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How *Mead* Has Muddled Judicial Review of Agency Action

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INTRODUCTION

When the Supreme Court decided *United States v. Mead Corp.* four years ago,[1] Justice Scalia predicted that judicial review of agency

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action would devolve into chaos. This Article puts that prediction to the test by examining the court of appeals decisions applying the decision. Justice Scalia actually understated the effect of *Mead*. This Article suggests a remedy for the mess.

In *Mead*, the Court held that an agency is entitled to deference under *Chevron, U.S.A., Inc. v. NRDC*[2] only if Congress has delegated to that agency the authority to issue interpretations that carry the force of law, and the agency has used that authority in issuing a particular interpretation.[3] Justice Scalia dissented, arguing that *Mead* makes an "avulsive change" in judicial review of agency action, the consequences of which "will be enormous, and almost uniformly bad."[4] On his reading, "what was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent."[5] Lower courts, he warned, would not know what to make of the decision in practice: "We will be sorting out the consequences of the *Mead* doctrine, which today has replaced the *Chevron* doctrine, for years to come."[6]

Notwithstanding Justice Scalia's doomsday forecast, the majority believed that *Mead* was justified in principle. The Court stated that *Mead* "tailors deference to [the] variety" of administrative procedures that Congress envisions and agencies employ.[7] An agency may receive *Chevron* deference as long as it chooses a proper procedure for issuing interpretations of the statute it administers.[8] Thus, an agency may receive *Chevron* deference if it chooses a procedure that Congress generally intends to produce interpretations with the "force of law" – as with notice-and-comment rulemaking or

1. 533 U.S. 218 (2001).
2. 467 U.S. 837 (1984). In *Chevron*, the Court articulated the following two-step test:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

3. *Mead*, 533 U.S. at 231-33.
4. *Id.* at 241 (Scalia, J., dissenting).
5. *Id.* (Scalia, J., dissenting).
6. *Id.* at 239 (Scalia, J., dissenting) (citations omitted).
7. *Id.* at 236.
8. *Id.*

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formal adjudication.[9] But an agency might not receive *Chevron* deference when it selects a more informal procedure unless the circumstances specifically suggest that Congress would have intended the resulting interpretation to carry the force of law.[10] The agency may, however, still earn judicial respect under *Skidmore v. Swift & Co.*,[11] if it produces an interpretation that reflects "'a body of experience and informed judgment'" upon which courts, though not required, may rely.[12]

This Article examines the effects of *Mead* by studying the court of appeals opinions that have purported to follow the decision.[13] Years have passed since *Mead* was decided, and we still lack a clear answer to the question when an agency is entitled to *Chevron* deference for procedures other than notice-and-comment rulemaking or formal adjudication. Lower courts adopt inconsistent approaches. Many find ways to avoid the question altogether. Others use *Mead* in ways broader than the Court intended.

First, courts adopt inconsistent approaches to the issue of *Chevron* deference when an agency does not use notice-and-comment rulemaking or formal adjudication.[14] Without fully recognizing their differences, courts vacillate from one set of considerations to another to determine whether an agency has issued an interpretation with the force of law. Some courts embrace the considerations articulated in *Mead* – namely, that an interpretation is entitled to *Chevron* deference, even if rendered through procedures other than notice-and-comment rulemaking or formal adjudication, as long as it "foster[s] fairness and deliberation" and "bespeaks the type of legislative

9. *Id.*

10. *Id.*

11. 323 U.S. 134 (1944).

12. *Mead*, 533 U.S. at 227 (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998), and quoting *Skidmore*, 323 U.S. at 140). Under *Skidmore*, agencies get deference only to the extent they offer interpretations with the "power to persuade." *Skidmore*, 323 U.S. at 140. As the *Skidmore* Court stated: "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*

13. This Article does not attempt to perform a quantitative analysis of the opinions. Nor does it aim to explore the underlying context of the decisions or broader agenda of the panels. Rather, it provides a critical reading of the cases – taking them for what they are and interpreting them for what they say. I assembled the cases for the Article by searching Westlaw on November 18, 2004 for a "Keycite" of *United States v. Mead Corp.*, 533 U.S. 218 (2001). I collected 147 "Citing References," comprised of 18 "Negative Cases" and 129 "Positive Cases." In the Article, I examine cases from the United States Courts of Appeals, numbering 16 "Negative Cases" and 66 "Positive Cases."

14. *See infra* Part II.A.

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activity that naturally binds more than the parties to the ruling."[15] But other courts apply the considerations later announced in *Barnhart v. Walton*, including "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."[16] The Supreme Court has not clarified the relationship between *Mead* and *Barnhart*, which were decided only one Term apart. As a result, it has left lower courts simply to choose between them. But rather than a split in the circuits between those consistently applying *Mead* and those consistently applying *Barnhart*, we see individual panels favoring one or another and panels in later cases involving the same interpretive procedure – in whatever circuit – following the previous panel's decision. Thus, *Chevron* deference appears to depend more than anything else on whether the first panel to evaluate a particular interpretive procedure favors *Mead*-style factors or *Barnhart*-style factors.

Second, rather than selecting an analysis, some courts simply avoid taking a firm position on *Chevron* deference.[17] Because courts are insecure about *Mead*, many grant lower-level *Skidmore* deference in addition to or in lieu of *Chevron* deference. Thus, courts engage in *Mead*-induced *Chevron* avoidance. Of course, courts have indulged in *Chevron* avoidance for as long as there has been *Chevron* deference. Courts (including the Supreme Court) have refrained from expressly determining whether interpretations of which they approved were "reasonable" under *Chevron*, "persuasive" under *Skidmore*, "correct" as a matter of statutory construction, all, some, or one of the above.[18] After *Mead*, courts have more reason than ever to avoid committing to *Chevron* deference.

These cases, which provide the most overt indication of uncertainty about *Chevron* deference after *Mead*, pack a punch that even Justice Scalia did not fully anticipate. While *Chevron* deference means that an agency, not a court, exercises interpretive control, *Skidmore* deference means just the opposite. When a court declines to grant *Chevron* deference exclusively or at all, and grants *Skidmore* deference as well or instead, it sends a mixed message to the agency

15. *Mead*, 533 U.S. at 230, 232.

16. 535 U.S. 212, 222 (2002).

17. *See infra* Part II.B.

18. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 416, 426 (1999) (stating that, while "clear" that Chevron provides the relevant analytical framework, the statutory meaning was "not obvious" as a "matter of plain meaning," and thus the agency's interpretation was not only reasonable but "the more appropriate one" in the statutory context).

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about who retains interpretive control and whether it would be willing to accept a new agency interpretation in the future. Although the Court decided at the end of last Term that courts are not prevented as a legal matter from accepting new agency interpretations if adopted through *Chevron*-worthy procedures, courts still might reject new interpretations as a practical matter.[19] As a consequence, agencies might find that *Chevron* avoidance reduces their ability to adapt new interpretations to changed circumstances. This result is more than a little ironic. Agencies with congressionally-authorized, notice-and-comment rulemaking authority may have to use such authority if they want *Chevron* deference, though *Mead* disclaims the need to do so.[20] Agencies with other, arguably comparable, lawmaking authority may have to accept *Skidmore* deference and reduced policymaking flexibility, though *Mead* disclaims that intention as well.[21]

Finally, in addition to confusing courts on whether *Chevron* deference applies to interpretations issued through informal procedures, *Mead* has complicated judicial review of agency action by insinuating itself where it really does not belong.[22] Some courts use the decision to address the general question whether an agency possesses delegated authority to issue interpretations *at all*, rather than the specific question whether an agency possesses delegated authority to issue interpretations *with the force of law*. In particular, they use *Mead* to address the general question whether agencies possess delegated authority to issue interpretations determining the limits of their own authority, even through notice-and-comment rulemaking. On the one hand, this is a sort of ingenious use of *Mead* to resolve one of the perennial puzzles of *Chevron* lore. Courts and scholars have long debated whether *Chevron* deference extends to jurisdictional questions.[23] On the other, it disregards what little guidance *Mead* provides on the significance of notice-and-comment rulemaking for *Chevron* deference. Assuming the lower courts are justified in ignoring *Mead* on this point, they still get *Mead* a bit backwards. They read the decision as relevant to determining when an explicit delegation of interpretive authority is necessary, while the

19. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S.Ct. 2688, 2691 (2005) (holding that prior judicial interpretation of an ambiguous statutory provision does not preclude *Chevron* deference to a subsequent agency interpretation).

20. *See Mead*, 533 U.S. at 230 (stating that "the want of [notice-and-comment rulemaking] here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded").

21. *See id.*

22. *See infra* Part II.C.

23. *See infra* text accompanying notes 185-189.

case was intended to address when an implicit one is present. But *Mead* cannot help decide when the absence of an express delegation of interpretive authority is fatal to *Chevron* deference. And reading the decision as pertinent on this issue cannot help us understand when the evidence of an implicit delegation of interpretive authority is sufficient for *Chevron* deference.

Recognizing that *Mead* generates uncertainty and confusion among lower courts, this Article considers where to go from here.[24] It briefly considers Justice Breyer's recent attempt in *National Cable & Telecommunications Association v. Brand X Internet Services* to clarify *Mead*.[25] Justice Breyer's effort is significant because it acknowledges the confusion that *Mead* has wrought. Unfortunately, Justice Breyer does not provide a cure. Rather, he states a proposition evident in *Mead* itself, that relatively formal procedures are not "necessary" for *Chevron* deference. And he provides no additional guidance, beyond an oblique reference to two possible examples, about which less formal procedures might qualify.[26] Thus, Justice Breyer does little to clarify the core confusion that *Mead* creates.

Furthermore, Justice Breyer raises a complexity not present in *Mead* itself – that the exercise of notice-and-comment rulemaking authority is not "sufficient" for an agency interpretation to command *Chevron* deference in cases involving "unusually basic legal question[s]."[27] Justice Breyer did not explain what he meant by "unusually basic legal questions," which is worrisome enough. Could he have meant scope-of-authority or jurisdictional questions of the sort that some lower courts have confronted in the wake of *Mead*? It would be interesting to identify a special condition on or a special exception to *Chevron* deference for such questions. But it would be difficult to attribute that exception to *Mead*, even if the exception is justified. At any rate, Justice Breyer does not address here the status of procedures less formal than notice-and-comment rulemaking.

Justice Scalia's proposal to stem the confusion is to jettison both *Mead* and *Skidmore*. In Justice Scalia's view, *Chevron* deference should turn only on whether the agency has issued an "authoritative" interpretation of the statute.[28] Furthermore, judicial deference should be an all-or-nothing proposition – either a court should defer under *Chevron* or it should not; he rejects the middle position of *Skidmore*.[29]

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24. *See infra* Part III.
25. 125 S.Ct. 2688, 2712 (2005) (Breyer, J., concurring); *see* discussion *infra* Part III.A.
26. *See Brand X*, 125 S.Ct. at 2712 (Breyer, J., concurring).
27. *Id.* at 2713 (Breyer, J., concurring).
28. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).
29. *Id.* at 250 (Scalia, J., dissenting).

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By eliminating *Mead* and *Skidmore*, Justice Scalia's solution simplifies judicial review of agency action.

Justice Scalia's proposal also has a larger theoretical advantage. It promotes political accountability of agency action. It removes from judicial control and remits to presidential control all authoritative agency interpretations, not just those rendered through certain procedures. And, by placing the interpretive role in administrative rather than judicial hands, it allows agency interpretations to evolve as presidential administrations and executive priorities change. In these ways, Justice Scalia's proposal enhances the political responsiveness of agency action, which, he claims, is what Congress intends and what *Chevron* recognizes.[30]

For all its strengths, Justice Scalia's proposal neglects an important point.[31] "Authoritative" positions have never been considered sufficiently law-like to comport with our constitutional structure. Even if such positions are subject to political accountability, political accountability alone does not adequately discipline the exercise of governmental lawmaking authority. Rather, procedural formality also is necessary to guard against, among other things, even the "authoritative" production of unfair, inconsistent, or arbitrary law. Procedural formality, whether imposed under constitutional law or administrative law, always has been a necessary feature of governmental legitimacy.

Because Justice Scalia's proposal eschews particular procedural formality, it also ignores a corollary: All procedures are not created equal. At one end of the spectrum, notice-and-comment rulemaking guarantees formalities that mimic the legislative process (and then some). Thus, notice-and-comment rulemaking best ensures the transparency, deliberation, and consistency that produce fair and reasonable laws. On the other end, "policy statements, agency manuals, and enforcement guidelines" guarantee no such formalities.[32] Because all procedures are not created equal, courts should not treat all resulting interpretations as equal. Rather, they should, as the *Mead* Court intended, "tailor deference to variety."[33]

If all procedures are not equal, however, neither is it true that the difference among procedures is so wide as to make all informal procedures suspect. Some have argued that courts should restrict *Chevron* deference to notice-and-comment rulemaking and formal

30. *Id.* at 244 (Scalia, J., dissenting).

31. *See infra* Part III.B.

32. Christensen v. Harris County, 529 U.S. 576, 587 (2000).

33. *Mead,* 533 U.S. at 236.

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adjudication.[34] This Article seeks to understand the Court's theoretical justification for leaving open the possibility that courts might extend *Chevron* deference to some less formal arrangement. It posits that *Mead* is best read as promoting judicial minimalism or functionalism in the service of congressional delegation.[35] *Mead* reflects the Court's reluctance to second-guess Congress in establishing regulatory regimes – the same concern that underlies the Court's refusal to enforce the nondelegation doctrine. More specifically, *Mead* can be understood as giving Congress room to create procedures that are more flexible and efficient than notice-and-comment rulemaking, which is notoriously ossifying.

