OF SCIENCE AND SNOWFLAKES: CONGRESSIONAL INTENT AND THE CASE AGAINST *SHERLEY V. SEBELIUS*

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I. INTRODUCTION

In ordering the National Institutes of Health (NIH) to stop paying for human embryonic stem cell research—one of the most promising avenues of research in modern medicine—a U.S. District Court in Washington, D.C. last August concluded that Congress clearly forbid such funding, and that the agency had no leeway to interpret the law otherwise.[1] U.S. District Judge

[*] J.D. Candidate, 2012 expected, Charleston School of Law. Having covered the congressional battles over embryonic stem cell research as a national reporter for the St. Petersburg Times, I appreciated this opportunity to examine the issue in a different form, from a different viewpoint. I owe my sincere thanks to Adjunct Professor Carolyn Russell, Esq., who helped me appreciate the strictures of legal writing as oddly liberating, and to my wife, Lisa Davis Allison, for her patience and her faith in me, and for forcing a little balance here and there, even against my will.

1. Sherley v. Sebelius (*Sherley III*), 704 F. Supp. 2d 63 (D.D.C. 2010), *vacated in part*, 644 F.3d 388 (D.C. Cir. 2011). The *Sherley* case has a complicated history. The district court originally dismissed the case because of standing; the D.C. Circuit reversed; on remand, the district court issued an injunction that was later vacated by the D.C. Circuit. Sherley v. Sebelius (*Sherley I*), 686 F. Supp. 2d 1 (D.D.C. 2009), *rev'd in part*, 610 F.3d 69 (D.C.

Royce C. Lamberth based his decision on an appropriations rider known as the Dickey-Wicker Amendment, renewed each budget year since 1996, that bars the government from paying for research "in which" human embryos are destroyed.[2] Because harvesting stem cells for research kills the embryo, Judge Lamberth reasoned, the NIH cannot fund embryonic stem cell (ESC) research and still comply with Dickey-Wicker.[3]

On its face, Lamberth's ruling may sound reasonable. A dead embryo *is* a dead embryo. Does it really make a difference if the embryo is destroyed before federal funding comes into play? In fact, it does. The Dickey-Wicker Amendment has long been incorporated into the delicate, bipartisan balance that has steadily propelled the NIH's expansion of funding for human embryonic stem cells and, contrary to the court's ruling, Congress has made clear that the law does not proscribe the type of ESC research the NIH was funding. Even if the text of the Dickey-Wicker Amendment arguably is ambiguous, the court erred in denying the NIH the well-established deference to interpret the law as the agency deems fit.[4] Although the district court in late July granted summary judgment for the government[5] after the

Cir.), *remanded to* 704 F. Supp. 2d 63 (D.D.C. 2010), *vacated in part*, 644 F.3d 388 (D.C. Cir. 2011). On remand, the district court granted summary judgment for the government. Sherley v. Sebelius (*Sherley V*), Civ. No. 1:09–CV–1575, 2011 WL 31111935, at *1 (D.D.C.).

2. Consolidated Appropriations Act, Pub. L. No. 111-117, § 509(a), 123 Stat. 3034, 3280–81 (2009).

3. *Sherley III*, 704 F. Supp. 2d at 71–72. In the 2-1 decision to vacate the injunction, a three-judge panel of the D.C. Circuit found that (1) the district court erred in finding that the plaintiffs were substantially likely to prevail at trial and (2) that a preliminary injunction on federal ESC funding would create a "certain and substantial" hardship for ESC researchers. Sherley v. Sebelius (*Sherley IV*), 644 F.3d 388, 398 (D.C. Cir. 2011). *But see id*. at 400–05 (Henderson, J., dissenting) (finding that plaintiffs suffered the greatest hardship by failure to uphold the injunction and that the plaintiffs, not the NIH, are likely to succeed at trial).

4. *See* Chevron USA v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984) (holding that agencies are entitled to deference when interpreting how to administrate a statute that is ambiguous, provided the interpretation is reasonable). The *Chevron* doctrine is a tenet of federal administrative law and serves as the lodestar for courts that are judging when an agency has properly administered the wishes of Congress. *See id*.

5. *Sherley V*, 2011 WL 31111935, at *1.

U.S. Circuit Court of Appeals for the District of Columbia vacated its injunction in April,[6] an appeal of that ruling appears likely.[7] Further, the *Sherley V* decision was based almost solely on the deference the appellate court was ready to give the NIH to interpret President Obama's stem cell policy and the Dickey-Wicker Amendment, and virtually ignored the clear intent of Congress. This is an important distinction, because the NIH policy—and interpretation—has shifted with each new presidential administration over the past decade while efforts in Congress to advance ESC research have only intensified. In an appeal of *Sherley V* or in similar claims in other districts, the judges should look critically at several factors the district court either failed to consider or simply ignored.

First, Congress has only become more bullish in its support for embryonic stem cell research over the past decade, having twice passed bills aimed at expanding NIH funding[8] and renewing Dickey-Wicker with the caveat that it not intrude on ESC research.[9] Congressional funding for human ESC research, meanwhile, has tripled in the past five years—hardly a sign that Congress wants to choke it off.[10]

Second, the court's determination that federal funding for ESC research and the Dickey-Wicker Amendment cannot legally coexist runs counter to the analysis and action of every presidential administration and the NIH since stem cells were discovered thirteen years ago. This includes the administration of President George W. Bush, who restricted NIH funding for

6. *Sherley IV*, 644 F.3d at 398.

7. *ADF Considering All Options for Appeal in Embryonic Stem Cell Funding Case*, ALLIANCE DEF. FUND (July 27, 2011), http://adfmedia.org/News/PRDetail/3959.

8. *See* discussion *infra* part IV-A.

9. *See, e.g.*, H.R. REP. 111-220, at 273 (2009) (stating that the renewal of Dickey-Wicker "should not be construed to limit Federal support for research involving human embryonic stem cells carried out in accordance with policy outlined by . . . President [Obama]").

10. National Institutes of Health, *Estimates of Funding for Various Research, Condition, and Disease Categories*, RES. PORTFOLIO ONLINE REP. TOOLS (Feb. 14, 2011), http://report.nih.gov/rcdc/categories [hereinafter *NIH Estimates of Funding*].

