocated consideration of all of the consensus-based values.<sup>132</sup> When these values point in the same direction, judicial deference is appropriate. When one or more is missing, judicial deference is inappropriate.<sup>133</sup> Others defended the Court’s focus on procedural formality, even if it sometimes comes at the expense of political accountability.<sup>134</sup> The more general point is that numerous scholars have felt at liberty to consider the values that they believe promote the best allocation of interpretive authority between courts and agencies precisely because they view the Court as making precisely the same move.

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matic objective,” by “ready translation of the general desire of the public for certain ends, through the legislator’s efforts to embody those ends in legislation, into a set of statutory words that will carry out those general objectives.” Breyer, *Active Liberty*, supra note 16, at 101.

<sup>128</sup> Merrill, supra note 3, at 995 n.112 (quoting *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 153 (1991)) (internal quotation marks omitted).

<sup>129</sup> Criddle, supra note 5, at 1302, 1303.

<sup>130</sup> Seidenfeld, supra note 8, at 281.

<sup>131</sup> See Barron & Kagan, supra note 8, at 235 (arguing that courts ought to examine who within an agency was responsible for the relevant interpretation).

<sup>132</sup> Criddle, supra note 5, at 1315–16.

<sup>133</sup> *Id.* at 1316.

<sup>134</sup> See Bressman, supra note 20, at 1479–80.

Many have further advocated that, whatever the proper allocation of interpretive authority, the Court ought to abandon its fiction of congressional delegation. The fiction is only a thin cover for other normative values or, worse, for ideological preferences.<sup>135</sup> It impairs the legitimacy of the Court's interpretive framework because it is a fiction. As Duffy illustrated:

But if this [fiction] is all that supports the Court's *Chevron* doctrine, something is quite amiss. For how, we must ask, would an executive branch agency fare before the Supreme Court (especially Justice Scalia) if it were to admit that its statutory authorization for one of its programs—to be sure, a good program supported by many policy considerations—was to be found only in a “fictional, presumed intent” of Congress? If the Executive would not be allowed to support its work on such imagined statutory authority, the Court should be equally demanding in judging the legitimacy of its own creation.<sup>136</sup>

In addition, the fiction ought to be abandoned because it is prone to misunderstanding and misapplication in practice. When *Mead* was decided, Justice Scalia warned that it was likely to confuse courts because of the “utter flabbiness of the Court's criteria.”<sup>137</sup> Empirical studies have since confirmed this prediction.<sup>138</sup> Those studies reveal that lower courts are uncertain about which of the Court's factors matters most or how they relate to each other.<sup>139</sup> As a result, lower courts often strive to avoid any determination on

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<sup>135</sup> See Criddle, *supra* note 5, at 1302 (arguing that the Court is now using its delegation fiction “to reach outcomes consistent with *Chevron*'s consensus-based approach”); Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 U. Chi. L. Rev. 823, 825–26 (2006) (demonstrating empirically that *Chevron* does not constrain judges from following their ideological preferences).

<sup>136</sup> Duffy, *supra* note 3, at 199; see also Criddle, *supra* note 5, at 1315–16 (arguing that the fiction impairs the clarity, political stability, and transparency of the Court's decisions); Sunstein, *supra* note 16, at 193 (arguing that the Court's decisions “point in unfortunate directions because they increase uncertainty and judicial policymaking without promoting important countervailing values”).

<sup>137</sup> 533 U.S. at 245 (Scalia, J., dissenting).

<sup>138</sup> See, e.g., Bressman, *supra* note 20, at 1457–69.

<sup>139</sup> *Id.* at 1458–64.

the congressional delegation issue, compounding uncertainty as to which institution possesses interpretive authority.<sup>140</sup>

My contention is that these arguments about the fiction of congressional delegation are themselves based on a fiction. Scholars have misread (1) how Congress behaves and (2) what the Court is actually doing. The next Part looks at Congress and the following Part looks at the Court.

### III. A PICTURE OF LEGISLATIVE BEHAVIOR

In this Part, I look at legislative behavior. We have evidence that Congress attends to delegation of interpretive authority when it writes statutes. That evidence consists of interviews with legislative staffers and studies of particular statutes. Although this evidence is not comprehensive, it calls into question—and provides reason to doubt—the claim that Congress does not think about the delegation of interpretive authority at all or in the way that the Court envisions. This evidence also undermines other claims: that Congress does not connect the express delegation of regulatory authority with an implicit delegation of interpretive authority; that Congress knows how to write express delegations when it wants to delegate any sort of authority; and that Congress intends for courts to exercise independent judgment on interpretive questions, consistent with the APA.

#### *A. Attending to the Delegation of Interpretive Authority*

Professors Victoria Nourse and Jane Schacter conducted interviews with legislative staffers and confirmed, among other things, that Congress attends to the delegation of interpretive authority when it chooses statutory language.<sup>141</sup> Those staffers reported that members of Congress often used “deliberate ambiguity” to obtain consensus on legislation.<sup>142</sup> Members of Congress were aware that the decision to use ambiguous or vague words came with a risk that a court or an agency would choose an interpretation that diverged

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<sup>140</sup> Id. at 1464–69.