Yet we must be careful not to read *Mead* as giving Congress too much room.[36] Congress should not have unfettered discretion to tinker with the procedures for lawmaking, as the Court has from time to time recognized. Specifically, Congress should not have unlimited authority to invent procedures for administrative lawmaking that promote less accountability and tolerate more arbitrariness than we have come to accept. If *Mead* allows Congress (or agencies) unduly to erode the procedures for administrative lawmaking, we ought to be concerned. We might, on this basis, argue for a revision of *Mead* that restricts *Chevron* deference, and hence the force of law, to the fruits of notice-and-comment rulemaking or formal adjudication.

This Article ultimately concludes that such unmitigated formalism is neither necessary nor wise. We instead should afford Congress or agencies a little leeway to create administrative lawmaking procedures beyond trial-type or paper hearings but require that those procedures adhere to certain specified limits – in particular, that the resulting policy is transparent, rational, and binding. Interestingly, we can reach this result through a narrow reading of *Mead* and *Barnhart*.

This Article proceeds in three parts. Part I describes *Mead* and *Barnhart*. Part II discusses the treatment of those cases in the courts of appeals, discerning three different patterns. Section A demonstrates that courts have alternated between *Mead*-type analysis and *Barnhart*-type analysis to evaluate whether *Chevron* deference extends to interpretations issued through informal procedures.

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34. Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 884-85 (2001) (arguing that *Chevron* deference should be restricted to legislative rules and binding adjudications); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 541-44 (2003) (arguing that *Mead* should have established a preference for notice-and-comment rulemaking).

35. *See infra* Part III.C.

36. *See id.*

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Section B shows that some courts have avoided clearly extending *Chevron* deference, granting *Skidmore* deference instead or as well, and potentially reducing agency flexibility to offer new interpretations in the future. Section C shows that courts have used *Mead* for a purpose broader than intended, to address the question of agency jurisdiction, disregarding *Mead's* basic point and inverting the case in the process. Part III reevaluates *Mead* and *Barnhart*, proposing a reconciliation that is justified in theory and workable in practice.

I. SETTING THE STAGE: *MEAD* AND *BARNHART*

To examine how the lower courts have handled *Mead*, it is necessary to discuss *Mead* and its progeny, *Barnhart*. *Mead* involved the question whether *Chevron* deference applies to a U.S. Customs Service ruling letter that specified the tariff classification for a particular imported product under the Harmonized Tariff Schedule of the United States.[37] More specifically, the Customs ruling letter classified imported day planners, three-ring binders with a small space for daily entries, as "diaries" that are "bound" for tariff purposes.[38] This classification represented a change in prior practice and resulted in an increase in taxable status.[39] The Federal Circuit had withheld *Chevron* deference from the ruling letter because such letters, not preceded by notice-and-comment rulemaking, "do not carry the force of law" and "are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review."[40] The court of appeals denied any deference to the ruling letter whatsoever and interpreted the statute independently.[41]

The Supreme Court, Justice Souter writing, agreed that ruling letters are not entitled to *Chevron* deference, though it preserved the possibility that ruling letters might earn *Skidmore* deference instead.[42] The Court held that *Chevron* deference applies only when it is

> apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which Congress did not actually have an intent as to a particular result,

37. *Mead*, 533 U.S at 221.
38. *Id.* at 224.
39. *Id.*
40. *Id.* at 226.
41. *Id.*
42. *Id.* at 227.

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and the agency exercises such authority.[43] The Court acknowledged that an express grant of notice-and-comment rulemaking or formal adjudication authority is "a very good indicator of delegation meriting *Chevron* treatment" because "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[44] The Court observed, however, that "the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[45]

Although the lack of notice-and-comment rulemaking authority was not fatal to *Chevron* deference for Customs ruling letters, the Court found that other considerations were. First, nothing in the statute conveyed a congressional intent to authorize Customs to issue ruling letters with the force of law.[46] The statute made reference to "binding rulings," but this reference did not "bespeak the legislative type of activity that naturally binds more than the parties to the ruling."[47] Ruling letters might be precedential, but "precedential value alone does not add up to *Chevron* entitlement."[48] Furthermore, ruling letters are not clearly precedential (and certainly not binding) because they are subject to independent review and displacement by the Court of International Trade ("CIT").[49]

Second, Customs did not "ever set out with a lawmaking pretense in mind when it undertook to make classifications like these."[50] As the Court observed, the "treatment by the agency makes it clear that a letter's binding character stops short of third parties; Customs has regarded a classification as conclusive only between itself and the importer to whom it was issued."[51] Indeed, the agency's practice in issuing such letters belies any indication that they are intended to carry the force of law. The letters come from 46 different Customs offices at a rate of 10,000-15,000 per year.[52] The Court was not persuaded by the fact that the ruling letter at issue in the case

43. *Id.* at 229 (internal quotations omitted).
44. *Id.* at 230.
45. *Id.*
46. *Id.* at 232.
47. *Id.*
48. *Id.*
49. *Id.* at 233.
50. *Id.*
51. *Id.*
52. *Id.*

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was generated by Customs Headquarters, rather than one of the myriad field offices, or that it contained a reasoned explanation for its classification.[53] This one good example was not evidence of a "more potent delegation" to Headquarters to issue ruling letters with the force of law.[54] The Court therefore found rulings letters "beyond the *Chevron* pale" and analogous to "'interpretations contained in policy statements, agency manuals, and enforcement guidelines.'"[55]

But, unlike the Federal Circuit, the Court held that the letters could merit "some" deference.[56] Specifically, the Court stated that "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires."[57] Because *Skidmore* deference might still apply, the Court remanded the case to the Federal Circuit or the CIT for a determination of whether the letter ruling had the "power to persuade."[58]

Justice Scalia dissented, contending the majority's decision was "neither sound in principle nor sustainable in practice."[59] As to principle, Justice Scalia remarked that *Mead* altered the law of judicial review of agency action, converting *Chevron's* presumption of agency discretion to resolve statutory ambiguities into "a presumption that agency discretion does not exist unless the statute, expressly or impliedly says so."[60] And when the statute does not say so, *Mead* "resurrects, in full force, the pre-*Chevron* doctrine of *Skidmore* deference, whereby '[t]he fair measure of deference to an agency administering its own statute . . . varie[s] with circumstances.'"[61] Thus, Justice Scalia commented, "the Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."[62] Justice Scalia

53. *Id.*
54. *Id.*
55. *Id.* at 234 (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)).
56. *Id.*
57. *Id.* (quoting Skidmore v. Swift, 323 U.S. 134, 139-40 (1944)).
58. *Id.* at 235, 238-39.
59. *Id.* at 241 (Scalia, J., dissenting).
60. *Id.* at 240 (Scalia, J., dissenting).
61. *Id.* at 241 (Scalia, J., dissenting) (quoting *id.* at 228 (majority opinion)).
62. *Id.* (Scalia, J., dissenting).

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rejected this test as inconsistent with *Chevron* and judicial review of agency action.

In adhering to *Chevron* for less formal letter rulings, Justice Scalia disclaimed any connection between "the formality of procedure and the power of an entity administering the procedure to resolve authoritatively questions of law."[63] The purpose of procedures like formal adjudication, he said, is to create a record for review of facts rather than to confer the power definitively to resolve questions of law.[64] Furthermore, he noted that agencies are free to select among procedures, even to "mak[e] law as they implement their program (not necessarily) through formal adjudication."[65] It is likely, he continued, that Congress intends for agencies to "accord the administrators or that agency, *and their* successors, the flexibility of interpreting the ambiguous statute now one way, and later another."[66] It cannot be, then, that Congress intends "when an agency chooses [informal] case-by-case administration, to eliminate all future agency discretion by having that same ambiguity resolved authoritatively (and forever) by courts."[67] But, Justice Scalia claimed, the majority's decision leads to just that result.[68]

In addition to theoretical flaws, Justice Scalia contended that the majority's decision had practical defects. First and foremost, he maintained that the decision would cause "protracted confusion" because of the "utter flabbiness of the Court's criterion."[69] The opinion listed, in addition to notice-and-comment rulemaking or comparable procedural formality, "a grab bag of other factors" that indicate *Chevron*-worthiness.[70] "It is hard to know," he stated, "what the lower courts are to make of today's guidance."[71]

Second, Justice Scalia argued that the decision would cause "an artificially induced increase in informal rulemaking" because such rulemaking and formal adjudication "are the only more-or-less safe harbors from the storm that the Court has unleashed."[72] Furthermore, he stated that the Court's de facto rulemaking requirement would create a perverse result because agencies are

63. *Id.* at 243 (Scalia, J., dissenting).

64. *Id.* (Scalia, J., dissenting).

65. *Id.* (Scalia, J., dissenting).

66. *Id* at 244. (Scalia, J., dissenting) (emphasis in original).

67. *Id.* (Scalia, J., dissenting).

68. *Id.* (Scalia, J., dissenting).

69. *Id.* at 245 (Scalia, J., dissenting).

70. *Id.* (Scalia, J., dissenting).

71. *Id.* (Scalia, J., dissenting).

72. *Id.* at 246 (Scalia, J., dissenting).

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entitled to *Chevron*-style deference when issuing interpretations of their own rules: "Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn clarify through informal rulings entitled to judicial respect."[73]

"Worst of all," Justice Scalia stated, the Court's decision would promote "ossification of large parts of our statutory law."[74] By removing informal agency interpretations from the *Chevron* regime, *Mead* reassigns those interpretations to judicial control. That is because "*Skidmore* deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future."[75] Furthermore, "once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now says what the court prescribed."[76] The resulting statutory "ossification" is particularly troubling when it "occurs simply because of an agency's failure to act by rulemaking (rather than informal adjudication) before the issue is presented to the courts."[77] Nor, said Justice Scalia, can an agency prevent the ossification simply by re-promulgating its interpretation through notice-and-comment rulemaking.[78] Courts are not at liberty to abdicate, and agencies do not possess authority to override, the judicial power once exercised.[79]

Finally, Justice Scalia faulted the majority's decision for "breathing new life into the anachronism of *Skidmore*."[80] *Skidmore*, which establishes "a sliding scale of deference" based on multiple factors, "is a recipe for uncertainty, unpredictability and endless litigation."[81] Because *Mead* pushes an untold number of agency interpretations into the *Skidmore* box, it is simply "irresponsible."[82]

In the end, Justice Scalia argued that the Customs ruling letter was entitled to *Chevron* deference. Under his test, the ruling letter "represents the authoritative view of the agency."[83] But even under the majority's test, Justice Scalia stated that the Customs ruling letter

73. *Id.* (Scalia, J., dissenting).
74. *Id.* at 247 (Scalia, J., dissenting).
75. *Id.* (Scalia, J., dissenting).
76. *Id.* (Scalia, J., dissenting).
77. *Id.* (Scalia, J., dissenting).
78. *Id.* (Scalia, J., dissenting).
79. *Id.* (Scalia, J., dissenting).
80. *Id.* at 250 (Scalia, J., dissenting).
81. *Id.* (Scalia, J., dissenting).
82. *Id.* (Scalia, J., dissenting).
83. *Id.* at 258 (Scalia, J., dissenting).

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was entitled to *Chevron* deference because it was issued by the agency head and therefore indistinguishable from a determination of the Comptroller of the Currency, to whom the Court earlier had extended *Chevron* deference.[84]

The very next Term, the Court had to apply *Mead* in *Barnhart v. Walton*.[85] *Barnhart* concerned the issue whether *Chevron* deference applied to a Social Security Administration ("SSA") interpretation of the Social Security Act.[86] The agency originally issued the interpretation in a 1957 OASI Disability Insurance Letter, a 1965 Disability Insurance State Manual, and a 1982 Social Security Ruling.[87] In 2001, it issued the same interpretation through notice-and-comment rulemaking.[88] The Court, Justice Breyer writing, held that the interpretation was entitled to *Chevron* deference. It first found that the statute "does not unambiguously forbid the agency's regulation," that the agency's interpretation was "permissible" because that interpretation comported with the statute's "basic objectives," and that the interpretation was evidently acceptable to Congress, which had repeatedly reenacted the relevant statutory provisions without change.[89] It then rejected the argument that the agency's regulation was not entitled to *Chevron* deference because the regulation was recently promulgated, "perhaps in response to this litigation," reasoning that it "previously [had] rejected similar arguments."[90]

The Court did not stop there. It went on to consider the agency's interpretation as if it had never been issued through notice-and-comment rulemaking. It observed that the agency's interpretation was "longstanding" and that the Court normally "accord[s] particular deference to an agency interpretation of 'longstanding' duration."[91] Furthermore, it stated that although the interpretation was originally rendered through procedures less formal than notice-and-comment rulemaking, such informality "does not automatically deprive that interpretation of the judicial deference otherwise its due."[92] Under *Mead*, the Court said, "whether a court should give such deference

84. *Id.* (Scalia, J., dissenting).
85. 535 U.S. 212 (2002).
86. *Id.* at 217.
87. *Id.* at 219-20.
88. *Id.* at 217.
89. *Id.* at 218-20.
90. *Id.* at 221.
91. *Id.* at 219.
92. *Id.* at 221.