ESC research but did not bar it.[11] Since 1999, the NIH has maintained Dickey-Wicker does not prohibit federal funding for stem cell research after the embryo has been destroyed.[12] Congress has never acted to disabuse the NIH of this notion.

Third, when a court sets out to interpret a statute based solely on its words, those words matter. In this instance, a plain reading of Dickey-Wicker permits the NIH to make this distinction. Dickey-Wicker bars funding for research "in which" an embryo is destroyed, not "for which" an embryo is destroyed. Finally, even if the D.C. Circuit were to disagree with the NIH distinction, the legislative history and administrative actions to date show that the language at least is ambiguous—and, under the standard the Supreme Court set in *Chevron USA v. National Resources Defense Council*,[13] the NIH therefore is entitled to deference in how it interprets the statute, provided the result is reasonable.[14] It would be unreasonable for the court to determine otherwise.

11. Presidential Address to the Nation on Stem Cell Research from Crawford, Texas, 37 WEEKLY COMP. PRES. DOC. 1149–51 (Aug. 9, 2001) [hereinafter Bush Stem Cell Address], *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010809-2.html.

12. Shortly after the discovery of embryonic stem cells, the general counsel for the Department of Health and Human Services advised the NIH that the agency could fund embryonic stem cell research and comply with Dickey-Wicker, provided that no federal funds were used to destroy the embryos. *Federal Funding for Research for Human Pluripotent Stem Cells*, Memorandum from Harriett S. Rabb, General Counsel, to Dr. Harold Varmus, Director of the NIH (Jan. 15, 1999) (on file with author) [hereinafter Rabb memo]. The NIH has maintained that policy since. *See, e.g.*, National Institutes of Health Guidelines for Research Using Human Pluripotent Stem Cells, 65 Fed. Reg. 51,976-01 (2000) (encapsulating the Rabb opinion in NIH ESC rules published in the Federal Register) [hereinafter Guidelines for Stem Cell Research]; *see also Sherley III*, 704 F. Supp. 2d at 63; Brief for Appellees at 50, Sherley v. Sebelius (*Sherley II*), 610 F.3d 69 (D.C. Cir.) (No. 09-5374), *remanded to* 704 F. Supp. 2d 63 (D.D.C. 2010), *vacated in part*, 644 F.3d 388 (D.C. Cir. 2011).

13. 467 U.S. 837 (1984).

14. *See id*. at 843; *see also Sherley IV*, 644 F.3d at 396 (finding that it is "entirely reasonable" under a *Chevron* analysis for the NIH to interpret Dickey-Wicker to permit ESC); Brief for Appellees, *supra* note 12, at 57 (arguing the NIH deserves *Chevron* deference). *But see Sherley IV*, 644 F.3d at 401–02 (Henderson, J., dissenting) (arguing the use of the term "research" in Dickey-Wicker is not ambiguous and therefore the NIH is not entitled to *Chevron* deference).

II. SCIENCE IN SEARCH OF A POLICY

In 1998, when Dr. James Thomson and his team at the University of Wisconsin first teased a stem cell from a microscopic, days-old human embryo, the potential was immediately clear.[15] ESCs are the building blocks for every cell in the human body, from brain matter to toenails.[16] Unlike so-called adult stem cells, which are taken from non-embryonic sources such as umbilical cord blood and bone marrow, embryonic stem cells are apparently undifferentiated—in other words, they have yet to be assigned a job.[17] Researchers believe these undifferentiated cells one day could be assigned a function in the lab and then used to replace damaged or missing cells throughout the body.[18] Potentially, this could yield treatments for a myriad of otherwise incurable ailments, including providing spinal cord repair for victims of diving accidents, pancreatic replacement for kids with diabetes, immune cells for chemotherapy patients, and neurons for people suffering from Parkinson's disease.[19]

Puzzling out the science would be up to the lab coats. Puzzling out how to pay for it, however, would be up to us. The American taxpayer, primarily through the NIH, is the leading

15. Not coincidentally, the Senate appropriations subcommittee that funds the NIH held its first hearing on embryonic stem cell research just one month after Dr. Thomson's discovery. It has since held twenty-one additional hearings. *See The Promise of Embryonic Stem Cell Research*: *Hearing Before the Subcomm. on Labor, Health and Human Services, and Educ. of the S. Comm. on Appropriations*, 110th Cong. (2010) [hereinafter *ESC Research Hearing*], *available at* http://appropriations. senate.gov/webcasts.cfm?method=webcasts. view&id=30fc79de-947c-4cb8-bb02-41022a9d4caeat.

16. For an in-depth, less politically oriented history of the regulatory and scientific contretemps regarding ESC research, see John A. Robertson, *Embryonic Stem Cell Research: Ten Years of Controversy*, 38 J.L. MED. & ETHICS 191 (2010).

17. National Institutes of Health, *Stem Cell Basics*, STEM CELL INFO. (Apr. 28, 2009), http://stemcells.nih.gov/info/basics/; *see also* National Institutes of Health, *What Are the Similarities and Differences Between Embryonic and Adult Stem Cells?*, STEM CELL INFO. (Jan. 20, 2011), http://stemcells. nih.gov/info/basics/basics5.asp.

18. *See* sources cited *supra* note 17.

19. *See* sources cited *supra* note 17.

driver of basic medical research in the world,[20] but Congress and the administration of President William J. Clinton struggled to determine what role federal money should play in the development of this science.[21] Harvesting stem cells from an embryo requires the destruction of that embryo, and after Thomson's discovery it was unclear whether funding such research would violate the Dickey-Wicker Amendment to the agency's appropriations bill. Congress first passed the rider in 1995—three years before ESCs were discovered—and has renewed it each budget cycle since.[22] The applicable portions proscribe the use of federal funds for:

> (1) the creation of a human embryo or embryos for research purposes; or (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under [applicable Federal regulations] . . . . [H]uman embryo or embryos includes any organism, not protected as a human subject under 45 CFR 46 . . . that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes [sperm or egg] or human diploid cells [cells that have two sets of chromosomes, such as somatic cells].[23]

In a memorandum to NIH Director Harold Varmus, Harriett S. Rabb, general counsel to the U.S. Department of Health and Human Services (HHS), determined the Dickey-Wicker Amendment would not prohibit research on embryonic stem cells "because such cells are not a human embryo within the statutory

20. The NIH spent roughly $38 billion on research and research projects in 2010. *Total NIH Budget* History*: FY 2010 Enacted*, NATIONAL INSTITUTES OF HEALTH RES. PORTFOLIO ONLINE REP. TOOLS, http://report.nih.gov/nihdatabook (last updated Apr. 15, 2011).