<sup>141</sup> See Nourse & Schacter, *supra* note 10, at 596–97 (interviewing sixteen counsels working on the Senate Judiciary Committee or one of its subcommittees who reported that legislative drafting involves a “willful lack of clarity”).

<sup>142</sup> Id. at 596.

from their preferences. But for some, the decision did not pose a risk so much as “an opportunity to let an agency, as opposed to a court, resolve the issue, and sometimes they specifically desired this result as well.”<sup>143</sup> Competing legislative coalitions were aware that they could seek to influence an agency to adopt their preferred position. By choosing words that “mean all things to all people,” members of Congress knew that they could secure the votes to enact a bill without sacrificing the opportunity to steer the law in their favored direction.<sup>144</sup>

Professors Joseph Grundfest and Adam Pritchard demonstrated the same phenomenon by studying a particular statute, the Private Securities Litigation Reform Act of 1995 (“PSLRA”).<sup>145</sup> Congress enacted the PSLRA to resolve a series of questions over the applicable pleading standard for securities fraud liability without destroying the consensus necessary to pass the larger reform statute.<sup>146</sup> The pleading standard under existing securities law had generated a circuit split among the Courts of Appeals as to whether it required the plaintiff to show that the defendant in the securities fraud case had been “barely reckless” or “highly reckless.”<sup>147</sup> Furthermore, the circuits had divided as to whether the plaintiff must “allege facts that give rise to a strong inference of fraudulent intent” or could merely state “that scienter existed.”<sup>148</sup> The PSLRA “purported to resolve this conflict by adopting a uniform standard for pleading scienter, the ‘strong inference’ standard.”<sup>149</sup> But it dodged the underlying issue—whether recklessness suffices, and if so, what sort—because this issue divided legislators as it had divided courts.<sup>150</sup> By choosing language that left the issue unresolved in the statute, Congress allowed “both sides [to] hope that the Supreme Court would eventually rule in their favor.”<sup>151</sup> Each coalition placed language in the legislative history that the

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<sup>143</sup> *Id.* at 596–97.

<sup>144</sup> *Id.*

<sup>145</sup> See Grundfest & Pritchard, *supra* note 10, at 650–66.

<sup>146</sup> *Id.* at 650.

<sup>147</sup> *Id.* at 651 (internal quotation marks omitted).

<sup>148</sup> *Id.* at 652 (internal quotation marks omitted).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 658.

<sup>151</sup> *Id.*

Court could use to adopt a favorable interpretation.<sup>152</sup> When President Clinton vetoed the bill, even he took steps to influence subsequent interpretation in the event that Congress nevertheless enacted the bill. In his veto message (the first of his administration), President Clinton stated that he opposed a heightened pleading standard and endorsed language in the conference committee report supporting his view.<sup>153</sup>

Although this case study demonstrates that Congress thinks about the delegation of interpretive authority when it chooses statutory language, it does not involve a delegation to an agency. It therefore does not substantiate the claim that all statutory ambiguity reflects a delegation to the agency. But the point here is not to defend an across-the-board presumption of congressional delegation to an agency based on statutory ambiguity. It is to deflect the claim that Congress does not think about the delegation of interpretive authority when it writes statutes.

Professor Margaret Lemos's case studies of statutes show that Congress is aware of delegating interpretive authority when it chooses ambiguous language.<sup>154</sup> Her work demonstrates that Congress regards courts (including the Court) as delegates of interpretive authority. This claim bucks conventional wisdom because scholars are uncomfortable thinking about courts as delegates.<sup>155</sup> Whatever authority courts possess to fill gaps in statutes must be judicial rather than legislative or executive. Her unconventional work stands against the broader claim that Congress does not think about the delegation of interpretive authority at all. Congress does think about that issue and often views courts and agencies as substitutes based on their relative institutional attributes. For example, Congress might prefer to delegate to courts if it desires more conservative (that is, narrower) interpretations or more stable interpretations. Again, Lemos's work is not useful to defend an across-the-board presumption of congressional delegation to an agency in the face of statutory ambiguity. In fact, it complicates the argu-

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<sup>152</sup> *Id.* at 657–58.

<sup>153</sup> *See id.* at 659.

<sup>154</sup> Lemos, *Consequences*, *supra* note 10; Lemos, *The Other Delegate*, *supra* note 10.

<sup>155</sup> *See, e.g.,* Martin H. Redish, *The Constitution as Political Structure* 140–41 (1995) (arguing that courts inevitably make law in the course of adjudication and therefore exercise judicial power, not legislative power).

ment, as does the analysis of the PSLRA. Some statutes involve both courts and agencies and deciding which institution possesses interpretive authority depends on the statutory scheme that Congress designed.