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depends in significant part upon the interpretive method used and the nature of the question at issue."[93] It determined that, in this case,

> the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[94]

On all these grounds, the Court upheld the interpretation.[95]

Justice Scalia concurred in the judgment on this issue. For him, *Chevron* deference was justified because the SSA's interpretation ultimately had emerged from notice-and-comment rulemaking.[96] He rejected the idea that "particular deference is owed to an agency interpretation of longstanding duration."[97] Because modern law, including *Chevron*, accepts the notion that there is more than one permissible meaning for a statutory ambiguity, agencies may "move from one [meaning] to another."[98] He continued, "so long as the most recent interpretation is reasonable its antiquity should make no difference."[99] He added that, if the Court cared to consider the informal agency pronouncements that predated the notice-and-comment rulemaking (and some of which pre-dated congressional acquiescence), it "should state why those interpretations were authoritative enough (or whatever-else-enough *Mead* requires) to qualify for deference."[100]

II. *MEAD* IN THE COURTS OF APPEALS

After *Mead* and *Barnhart*, lower courts generally understand that *Chevron* deference applies only if Congress delegates, and the agency exercises, authority to issue interpretations with the force of law. This Part demonstrates that courts lose focus thereafter. As Section A shows, courts alternate between *Mead*-style analysis and *Barnhart*-style analysis to determine whether an agency issued an interpretation with the force of law. As Section B documents, some courts are so uncertain about which analysis applies that they avoid deciding and grant *Skidmore* deference in addition to or in lieu of

93. *Id.* at 222.
94. *Id.*
95. *Id.*
96. *Id.* at 226 (Scalia, J., concurring).
97. *Id.* (Scalia, J., concurring) (quotations omitted).
98. *Id.* (Scalia, J., concurring).
99. *Id.* (Scalia, J., concurring).
100. *Id.* at 227 (Scalia, J., concurring).

Chevron deference to agency interpretations contained in nonconventional formats. As Section C reveals, some courts read too much into *Mead* and use it for a broader purpose than intended.

A. *Analytical Divergence*

After *Mead*, courts diverge as to what evidence demonstrates that Congress intended an agency to issue an interpretation with the force of law and that the agency exercised its authority to do so.[101] As

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101. Courts generally do not diverge on the analysis for interpretations issued through procedures presumptively entitled to *Chevron* deference, such as notice-and-comment rulemaking. *See, e.g.*, BCCA Appeal Group v. EPA, 355 F.3d 817, 825 (5th Cir. 2004); Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 125-26 (2d Cir. 2004); Shotz v. City of Plantation, 344 F.3d 1161, 1179 (11th Cir. 2003); BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc., 317 F.3d 1270, 1277 (11th Cir. 2003); Stroup v. Barnhart, 327 F.3d 1258, 1261 (11th Cir. 2003); N.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316, 328-29 (2d Cir. 2003); Student Loan Fund of Idaho, Inc. v. U.S. Dept. of Educ., 272 F.3d 1155, 1165 (9th Cir. 2001).

In addition, courts generally do not diverge on the analysis for interpretations contained in formats traditionally excluded from *Chevron* deference, such as: (1) agency manuals, handbooks, and other internal documents, see Tennessee Prot. & Advocacy, Inc. v. Wells, 371 F.3d 342, 351 (6th Cir. 2004) (agency annual report); Colorado v. Sunoco, Inc., 337 F.3d 1233, 1243 (10th Cir. 2003) (agency reports and memoranda); Pub. Citizen, Inc. v. U.S. Dep't of Health and Human Servs., 332 F.3d 654, 660 (D.C. Cir. 2003) (peer review organization manual); Butterbaugh v. Dep't of Justice, 336 F.3d 1332, 1340-41 (Fed. Cir. 2003) (agency personnel manual); James v. Von Zemenszky, 301 F.3d 1364, 1366 (Fed. Cir. 2002) (agency directive and handbook); Am. Fed'n of Gov't Employees v. Rumsfeld, 262 F.3d 649, 658 n.10 (7th Cir. 2001) (internal agency memoranda), and (2) litigating positions, see NRDC v. Abraham, 355 F.3d 179, 201 (2d Cir. 2004) (interpretation that "followed the petitioner's suits in both this court and the district court"); In re New Times Sec. Servs., Inc., 371 F.3d 68, 81 (2d Cir. 2004) ("the position taken by the SEC in its brief"); Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219, 227 (2d Cir. 2002) (interpretation "expressed only as a position in litigation"); Ala. Power Co. v. U.S. Dep't of Energy, 307 F.3d 1300, 1312-13 (11th 2002) (interpretation in settlement agreement); Pool Co. v. Cooper, 274 F.3d 173, 179 n.3 (5th Cir. 2001) (interpretation advanced in "litigation briefs"); Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 574 (7th Cir. 2001) (interpretation in amicus brief).

Courts also generally agree on the analysis for interpretations contained in Customs classification rulings, denied *Chevron* deference in *Mead*, and procedurally-analogous IRS Revenue rulings. *See* Structural Indus., Inc. v. United States, 356 F.3d 1366, 1370 (Fed. Cir. 2004) (Customs classification ruling); Fed. Nat'l Mortgage Ass'n v. United States, 379 F.3d 1303, 1307 (2004) (IRS revenue procedure); Ammex, Inc. v. United States, 367 F.3d 530, 535 (6th Cir. 2004) (IRS revenue ruling); Park B. Smith, Ltd. v. United States, 347 F.3d 922, 925 (Fed. Cir. 2003) (Customs classification ruling); Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 181 (6th Cir. 2003) (IRS revenue ruling); O'Shaughnessy v. Comm'r, 332 F.3d 1125, 1130-31 (8th Cir. 2003) (IRS revenue ruling); Omohundro v. United States, 300 F.3d 1065, 1067-68 (9th Cir. 2002) (IRS revenue ruling); Rocknel Fastener, Inc. v. United States, 267 F.3d 1354, 1357-58 (Fed. Cir. 2001) (Customs classification ruling). *Cf.* Rubie's Costume Co. v. United States, 337 F.3d 1350, 1355 (Fed. Cir. 2003) (debating whether *Mead* withholds *Chevron* deference from Customs classification rulings even if issued through notice-and-comment rulemaking and concluding that it does); Heartland By-Products, Inc. v. United States, 264 F.3d 1126, 1135 (Fed. Cir. 2001) (same).

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described below, some courts concentrate on whether an interpretation binds more than the parties at hand; some broaden this analysis to ask whether, in addition to binding effect, the interpretation reflects public participation; some limit their focus to whether an agency interpretation reflects careful consideration; and some expand this focus, weighing careful consideration along with agency expertise and statutory complexity.

At a more general level, the courts can be sorted into two groups: those that consider *Mead*-inspired factors and those that consider *Barnhart*-inspired factors. Some courts consider whether an interpretation reflects binding effect, either alone or together with deliberation (via public participation) – the factor that *Mead* made determinative. Other courts consider whether an agency interpretation reflects careful consideration, either alone or together with agency expertise and statutory complexity – the factor that *Barnhart* made relevant. The problem, as discussed below, is that these tests are not necessarily equivalent. Nor do the courts generally acknowledge that they have chosen one over another. As a result, *Chevron* deference seems to turn more on which test a court prefers than on which procedure an agency uses.

Consider first the cases in which courts have selected *Barnhart*-style analysis to evaluate whether a particular interpretive procedure is entitled to *Chevron* deference. Nowhere is this more evident than in the one place where the circuits have split over the appropriate level of deference due one particular interpretive procedure: Housing and Urban Development ("HUD") Statements of Policy. Although the circuits have differed in their conclusions, they have agreed on the basic analysis. Each examines whether HUD Statements of Policy reflect "careful consideration" or require "agency expertise," as *Barnhart* contemplated.[102] None discusses whether those documents are binding, as *Mead* emphasized.[103]

For example, in *Schuetz v. Banc One Mortgage Corp.*, the Ninth Circuit held that the 2001 HUD Statement of Policy was entitled to *Chevron* deference based on the *Barnhart* factors.[104] HUD Statements of Policy interpret ambiguous provisions of the Real Estate Settlement Procedures Act.[105] The 1999 and 2001 Statements of Policy, for instance, specifically determined whether the statute permits mortgage brokers to charge home buyers certain real estate

102. *Barnhart*, 535 U.S. at 222.

103. *Mead*, 533 U.S. at 230, 232.

104. 292 F.3d 1004, 1011-13 (9th Cir. 2002).

105. 12 U.S.C. § 2601, *et seq.* (2005).

settlement fees which had been the subject of litigation.[106] HUD Statements of Policy do not emanate from notice-and-comment rulemaking but are published in the Federal Register. The Ninth Circuit, finding *Chevron* deference appropriate, reasoned that "Congress authorized the Department to interpret [the statute], HUD has responsibility for enforcing the statute, and it has expertise in the home mortgage lending industry."[107]

The Seventh Circuit also followed *Barnhart*-style analysis, but in *Krzalic v. Republic Title Co.*,[108] the court held that the 2001 HUD Statement of Policy was not entitled to *Chevron* deference. Using the same factors, the court found that an agency must use "something more formal, more deliberative, than a simple announcement."[109] It concluded that the 2001 Statement of Policy did not satisfy this requirement, noting that, "[o]ne fine day the policy statement simply appeared in the Federal Register. No public process preceded it."[110] The court saw no "discussion," "no reason," "no evidence or interpretive methodology," and "no abuse pointed to that might justify the contorted interpretation urged by HUD."[111]

The Second Circuit disagreed and held that the 2001 Statement of Policy was entitled to *Chevron* deference. In *Kruse v. Wells Fargo Home Mortgage, Inc.*, the Second Circuit employed a *Barnhart*-based analysis that "weigh[ed]" several factors.[112] The court stated that the Statement of Policy "arose out of the 'careful consideration the Agency has given the question over a long period of time.'"[113] It did not believe, as did the Seventh Circuit, that the Statement of Policy simply appeared in the Federal Register.[114] Rather, the court noted that HUD wrote the Statement of Policy in response to an earlier decision in which the Seventh Circuit had

106. Real Estate Settlement Procedures Act Statement of Policy 2001-1: Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10,080 (Mar. 1, 1999) (resolving issue of lender payments at behest of Conference Report on the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act); Clarification of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees under Section 8(b), 66 Fed. Reg. 53,052 (Oct. 18, 2001) (resolving lingering questions about lender payments and unearned fees raised by two court decisions).

107. *Schuetz*, 292 F.3d at 1013.

108. 314 F.3d 875 (7th Cir. 2002).

109. *Id.* at 881. It also found HUD's interpretation inconsistent with the statute, making *Chevron* deference, as a technical matter, irrelevant. *See id.* at 879.

110. *Id.* at 879.

111. *Id.*

112. 383 F.3d 49, 61 (2d Cir. 2004).

113. *Id.* at 60 (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002)).

114. *Id.* at 61.

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refused to depart from its own precedent.[115] Because the Statement of Policy was a targeted response to a judicial decision, the court recognized "further reason to defer to it."[116] Furthermore, the court affirmed that HUD has particular expertise on real estate settlement fees and the market for federally related home mortgage loans.[117] Citing *Barnhart*, the court stated that this expertise "bolsters the argument that we should defer to the Policy Statement."[118]

These cases demonstrate that the circuits, though disagreeing on the appropriate level of deference for the 2001 HUD Statement of Policy, agree on the applicable mode of analysis. Other courts employ similar *Barnhart*-based analysis with respect to other informal procedures. For example, in *Robert Wood Johnson University Hospital v. Thompson*, the Third Circuit accorded *Chevron* deference to an interpretation contained in Department of Health & Human Services ("HHS") Guidelines because it effectively met the *Barnhart* test.[119] The policy, challenged as a mere litigating position, was instead rooted "in regulations and administrative practice" and was well explained in the Federal Register.[120] Finally, it concerned a complex regulatory scheme and thus especially implicated the agency's expertise.[121]

Of these cases, *Krzalik* is the most unusual because it recognized that *Mead* and *Barnhart* present a puzzle and an opportunity for choice.[122] Judge Posner, writing for the majority, argued that *Barnhart* merged *Chevron* and *Skidmore*, making the multiple factors from the latter determinative under the former.[123] Judge Easterbrook, concurring, contended that *Mead* took pains to distinguish *Chevron* and *Skidmore*, maintaining a distinct approach for each.[124] *Mead* and *Barnhart* suggest disparate tests for *Chevron* deference, leaving individual panels (even individual judges) simply to select between them.

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115. *Id.* (citing Echevarria v. Chicago Title & Trust Co., 256 F.3d 623, 630 (7th Cir. 2001)).

116. *Id.*

117. *Id.*

118. *Id.*

119. 297 F.3d 273, 281-82 (3d Cir. 2002).

120. *Id.* at 281.

121. *Id.* at 282. The Sixth Circuit also applied *Barnhart*-style analysis in Hospital Corp. of Am. & Subsidiaries v. Comm'r. 348 F.3d 136, 144-45 (6th Cir. 2003) (granting *Chevron* deference to temporary IRS regulations that "were arrived at centrally by the Treasury Department, after careful consideration").

122. *Compare* Krzalic v. Republic Title Co., 314 F.3d 875, 877-79 (7th Cir. 2002) (arguing that *Barnhart* conflated *Chevron* and *Skidmore*), *with id.* at 882 (Easterbrook., J., concurring) (arguing that *Mead* distinguished *Chevron* and *Skidmore*).

123. *Id.* at 879.

124. *Id.* at 882 (Easterbrook, J., concurring).

Yet other courts, even within the circuits already discussed, embrace the alternative *Mead*-grounded analysis, without expressly so stating or recognizing the implicit conflict with other panels or judges in the same circuit. For example, in *Wilderness Society v. United States Fish & Wildlife Service*, the Ninth Circuit en banc debated whether *Chevron* deference should apply to interpretations contained in agency permitting decisions, noting that those interpretations lacked binding effect – a *Mead*-type consideration.[125] Significantly, the prior Ninth Circuit panel had extended *Chevron* deference to the interpretation.[126] In doing so, the panel exhibited insecurity about *Mead*, stating that "[a]fter *Mead*, we are certain of only two things about the continuum of deference owed to agency decisions: *Chevron* provides an example of when *Chevron* deference applies, and *Mead* provides an example of when it does not."[127] The panel nevertheless had accorded *Chevron* deference to the interpretation because the permitting decision was made after the public had an opportunity to comment, was consistent with the agency's Final Plan for the area, and the Plan was a product of notice-and-comment rulemaking that "is undoubtedly owed *Chevron* deference."[128] Additionally, the permitting decisions complied with the National Environmental Policy Act ("NEPA"), and NEPA provides a "relatively formal administrative procedure tending to foster . . . fairness and deliberation."[129]

The en banc court reversed because neither the permitting decision nor the interpretation contained therein had a binding effect on future parties.[130] "Applying *Mead*," the court held, "we conclude that this case involves only an agency's application of law in a particular permitting context, and not an interpretation of a statute that will have the force of law generally for others in similar circumstances."[131] Similarly, the court held that several project-specific documents, including NEPA-related documents and an opinion letter from the Department of the Interior's Regional Solicitor's office, were not entitled to *Chevron* deference because they do not "bind the [United States Fish & Wildlife Service] to permit a

125. 316 F.3d 913, *rev'd en banc*, 353 F.3d 1051 (9th Cir. 2003).