21. *Compare* President Clinton's Statement on Federal Funding of Embryonic Stem Cells, 30 WEEKLY COMP. PRES. DOC. 2459-60 (Dec. 2, 1994) (announcing his decision to forbid the NIH to fund embryonic stem cell research), *available at* http://www.gpo.gov/fdsys/pkg/WCPD-1994-12-12/pdf/ WC PD-1994-12-12-Pg2459-3.pdf, *with* Guidelines for Stem Cell Research, *supra* note 12 (issuing NIH guidelines for the funding of embryonic stem cell research).

22. *See* Consolidated Appropriations Act, Pub. L. No. 111-117, § 509(a), 123 Stat. 3034, 3280–81 (2009).

23. *Id*.

definition."[24] Her opinion (the Rabb memo) was based on the notion that the statute defined an embryo as an *organism*, and a stem cell by itself is not an organism—unlike an embryo, an embryonic stem cell could not grow into a human, even if implanted into a woman's uterus.[25] The NIH developed and issued guidelines for funding human ESC research in August 2000, then announced the agency soon would begin accepting grant applications.[26]

The 2000 election of President George W. Bush, however, put those plans on hold. In August 2001, after six months of debate within the White House, Bush used the first national television address of his presidency to announce a compromise: federal funding could be used for research on approximately sixty existing stem cell lines, ones in which the embryos already had been destroyed.[27] The idea was to open the federal funding taps without encouraging further destructions of embryos. "Leading scientists tell me research on these sixty lines has great promise that could lead to breakthrough therapies and cures," the President told the nation.[28] "This allows us to explore the promise and potential of stem cell research without crossing a fundamental moral line, by providing taxpayer funding that would sanction or encourage further destruction of human embryos that have at least the potential for life."[29]

At first, stem cell researchers and their allies in Congress were encouraged.[30] But as the years progressed, it became clear the policy was not as helpful as they had hoped. Only about twenty-five of the sixty ESC lines President Bush mentioned were truly viable, and most had been contaminated by mouse

24. Rabb memo, *supra* note 12, at 2–3.

25. *Id*.

26. Approval Process for the Use of Human Pluripotent Stem Cells in NIH-Supported Research, 65 Fed. Reg. 51,975 (Aug. 25, 2000), *withdrawn,* 66 Fed. Reg. 57,107 (Nov. 14, 2001).

27. Bush Stem Cell Address, *supra* note 11, at 1149–51.

28. *Id*.

29. *Id*. at 1151.

30. *E.g.*, *Bush to Allow Limited Stem Cell Funding*, CNN (Aug. 10, 2001), http://articles.cnn.com/2001-08-10/us/stem.cell.politics_1_cell-funding-cell-research-cell-lines?_s=PM:fyi.

"feeder" cells used to keep them propagating.[31] These lines were rendered unusable for creating human treatments.[32] Faced with such limitations, a coalition of medical and patient advocacy groups called the Coalition for the Advancement of Medical Research (CAMR) joined forces with a bipartisan group of lawmakers on Capitol Hill to expand stem cell funding legislatively.[33] Barely over a page long, the Stem Cell Research Enactment Act of 2005 (H.R. 810) would require the NIH to fund research on embryonic stem cell lines that met three conditions designed to ensure compliance with Dickey-Wicker:

> (1) The stem cells were derived from human embryos that have been donated from in vitro fertilization clinics, were created for the purposes of fertility treatment, and were in excess of the clinical need . . . .
>
> (2) Prior to the consideration of embryo donation and through consultation with the individuals seeking fertility treatment, it was determined that the embryos would never be implanted in a woman and would otherwise be discarded.
>
> (3) The individuals seeking fertility treatment donated the embryos with written informed consent and without receiving any financial or other inducements to make the donation.[34]

By early 2005, after nearly a year of lobbying, proponents determined they likely had the votes to pass H.R. 810 in the United States House of Representatives. The real hurdle was persuading the conservative Republican leaders, particularly Speaker Dennis Hastert of Illinois and Majority Leader Tom Delay of Texas, to permit it to come for a vote. The speaker and majority leader serve as the gatekeepers for all legislation in the House, and up to that point they had ignored H.R. 810;

31. JUDITH A. JOHNSON & ERIN D. WILLIAMS, CONG. RESEARCH SERV., RL 31015, STEM CELL RESEARCH 13–15 (2006), *available at* http://www.fas.org/spp/civil/crs/RL31015.pdf.

32. *Id*.

33. Wes Allison, *Republican v. Republican: A Cellular Division, Part I*, ST. PETERSBURG TIMES, Aug. 13, 2006, http://www.sptimes.com/2006/08/13/Worldandnation/Republican_vs_Republi.shtml.

34. Stem Cell Research Enhancement Act of 2005, H.R. 810, 109th Cong. (2006), *vetoed by* H. DOC. NO. 109-127, at 1–2 (2d Sess. 2006).

conservatives were confident it would never see the light of day.[35] Desperate to bring the bill to the floor, eight moderate Republicans gave Hastert an ultimatum: Unless he and Delay promised an up-or-down vote on H.R. 810, they would vote against a key Republican budget bill.[36] Hastert relented and the bill passed easily.[37] The Senate eventually followed,[38] but Bush vetoed H.R. 810—his first veto after six years in office.[39] The 110th Congress passed essentially the same bill, and again Bush vetoed it.[40]

The 2008 election of President Barack Obama—who campaigned on his support for ESC research—was seen as a final victory for supporters of the research. When the President issued Executive Order 13,505 on March 9, 2009, ordering the NIH to promulgate rules for ESC research funding, those who joined him in the Oval Office included many of the Republican and Democratic lawmakers who had spent the last five years battling legislatively to do what he was now able to accomplish literally with the stroke of a pen.[41] He revoked Bush's restrictions and directed the NIH to fund stem cell research in a way that complied with Dickey-Wicker.[42] The Agency's final guidelines

35. Allison, *supra* note 33.

36. *Id.*

37. 151 CONG. REC. 3809 (2005) (recording the voting record for S. 7674).

38. 152 CONG. REC. 7674 (2006) (recording the voting record for H.R. 3817).