*B. Connecting Regulatory Authority and Interpretive Authority*

Lemos's work is also relevant to the claim that Congress does not view interpretive authority as implicitly tied to general regulatory authority.<sup>156</sup> Congress can sever interpretive authority from general regulatory authority, and it sometimes does. But Lemos's work suggests why it rarely does and therefore why it is reasonable to view the greater grant of regulatory authority as conferring the lesser grant of interpretive authority.

Start from the backdrop of Title VII of the Civil Rights Act of 1964 or the Sherman Act, the subjects of Lemos's work. These statutes contain prohibitions on private conduct. Only Title VII directly involves an agency, but that agency does not possess general regulatory authority. Both grant implementation authority, as well as interpretive authority, to courts. But neither contains a grant of rulemaking authority to courts, nor could they do so constitutionally. Courts possess authority to implement the statutes in the course of case-by-case adjudication. As part of that authority, they possess the subsidiary authority to interpret the statutes. Some may argue that this interpretive authority has always belonged to courts and therefore Congress does not need to delegate it. But that is silly. Courts have authority to interpret a law because the law gives parties a right to invoke judicial jurisdiction over that law. Interpretive authority comes from implementation authority. The same could be said of agencies. When Congress grants an agency general regulatory authority, which it must do to involve an agency in the

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<sup>156</sup> A delegation of general regulatory authority is an express statutory provision granting an agency the power to "make 'such rules and regulations as are necessary to carry out the provisions of this chapter' or words to that effect." Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 *Harv. L. Rev.* 467, 469 (2002); see also Duffy, *supra* note 3, at 199–203 (arguing that an express delegation of authority to issue legislative rules carries with it an implicit delegation of authority to issue statutory interpretations); Merrill & Watts, *supra*, (identifying a lost legislative drafting convention for signaling when authority to issue "rules and regulations" encompassed the power to issue rules with the force of law).

implementation of the law, it conveys interpretive authority at the same time. Congress is not in the habit of viewing the two separately, nor is it in the habit of viewing courts as default interpreters, requiring an express delegation to agencies. There is a simple way to put the point: Congress grants authority to make decisions, not to make policies plus or minus interpretations.<sup>157</sup> That distinction is an academic one.

The connection between general regulatory authority and interpretive authority also refutes the *expressio unius* claim. Congress does know how to write explicit delegations, and it must do so for an agency to possess general regulatory authority. But Congress might assume that the agencies will also possess interpretive authority over any ambiguity that it unintentionally or deliberately creates. The point again is that Congress may not think about the delegation of interpretive authority as academics do, focusing on the need for clear rules to vindicate judicial decisions that basically get it right. Rather, it may think about the issue as legislators do, focusing on whether to write clear language or leave room for an agency or court (which one?) to fill the gaps.

Although Lemos's work is only a starting point, the evidence on the other side is weak. The best example of the Court refusing to read a general delegation of regulatory authority to contain a delegation of interpretive authority is the Internal Revenue Code, as Merrill and Hickman noted when explaining the background understanding before *Chevron*.<sup>158</sup> But, until recently, the Court held that the Internal Revenue Code is subject to a different interpretive framework than ordinary regulatory statutes.<sup>159</sup> Perhaps that was not clear until Professor William Eskridge and Lauren Baer demonstrated that the Court actually applies seven or eight differ-

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<sup>157</sup> Cf. Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 26 (1983) (observing that "'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency").

<sup>158</sup> Merrill & Hickman, *supra* note 99, at 871 & n.212 (citing tax cases for the proposition that, if anything, there was a background understanding before *Chevron* that the delegation of general rulemaking or adjudicative authority did not confer a grant of interpretive authority).

<sup>159</sup> See 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, 1097–1120 (2008) (documenting the diversity of deference doctrines, including one for tax statutes).

ent deference doctrines.<sup>160</sup> In any event, the Court did not apply *Chevron* to IRS regulations implementing the Internal Revenue Code. It was never a good example from which to generalize. Other statutes contain greater possibility of delegation. Notably, the Court has now changed its view of the Internal Revenue Code in line with the suggestion here. In *Mayo Foundation for Medical Education and Research v. United States*, the Court read the explicit delegation of authority to “prescribe all needful rules and regulations for the enforcement” of the Internal Revenue Code to the Treasury Department to convey a delegation of interpretive authority.<sup>161</sup>

### C. Maintaining a Judicial Check

The evidence that Congress attends to the delegation of interpretive authority and thinks about courts and agencies as substitutes for exercising that authority undermines the claim that Congress “intends that courts exercise independent judgment when it confers authority on agencies subject to APA-style judicial review.”<sup>162</sup> If Congress (1) thinks about the delegation of interpretive authority, particularly when necessary to obtain legislative consensus, and (2) is not in the habit of distinguishing the delegation of policymaking and interpretive authority, why would it want to subject interpretations to a more stringent standard of review than policies (which are subject to the arbitrary and capricious standard of review)?<sup>163</sup> Critics might answer, “because the APA says so.” But that argument is weak.