126. *Wilderness Soc'y*, 316 F.3d at 922.

127. *Id.* at 921.

128. *Id.* at 922.

129. *Id.*

130. *Wilderness Soc'y*, 353 F.3d at 1067-68 (en banc).

131. *Id.* at 1067 (en banc); *see also* High Sierra Hikers Ass'n v. Blackwell, 381 F.3d 886, 904 (9th Cir. 2004) ("The Forest Service was not acting with the force of law in this case because it was granting permits, not acting in a way that would have precedential value for subsequent parties.").

similar activity in another wilderness."[132] The court determined that "[e]ven when considered together, the Special Use Permit and the underlying documents do not 'bespeak the type of legislative activity that would naturally bind more than the parties to the ruling.'"[133] This is the same circuit that had demanded only careful consideration, while in *Barnhart* mode, with respect to HUD Statements of Policy.[134]

Like the Ninth Circuit, the Second Circuit also has undertaken varying analyses. In *Schneider v. Feinberg*, the Second Circuit extended *Chevron* deference to an agency interpretation rendered through an informal procedure because that interpretation had binding effect.[135] Moreover, citing *Mead*, it stated that the "touchstone" of *Chevron* deference is binding effect, not any other consideration.[136] Because the challenged interpretations applied "equally to all claimants," the court held that they were entitled to *Chevron* deference.[137] Again, this came from a court that gave *Chevron* deference to the non-binding but carefully considered HUD Statements of Policy.

In sum, courts vacillate between two different modes of analysis for determining whether *Chevron* deference applies to interpretations obtained through nonconventional procedures. Sometimes a particular court employs *Mead*-style analysis, and at other times it uses *Barnhart*-style analysis.[138] Furthermore, these

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132. *Wilderness Soc'y*, 353 F.3d at 1067 (en banc).

133. *Id.* (en banc) (quoting United States v. Mead Corp., 533 U.S. 218, 232 (2001)).

134. *See* Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004, 1011-13 (9th Cir. 2002).

135. 345 F.3d 135, 144 (2d Cir. 2003).

136. *Id.* at 143.

137. *Id.* Among the other courts to have emphasized binding effect are: FEC v. Nat'l Rifle Ass'n of Am., 254 F.3d 173, 186 (D.C. Cir. 2001) (granting *Chevron* deference to FEC advisory opinions that "not only reflect the Commission's considered judgment made pursuant to congressionally delegated lawmaking authority, but also have binding legal effect"); Hall v. EPA, 273 F.3d 1146, 1155-56 (9th Cir. 2001) (denying *Chevron* deference to interpretation contained in an EPA approval of a state air quality plan ("SIP") because the "SIP's reach extends only to those it directly regulates, and does not have 'force of law' constituting binding precedent for future SIP revisions"). *Cf.* Pesquera Mares Australes LTDA v. United States, 266 F.3d 1372, 1380 (Fed. Cir. 2001) (granting *Chevron* deference to interpretations contained in Department of Commerce anti-dumping determinations because those "interpretations are embodied in rulings that are given precedential effect"). Note, however, that these cases are pre-*Barnhart*.

138. Some courts have applied little analysis at all, asking only whether Congress gave an agency general implementation authority without further inquiring whether Congress intended the agency to use a particular procedure to discharge such authority. *See* Heimmermann v. First Union Mortgage Corp., 305 F.3d 1257, 1261-62 (11th Cir. 2002) (granting *Chevron* deference to interpretation contained in HUD Statement of Policy because the statute delegates "the power to issue interpretations," and HUD uses Statements of Policy to discharge that obligation); Am. Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001) (granting *Chevron* deference to interpretation of Clean Air Act in EPA SIP approval because "EPA has been charged by Congress with the authority to administer and interpret the Act" and "the EPA's action in this

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analyses are not equivalent, at least not in the way that courts have understood them. As the dispute between Judge Posner and Judge Easterbrook demonstrates, careful consideration is worlds apart from binding effect. Courts that require one but not the other may arrive at different conclusions about whether a particular informal interpretive procedure is entitled to *Chevron* deference. Thus, it is possible to imagine a real circuit split over whether a particular informal interpretive procedure is entitled to *Chevron* deference – not because the courts disagree on whether a particular procedure is entitled to *Chevron* deference, but because they disagree on the prior question of how to *determine* whether *Chevron* deference applies.

What emerges is a sense that courts diverge not only on what *Mead* means but also on how it relates to *Barnhart*. The Supreme Court has not clarified the relationship between the two decisions, leaving courts simply to select between them on a case-by-case or procedure-by-procedure basis often without any acknowledgement that they are doing so. As a result, *Chevron* deference appears to depend more than anything on whether the first panel to consider a particular interpretive procedure favors the *Mead* or the *Barnhart* test. In other words, *Chevron* deference seems to vary with the different analyses that courts choose rather than the different tools that agencies use. This is far from a satisfactory answer to the question when *Chevron* deference applies to interpretations rendered through informal procedures.

B. Chevron *Avoidance*

In many cases, the courts express their uncertainty about *Mead* by refraining from deciding clearly whether *Chevron* deference applies. Instead, they find an easier way out. Some refuse to choose between *Chevron* deference and *Skidmore* deference and simply determine that lower-level *Skidmore* deference supports the agency's interpretation.[139] Others refuse to choose and simply determine that

case was taken in exercise of that authority"). It is worth noting that the Tenth Circuit's decision in *American Wildlands* appears to create a thin circuit split with the Third Circuit's decision in *Hall* because the former grants deference to an EPA SIP approval while the latter does not.

139. *See, e.g.*, Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp., 374 F.3d 362, 369 (5th Cir. 2004) (refusing to decide whether *Chevron* or *Skidmore* analysis applies to interpretation contained in Pension Benefit Guarantee Corporation audit review order because it "may be upheld under the less deferential standard set forth in [*Skidmore*]"); Pronsolino v. Nastri, 291 F.3d 1123, 1133, 1134-35 (9th 2002) (refusing to decide whether *Chevron* or *Skidmore* analysis applies to interpretation contained in EPA "policy, regulations, and practice" because the interpretation is "one to which we owe substantial *Skidmore* deference, at the very least").

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both *Chevron* deference and *Skidmore* deference support the agency's interpretation.[140] These grounds are more straightforward than determining whether Congress intended the interpretive procedure to carry the force of law, and they achieve the same practical result, at least in the short term: the agency wins. But, as discussed below, the agency also loses.

Consider an example of *Mead*-induced *Chevron* avoidance. In *Community Health Center v. Wilson-Coker*, the Second Circuit refused to decide whether *Chevron* deference applies to an interpretation of the Medicaid Act contained in the federal Centers for Medicare and Medicaid Services' ("CMS") Rural Health Clinic and Federally Qualified Health Center Manual.[141] The Second Circuit explained that "in cases such as this, where a highly expert agency administers a large and complex regulatory scheme in cooperation with many other institutional actors, the various possible standards for deference begin to converge."[142] In particular, the court continued, *Mead* requires deference to agency interpretations appearing in "format[s] authorized by Congress for use in issuing 'legislative' rules."[143] But *Barnhart* requires deference to interpretations,

> depending upon to what extent the underlying statute suffers from exposed gaps in its policies, especially if the statute itself is very complex, as well as on the agency's expertise in making such policy decisions, the importance of the agency's decisions to the administration of the statute, and the degree of consideration the agency has given the relevant issues over time.[144]

Furthermore, the court observed that, even if neither *Mead* nor *Barnhart* requires deference, *Skidmore* permits deference "based largely on a similar set of concerns: the agency's expertise, the care it took in reaching its conclusions, the formality with which it promulgates its interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments."[145] Because these tests evince no clear demarcations, the court avoided determining "the

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140. *See, e.g.*, Cmty. Health Ctr. v. Wilson-Coker, 311 F.3d 132, 138 (2d Cir. 2002) (refusing to decide whether *Chevron* or *Skidmore* analysis applies to interpretation contained in Centers for Medicare and Medicaid Services manual because interpretation deserves "considerable deference, whether under *Chevron* or otherwise"); Old Ben Coal Co. v. Dir., Office of Workers' Compensation Programs, 292 F.3d 533, 542 (7th Cir. 2002) (refusing to decide whether *Chevron* or *Skidmore* analysis applies to interpretation articulated by Department of Labor and encapsulated in Benefits Review Board determination because the interpretation is "both reasonable and persuasive").

141. *Cmty. Health Ctr.*, 311 F.3d at 132.

142. *Id.* at 138.

143. *Id.*

144. *Id.*

145. *Id.*

exact molecular weight of deference we accord to the CMS's position."[146]

The court instead accorded CMS's interpretation "considerable deference, whether under *Chevron* or otherwise."[147] In so doing, the court noted, as the Supreme Court had previously done, that even CMS interpretations contained in letters from regional administrators warrant "respectful consideration."[148] Although such interpretations are highly informal, they deserve substantial weight because "CMS regional staff reviews State plans and amendments, discusses any issues with the Medicaid agency, and consults with central office staff on questions regarding application of Federal Policy."[149] Moreover, the court stated that "[w]e take care not lightly to disrupt the informed judgments of those who must labor daily in the minefield of often arcane policy, especially given the substantive complexities of the Medicaid statute."[150]

Community Health Center illustrates why courts engage in *Chevron* avoidance. After *Mead*, courts are uncertain whether interpretations contained in formats like the CMS manual are entitled to *Chevron* deference or even which analytical framework applies. As a result, they sidestep the question. In this case, the court upheld the interpretation as either "reasonable" or "persuasive."[151] Not all courts respond to *Mead* in this fashion; some courts uphold interpretations as at least "persuasive."[152] But the impulse is identical. Because agencies win under any standard, the particular degree of deference makes little apparent difference.

This impulse is problematic because the degree of deference may make a difference in the long run. When an agency commands *Chevron* deference, it retains the ability to change its position in the future.[153] Thus, an agency retains the ability to adapt open-ended statutory terms to evolving technologies or administrative priorities. When an agency wins as a result of *Skidmore* deference, it may lose this flexibility because the court rather than the agency retains

146. *Id.* at 137-38.

147. *Id.* at 138.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See supra* note 140.

153. *See* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1301 (2002) ("[A]pplying the incorporation theory of precedent to interpretive rulings means that most judicial challenges to agency decisions will preclude the agency from ever adopting its own interpretation of a statute.").

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interpretive control.[154] *Skidmore* deference, though phrased as "deference," actually allocates interpretive control to courts.[155]

One might think that, as a practical matter, once courts exercise interpretive control, they are less likely to yield such control in the future.[156] This is especially true if, in the course of deciding that an interpretation is not merely "reasonable" but "persuasive," a court convinces itself that the interpretation is best. In any event, the agency is left to guess at the extent to which the court has foreclosed future departures. Faced with uncertainty about the court's posture toward the prior interpretation, the agency might refrain from offering any subsequent interpretation for fear the court would find it patently "unreasonable" or inconsistent with the statute.

Chevron avoidance exaggerates the problem. Take a decision to grant at least *Skidmore* deference. What precisely is the message there? The agency is left to guess whether the court has foreclosed the possibility of future departures or simply dodged the *Chevron* bullet. The same holds for a decision to grant both *Chevron* and *Skidmore* deference. The agency is forced to guess whether the court is amenable to change; if an interpretation is acceptable under either analysis, the interpretation may be the best or simply good enough for the court to avoid taking a position on the stronger-form *Chevron* deference. *Chevron* avoidance sends unclear or conflicting signals. While an agency can measure the degree of the court's ambivalence toward *Chevron* deference after *Mead*, it cannot evaluate the degree of the court's commitment to the current interpretation.

Of course, these are only practical impediments to subsequent agency interpretation. The Supreme Court decided last Term that prior judicial precedent and stare decisis principles do not prevent courts from accepting subsequent agency interpretations.[157] Thus,

154. *See id.* at 1302-03; William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is* Chevron *Step Two, Not* Christensen *or* Mead, 54 ADMIN. L. REV. 719, 722-25 (2002) (arguing that once a court chooses a meaning in reliance on agency informal adjudication, agency may not be able to depart even through use of congressionally-specified procedures such as notice-and-comment rulemaking or formal adjudication).

155. *See* Bamberger, *supra* note 153, at 1300 (noting that courts make the interpretive judgment under a *Skidmore* regime). In this respect, the phrase *Skidmore* "deference" is misleading. A court granting *Skidmore* deference does not actually relinquish interpretive power to the agency but recognizes the agency as a kind of expert witness, particularly useful in rendering its own interpretive judgment.

156. *Id.*

157. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S.Ct. 2688, 2696-2712 (2005). *Brand X* concerned a prior judicial interpretation issued in the absence of any agency interpretation, rather than one issued in the presence of an agency interpretation that merits *Skidmore* deference and not *Chevron* deference. *Id.* But the holding in *Brand X* should

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Chevron avoidance does not require courts as a legal matter from accepting new agency interpretations. Consequently, it does not compel an agency to forego changes.