39. *See* Message to the House of Representatives Returning Without Approval the "Stem Cell Research Enhancement Act of 2005," 42 WEEKLY COMP. PRES. DOC. 1365 (July 19, 2006), *available at* http://www.gpo.gov/fdsys/pkg/WCPD-2006-07-24/pdf/WCPD-2006-07-24-Pg1365.pdf.

40. 153 CONG. REC. S4389 (daily ed. Apr. 11, 2007) (recording the 63 to 34 Senate roll call vote 127 on the passage of S. 5); 153 CONG. REC. H6143 (daily ed. June 7, 2007) (recording the 247 to 146 House roll call vote 443 on the passage of S. 5); *see* Message to the Senate of the United States, 43 WEEKLY COMP. PRES. DOC. 833–34 (June 20, 2007), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070620-5.html.

41. Press Release, Office of the White House Press Secretary, Participants and Attendees at President Barack Obama's Signing of Stem Cell Executive Order and Scientific Integrity Presidential Memorandum (Mar. 9, 2009), *available at* http://www.whitehouse.gov/the-press-office/Participants-and-Attendees-at-President-Barack-Obamas-Signing-of-Stem-Cell-Executive-Order-and-Scientific-Integrity-Presidential-Memorandum. Also in attendance at the signing of the executive order was Harriett S. Rabb. *Id.*

42. Exec. Order No. 13,505, Removing Barriers to Responsible Scientific

included this key passage:

> For the purpose of NIH funding, an embryo is defined by Section 509, Omnibus Appropriations Act, 2009 . . . otherwise known as the Dickey Amendment, as any organism not protected as a human subject under 45 CFR Part 46 that is derived by fertilization, parthenogenesis, cloning or any other means from one or more human gametes or human diploid cells. Since 1999, the [HHS] has consistently interpreted this provision as not applicable to research using [human embryonic stem cells (hESCs)], because hESCs are not embryos as defined by Section 509. This long-standing interpretation has been left unchanged by Congress, which has annually reenacted the Dickey Amendment with full knowledge that HHS has been funding hESC research since 2001. *These guidelines therefore recognize the distinction, accepted by Congress,* between the derivation of stem cells from an embryo that results in the embryo's destruction, for which federal funding is prohibited, and research involving hESCs that does not involve an embryo nor result in an embryo's destruction, for which federal funding is permitted.[43]

III. JUDICIAL ROADBLOCK

Previous attempts to use the courts to block NIH funding under the new guidelines had failed for lack of standing,[44] and at first it appeared the plaintiffs in *Sherley* were bound for the same dead end.

The original complaint filed with the U.S. District Court for the District of Columbia included a host of plaintiffs, including Drs. James L. Sherley and Theresa Deisher, who conduct NIH-sponsored research involving so-called adult stem cells taken from organs, umbilical cord blood, and other non-embryonic sources; Nightlight Christian Adoptions (Nightlight), which

Research Involving Human Stem Cells, 74 Fed. Reg. 10,667 (Mar. 9, 2009).

43. National Institutes of Health Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32,170–73 (July 7, 2009), *available at* http://stemcells.nih.gov/policy/2009guidelines.htm (emphasis added).

44. *See, e.g.*, Doe v. Sebelius, 676 F. Supp. 2d 423, 429 (D. Md. 2009) (holding that a frozen embryo, potential adoptive parents, and a non-profit anti-stem cell research group lack standing to challenge the NIH rules in part because "embryos do not have legally protected interests").

adopts out unused frozen embryos—it called them "snowflakes"—from *in vitro* fertilization clinics; various unnamed embryos; the Christian Medical Association; and two couples who had adopted snowflakes and might like to adopt more.[45] As in similar cases in other district courts, U.S. District Judge Royce C. Lamberth granted the government's motion to dismiss because the plaintiffs lacked standing, primarily for want of an injury-in-fact.[46] The judge also rejected the plaintiff's contention that the doctors faced an injury-in-fact because they must now compete for grant money with embryonic stem cell researchers.[47] He wrote that "increased competition for funding is an insufficient injury to impart standing."[48]

On appeal, however, a three-judge panel of the U.S. Court of Appeals for the District of Columbia disagreed with the district court, holding that the doctors indeed had standing as economic competitors who would be negatively affected by the new NIH policy permitting embryonic stem cell research.[49] "There can be no doubt the Guidelines will elicit an increase in the number of grant applications involving ESCs . . . for a share in a fixed amount of money," the court wrote.[50] "That is an actual, here-

45. *Sherley I*, 686 F. Supp. 2d 1 (D.D.C. 2009), *rev'd in part*, 610 F.3d 69 (D.C. Cir.) (finding that two plaintiffs, Drs. Sherley and Deisher, had "competitor standing" to challenge NIH ESC rules), *remanded to* 704 F. Supp. 2d 63 (D.D.C. 2010), *vacated in part*, 644 F.3d 388 (D.C. Cir. 2011). For a snappy overview of the run-up of the procedural posture and the legal questions at issue, see Anne Clark Pierson, Sherley v. Sebelius: *Circuit Court Allows Federal Funding of Embryonic Stem Cell Research to Continue for Now*, 38 J.L. MED. & ETHICS 875 (2010).

46. *Sherley I*, 686 F. Supp. 2d at 6.

47. *Id.*

48. *Id.*

49. *Sherley II*, 610 F.3d at 74. The doctrine of competitor standing permits a plaintiff to establish the Article III standing requirement that he faces an actual or imminent injury that is "fairly traceable" to the government's policy by showing increased competition will hurt his chances of succeeding economically. *Id.* at 72. The court held competitor standing simply "relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors." *Id.* (citing Canadian Lumber Trade Alliance v. United States, 517 F.3d 1319, 1332 (Fed. Cir. 2008)).