First, the language of the APA does not preclude judicial deference. Duffy has already demonstrated why the “questions of law” language does not preclude judicial deference.<sup>164</sup> In addition to his argument, there is the more general argument that the language of

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<sup>160</sup> *Id.*

<sup>161</sup> 113 S. Ct. 704, 713–14 (2011) (internal quotation marks omitted) (finding that Congress delegated authority to issue interpretations of the Internal Revenue Code with the force of law to the Treasury Department and that such authority makes those interpretations eligible for *Chevron* deference).

<sup>162</sup> Merrill & Hickman, *supra* note 99, at 871 n.211.

<sup>163</sup> See 5 U.S.C. § 706(2)(A) (2006) (directing reviewing courts to “(2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

<sup>164</sup> Duffy, *supra* note 3, at 197–98.



the judicial review provision has in other places not been taken to mean what it says. Around the time that *Chevron* was decided, the Court interpreted the “arbitrary and capricious” language in the judicial review provision to mean considerably more than it says. To survive muster under the arbitrary and capricious test, an agency must provide an extensive explanation demonstrating that it has complied with a list of factors.<sup>165</sup> This reading is known as the reasoned decision-making requirement or the hard look doctrine.<sup>166</sup> Whatever the merits of this reading, it demonstrates that the Court has not felt constrained by the literal language of the judicial review or even by the compromises that the legislative history reveals.<sup>167</sup> It has interpreted the provision to accommodate felt needs.

Second, the view that Congress intends to delegate interpretive authority to agencies does not preclude the possibility that Congress also intends for courts to supply a check on that authority. The relevant question is how stringent a check—de novo review or reasonableness review? Critics have justified the preference for de novo review by arguing that Congress does not trust agencies. This may be true, but it creates a puzzle. When interpretations are often so much like other policy decisions, involving competing interests and complex issues, why would Congress intend to treat them so differently? In other words, if Congress trusts agencies to make policy decisions, subject to arbitrary and capricious review, why

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<sup>165</sup> See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 475–76 (2003) (noting the shifts in agency and judicial practice).

<sup>166</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring an agency to demonstrate that it has not “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”); see also Bressman, *supra* note 19, at 1776–1804 (describing the extensive role of the Court in elaborating the sparse language of the APA).

<sup>167</sup> See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1561 (1996) (arguing that the APA was a response to conservatives’ fear of New Deal agencies). By contrast, the Court has felt constrained by the structure of the APA. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 548–49 (1978) (forbidding courts from requiring more procedures in notice-and-comment rulemaking than the APA requires and observing that the APA creates a bipolar model of informal rulemaking and formal rulemaking with no hybrid in between).

would it not trust agencies to issue interpretations, subject to reasonableness review? It is plausible to believe that Congress might seek greater judicial intervention for certain sorts of questions, such as those in which Congress has an ongoing interest and agencies or administrations have too great an incentive to proceed unilaterally (recall *FDA v. Brown & Williamson Tobacco Corp.* or *Gonzales v. Oregon*).<sup>168</sup> But it is implausible to believe that Congress makes a general distinction.

To summarize this Part, we have direct evidence from interviews of legislative staffers and case studies of particular statutes that Congress attends to the delegation of interpretive authority. This evidence undermines the claim that Congress does not think about the delegation of interpretive authority at all. It also helps to explain why (1) Congress might generally view the greater delegation of general regulatory authority to include a lesser delegation of interpretive authority and (2) the inclusion of a delegation of regulatory authority does not preclude the inference of a delegation of interpretive authority. This evidence also undermines the APA claim, although that claim has been weak from the start. Furthermore, viewing Congress as intending to delegate interpretive authority to agencies in the face of statutory ambiguity does not rule out the view that Congress intends a judicial check when it subjects agencies to judicial review under the APA. It means that Congress may generally intend reasonableness review rather than *de novo* review.

#### IV. AN EVALUATION OF JUDICIAL PRACTICE

While I focused in the last Part on Congress, I concentrate in this Part on the Court. We have evidence that the presumption that the Court applies and the factors that the Court considers are related to congressional delegation. Political scientists have demonstrated how Congress decides to delegate, and their sense is consistent with the Court's sense. Though this evidence is indirect, it calls into

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<sup>168</sup> *Gonzales v. Oregon*, 546 U.S. 243 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). I have argued elsewhere that Congress is just as likely to delegate interpretive authority to an agency over significant questions. See Bressman, *supra* note 21, at 608–09, 613–18; see also Lisa Schultz Bressman, *Deference and Democracy*, 75 *Geo. Wash. L. Rev.* 761, 786–90 (2007) (discussing ways in which the too-big-to-delegate doctrine might relate to legislative intent).

question—and provides reason to doubt—the claim that the Court is only considering normative values or following ideological preferences when applying its analysis.<sup>169</sup> It may also be considering the strategic political interests of Congress.