Although it is possible to overstate the effect of practical impediments, we still have reason to worry. To the extent that *Chevron* avoidance convinces agencies to forego changes, it has the effect of reducing their maneuvering space. Agencies may become dissuaded from changing course if they fail to receive *Chevron* deference, even after issuing interpretations in ways that plausibly entitle them to *Chevron* deference. To the extent that *Mead* offers courts more reason than ever to refuse to grant *Chevron* deference outright, it is cause for concern.

Because agencies cannot be certain as to how future courts may react as a practical matter to subsequent interpretations, they are left with one option: rushing to rulemaking. As Justice Scalia quipped, "[b]uy stock in the GPO."[158] *Mead* makes clear that agencies can command *Chevron* deference by invoking notice-and-comment rulemaking where congressionally authorized to do so.[159] That is, notice-and-comment rulemaking and formal adjudication are *Mead* "safe harbor[s]."[160] *Mead* purportedly does not require agencies to use notice-and-comment rulemaking power, and it would be ironic if lower court interpretations effectively accomplished that result.[161] It also would be ironic if lower court interpretations deprived the fruits of notice-and-comment rulemaking of *Chevron* deference because such fruits come after an interpretation that prompted *Chevron* avoidance. Perhaps one could defend these results – or rather, defend a revision of *Mead* to require that agencies use notice-and-comment rulemaking when congressionally authorized if they want to command *Chevron* deference and retain interpretive flexibility. That is not, however, what the Court said it intended. It said that it wanted to tailor *Chevron* deference to the various procedures that agencies use, not the other way around.[162]

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apply to the latter as well as the former. *Cf.* Bamberger, *supra* note 153, at 1298-1301 (noting that judicial interpretation occurs and stare decisis attaches in both circumstances).

158. United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting); *see also* Bamberger, *supra* note 153, at 1303 ("When an agency believes an issue is important enough that it wishes its policy choices to command deference in the courts, it must go through the more formal notice-and-comment rulemaking or adjudicative hoops necessary to create policy with the force of law.").

159. *Mead*, 533 U.S. at 230.

160. *Id.* at 246 (Scalia, J., dissenting).

161. *Id.* at 231 (stating that "we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded").

162. *Id.* at 236 (contending that *Mead* "tailor[s] deference to variety").

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Moreover, sometimes agencies are not congressionally authorized to issue interpretations through notice-and-comment rulemaking. And *Mead* makes clear that agencies cannot shoehorn themselves into *Chevron* deference by voluntarily adopting procedures that Congress has not authorized.[163] Such agencies are left with whatever procedures Congress has authorized. If those procedures sit in the twilight zone that *Mead* apparently creates, agencies might find that they are consigned to *Skidmore* deference and reduced interpretive flexibility despite their best efforts.

In sum, lower courts have not made progress toward answering the question when an interpretation generated through an informal procedure is entitled to *Chevron* deference because they have chosen to avoid the question. Worse, they may have converted their very uncertainty into reduced agency flexibility. Even Justice Scalia did not fully imagine this result.

C. Jurisdictional Questions and Explicit Delegations

In addition to approaching *Mead* in an uncertain fashion, some lower courts employ *Mead* for purposes broader than intended. As described below, they use *Mead* to address the general question whether an agency has delegated authority to issue interpretations at all, rather than the specific question whether an agency has delegated authority to issue interpretations with the force of law. In particular, they use *Mead* to address the general question whether an agency has delegated authority to issue interpretations concerning its own jurisdiction, even through notice-and-comment rulemaking. The problem is that, in so doing, they disregard what little guidance *Mead* provides on the siguificance of notice-and-comment rulemaking for *Chevron* eligibility. If justified in so doing, they nevertheless get *Mead* a bit backwards. Courts read the decision as relevant to determining when an explicit delegation of interpretive authority is necessary, while it was intended to address when an implicit one is present.

Consider *Motion Picture Association of America, Inc. v. FCC*, in which the D.C. Circuit invalidated Federal Communications Commission ("FCC") rules that required television programming to include video descriptions because the rules were beyond the scope of the Telecommunications Act.[164] That Act added new provisions to the Communications Act of 1934 for "closed captioning" and "video

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163. *Id.* at 231-33 (requiring that Congress delegate authority to issue interpretations with the force of law).

164. 309 F.3d 796, 798-99 (D.C. Cir. 2002).

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description" technologies to assist hearing and visually impaired individuals.[165] The Act required the Commission to prepare a report on video descriptions and issue regulations on closed captioning.[166] After preparing the report, the Commission issued, after notice-and-comment, rules mandating that television programming include video descriptions.[167] The court held that the FCC lacked statutory authority to promulgate such rules.[168]

In articulating the standard of review, the court began with *Chevron*. It described both Step One and Step Two, noting that "in either situation, the agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue."[169] It then discussed *Mead*:

> *Mead* reinforces *Chevron*'s command that deference to an agency's interpretation of a statute is due only when the agency acts pursuant to "delegated authority." The Court in *Mead* also makes it clear that, even if an agency has acted within its delegated authority, no *Chevron* deference is due unless the agency's action has the "force of law." In this case, the principle question is whether Congress "delegated authority" to the FCC to promulgate visual description regulations. Absent such authority, we need not decide whether the regulations are otherwise "reasonable." An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress.[170]

The FCC had argued that the statute in question did not foreclose jurisdiction, but created "ambiguity resulting in delegated authority" to the agency.[171] The court rejected the argument, reasoning that congressional silence as to certain authority did not entitle the agency to assert such authority.[172] Rather, express congressional delegation is necessary.

Consider also *Natural Resources Defense Council v. Abraham*, in which the Second Circuit held that an agency lacked delegated authority to resolve a jurisdictional question.[173] The case involved a Department of Energy ("DOE") rule under the Energy Policy and Conservation Act ("EPCA") that established reduced efficiency standards for certain air conditioning units.[174] The court determined that the plain language of § 325(o)(1) of the statute precluded the agency from issuing reduced home appliance efficiency standards after

165. 47 U.S.C. § 613 (1996).

166. *Id.*

167. *Motion Picture Ass'n*, 309 F.3d at 798.

168. *Id.* at 801.

169. *Id.*

170. *Id.* at 806 (citations omitted).

171. *Id.*

172. *Id.*

173. 355 F.3d 179, 184 (2d Cir. 2004).

174. *Id.* at 195.

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it published the original standards in the Federal Register.[175] The agency had argued that it had not "published" the original efficiency standards because it had suspended the effective date of those standards.[176] The court disagreed, observing that "under its interpretation, DOE could insulate itself from [the statute's] operation indefinitely by . . . simply suspending indefinitely the standards' effective date."[177]

Although the court held that the plain language of the statute contradicted the agency's interpretation under *Chevron* Step One,[178] it nevertheless considered the level of deference that would apply to the agency's interpretation of section 325(o)(1).[179] The court first expressed general skepticism about deferring to an agency on a jurisdictional question: "Given that the question at issue here is the degree to which DOE's discretion has been circumscribed by Congress, we are mindful . . . that it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power."[180] The court then concluded, on the authority of *Mead*, that "a lesser degree of deference than *Chevron*-level" would apply to the agency's interpretation, assuming the statute was ambiguous.[181] The court reasoned that "interpreting the application of section 325(o)(1) is not part of DOE's delineated duties to promulgate efficiency standards, which *were* explicitly delegated to DOE by Congress in the EPCA and intended to carry the force of law."[182] Thus, the agency lacked the express delegated authority that *Mead* requires for *Chevron* deference.[183] In the absence of such authority, the DOE had no interpretive power to enlarge its regulatory power over efficiency standards.

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175. *Id.* at 195-97.

176. *Id.* at 197.

177. *Id.* at 200.

178. *Id.* at 199.

179. *Id.*

180. *Id.* (quotations omitted).

181. *Id.* at 200.

182. *Id.* at 201 (emphasis in the original). The court offered two other reasons that *Chevron* deference would not apply to the agency's interpretation. It found that the agency's interpretation "did not go through the full notice-and-comment procedures laid out in EPCA . . . and is more in the nature of an interpretive rule than legislative one." *Id.* While the DOE had issued the revised efficiency standards through notice-and-comment rulemaking, it had not expressly ventilated the interpretation of section 325(o)(1) concerning the "publication" of the original standards. *Id.* The court also found that the "DOE's interpretation followed the petitioners' suits in both this court and the district court arguing that section 325(o)(1) constrained its ability to rescind the original standards and replace them with weaker standards, and thus was arguably an interpretation advanced in contemplation of litigation." *Id.* at 201.

183. *Id.* at 200.

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In the above cases, the courts cite *Mead* in determining whether an agency has the power to issue interpretations concerning the scope of its own authority, even through notice-and-comment rulemaking.[184] At first glance, one might think that these courts use *Mead* in an unexceptional way, as reaffirming what always has been a necessary condition of *Chevron* deference (i.e., that an agency possess delegated authority to issue interpretations that resolve statutory ambiguities). Upon further reflection, one might even think that courts use *Mead* in a clever way: to address the longstanding puzzle whether *Chevron* deference extends to jurisdictional questions.[185] Courts long have debated whether Congress can "be presumed to intend that courts defer to agency judgments about the scope of their jurisdiction."[186] The worry is that agencies might tend to expand the

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184. *See also* Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 3 (D.C. Cir. 2002) (applying *Mead* and holding that the FERC lacked express "delegated authority" to require public utilities to relinquish their statutory right to file tariff rate charges as a condition of FERC approval of agreements among such utilities, and to prohibit members from withdrawing from such agreements without FERC approval); Michigan v. EPA, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (applying *Mead* and holding that the EPA lacked express "delegated authority" to administer a federal operating program beyond the borders of Indian country). Another case that falls in this category emerged after the search that formed the basis for this Article. *See* American Library Ass'n v. FCC, 406 F.3d 689, 698-99 (D.C. Cir. 2005) (applying *Mead* and holding that the FCC lacked "delegated authority" to issue broadcast flag regulations under the Communications Act of 1934). Similar to these cases are those in which lower courts used *Mead* to determine whetber an agency possessed "delegated authority" to interpret a statute that gave responsibility to more than just that one agency. *See, e.g.*, MCI Telecomms. Corp. v. Bell Atlantic Penn., 271 F.3d 491, 515 (3d Cir. 2001) (applying *Mead* and bolding that the state public utility commission lacked "delegated authority" to interpret the federal Telecommunications Act).

185. *See* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2674 (2003) (noting that the Supreme Court has not resolved whether *Chevron* deference applies to jurisdictional questions, and arguing that *Chevron* deference should not apply to such questions); Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 992-93 (1999) (same); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L. J. 833, 851 (2001) (noting that the Court has not resolved Chevron's relationship to jurisdictional questions).

186. Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. 187, 219 (1992) ("*Chevron* does not require a court to accept an agency's view of the scope of its delegated authority, jurisdictional or substantive. By definition, Congress cannot have left this determination to the agency."); Merrill & Hickman, *supra* note 185; Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 209 (2004) (arguing that agencies may pursue their own self-interest in interpreting statutes); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 498 (1989) ("Cass Sunstein's pithy criticism of deference according to *Chevron* – 'foxes shouldn't guard henhouses' – is a counsel not merely of prudence, but of constitutional necessity." (quoting Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 368 (1987) (statement of Cass R. Sunstein))); Gellhorn & Verkuil, *supra* note 185, at 1009 ("agencies have no comparative advantage in reading statutes and . . . agency self-interest may cloud its judgment); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2099 (1990) ("The principal reason [for an independent judicial role] is that Congress would be unlikely to want agencies to have the

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limits of their authority. But the countervailing concern is that courts have no reliable means to distinguish questions involving the scope of delegated authority from questions involving the application of delegated authority.[187] As a result, courts might overstep their bounds in determining the permissible limits of agency action.[188]

But if courts effectively invoke *Mead* to resolve this tension, they create difficulties in the process. Courts infer from *Mead* that they cannot presume that Congress intends to extend *Chevron* deference to certain interpretations even if issued through notice-and-comment rulemaking, including those addressing jurisdictional questions. As a result, they ignore *Mead*'s basic purpose. *Mead*, which specifically requires that "Congress [has] delegated authority to the agency generally to make rules carrying *the force of law*," does not contain generic guidance on whether Congress has delegated authority to the agency to act *at all*.[189] While *Mead* does contain some guidance on notice-and-comment rulemaking authority, it recognizes that such authority presumptively constitutes "delegated authority" to

authority to decide on the extent of their own powers. To accord such power to agencies would be to allow them to be judges in their own cause, in which they are of course susceptible to bias.").

187. *See* Garrett, *supra* note 185, at 2674 ("It is sometimes difficult to distinguish between a question that concerns the agency's jurisdiction, which would merit independent assessment by the judiciary, and a question of applying delegated authority to a borderline case, in which deference to the agency's decision would be appropriate either when Congress has signaled that agency views on the meaning of statutes should be controlling or when the judicial default rule understands congressional silence as such a delegation."); Merrill & Hickman, *supra* note 185, at 910-11 (contending that the Court implicitly agrees that, as a practical matter, questions of jurisdiction must remain within *Chevron*'s domain).

188. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2153-54 (2002) ("But the problem with that claim is that every statutory interpretation implicates the scope of agency jurisdiction by defining what comes within the statutes over which the agency has uncontested jurisdiction.").

189. United States v. Mead Corp., 533 U.S. 218, 218 (2001). As Professor Vermeule has written, *Mead* does not contain "an abstract instruction" to the lower courts on "whether Congress expressly delegated to the agency the power to take the very action that it did take." Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 352 (2003).

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issue interpretations with the force of law.[190] Thus, courts disregard the little bit of guidance that *Mead* does give concerning the significance of notice-and-comment rulemaking for *Chevron* eligibility.