50. *Id.*

and-now injury."[51]

On remand, Judge Lamberth took the case one step further. With the good doctors now blessed with standing, the judge granted their motion for a preliminary injunction halting all further NIH funding of human ESC research.[52] Lamberth reasoned that the public interest weighed in favor of the injunction; that the plaintiffs otherwise faced irreparable harm; and, most importantly, that plaintiffs Sherley and Deisher were likely to succeed on the merits of their claim because the NIH guidelines for ESC research clearly violated Dickey-Wicker.[53] His decision shocked the research community, congressional supporters of ESC research, and the NIH.[54] When President Obama signed the Executive Order directing the NIH to create guidelines for ESC research in March 2009, "most of us thought this fight was finally over," Senator Tom Harkin told his Health and Human Services appropriations subcommittee after the district court's ruling.[55] "At last, we thought, our brightest young minds could enter this field without worrying that they'd go to the lab one day and find the doors ordered shut by someone in Washington, D.C."[56]

Judge Lamberth's decision relied on two interrelated arguments. First, he found that the term "research," as used in the Dickey-Wicker Amendment, unambiguously applies to *any* research related to embryonic stem cell research, and shows "the unambiguous intent of Congress to enact a broad prohibition of funding research in which a human embryo is destroyed."[57]

51. *Id*. It is worth noting, however, that the NIH plans to spend roughly $341 million on human *non*-embryonic stem cell research in 2011, compared with $125 million for embryonic stem cell research. The plaintiffs' funding is hardly at risk. *NIH Estimates of Funding*, *supra* note 10.

52. *Sherley III*, 704 F. Supp. 2d at 73. The D.C. Circuit Court of Appeals in September 2010 temporarily lifted the injunction and a three-judge panel of the D.C. Circuit then vacated the injunction, pending trial in the district court. *Sherley VI*, 644 F.3d at 388.

53. *Sherley III*, 704 F. Supp. 2d at 71–72.

54. Sheryl Gay Stolberg & Gardiner Harris, *Stem Cell Ruling Will Be Appealed*, N.Y. TIMES, Aug. 24, 2010, http://www.nytimes.com/2010/08/25/health/policy/25stem.html.

55. *ESC Research Hearing*, *supra* note 15, at 1 (statement of Sen. Harkin).

56. *Id*.

57. *Sherley III*, 704 F. Supp. 2d at 70–71.

Given this lack of ambiguity, the court found that the NIH is not entitled to *Chevron* deference in interpreting the terms of the statute and applying them to the regulations it promulgated for stem cell research.[58]

Second, having established that the broad definition of "research" unambiguously reflected the intent of Congress, the court concluded the NIH guidelines illegally permit "research in which a human embryo is destroyed."[59] The district court rejected the government's contention that the NIH policy draws an important line between the derivation of stem cells from embryos, which is privately funded, and federally funded research on the cells alone.[60] By applying this broad definition of "research," the court held that "ESC research is clearly research in which an embryo is destroyed," and "the two cannot be separated."[61]

Congress, however, has determined they *could* be separated and—more importantly—that they *should* be separated.

IV. SURMOUNTING THE ROADBLOCK

A. Congress Pushes Stem Cell Research

Contrary to the district court's holding in *Sherley III*, a review of the congressional record and the legislative history of embryonic stem cell policy shows Congress wants more embryonic stem cell research, not less. While it may appear contradictory to prohibit the taxpayer-funded destruction of embryos while permitting taxpayer-funded research on cells extracted from destroyed embryos, Congress indeed has drawn this distinction, and it has consistently maintained that the twelve-year-old NIH stem cell policy can and should coexist with the Dickey-Wicker Amendment.

58. *Id*. *But see* Chevron, USA v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

59. *Sherley III*, 704 F. Supp. 2d at 71.

60. *Id*.

61. *Id*.

First, Congress has repeatedly peppered its bills and reports relating to NIH funding with encouragement for ESC research. For example, every year since President Bush first authorized ESC research funding in 2001, the report accompanying the Health and Human Services appropriations bill has expressly noted that Congress' renewal of Dickey-Wicker in no way should be construed to interfere with NIH funding for embryonic stem cell research.[62] Also, the 2001 House committee report on the Health and Human Services appropriations bill, which includes the Dickey-Wicker Amendment, said it "is the Committee's intent that the NIH move ahead expeditiously to implement the President's policy concerning support of scientifically meritorious research involving both adult and human embryonic stem cells"—a policy that would not be possible under Judge Lamberth's ruling.[63] Meanwhile, the Senate appropriations subcommittee that funds the NIH has held at least twenty-one hearings on ESC research, with the main goal of encouraging more research.[64] And in the last Congress, in 2009, the House report accompanying the HHS appropriations bill noted that the chamber was pleased that the NIH had published its guidelines for ESC research funding, per President Obama's orders.[65] The report also urged the NIH to "expedite this important area of

62. *E.g.*, H.R. REP. NO. 107-229, at 180 (2001); H.R. REP. NO. 109-143, at 200 (2005); H.R. REP. NO. 111-220, at 273 (2009). In each report, the House explained its renewal of Dickey-Wicker "should not be construed to limit federal support for research involving human embryonic stem cells listed on an NIH registry and carried out in accordance with policy outlined by the President." The government's brief in *Sherley II* touches on this point as well. Brief for Appellees, *supra* note 12, at 37–39.

63. H.R. REP. NO. 107-229, at 98 (2001).

64. *See, e.g.*, *ESC Research Hearing*, *supra* note 15; *see also Can Congress Help Fulfill the Promise of Stem Cell Research?: Joint Hearing Before the S. Comm. on Health, Educ., Labor and Pensions and the Subcomm. on Labor, Health and Human Services, Education and Related Agencies of the S. Comm. on Appropriations*, 110th Cong. 4–6 (2007) (statement of Sen. Harkin) [hereinafter *Joint ESC Research Hearing*]; *Alternative Methods for Deriving Stem Cell: Hearing before the Subcomm. of Labor, Health and Human Services, and Education of the S. Comm. on Appropriations*, 109th Cong. 1 (2005) (statement of Chairman Specter) ("[T]his subcommittee . . . has been pursuing this matter very, very diligently over the course of the intervening [seven] years.").

65. *See* H.R. REP. NO. 111-220, at 138 (2009).

research," while asking the agency to find ways to apply more of the federal economic stimulus funding from the American Reinvestment and Recovery Act of 2009 to ESC research.[66] Furthermore, in a town where money talks, federal funding for human ESC research has rocketed from $38 million in 2006 to an estimated $126 million in 2011[67]—hardly a sign that Congress is trying to curtail it.