*A. The Nature of the Question and the Expertise of the Agency*

Two of the factors that recur in the Court's particularized inquiry are the nature of the question (big or interstitial) and the expertise of the agency. Critics do not view these factors as necessarily bearing a relation to congressional delegation, regardless of whether they are valid considerations. But political scientists, such as Professors David Epstein and Sharyn O'Halloran, have asserted that Congress is likely to delegate authority to agencies to avoid complex issues and capitalize on agency expertise. Congress could write "detailed, exacting laws," and deliver to powerful constituents every policy that they desire.<sup>170</sup> The difficulty is that specificity requires legislative time, expertise, and consensus.<sup>171</sup> When any of these necessary ingredients is in short supply or when legislators can simply use their time more effectively elsewhere, Congress is likely to delegate authority to an agency. Thus, "the more complex . . . a policy area," the more likely Congress is to delegate authority to an agency to conserve legislative time and capitalize on agency expertise.<sup>172</sup> The Court's factors fall in line with these ideas.

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<sup>169</sup> See, e.g., Barron & Kagan, *supra* note 8, at 212 (arguing that the Court in *Chevron* is best understood as promoting political accountability); Criddle, *supra* note 5, at 1302 (arguing that the Court is now using its delegation fiction "to reach outcomes consistent with *Chevron's* consensus-based approach"); Miles & Sunstein, *supra* note 135, at 825–26 (demonstrating empirically that *Chevron* does not constrain judges from following their ideological preferences); Note, Justifying the *Chevron* Doctrine: Insights from the Rule of Lenity, 123 Harv. L. Rev. 2043, 2048 (2010) (arguing that the most satisfying justification in *Chevron* is political accountability).

<sup>170</sup> Epstein & O'Halloran, *supra* note 11, at 962; Terry M. Moe, Political Institutions: The Neglected Side of the Story, 6 J.L. Econ. & Org. 213, 228 (1990) ("The most direct way [to achieve control] is for today's authorities to specify, in excruciating detail, precisely what the agency is to do and how to do it, leaving as little as possible to the discretionary judgment of bureaucrats . . .").

<sup>171</sup> See Epstein & O'Halloran, *supra* note 11, at 967; David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 Geo. L.J. 97, 106–12 (2000); B. Dan Wood & John Bohte, Political Transaction Costs and the Politics of Administrative Design, 66 J. Pol. 176, 177 (2004).

<sup>172</sup> Epstein & O'Halloran, *supra* note 11, at 967.

In *Barnhart v. Walton*, the Court mentioned the “interstitial nature” of the question and the “related expertise of the Agency.”<sup>173</sup> It also pointed to “the importance of the question to administration of the statute” and “the complexity of that administration.”<sup>174</sup> In *Zuni Public School District No. 89 v. Department of Education*, it emphasized the “technical nature” of the question.<sup>175</sup> In *FDA v. Brown & Williamson Tobacco Corp.*, the question was of the opposite nature.<sup>176</sup> The Court noted that tobacco regulation had been subject to ongoing consideration by Congress.<sup>177</sup> Physician-assisted suicide, at issue in *Gonzales v. Oregon*, was subject to ongoing debate by the people themselves.<sup>178</sup>

Scholars (and Justices) have viewed these factors as “agency policy concerns,”<sup>179</sup> but the factors are more related to congressional delegation than they appear. They are the sorts of concerns that political scientists have identified as relevant to how Congress decides to delegate. When these factors are present, political scientists have asserted that Congress is more likely to delegate.

### B. The Interpretive Method Used

The most prominent factor in the Court’s inquiry is the interpretive method used. This factor was at the core of *United States v. Mead Corp.* There the Court examined the interpretive method to determine whether it reflected “fairness and deliberation” and whether it connoted “the legislative type of activity that would naturally bind more than the parties to the ruling.”<sup>180</sup> The Court also referred to notice-and-comment rulemaking and formal adjudication as the paradigmatic procedures to which *Chevron* applies.<sup>181</sup>

Although critics have argued that procedural formality is unrelated to congressional delegation, political scientists have asserted

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<sup>173</sup> 535 U.S. 212, 222 (2002).

<sup>174</sup> *Id.*

<sup>175</sup> 550 U.S. 81, 90 (2007).

<sup>176</sup> 529 U.S. 120, 137–39 (2000).

<sup>177</sup> *Id.*

<sup>178</sup> 546 U.S. 243, 249 (2006) (citing *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

<sup>179</sup> See, e.g., *Zuni*, 550 U.S. at 107 (Kennedy, J., concurring).

<sup>180</sup> *Mead*, 533 U.S. at 230, 232.