If the courts merely read *Mead* for a purpose broader or even different than intended, they would raise little cause for concern. Lower courts often read Supreme Court decisions in these ways and raise no red flags. The real difficulty is that the lower courts, if right to ignore *Mead* as to the significance of notice-and-comment rulemaking, distort *Mead* in the process.[191] Lower courts understand the case as relevant to the question when an agency needs an *explicit* delegation to issue interpretations of statutory ambiguities (answer: when those ambiguities define the scope of the agency's authority). But the case addresses a different, if not opposite, sort of question: when an agency has an *implicit* delegation to issue interpretations with the force of law. As Professor Vermeule writes, "the central point of *Mead* is to establish a series of indicators that reviewing courts must use to discern when, absent an express delegation of authority authorizing the agency action in question, Congress should nonetheless be taken to have implicitly delegated the relevant authority."[192] *Mead* does not concern the absence of express delegations but the evidence of implied delegations.

In short, lower courts read *Mead* in an uncomfortable fashion. *Mead* does not address general questions of delegated authority or impose specific limits on notice-and-comment rulemaking. But even if it does, it does not speak to express delegations of authority to issue interpretations. By using *Mead* to resolve the question whether an agency is entitled to *Chevron* deference when issuing interpretations of jurisdictional terms, courts confuse our basic understanding of the decision.

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190. *Cf.* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 469, 471 (2002) (arguing that, after *Mead*, courts still must determine whether a general grant of authority to make "rules or regulations" encompasses the authority to make rules with the force of law).

191. Vermeule, *supra* note 189, at 352 (examining Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 798-99 (D.C. Cir. 2002) and concluding that "[t]his analysis is a caricature of *Mead*'s prescribed approach. First, and most seriously, the panel seemed to assume that *Mead* requires an express delegation of agency power; only on that assumption can we make sense of the panel's claim that unless [the statute] supplied the requisite authority, the Commission must lose. Not one sentence in *Mead*, however, supports this assumption.").

192. *Id.*; *see also* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2003-2004 106 (Jeffrey S. Lubbers ed., 2004) ("In application, *Mead* continues to confound lower courts); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from* Chevron *Principles in* United States v. Mead, 107 DICK. L. REV. 289 (2002).

III. MEAD IN THE FUTURE

As Justice Scalia predicted, *Mead* has muddled judicial review of agency action. Lower courts apply different analytical frameworks to determine when Congress delegates, and agencies exercise, authority to issue interpretations with the force of law. Furthermore, courts avoid *Mead* and *Chevron* when *Skidmore* will do. Finally, they disregard *Mead*'s basic purpose and invert the case.

This Part asks where to go from here. To answer that question, it reopens the debate over whether *Mead* is theoretically defensible, because one thing is certain: If *Mead* is not theoretically defensible, then its practical effects are not worth tolerating. The following Part seeks to get at the debate in a modest way, by reexamining the disagreement between the dissent and the majority in *Mead*. Ultimately, this Part concludes that neither side gets it right as a theoretical matter and proposes a new approach that is both defensible in theory and workable in practice. Before turning to that discussion, however, this Part briefly considers Justice Breyer's recent attempt in *National Cable & Telecommunications Association v. Brand X Internet Services* to clarify *Mead*. It shows that Justice Breyer's effort does not eliminate the need for a new approach.

A. *Decoding the Concurrence in* Brand X

Concurring in *Brand X*, Justice Breyer endeavored to rebut Justice Scalia's characterization of *Mead* as requiring "'some unspecified degree of formal process' before the agency" for that agency to receive *Chevron* deference.[193] Interestingly, the issue in *Brand X* had nothing to do with *Mead*'s asserted demand for procedural formality. The interpretation in the case undoubtedly reflected such formality because it was the product of notice-and-comment rulemaking.[194] But Justice Breyer and the other members of the Court evidently were in the mood for clarification.[195] Indeed, the

193. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S.Ct. 2688, 2712 (2005) (Breyer, J., concurring) (quoting *infra*, at 2718 (Scalia, J., dissenting)).

194. In *Brand X*, the Court considered whether the FCC's conclusion that "cable companies that sell broadband Internet service do not provide 'telecommunications servic[e]' as the Communications Act defines that term" was a "lawful construction of the Communications Act under Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), and the Administrative Procedure Act, 5 U.S.C. § 555 *et seq.*" *Brand X*, 125 S.Ct. at 2695. The Court held that it was. *Id.*

195. *See id.* at 2702 ("Nevertheless, it is no great mystery why we are reaching the point here. There is genuine confusion in the lower courts over the interaction between the *Chevron* doctrine and *stare decisis* principles, as the petitioners informed us at the certiorari stage of this litigation.") (quotations omitted).

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majority resolved an issue that it did not have to address: whether "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference."[196] Holding that prior precedent does not trump *Chevron* deference, the Court provided much needed clarification on this issue for the lower courts.[197] As for *Mead*, Justice Scalia invited clarification of that case by again asserting his own characterization. Justice Breyer embraced the opportunity. Unfortunately, his effort may do more harm than good.

On Justice Breyer's reading of *Mead*, "the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for *Chevron* deference to an agency's interpretation of a statute."[198] "It is not a necessary condition," he stated, "because an agency might arrive at an authoritative interpretation of a congressional enactment in other ways, including ways that Justice Scalia mentions."[199] But the Court made this general proposition clear in *Mead* itself.[200] Furthermore, the "ways" that Justice Scalia mentions amount to one example involving a "position taken by an agency before the Supreme Court, with the full approval of the agency head."[201] Justice Breyer did not explain why or how agency litigating positions, which traditionally have been denied *Chevron* deference, may qualify.[202] Nor did he provide any other insight beyond a citation to *Mead*, which only gave one example of a *Chevron*-worthy, nontraditional process. That example involved the Comptroller of the Currency, whose unique functions do not readily compare to those of other officials or agencies.[203] Thus, Justice Breyer's purported clarification on the status of procedures less formal than notice-and-comment rulemaking is not much help.

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196. *See id.* at 2700; *id* at 2702 ("As the dissent points out, it is not logically necessary for us to reach the question whether the Court of Appeals misapplied *Chevron* to decide whether the Commission acted lawfully.").

197. *See id.* at 2702.

198. *Id.* at 2712 (Breyer, J., concurring).

199. *Id.* (Breyer, J., concurring).

200. *See* United States v. Mead, 533 U.S. 218, 230 (2001) ("The want of [notice-and-comment rulemaking] here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

201. *Brand X*, 125 S. Ct. at 2718 (Scalia, J., dissenting).

202. *See, e.g.*, NRDC v. Abraham, 355 F.3d 179, 201 (2d Cir. 2004) (rejecting *Chevron* deference for agency litigating position); In re New Times Securities Servs., Inc., 371 F.3d 68, 81 (2d Cir. 2004) (same); Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219, 227 (2d Cir. 2002) (same); Ala. Power Co. v. U.S. Dept. of Energy, 307 F.3d 1300, 1312-13 (11th Cir. 2002) (same); Pool Co. v. Cooper, 274 F.3d 173, 179 n.3 (5th Cir. 2001) (same); Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 574 (7th Cir. 2001) (same).

203. *See Mead*, 533 U.S. at 231 (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995)).

Furthermore, his attempted clarification adds a complexity absent in *Mead* itself. In Justice Breyer's view, a formal proceeding is "not a sufficient condition because Congress may have intended *not* to leave the matter of particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue."[204] Thus, Justice Breyer began to describe a category of interpretations as to which *Chevron* deference may not apply, even in the face of notice-and-comment rulemaking. But he did not continue to describe that category of "unusually basic legal question[s]." He offered only a single counterfactual reference as illustration, one involving what is best understood as an agency's implausible assertion of statutory authority.[205]

Could it be that Justice Breyer reads *Mead* to impose an additional requirement on, or to create a special exception to, *Chevron* deference for scope-of-authority or jurisdictional questions, as some lower courts have done? Consider that Justice Breyer began his concurrence by chiding the agency for its aggressive resolution of such a question: "I join the Court's opinion because I believe that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority – though perhaps just barely."[206] Maybe Justice Breyer intended to warn the FCC that it was treading close to a line that, he believes, *Mead* draws for *Chevron* deference on scope-of-authority questions.

Even if Justice Breyer has in mind a reading of *Mead* as relevant to scope-of-authority questions, this reading is neither obvious nor natural. As discussed above, any further condition on *Chevron* deference for scope-of-authority questions – let alone "unusually basic legal question[s]" – is not fairly attributed to *Mead*.[207] That is not to deny the value in commencing a discussion or uncovering the full Court's position on the relationship between *Chevron* deference and jurisdictional questions. But *Mead*, which concerns implicit delegations and unconventional procedures, contains

204. *Brand X*, 125 S. Ct. at 2713 (Breyer, J., concurring).

205. *Id.* at 2713 (Breyer, J., concurring) (citing General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) and noting that the Court in that case "reject[ed the] agency's answer to [the] question [of] whether age discrimination law forbids discrimination against the relatively young").

206. *Id.* (Breyer, J., concurring). As a result of the majority's opinion upholding the FCC's interpretation in *Brand X*, the agency now has power under its "ancillary jurisdiction" to make rules for information services, including email and instant messaging and the like. *Id.* at 2696 (noting that the FCC may regulate cable-facilitated "information service" under its ancillary jurisdiction).

207. *See supra* Part II.C.

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no particular clues. Moreover, reading it otherwise (or even as consistent with a particular position on the scope-of-authority issue) does not make any headway on addressing the most serious source of confusion that the decision generates in lower courts: the status of procedures less formal than notice-and-comment rulemaking. This Part now returns to that issue.

B. Rejecting the Dissent in Mead

Justice Scalia would abandon both *Mead* and *Skidmore.*[208] To the extent that *Chevron* rests on a presumption of congressional delegation, Justice Scalia thinks the Court should not demand an affirmative showing of such delegation.[209] Thus, he argues that *Chevron* analysis applies as long as the agency issued an "authoritative" interpretation of the statute, regardless of the procedures used.[210] Furthermore, he believes that the Court should not slice-and-dice levels of deference.[211] An agency cannot command a little deference any more than it can possess a little delegation. It either has interpretive power or it does not.

Justice Scalia's proposal has new appeal in light of the evidence presented here. The proposal would eliminate the problematic effects of *Mead* by eliminating the case. It would further streamline judicial review of agency action by eliminating *Skidmore.* Rather than deliver simplicity for its own sake, Scalia's proposal recognizes that nuanced rules like the ones in *Mead* and *Skidmore* have no use unless lower courts can meaningfully understand them.

Justice Scalia's proposal also is worth reconsidering because his vision of judicial deference promotes political accountability far better than the Court's version.[212] First, Justice Scalia's proposal wrests from judicial control and remits to presidential control *all* authoritative agency interpretations of ambiguous statutory provisions and not just those issued through particular procedures. Second, the proposal, by placing this interpretive role in administrative hands, allows agency interpretations to evolve as presidential administrations and executive priorities change. In both

208. *See Mead,* 533 U.S. at 250, 258 (Scalia, J., dissenting).

209. *See id.* at 241 (Scalia, J., dissenting).

210. *See id.* at 258 (Scalia, J., dissenting).

211. *See id.* at 250 (Scalia, J., dissenting).

212. *See* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element,* 53 ADMIN. L. REV. 803, 837 (2001) (noting that Justice Scalia's position "may be grounded in the expansive visions of presidential authority (and hesitations about judicial authority) he has voiced in other contexts").

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ways, Justice Scalia's proposal enhances the political responsiveness of agency action – which, he claims, is what Congress intends and what *Chevron* recognizes.[213] Perhaps democracy demands this accountability for the administrative state.[214]

But Justice Scalia's strategy, while highly workable, is not entirely defensible. "Authoritative" positions are insufficiently law-like to command the force of law. An authoritative position might be carefully considered. Thus, it might reflect the deliberation and expertise we expect from agencies as compensation for their creation. An authoritative position might be transparent. Thus, it might be subject to the political control and public scrutiny we demand for agencies as compensation for their lack of direct accountability.[215] Nevertheless, the constitutional structure arguably demands more than careful consideration and transparency – indeed, more than political accountability – when it comes to lawmaking. The Constitution also demands consistent application, as evident in Article 1, the Due Process Clause, and elsewhere.[216] Thus, it requires procedural formalities to promote predictable and fair lawmaking, not

213. *See Mead*, 533 U.S. at 244 (Scalia, J., dissenting).

214. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978-79 (1992) (noting that political accountability has replaced judicial review of administrative decisions); Richard J. Pierce Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 486 (1990) (same); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755-60 (1996) (noting transition from administrative expertise to political accountability as discipline for agency rulemaking); *cf.* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1242-43 (2002) (asserting a new justification for judicial control of statutory interpretation).

215. This may not always be the case. "Authoritative" positions often are not carefully considered or transparent. *See* Bressman, *supra* note 34, at 503-11 (offering examples). If they are not at least transparent, they do not foster political accountability because they are not subject to public scrutiny or response. *Id.* at 506. Professors Barron and Kagan can be understood to address this objection by requiring *Chevron*-eligible interpretations to come from those most visible and accountable within an agency – namely, the agency head. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 241. One wonders, however, whetber the visibility and accountability of the official automatically corresponds to the transparency of the interpretation. *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376-77 (2001) (limiting *Chevron* deference to agency interpretations that reflect official, transparent presidential directives). And Professor Vermeule predicts that the agency-head rule will be easy to gut. Vermeule, *supra* note 189, at 359 ("Given the internal structure of agency hierarchies, nothing will be easier than for agency heads to circumvent the rule, delegating decisions de facto while retaining de jure authority; and reviewing judges will be hard pressed to discern when this has occurred.").