Second, consider the legislation Congress passed. In 2006, the 109th Congress overwhelmingly passed H.R. 810, which would have required the NIH to fund ESC research on lines derived from donated frozen embryos; in 2007, the 110th Congress passed essentially the same bill (known at that time as S. 5).[68] Although President Bush vetoed both bills, their easy passage[69] and the debate surrounding them further underscore the extent to which Congress has drawn the very distinction between ESC research and Dickey-Wicker that the district court rejected in *Sherley III*. After President Bush authorized the NIH to fund research on stem cells already derived from human embryos, essentially incorporating the logic articulated in the Rabb memo,[70] the debate over ESC research in the House and Senate has focused not so much on whether ESC research is legally proscribed by Dickey-Wicker, but whether the therapeutic potential of stem cells harvested from human embryos sufficiently outweighs the moral concerns, or whether so-called adult stem cells harvested from less troubling sources, such as umbilical cords and organs, are equally potent.[71] The floor

66. *Id.*

67. *NIH Estimates of Funding*, *supra* note 10.

68. Stem Cell Research Enhancement Act of 2005, H.R. 810, 109th Cong. (2006), *vetoed by* H. DOC. NO. 109-127, at 1–2 (2d Sess. 2006); Stem Cell Research Enhancement Act of 2007, S. 5, 110th Cong. (2006), *vetoed by* President Bush.

69. 151 CONG. REC. H3851 (daily ed. May 24, 2005) (recording the 238 to 194 House roll call vote 204 on the passage of H.R. 810); 152 CONG. REC. S7692 (daily ed. July 18, 2006) (recording the 63 to 37 Senate roll call vote 206 on the passage of H.R. 810); 153 CONG. REC. S4389 (daily ed. Apr. 11, 2007) (recording the 63 to 34 Senate roll call vote 127 on the passage of S. 5); 153 CONG. REC. H6143 (daily ed. June 7, 2007) (recording the 247 to 146 House roll call vote 443 on the passage of S. 5).

70. *See supra* text accompanying notes 24–26.

71. *See, e.g.*, *Joint ESC Research Hearing*, *supra* note 64, at 4 (statement of

debate over H.R. 810 in the U.S. House of Representatives during the 109th Congress is particularly illustrative. Through hours of spirited debate covering more than forty pages in the *Congressional Record*, not once does an opponent of H.R. 810 specifically cite the Dickey-Wicker Amendment as a reason to reject H.R. 810.[72] To be sure, several opponents of ESC research took issue with the bill on grounds that it would marshal taxpayer money to encourage the destruction of embryos.[73] But by passing the bill (while also renewing Dickey-Wicker), the majority clearly accepted the view advanced by Representative Diane DeGette of Colorado, a Democratic co-sponsor of the bill, who raised Dickey-Wicker in order to illustrate the distinction apparently lost on the district court in *Sherley*.

> [If a couple decided to donate their unused frozen embryo to science,] a stem cell line would be developed from the embryo with private funds. No federal funds. The only federal funds used under the [U.S. Representative Mike] Castle/DeGette bill are federal funds to then develop those embryonic stem cell lines . . . . So no embryos will be destroyed with federal funds.[74]

Republican and Democratic advocates for ESC funding in the Senate made similar arguments during passage of H.R. 810 in 2006 and S. 5 in 2007.[75] "Each year, Congress attaches the Dickey-Wicker Amendment to the Labor-HHS appropriations bill stating that no federal funds can be used to destroy human embryos. That has not changed," Senator Claire McCaskill, a

Sen. Enzi that "[w]hile several non-embryonic stem cell therapies are now in practice, every reputable scientist will admit that possible cures or advanced treatment, using embryonic stem cells are many years away").

72. *See generally* 151 CONG. REC. H3809–51 (daily ed. May 24, 2005).

73. *See*, *e.g.*, *id*. at H3811–12 (statement of Rep. Stupak); & H3821 (statement of Rep. Delay that "what this whole bill does is to allow funding of embryonic stem cell research, and in order to do that research, you have to destroy the embryo").

74. *Id*. at H3824–25 (statement of Rep. DeGette).

75. *E.g.*, 152 CONG. REC. S7569 (daily ed. July 17, 2006) (statement of Sen. Specter on H.R. 810) ("This bill does not allow Federal funds to be used for the derogation of stem cell lines, a step in the process where the embryo is destroyed—the lines are created and the embryos are destroyed before they are subjected to research which is funded by the federal government under the bill which Senator Harkin and I are promoting.").

Democrat from Missouri, said on the Senate floor during the debate over S. 5 in 2007.[76] "This bill simply allows federal funds to be used to study stem cell lines that are derived from human embryos that otherwise would have been discarded . . . . Not a dime of federal money will fund the destruction of human embryos."[77] And not a dime has been spent.[78]

Third, Congress has never acted to disabuse the NIH of its 13-year-old interpretation of how Dickey-Wicker can coexist with ESC research; nor has it changed Dickey-Wicker. Ever since the Rabb memo in 1999, of course, the NIH has held that ESC research is permitted so long as federal funding is not actually used to destroy any embryos,[79] and Congress has acted neither to change that interpretation, nor to change Dickey-Wicker. Surprisingly, the district court in *Sherley III* cited this

76. 153 CONG. REC. S4342–43 (daily ed. Apr. 11, 2007) (statement of Sen. McCaskill).

77. *Id.*; *see, e.g.*, 152 CONG. REC. S7690 (daily ed. July 18, 2006) (statement of Sen. Dodd) ("I have heard some of my colleagues who oppose this legislation argue that this legislation allows, even encourages, taxpayer-funded destruction of human embryos. That is totally false. An amendment is attached to every annual Labor-HHS appropriations bill prohibiting any [f]ederal funds from being used to destroy human embryos. This amendment, referred to as the 'Dickey amendment,' is not affected by this legislation. Federal funds can be used to study stem cell lines that were derived from human embryos . . . but the derivation process itself cannot be funded using [f]ederal dollars.").