<sup>181</sup> *Id.* at 230.

that administrative procedures can help Congress monitor how agencies implement statutes. They started with the observation that delegation creates a need for legislative monitoring because agencies may implement statutes in ways that depart from legislative preferences.<sup>182</sup> But direct monitoring—that is, watching agencies—is time consuming. According to political scientists such as Professors Mathew McCubbins, Roger Noll, Thomas Schwartz, and Barry Weingast, a more efficient form of monitoring is for Congress to rely on constituents to watch agencies and call for legislative intervention when agencies depart from their preferences.<sup>183</sup> Administrative procedures, especially notice-and-comment rulemaking, facilitate such efficient “fire-alarm” monitoring.<sup>184</sup> Notice-and-comment rulemaking procedures place constituents in the administrative process, where they may monitor agencies for Congress.<sup>185</sup>

The Court’s concern for procedures, though framed in lawyerly terms, tracks what political scientists have been saying about procedures. They can be useful to Congress and are therefore part of the delegation calculus. When procedures are absent, Congress is less able to rely on this efficient form of monitoring. Furthermore, under circumstances such as those in *Mead* or *Gonzales*, it may have no ability to monitor at all because it lacks awareness of the interpretation until that interpretation reaches a court. One of the benefits of notice-and-comment rulemaking procedures is that they bring information about agency actions to light before those actions are final, allowing Congress to intervene more efficiently and effectively. After an action is final, neither the agency nor Con-

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<sup>182</sup> See Epstein & O’Halloran, *supra* note 11, at 963 (observing that agencies are influenced “by the President, by interest groups, by the courts, and by the bureaucrats themselves”); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *Can the Government Govern?* 267, 271 (John E. Chubb & Paul E. Peterson eds., 1989) (“Experts have their own interests—in career, in autonomy—that may conflict with those of [legislators].”).

<sup>183</sup> Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols and Fire Alarms*, 28 *Am. J. Pol. Sci.* 165, 166–72 (1984).

<sup>184</sup> Bressman, *supra* note 19, at 1767–71.

<sup>185</sup> See McCubbins et al., *Administrative Procedures*, *supra* note 11, at 246; McCubbins et al., *Structure and Process*, *supra* note 11, at 442; see also Rui J.P. de Figueiredo, Jr., Pablo T. Spiller & Santiago Urbiztondo, *An Informational Perspective on Administrative Procedures*, 15 *J.L. Econ. & Org.* 283, 300–01 (1999) (modeling the function of administrative procedures).

gress has the ability to change it without formal action—either a new rule or statute. Before an action is final, an agency can better respond to informal congressional pressure. Formal adjudication does not have this feature, even though the Court in *Mead* listed it as a good indication of congressional delegation. But formal adjudication at least serves the transparency function that is essential for legislative monitoring.

What about the “longstanding’ duration” of the interpretation and “the careful consideration the Agency has given the question over a long period of time,” other factors that the Court considered in *Barnhart*?<sup>186</sup> These factors are also broadly consistent with the political science account of congressional delegation because they reduce monitoring costs. If Congress is aware of an agency interpretation when drafting legislation and can rely on the consistency of that interpretation over time, it has less need to monitor the interpretation over time. The Court might count such consistency as an indication that Congress could delegate with confidence. On the other hand, if Congress has been misled by an agency about an interpretation at the time of drafting, then no amount of monitoring is dependable. Thus, the Court might count such bad faith as a counter-indication of delegation.<sup>187</sup>

By putting together the three considerations—the nature of the question, the expertise of the agency, and the interpretive method used—we can also see why a presumption of delegation is consistent with legislative interests. The Court might believe, as political scientists have asserted, that Congress is likely to delegate complex questions to capitalize on agency expertise. The Court might also believe, as political scientists have asserted, that when an issue is contentious, Congress is likely to delegate to obtain legislative consensus. Furthermore, the Court might believe, as political scientists have asserted, that the regulatory state is characterized by these sorts of questions. They are the norm rather than the exception. Justice Stevens floated these ideas in *Chevron*, but they are more

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<sup>186</sup> 535 U.S. at 220, 222.

<sup>187</sup> Cf. *Morton v. Ruiz*, 415 U.S. 199, 213–28 (1974) (rejecting this interpretation because Congress was aware when drafting legislation that agency did not consistently adhere to its interpretation and had misled members of the relevant committee about that interpretation).

grounded than they seem.<sup>188</sup> They fall in line with what political scientists have been saying about Congress's delegation calculus.

To summarize this Part, the political science account of congressional delegation provides indirect support for the Court's framework. This is not to deny that the Court's factors serve normative values, such as promoting rational deliberation and procedural fairness. Nor is it to deny that the Court's presumption serves normative values, such as political accountability, or reduces institutional costs, such as judicial uncertainty and analytical complexity. Rather, it is to say that the Court's framework is also consistent with legislative interests. By making this claim, I do not imagine the Justices reading the work of political scientists. I instead credit the Court for recognizing that Congress is a distinct entity, motivated by political concerns rather than purely normative ones. The Court considers those political concerns precisely because it is trying to capture Congress's statutory design choices. It may be that critics have not accurately perceived what the Court is doing because they themselves have been too fixated on normative concerns.