216. *See* Bressman, *supra* note 34, at 495-503 (describing the Constitution as dedicated to the prevention of arbitrariness, which includes the prevention of special treatment at public expense).

simply accountable lawmaking.[217] Administrative law has followed suit, relying on procedures simultaneously to facilitate accountable agency decisionmaking and to prevent arbitrary agency decisionmaking.[218] In this way, administrative law can be understood to have incorporated (some might even say perfected) the constitutional strategy for ensuring that government officials exercise lawmaking authority in a legitimate fashion. One need not claim that the particular procedures that the Administrative Procedure Act ("APA"), for example, imposes are constitutionally compelled to maintain that *some* procedures are constitutionally appropriate before a court accords an agency interpretation the status of law.[219]

Because Justice Scalia would not demand particular procedural formality, he is indifferent to the claim that all administrative procedures are not created equal.[220] At one end of the spectrum, notice-and-comment rulemaking "by its nature, facilitates the participation of affected parties, the submission of relevant information, and the prospective application of resulting policy."[221] In addition, it "fosters logical and thorough consideration of policy" as a result of the judicially-enforced reasoned decisionmaking requirement that accompanies it.[222] Notice-and-comment rulemaking translates the legislative process to the administrative state, and then some.

Likewise, formal adjudication more than translates the judicial process to the administrative state. It develops generally applicable standards on a case-by-case basis, "afford[ing] important procedural protections to individual litigants" in the process.[223] But, as compared

217. *Id.*

218. *Id* at 470-74; *cf.* John Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 894 (2004) ("Prescribed lawmaking processes such as bicameralism plus presentment or notice-and-comment rulemaking promote caution, deliberation, and accountability.").

219. *Cf.* Barron & Kagan, *supra* note 215, at 230-34 (arguing that an emphasis on "proceduralism" is misguided).

220. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390-96 (2004) (comparing different agency procedures); *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 26-31 (1990) (noting differences among procedures and arguing that interpretive rules should not bind citizens and courts); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001) (describing range of "nonlegislative" rules); Manning, *supra* note 218, at 894 (distinguishing legislative rules, which are capable of binding with the force of statutes, from nonlegislative rules, which are not); Merrill & Hickman, *supra* note 185, at 900-08 (noting differences among procedures and arguing that only notice-and-comment rulemaking and formal adjudication warrant *Chevron* deference); Strauss, *supra* note 212, at 803-04 (describing hierarchy of agency law).

221. Bressman, *supra* note 34, at 541-42.

222. *Id.* at 542.

223. *Id.*

to notice-and-comment rulemaking, it is, in some sense, a second-best approach for formulating generally applicable standards. It

> applies new rules retroactively to the parties in the case[,] .... excludes other affected parties in the development of policy applicable to them, ... and tends to approach broad policy questions from a narrow perspective – only as necessary to decide a case – which decreases the comprehensiveness of the resulting rule and increases the risk that bad facts will make bad law.[224]

Other methods fall farther down the scale. Informal procedures often produce generally applicable standards, yet they are "less fair and deliberative than formal adjudication, which at least provides procedural protections for individual litigants and the possibility of intervention and amicus curiae filings for others parties."[225] Informal procedures are "retroactive and narrowly focused[,] ... and less visible."[226] Furthermore, they often fail to bind either the agency or the public.[227] In any event, informal procedures provide no *assurance* of fairness, deliberation or binding effect. Such results are happenstance, if they materialize at all.

If administrative procedures are not all the same, *Mead* is at least partially correct – reviewing courts should not treat all agency interpretations identically. Rather, courts should give legal force only to interpretations contained in procedures that reflect the indicia of lawmaking authority.[228] Justice Scalia's strategy (concededly) cannot countenance such diversity.

C. *Rejecting the Majority in* Mead

Rejecting the dissent does not mean that the Court's project is justified in whole. Scholars have argued that courts should give legal force only to interpretations contained in notice-and-comment rulemaking, and perhaps formal adjudication, because such procedures are the best for making general policy.[229] Of course, the Court has taken a broader view. In *Mead* and *Barnhart*, it

224. *Id.*

225. *Id.*

226. *Id.* at 543.

227. *Id.*

228. Of course, agencies remain free to select any procedure they desire. *See* SEC v. Chenery Corp., 332 U.S. 194, 201-03 (1947) (stating that agencies have a choice among procedures). But they cannot expect the same legal treatment regardless of their choice.

229. Bressman, *supra* note 34, at 541-44 (arguing that *Mead* should have established a preference for notice-and-comment rulemaking); Merrill & Hickman, *supra* note 185, at 884-85 (arguing that *Chevron* deference should be restricted to legislative rules and binding adjudications).

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acknowledged the possibility that courts could give legal force to interpretations contained in some unspecified informal procedures.[230]

Why would the Court preserve the possibility that interpretations contained in informal procedures might qualify for *Chevron* deference? Why not sacrifice the marginal cases in favor of a sharper rule that might provide courts and agencies with greater guidance? The answer cannot be the one that many scholars have given for why the Court wrote *Mead* in the first place – namely, judicial aggrandizement. Scholars claim that the Court wrote *Mead* because it wanted to regain the interpretive power that courts lost to *Chevron* by increasing the hurdles that agencies face under *Chevron*.[231] But even if judicial aggrandizement can account for *Mead* generally, it cannot explain why the Court refused to draw the *Chevron* line at the fruits of notice-and-comment rulemaking and formal adjudication. If the Court had so restricted *Chevron* deference, it would have maximized judicial interpretive authority. Unless an agency uses delegated notice-and-comment rulemaking or formal adjudication authority, courts would get interpretive control.

Judicial minimalism, rather than judicial aggrandizement, better explains the Court's apparent reluctance to create a bright-line rule. In essence, the Court refused in *Mead* to preclude *Barnhart*, and refused in *Barnhart* to preclude other cases involving informal procedures. Thus, the Court refused to decide more than it had to. Professor Sunstein has defended judicial minimalism as more than recognizing the limits of judicial foresight, but also as cultivating the advantages of political elaboration.[232] By refusing to decide more than it has to in individual cases, the Court leaves political officials "room in which to adapt to coming developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal issues."[233]

230. *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001); Barnhart v. Walton, 535 U.S. 212, 221-22 (2002).

231. *See, e.g.*, Michael P. Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 677-81 (2002) (arguing that *Mead* shifts interpretive authority from agencies to courts); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 751 (2002) (arguing that *Mead* represents "a naked power grab by the federal courts"); Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 793-94 (2002) (contending that *Mead* gives courts too large a role in denying agencies the deference that they are due).

232. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 53 (1999); Mark Tushnet, *The Supreme Court, 1998 Term – Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 92-96 (1999) (arguing that the current Court subscribes to judicial minimalism).

233. SUNSTEIN, *supra* note 231, at 53.

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Here, we might view the Court as giving Congress latitude to experiment with different forms of administrative lawmaking authority. In this vein, consider the Court's own characterization of its project:

> Underlying the position we take here . . . is a choice about the best way to deal with an inescapable feature of the body of congressional legislation authorizing administrative action. That feature is the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress. . . . If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. 234

We might put a finer point on this general nod to congressional intent. The Court can be seen as giving Congress latitude to reform or update traditional administrative procedures, creating forms of administrative lawmaking authority that are more efficient than notice-and-comment rulemaking and formal adjudication. Scholars have argued for years that notice-and-comment rulemaking is too stultifying.[235] It creates a potentially endless cycle of public comment and judicial review, forcing agencies to refrain from issuing new regulations or revising old ones. It is ill-adapted to many technological and scientific problems, requiring agencies "to set achievable levels of compliance based on speculation when they more fruitfully might experiment with proposed levels," and "to produce rules that, by the time they are final, already have outlived their usefulness because technological or scientific advances have superseded them."[236] It is rigid, "prohibit[ing] agencies from

234. *Mead*, 533 U.S. at 235-36.

235. The "ossification" literature is enormous. *See, e.g.*, STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 49 (1993); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 19, 199-200, 224-54 (1990); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1471-72 (1992); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 71 (1995); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Paul R. Verkuil, *Comment: Rulemaking Ossification – A Modest Proposal*, 47 ADMIN. L. REV. 453, 453 (1995); Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659 (1997).

236. Bressman, *supra* note 34, at 545-46.

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negotiating policy directly with affected parties, as they might through settlement negotiations in an enforcement action."[237] Finally, it is expensive, asking agencies to commit an inordinate portion of their budgets.[238]

Formal adjudication is limited as well. It is only suited to contexts involving particular disputes. Even in these contexts, it is cumbersome and costly because it typically involves trial-type hearings.[239] Indeed, this realization prodded agencies to choose notice-and-comment rulemaking as the preferred policymaking tool more often than the drafters of the APA had anticipated.[240] While some agencies continue to use formal adjudication for the formulation of generally applicable standards, most do not.[241]

Mead leaves Congress leeway in which to rethink the tools of administrative lawmaking authority. In this light, we might consider *Mead* as *Chevron*'s under-enforced nondelegation doctrine.[242] *Mead* reflects the Court's refusal to second-guess Congress on the particulars of delegating statutes, whether the substantive mandates or the procedures for implementing them. As such, it might be understood as falling in line with the Court's refusal to enforce the nondelegation doctrine.[243] In addition, it might be understood as consistent with other cases, judicial minimalism aside, in which the Court has declined to adopt "formalist and unbending rules" in deference to congressional delegation.[244] While acknowledging that such rules "might lend a greater degree of coherence" to the law, the Court has found that "they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I

237. *Id.* at 546.

238. *Id.* at 545.

239. *See* Magill, *supra* note 220, at 1391.

240. *See id.* at 1398 (noting the shift from formal adjudication to notice-and-comment rulemaking, and attributing the cause in part to agency preference).

241. The National Labor Relations Board, for example, continues to use formal adjudication for the formulation of generally applicable standards. *See* Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 281-82 (1991).

242. *Cf.* Barron & Kagan, *supra* note 215, at 241 (arguing that *Mead* should be read to restrict agency heads from delegating interpretive authority to field officials).

243. Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (noting that the Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law"); *see id.* at 373.

244. Morrison v. Olson, 487 U.S. 654, 689 (1988) ("[O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"); Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 851 (1986).

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powers."[245] These cases, which allow Congress to create so-called independent agencies and Article I courts, employ functionalist tests to determine whether congressional delegation unduly infringes executive or judicial power.[246]

This view of *Mead* is not without difficulties. It assumes that *Mead* gives room to Congress, when *Mead* in practice often gives room to courts and agencies. In informal procedures cases, courts frequently must infer congressional delegation from agency practice – the statute is simply not that much help.[247] Thus, courts must decide whether an agency has exercised authority in ways that reflect indicia of lawmaking authority, such that Congress may be presumed to have delegated such authority.[248] *Mead*, therefore, is unlike the nondelegation doctrine or the functional tests under which courts determine whether to uphold authority that Congress clearly intended to convey. Under *Mead* and *Barnhart*, courts must determine whether to recognize authority that agencies assert, and Congress is presumed to have conveyed.[249]

Nevertheless, assuming that judicial minimalism or functionalism is the most plausible explanation for *Mead*, the next step is to ask whether it is an adequate justification. The costs are evident. As this Article demonstrates, lower courts lack a clear sense for how to apply the case.[250] This effect was a predictable consequence of both judicial minimalism and functionalism, which by definition are antithetical to judicial guidance. Justice Scalia rightly saw it coming. Courts also engage in *Chevron* avoidance and *Mead* over-reading.[251] These effects also are attributable to the narrowness that accompanies

245. *Schor*, 478 U.S. at 851.

246. *See Morrison*, 487 U.S. at 689-90 ("The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."); *Schor*, 478 U.S. at 851 ("[I]n reviewing Article III challenges [to non-Article III tribunals], we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.").

247. *See* Barron & Kagan, *supra* note 215, at 212 ("Although Congress can control applications of *Chevron*, it almost never does so, expressly or otherwise; most notably, in enacting a standard delegation to an agency to make substantive law, Congress says nothing about the standard of judicial review.").

248. *Id.* ("*Chevron* is judicial construction, reflecting implicit policy judgments about what interpretive practices make for good government.").

249. To the extent that agencies are political actors in the sense that they are subject to political control, perhaps *Mead* retains its minimalist/functionalist nature.

250. *See supra* Part II.A.

251. *See supra* Parts II.B & II.C.

minimalist reasoning and the imprecision that attends functionalist reasoning.

The question is whether these costs are offset by *Mead*'s goal of creating maximum room for congressional delegation (or administrative/judicial innovation). That answer may well be no. But a better approach might be to question the goal itself. The next Section offers a reason why we might rethink *Mead*'s goal and, in the course, repair *Mead*'s mess.

D. Rethinking the Case

1. Justifying a Return to Formalism

We might reject *Mead* because it permits Congress – to say nothing of agencies – too much room to erode the procedures for exercising administrative lawmaking authority. In this regard, we might consider replacing *Chevron's* under-enforced nondelegation doctrine with *Chevron*'s equivalent of *Chadha*,[252] *Bowsher*,[253] or *Clinton*.[254] In those cases, the Court denied Congress room to diminish the procedures for exercising lawmaking authority. It found that Congress had violated the requirements of bicameralism and presentment by creating the one-house legislative veto (*Chadha*), the legislative-branch agency (*Bowsher*), and the presidential line-item veto (*Clinton*). Perhaps it is outlandish to suggest that such formalistic analysis might apply when Congress creates novel lawmaking procedures for agencies, rather than for itself or the President, because agencies (unlike Congress and the President) already operate at a remove from the constitutionally-prescribed lawmaking channels. But maybe they operate at too far a remove when Congress gives them broad latitude to side-step notice-and-comment rulemaking and formal adjudication, which have taken their place as the administrative counterparts of the legislative and judicial processes.