78. *NIH Human Embryonic Stem Cell Registry,* U.S. DEP'T OF HEALTH AND HUMAN SERV. OFFICE OF EXTRAMURAL RES. (Feb. 2, 2011), http://grants.nih.gov/stem_cells/registry/current.htm. To comply with Dickey-Wicker, stem cells eligible for federal funding are provided by seventy-six privately financed, NIH-approved stem cell lines, or colonies, created and maintained with private funding at institutions such as the Human Embryonic Stem Cell Facility at Harvard University, The Rockefeller University, the University of California-San Francisco, and Advanced Cell Technology Inc. *Id.*

79. *See supra* note 43 and accompanying text (citing the NIH guidelines stating that "[s]ince 1999, the . . . [HHS] has consistently interpreted [Dickey-Wicker] as not applicable to research using hESCs, because hESCs are not embryos as defined by Section 509. This long-standing interpretation has been left unchanged by Congress, which has annually reenacted the Dickey Amendment with full knowledge that HHS has been funding hESC research since 2001. These guidelines therefore recognize the distinction, accepted by Congress, between the derivation of stem cells from an embryo that results in the embryo's destruction, for which federal funding is prohibited, and research involving hESCs that does not involve an embryo nor result in an embryo's destruction, for which federal funding is permitted.").

congressional inaction as evidence that Congress never endorsed the NIH position regarding ESC research and Dickey-Wicker.[80] In reality, the congressional inaction serves as powerful proof that Congress endorses the way the NIH handles ESC research within the confines of Dickey-Wicker. Congress clearly knows how the NIH has been interpreting the law for the past twelve years, and Congress could have acted if it did not approve. Instead, Congress' only actions regarding embryonic stem cell research have been to push for more of it, while simultaneously renewing Dickey-Wicker as-is. As the Supreme Court stated, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."[81]

B. The Court's Definition of Research Is Not Supported by the Record

By decreeing that the prohibition on embryonic research in Dickey-Wicker means *any* research related to stem cells,[82] the district court in *Sherley III* not only contravenes the congressional intent regarding stem cell research, as detailed above, but ignores an important rule of statutory interpretation. Under the canon of *noscitur a sociis*, "an ambiguous term may be given more precise content by the neighboring words with which it is associated."[83]

In his ruling, Judge Lamberth wrote that the term "research" used in Dickey-Wicker means any research, not the government's "alternative definition of research as 'a piece of research.'"[84] He added that "[h]ad Congress intended to limit the Dickey-Wicker

80. *Sherley III*, 704 F. Supp. 2d 63, 67–68 (D.D.C. 2010) (stating that "[d]efendants have maintained this interpretation of the Dickey-Wicker Amendment. Congress, however, has not altered the Dickey-Wicker Amendment in response") (internal citations omitted), *vacated in part*, 644 F.3d 388, 396 (D.C. Cir. 2011) (noting that Congress continues to reenact Dickey-Wicker unchanged despite the NIH funding for human ESC).

81. Lorillard v. Pons, 434 U.S. 575, 580 (1978).

82. *Sherley III*, 704 F. Supp. 2d at 71.

83. United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1587 (2010).

84. *Sherley III*, 704 F. Supp. 2d at 70–71.

to only those discrete acts that result in the destruction of an embryo, like the derivation of ESCs, or to research on the embryo itself, Congress could have written the statute that way."[85]

First, the court offers no objective basis for this broad definition of research and, as discussed above, Congress is presumed to accept an agency's interpretation of a statute when it declines—in this case, for twelve years—to change that statute.[86] Second, Congress actually wrote Dickey-Wicker in a way that narrows the meaning of research; it forbids funding for research "in which" an embryo is destroyed, not the much broader prohibition on research "for which" an embryo might be destroyed, or on research "related" to the destruction of embryos.[87] It is important to remember that the Dickey-Wicker Amendment was first passed three years before embryonic stem cells were discovered at the University of Wisconsin. The evils that its chief sponsor, Representative Jay Dickey, a Republican from Arkansas, sought to prevent involved taxpayer-funded experiments on live human embryos, not the manipulation of stem cells cultivated by private interests.[88] "Here we have no direct promise, no testimony, no science at all telling us that we might have anything to come from this. Mr. Chairman, this is what Nazi Germany did during that time. No results," Dickey said during House floor debate over an amendment aimed at undoing his in 1996.[89] He added that "[w]e cannot allow federal funds to be used to terminate lives, for the creation or the experimentation which is a lethal experimentation because it is eliminating lives [and] is not acceptable."[90] Opponents to the measure, meanwhile, worried not about how the amendment might restrict regenerative medicine, but how it might dissuade research into embryonic development.[91] No one, it appears,

85. *Id*. at 71.

86. *Lorillard*, 434 U.S. at 580.

87. *See* Consolidated Appropriations Act, Pub. L. No. 111-117, § 509(a), 123 Stat. 3034, 3280–81 (2009).

88. *See*, *e.g.*, 142 CONG. REC. H7339 (daily ed. July 11, 1996) (statement of Rep. Dickey).

89. *Id*.

90. *Id*.

91. H.R. REP. NO. 104-209, at 384–85 (1995) ("We feel . . . that the [Dickey]

contemplated that these as-yet undiscovered stem cells may one day help the lame to walk, or allow a diabetic to begin producing her own insulin.

Even if the district court or the D.C. Circuit Court of Appeals were to agree that the plain meaning of the word "research" is exactly as the district court applied it when issuing the temporary injunction, the D.C. Circuit has held that the plain meaning rule "has its limitations" and "will not be followed when it produces absurd results."[92] Furthermore, the court "may depart from the literal meaning of the words when at variances with the intention of the legislature as revealed by legislative history."[93] Congressional reports may be consulted to determine intent.[94] As detailed above, the legislative history of NIH stem cell funding and Dickey-Wicker—especially the recent committee reports—shows it is absurd to suggest that Congress in any way intends to bar NIH funding for ESC research.[95] The NIH also has interpreted the statute to permit funding for research on ESCs, but not embryos since 1999 and Congress has declined to intervene.[96]

C. The NIH Deserves Leeway to Define "Research"

Even if, on appeal, the D.C. Circuit were to prefer the district court's broad interpretation of the word "research" as it is used in Dickey-Wicker, the court would be forced to ignore more than a decade of congressional and agency interpretation to the contrary—and, as such, the court should at least find the term

provision will deprive the American people of the medical advancements that such research would provide. Early stage embryo research involves examining how cells develop and divide once sperm and egg meet and form an embryo. This research could lead to advancements in the prevention of pregnancy loss and infertility, the diagnosis and treatment of genetic disease, the prevention of birth defects, and the prevention and detection of childhood and other cancers.").

92. *See* D.C. Nat'l Bank v. District of Columbia, 348 F.2d 808, 810 (D.C. Cir. 1965) (citing Sorrells v. United States, 287 U.S. 435, 446 (1932)).