## V. AN ORDINARY FICTION

In the previous Parts, I demonstrated that the fiction of congressional delegation is not as false or fraudulent as scholars believe. In this Part, I explore the "true" character of the fiction. I argue that the fiction is no different in kind than the one that the Court often applies in determining the meaning of statutes. Conceived this way, it is not so easily dismissed and ought to be reconsidered.

The fiction arises not because the Court does not *actually* inquire into whether Congress intended to delegate interpretive authority to an agency, as scholars believe. Rather, it arises because the Court does not inquire into whether Congress *actually* intended to delegate interpretive authority to an agency. The phrasing is very similar, but the effect is quite different. To determine whether Congress intended to delegate, the Court infers legislative intent from the available sources, including statutory text, statutory context, and legislative history. Thus, it employs a fictionalized notion of legislative intent.

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<sup>188</sup> 467 U.S. at 865.

This fiction is not surprising or exceptional. Early in the twentieth century, legal realism cast doubt on whether Congress, as a multi-member body, can possess a single, collective intention and whether courts possess the tools to ascertain that intention.<sup>189</sup> The Legal Process School stepped in to offer courts a way to impute legislative intent, directing them to interpret statutes by assuming that “reasonable legislators pursue reasonable purposes reasonably.”<sup>190</sup> Justice Breyer is the leading voice for this approach on the sitting Court, but he is not alone in imputing legislative intent.<sup>191</sup> The Court often imputes legislative intent when determining the meaning of statutory language, relying on statutory text, statutory context, and legislative history.<sup>192</sup> Functionally, the Court is attributing collective intent to determine the delegation of interpretative

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<sup>189</sup> See Radin, *supra* note 14, at 870–71 (critiquing the notion of collective intent). See generally Kenneth J. Arrow, *Social Choice and Individual Values* (2d ed. 1963) (demonstrating the impossibility of collective intent); Moglen & Pierce, *supra* note 1, at 1211 (describing “the largely implicit fictional assumptions that judges make about the group behavior of legislators that are and have been the foundation of judicial interpretation of legislative documents”).

<sup>190</sup> See Hart & Sacks, *supra* note 15, at 1378.

<sup>191</sup> See Breyer, *Active Liberty*, *supra* note 16, at 98–101.

<sup>192</sup> See, e.g., *Begay v. United States*, 553 U.S. 137, 147 (2008) (Breyer, J., joined by Roberts, C.J., Stevens, Kennedy, and Ginsburg, JJ.) (finding, after examining statutory text, basic purpose, and whole code, “no reason to believe that Congress intended to bring within the statute’s scope these kinds of crimes, far removed as they are from the deliberate kind of behavior associated with violent criminal use of firearms”); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (Breyer, J., joined by Roberts, C.J., Stevens, Scalia, Kennedy, Souter, Thomas, and Ginsburg, JJ.) (finding, after examining statutory text and generally acknowledged purpose, “strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 757 (2004) (Ginsburg, J., concurring) (“In 1948, when the Federal Tort Claims Act was enacted, it is also true, Congress reasonably might have anticipated that the then prevailing choice-of-law methodology, reflected in the Restatement (First) of Conflicts, would lead mechanically to the law of the place of injury.”); *Miller v. Albright*, 523 U.S. 420, 440 (1998) (Stevens, J.) (“If, as Congress reasonably may have assumed, the formal requirements in § 1409(a)(4) tend to make it just as likely that fathers will have the opportunity to develop a meaningful relationship with their children as does the fact that the mother knows of her baby’s existence and often has custody at birth, the statute’s effect will reduce, rather than aggravate, the disparity between the two classes of children.”); *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) (“In my view, the legislative history of § 103(f)(2) demonstrates that Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.”).



authority in much the same way under *Mead/Barnhart* and *Brown & Williamson/Gonzales*.

The Court also frequently applies various presumptions of legislative intent, some of which are less well-grounded in legislative behavior than *Chevron's* presumption.<sup>193</sup> *Chevron's* presumption reflects a reasonable probability about how Congress behaves. Some presumptions or canons of construction do not reflect such a reasonable probability. For example, is it a reasonable probability that Congress does not intend to raise serious constitutional questions, or is the Court hesitant to make more constitutional law than necessary?<sup>194</sup> In any event, the constitutional avoidance canon is a normalized tool for picking between two possible interpretations. *Chevron's* presumption is essentially the same for picking between two possible interpreters.

Even if the fiction of congressional delegation is an ordinary one, there is room to argue about its implementation. For example, Justice Scalia is no more a fan of a standard-based approach or judicial reliance on legislative history here than in other contexts.<sup>195</sup> But his objection raises separate issues—the rules/standards debate and the legislative history debate.<sup>196</sup> Critics of the fiction of congressional delegation generally have not been reprising these debates.

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<sup>193</sup> See, e.g., *Neder v. United States*, 527 U.S. 1, 21–22 (1999) (Rehnquist, C.J.) (“It is a well-established rule of construction that ‘[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’” (alteration in original) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)) (internal quotation marks omitted); see also *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (Scalia, J., joined by Stevens, O’Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.) (“[The canon of constitutional avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”).

<sup>194</sup> See Smith, *supra* note 1, at 1463–64 (noting that the unconstitutionality canon is not premised on a fact about how Congress acts but is propounding a normative view that Congress does not intend to enact unconstitutional statutes).

<sup>195</sup> See Scalia, *supra* note 17, at 29–37 (discussing and rejecting judicial reliance on legislative history).

<sup>196</sup> See Thomas Merrill, *The Mead Doctrine: Rules, Standards, Meta-Rules and Meta-Standards*, 54 *Admin. L. Rev.* 807, 807–08 (2007) (noting the rules/standards debate in *Mead*); Sunstein, *supra* note 16, at 197–205 (examining the rules/standards debate between Justices Scalia and Breyer).

Nor have critics been engaging the benefits of the fiction. In other writing, I have said that the fiction of congressional delegation ensures judicial consideration of Congress's role in lawmaking, consistent with separation of powers.<sup>197</sup> Without a concern for congressional interests, regulatory policy is a one-branch enterprise. Even if Presidents are accountable and agencies are experts, unitary lawmaking is not the government that the Framers envisioned. In addition to the normative point, using the fiction to clarify the contours of the doctrine has a practical benefit for lower courts charged with applying that doctrine.<sup>198</sup> I have also shown that extending the fiction may address a problem implicit in the Court's framework, namely, that it invites courts to rely too heavily on the traditional tools of statutory construction and ignore other signs that Congress intended to delegate interpretive authority to the agency.<sup>199</sup> *Zuni Public School District No. 89 v. Department of Education* illustrates the problem. The dissenters favored a literalistic meaning that precluded consideration of other signs of congressional delegation.<sup>200</sup> But the problem was not limited to textualism. Justice Stevens applied purposivism with the same result.<sup>201</sup> Justice Breyer inverted the steps of *Chevron* to avoid the trap of the traditional tools.<sup>202</sup> This use of the fiction, I contended, would finally tailor statutory interpretation to fit the regulatory state.<sup>203</sup>

I do not intend to reargue these points here. My concern is more basic. Critics have not fully appreciated these points or others because they have felt free to disregard the fiction of congressional delegation. As a result, the debate over how to allocate interpretive authority between courts and agencies has gotten too far away from how Congress designs statutes. My argument would reset the debate. In the end, critics could still argue that other considerations are more important to the analysis than legislative interests. But they would have to defeat legislative interests rather than simply dismissing them.

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<sup>197</sup> See Bressman, *supra* note 19, at 1790–91.

<sup>198</sup> See Bressman, *supra* note 20, at 1448.

<sup>199</sup> See Bressman, *supra* note 21, at 575–76.

<sup>200</sup> 550 U.S. 81, 113 (2007) (Scalia, J., dissenting).

<sup>201</sup> *Id.* at 106 (Stevens, J., concurring).

<sup>202</sup> See *id.* at 107 (Kennedy, J., concurring) (describing Justice Breyer's opinion "invert[ing] *Chevron*'s logical progression").

<sup>203</sup> See Bressman, *supra* note 21, at 575–88.

## CONCLUSION

Legal fictions are judicial constructs that help courts decide cases, but some are better than others. According to critics, the fiction that the Court employs to review agency statutory interpretations is the worst sort, both false and fraudulent. Congress is unlikely to delegate interpretive authority at all or in the way that the Court imagines. Furthermore, the Court does not actually care about whether Congress intends to delegate interpretive authority in any particular instance and instead applies a presumption triggered by statutory ambiguity and a particularized analysis involving factors that bear no relation to congressional delegation.

I have argued that critics have been proceeding on a misimpression of the Court's fiction, both in terms of legislative behavior and judicial practice. First, there is direct evidence that Congress attends to the delegation of interpretive authority when it writes statutory language. It may regard the delegation of general regulatory authority as sufficient to convey a delegation of interpretive authority. Second, there is indirect evidence that the Court's framework captures whether Congress intended to delegate interpretive authority. The Court applies a presumption of legislative intent and draws an inference of legislative intent that corresponds to the political science account of how Congress decides to delegate. By applying a presumption and drawing an inference, the Court *is* employing a fiction. It does not care about whether Congress actually intended to delegate interpretive authority in any particular instance. But the fiction that the Court employs is no different in kind from the one that it often employs when interpreting statutes. The fiction is an ordinary fiction.

By proceeding under a misimpression about the fiction of congressional delegation, critics have had license to disregard it in evaluating how to allocate interpretive authority between courts and agencies. This Essay seeks to bring that issue back to how Congress designs statutes. Critics could still argue that other considerations are more important to statutory interpretation, but the burden of persuasion is higher than they thought.