93. *Id*. (citing United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542–43 (1940)).

94. *Id*. at 810–11.

95. *See, e.g.*, *supra* text accompanying notes 62 and 63.

96. Rabb memo, *supra* note 12, at 2–3.

ambiguous and that the NIH therefore deserves deference in determining how to apply it. Based on the Supreme Court's ruling in *Chevron*, it is settled law that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."[97] As long as the agency's interpretation is reasonable, the reviewing court must "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[98] Further, the Supreme Court has held that "[i]f the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'"[99]

Given the chasm between the district court's reading of the law and what the congressional record suggests is the correct reading of the law, the NIH clearly has some gaps to fill with its authority and expertise.

Should that be the case, established law binds the court to give the NIH and its assembled expertise the authority to interpret the provision as it sees fit. Even though the administration policy was more restrained under President George W. Bush than under President Barack Obama, the Supreme Court has made clear that a shift in policy does not undermine an agency's authority to use its expertise to set policy when a statute is ambiguous.[100] The Supreme Court has held that "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute

97. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 980 (2005) (citing Chevron, USA v. Natural Res. Def. Council, 467 U.S. 837, 865–66 (1984)).

98. *Id.*; *see also* Holly Farms Corp. v. NLRB, 517 U.S. 392, 398–99 (1996) ("Courts . . . must respect the judgment of the agency empowered to apply the law . . . even if the issue with nearly equal reason might be resolved one way rather than another." (citations omitted)).

99. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995); *see Chevron,* 437 U.S. at 844.

100. *Brand X*, 545 U.S. at 981.

with the implementing agency."[101] Further, the agency must consider "varying interpretations and the wisdom of its policy on a continuing basis."[102] Finally, *Chevron* deference is most appropriate when Congress has delegated authority to the agency to make rules that carry the force of law, and the agency interpretation was promulgated in such a way as to accomplish that.[103] That indeed is the case here. The NIH followed standard notice-and-comment procedures, publishing its draft guidelines in the Federal Register and acting under its authority bestowed in the Code of Federal Regulations, which means its interpretation carries the force of law.[104] The Supreme Court also has advised that it "will normally accord particular deference to an agency interpretation of 'longstanding' duration."[105]

V. CONCLUSION

One of the most troubling aspects of *Sherley* is that the lead plaintiff, Dr. James Sherley, set forth an intellectually dishonest, if legal, argument to convince the U.S. Court of Appeals for the D.C. Circuit that he deserved standing to challenge the current ESC policy. Dr. Sherley is an award-winning researcher who works with non-embryonic stem cells, such as those found in umbilical cord blood.[106] In making his case, he argued that funding embryonic stem cell research would irreparably harm him and others by reducing the amount of federal money available for work with non-embryonic cells.[107] The appellate

101. *Id*. (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996)).

102. *Id*. (citing *Chevron*, 437 U.S. at 863–64).

103. Gonzales v. Oregon, 546 U.S. 243, 255–56 (2006).

104. Protection of Human Subjects, 45 C.F.R. § 46 (2010). The Health and Human Services department or agency "heads retain final judgment as to whether a particular activity is covered by this policy." *Id*. § 46.101(c); *see also* National Institutes of Health Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32,170 (July 7, 2009).

105. Barnhart v. Walton, 535 U.S. 212, 220 (2002) (citing N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982)).

106. Maggie Fox, *Stem Cell Opponent Has Challenged Authority Before*, REUTERS (Aug. 24, 2010, 4:40 PM), http://www.reuters.com/article/idUSN242 7127520100824.

107. *Sherley I*, 686 F. Supp. 2d 1 (D.D.C. 2009), *rev'd in part*, 610 F.3d 69

court applied the doctrine of competitor standing to give the complaint grounds.[108] His argument, however, is akin to suggesting that studying the effects of rising sea levels on the salt marsh in South Carolina is somehow detrimental, say, to research on the effects of shrinking ice floes in the Bering Sea of Alaska—the researchers may compete for a finite pool of federal dollars, but both inform our understanding about the ramifications of global warming. The same is true about all types of stem cell research.

The truth is that no one knows which type of stem cell research will prove most effective, if any; while non-embryonic stem cells, such as those harvested from umbilical cord blood, have been used for years to treat leukemia and other disorders, neither type has been used to help the lame to walk or the blind to see. As far as such things go, it is still early in the game. But this is basic, cell-level research marked by incremental advances, and as he well knows, Dr. Sherley's work one day may benefit from work that his counterparts in ESC research are doing today.

The D.C. Circuit's decision to impart standing on Drs. Sherley and Deisher gave ESC research foes their first toe-hold in the federal courts, but the implications of an adverse finding against President Obama's stem cell policy would be enormous. It is encouraging that the U.S. Court of Appeals for the District of Columbia vacated the district court's preliminary injunction,[109] and that the district court read that ruling as contrary to Drs. Sherley and Deisher's case regarding the latitude of the NIH to apply the law.[110] These actions permit the NIH to continue

(D.C. Cir.), *remanded to* 704 F. Supp. 2d 63 (D.D.C. 2010), *vacated in part*, 644 F.3d 388 (D.C. Cir. 2011).

108. *Sherley II*, 610 F.3d at 74.

109. *Sherley IV*, 644 F.3d at 390–91.

110. *Sherley V*, 2011 WL 3111925, at *11. Specifically, the district court found "that the D.C. Circuit's opinion, vacating the award to plaintiffs of a preliminary injunction, constrains this Court on remand. As stated above, this Court initially agreed with plaintiffs' understanding of the Dickey–Wicker Amendment . . . . On appeal, however, the D.C. Circuit rejected this Court's view, concluding that the text of the Dickey–Wicker Amendment is ambiguous . . . . Therefore, absent a compelling reason to depart from that holding, the Court is constrained to adopt it at this stage of the proceedings." *Id*. (citations omitted).

funding ESC research for now, but that ruling was far from determinative. However, administrations change and, with them, their interpretation of statutes and congressional intent. And given the conservative majority of the Roberts Court, the prospects for embryonic stem cell research are not encouraging. The only true protection would be for Congress to act so explicitly that any district court would find the Dickey-Wicker Amendment does not proscribe ESC research. Until then, however, the courts should examine the legislative and administrative record and realize that Congress implicitly has done just that.