To illustrate, consider why the Court employs formalistic rather than functional analysis when Congress creates informal procedures for itself or the President. The following defense of

252. INS v. Chadha, 462 U.S. 919 (1983) (invalidating the one-house legislative veto).

253. Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating power of Comptroller General, removable by Congress, to identify automatic spending reductions).

254. Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating presidential line-item veto).

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Chadha resonates with the underlying goals of fairness and the avoidance of arbitrariness:

> The legislative veto allows Congress to assert a passive-aggressive form of control. A legislative veto may be exercised without public hearing, report, or statement of reasons, and may be passed without recorded vote. Thus, it clearly does not have the qualities of the administrative action it reverses—such as participation, transparency, and rationality. Furthermore, it does not even have the benefits of concerted action that the Constitution typically demands for legislative action, which mutes the influence of private groups, moderates the production of improvident law, and ensures that whatever law is produced at least receives the assent of both accountable branches, or a supermajority of one. In *Chadha* itself, the veto had the additional vice of determining individual rights without procedural safeguards and without binding more than the party to the ruling. Thus, it furnished no basis on which to assess fair application in a particular case or promote predictable and consistent application in future cases—that is, to prevent arbitrariness.[255]

We could easily convert this description of informal legislative procedures to one involving informal administrative procedures. Such informal administrative procedures, as noted above, provide no assurance of participation, transparency, and rationality. They do little to prevent private interests or political officials from pressing agencies for favorable departures at public expense. As a result, they do not promote consistent application in future cases. Of course, some informal procedures may exhibit positive characteristics, which is to say the indicia of lawmaking authority. But good instances have not persuaded the Court to waive constitutional guarantees in the legislative and executive contexts. Although the Court has allowed Congress substantial latitude to alter the locus of lawmaking power, it has not allowed Congress similar room to alter the channels for exercising such power. The Court has good reason; channels, like the requirements of bicameralism and presentment themselves, provide an important mechanism for controlling administrative power once created.

In the agency context, the channels are not constitutionally specified, but they are equally important. When the Court in *Mead* chose not to restrict Congress or agencies to notice-and-comment rulemaking or formal adjudication, it allowed potentially significant alteration of the channels for exercising administrative lawmaking authority.[256] Whether it did so because it hesitated to narrow the space that Congress has for designing flexible and efficient administrative procedures or because it trusts that agencies and courts working together will use their authority wisely, the Court overlooked the countervailing concerns. Courts and agencies might

255. Bressman, *supra* note 34, at 520.

256. United States v. Mead Corp., 533 U.S. 218, 230 (2001).

not do as much as they should to ensure that administrative decisionmaking does not go awry. Or Congress might endorse procedures for administrative lawmaking that really push the outer limits, yet are difficult to reject on the margins. Blind faith is a poor substitute for procedural formality. The latter ensures the basic indicia of lawmaking authority; the former does not.

The upshot is that the Court might have done better in *Mead* to adopt a bright-line rule, limiting *Chevron* deference to the fruits of notice-and-comment rulemaking and formal adjudication. Such a rule would restrict the force of law to interpretations that no doubt reflect the basic indicia of lawmaking authority. Moreover, it would eliminate potentially problematic procedural delegations of the sort for which the Constitution generally, and the Court typically, have little tolerance. We might advise the Court to amend *Mead* accordingly.

2. Moderating the Embrace of Formalism

We can, however, leave the door open just a bit to the idea that Congress or agencies might at some point develop decisional processes that do not fit neatly into the existing categories. Particularly in light of the Internet, we might envision a time at which agencies legitimately make law through means other than trial-type or paper hearings. If it is unnecessary to restrict procedural innovation, we would be wise to cultivate it. We can do so by articulating the outer boundaries within which Congress or agencies legitimately may operate.

Interestingly, we can articulate the boundaries by reading *Mead* and *Barnhart* more narrowly than lower courts have read them. Lower courts have read the decisions to present alternative frameworks or optional factors for assessing *Chevron* eligibility. We might read them instead to require comparable, minimum indicia of lawmaking authority. Those minimum indicia must serve to evince both considered judgment and consistent application. Thus, we might read *Mead* and *Barnhart* to require (a) "deliberation" (*Mead*'s term) *or* "careful consideration" (*Barnhart*'s term) *and* (b) binding effect (i.e., "the legislative type of activity that naturally binds more than the parties to the ruling," as in *Mead*) *or* practical adherence (i.e., "longstanding" effect, as in *Barnhart*).[257]

In what sense do the factors within (a) and the factors within (b) establish comparable indicia of lawmaking authority? "Deliberation" obviously is a close cousin of "careful consideration," if

257. *Mead*, 533 U.S. at 230, 232; Barnhart v. Walton, 535 U.S. 212, 219, 222 (2002).

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not an identical twin. They invoke similar notions of transparent and well-reasoned decisiomaking. Binding effect and practical adherence are not clear equivalents. Binding effect is immediate and irrevocable until officially renounced, while practical adherence imbues an interpretation with de facto "legal" status over time. But binding effect and practical adherence serve a similar function for *Chevron* purposes. Binding effect is promise of consistent application, while practical adherence is evidence of consistent application. Of course, practical adherence is only of limited use. It does not apply to new interpretations. New interpretations that lack legally binding effect would not qualify for *Chevron* deference unless and until they persisted over time. Neither would changed interpretations, at least until the changed interpretation earned its own "longstanding" status. Thus, binding effect together with deliberation or careful consideration are the central considerations, with the caveat that a consistently-held, well-reasoned interpretation can acquire *Chevron* eligibility simply by virtue of duration. This caveat does not extend, however, to interpretations contained in formats that never have commanded *Chevron* deference. Interpretations contained in formats unquestionably too informal to carry the force of law even before *Mead* and *Barnhart* cannot acquire *Chevron* deference after *Mead* and *Barnhart* simply by virtue of their longstanding duration.[258]

Lower courts have not understood *Mead* and *Barnhart* to require comparable, minimum lawmaking values.[259] Nor have they understood *Barnhart* to emphasize whether an interpretation is "longstanding."[260] Thus, we would have to read *Mead* and *Barnhart* differently than the lower courts have done, not only as reconcilable but as demanding that an interpretation emanate from a procedure that reflects both considered judgment and consistent application. We also might have to read the cases differently than the Court intended, although discerning precisely what the Court intended is what got us

258. *See* Alaska Dept. of Envtl. Conservation v. EPA, 540 U.S. 461, 486-88 (2004) (noting that, while the "longstanding duration" of an agency interpretation typically should qualify that interpretation for "particular deference," agency interpretation that appeared in an internal guidance memorandum only commands *Skidmore* deference because it does not carry the force of law).

259. *Compare* Krzalik v. Republic Title Co., 314 F.3d 875, 877-79 (7th Cir. 2002) (Posner, J.), *with id.* at 882 (Easterbrook, J., concurring in the judgment) (disagreeing about the relationship between *Mead* and *Barnhart*).

260. Indeed, Justice Scalia has said that the longstanding nature of an interpretation is simply irrelevant to *Chevron* deference once we acknowledge that agencies should be able to change their interpretations over time. *Barnhart*, 535 U.S. at 226 (Scalia, J., concurring in the judgment). Acknowledging that agencies should be able to change their interpretations over time, however, should not prevent the duration of a particular interpretation from serving as evidence that an agency has treated that interpretation as binding in practice.

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here in the first place.[261] In any event, nothing the Court has done or said *precludes* us from reading the cases this way.[262]

Reading the cases this way is not only appropriate in theory but advantageous in practice. It offers lower courts guidance in applying *Chevron*, which should unify their approaches and ease their discomfort whether or not the Court ever rethinks *Mead*. Specifically, it instructs the courts requiring careful consideration that they are only half right.[263] It tells the courts requiring binding effect that they also are only half right.[264] It alerts the courts inclined toward *Chevron* avoidance that their approach is no longer necessary.[265] And it clues the courts inclined toward over-reading *Mead* that the decision is most profitably read as protecting the exercise of lawmaking authority, not as serving a more general purpose.[266]

This solution has weak spots, which must be noted. Although the solution purports to create room for nonconventional procedures, it may well establish a preference for notice-and-comment rulemaking or formal adjudication because so few informal procedures, present or future, will meet the test. Such a preference, though perhaps justified, no doubt has drawbacks. The most obvious drawback is efficiency. As previously discussed, notice-and-comment rulemaking is ossifying, and formal adjudication is burdensome.[267] These effects are regrettable. But the Constitution strikes a balance between efficiency and procedural formality, committing us to a certain degree, perhaps a large degree, of inefficiency. As the onerous requirements

261. Conversely, this reading might be just what the Court had in mind. In the latest encounter with *Mead* and *Barnhart*, the Court, per Justice Ginsburg, noted that the "longstanding duration" of an agency interpretation typically should entitle that interpretation to "particular deference." Alaska Dept. of Envtl. Conservation, 540 U.S. at 486-88 (quoting *Barnhart*, 535 U.S. at 220). The Court withheld *Chevron* deference, however, because the agency interpretation appeared in an internal guidance memorandum of the sort that never has, and still does not, command more than *Skidmore* deference. *Id.* In the end, the Court granted *Skidmore* deference because the agency interpretation "rationally construed the Act's text." *Id.*

262. *See* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 833 (2002) (stating that "nothing the Court [in *Mead*] did or said precludes future decisions that brush away the fuzziness in the majority's exposition, leaving us with a clear and defensible meta-rule"). In this respect, the Court's minimalism is an advantage.

263. *See supra* text accompanying notes 102-125.

264. *See supra* text accompanying notes 126-138.

265. *See supra* text accompanying notes 140-153.

266. *See supra* text accompanying notes 165-185.

267. *See supra* text accompanying notes 235-242.

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of the legislative process attest, efficiency often yields to procedural formality and the values it secures.[268]

Another significant concern is that any incentive for agencies to undertake notice-and-comment rulemaking inevitably will generate, as Justice Scalia observed in *Mead*, a corresponding incentive "to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn clarify through informal rulings entitled to judicial respect."[269] This problem, however, results not from *Mead* but from the Court's decision to leave "intact the related but freestanding principle that reviewing courts must afford an agency's interpretation of its own regulation controlling weight unless that interpretation is plainly erroneous or inconsistent with the regulation."[270] Many believe that this freestanding principle is an anomaly and ought to be reformed.[271] To the extent that any reading of *Mead* establishes a preference for notice-and-comment rulemaking, perhaps it finally will prompt change where change is long overdue.

CONCLUSION

Justice Scalia might say he told you so. Years after *Mead*, we are no closer to determining when Congress has delegated, and an agency has exercised, authority to issue interpretations with the force of law. This Article highlights at least three different pathologies among the lower courts. First, lower courts vacillate between two different analytical frameworks for assessing *Chevron* eligibility for informal procedures, without acknowledging the choice or the difference.[272] As a result, *Chevron* deference seems to turn more on the particular test that a court follows than the particular procedure that an agency uses. Second, because lower courts are uncertain when *Chevron* deference applies, they often refuse to commit and grant *Skidmore* deference instead or as well.[273] When a court refuses to extend *Chevron* deference exclusively or at all to an interpretation, it

268. *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-33 (1992) (arguing that the requirements of bicameralism and presentment in Article I diminish the production of improvident law by making all law more difficult to enact).

269. United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting).

270. Manning, *supra* note 218, at 943 (quotations omitted).

271. *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 660-80 (1996); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 103 (2000).

272. *See supra* Part II.A.

273. *See supra* Part II.C.

effectively may reduce agency flexibility to offer new interpretations in the future. Finally, lower courts have read *Mead* as relevant to the general question whether an agency is entitled to *Chevron* deference for interpretations concerning its own jurisdiction, ignoring what little guidance *Mead* actually offers on the significance of notice-and-comment rulemaking for *Chevron* deference. If justified in so doing, courts nevertheless turn the case somewhat upside down, understanding *Mead* as relevant to the question when an agency needs an explicit delegation of authority to issue interpretations of statutory ambiguities rather than when an agency possesses an implicit delegation of authority to issue interpretations with the force of law.

This Article proposes a way out of *Mead*'s mess. It does not follow Justice Breyer's recent attempt to clarify the case, concurring in *Brand X*, because it does not find much there. It does not advocate Justice Scalia's solution of abandoning the focus on procedural formality because it argues that this focus secures values important to agency lawmaking. Nor does it adopt the Court's current position, which understands the importance of procedural formality but does not take the lesson seriously enough. *Mead* and *Barnhart* preserve the possibility that Congress or agencies could create procedures more efficient than notice-and-comment rulemaking or formal adjudication without clearly defining any outer boundaries on this power. If we are to permit Congress and agencies some space in which to create new policymaking procedures, we should insist on some basic limits. Specifically, we should restrict *Chevron* deference to procedures or interpretations that reflect transparency, rationality, and consistency. We might even locate such limits in a narrow reading of *Mead* and *Barnhart* themselves. In so doing, we could offer lower courts much needed guidance to unify their approaches and reduce their uncertainty.

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How Do Corporations Play Politics?: The FedEx Story

Jill E. Fisch *58 Vand. L. Rev. 1495 (2005)*

United States law extensively regulates corporate participation in the political process. The rationale for this regulatory scheme is a concern that corporate political activity, particularly campaign contributions, will corrupt the political process and enable corporations to obtain rents at society's expense. Regulators, the media, and the public generally view corporate political activity as illegitimate and distinguish it from operational business decisions. Critics of corporate political activity advocate ever-increasing regulatory restrictions and support their analysis with empirical studies that purport to demonstrate the ability of corporate donors to buy favorable legislation by making political contributions to members of Congress.

This Article challenges the prevailing characterization of corporate political activity as a distortion of the political process. Using a case study methodology, the Article examines the political involvement of one company, FedEx, in a series of regulatory reforms over a forty-year period. Drawing upon the business context, the legislative record, campaign finance materials, and interest group analysis, the Article demonstrates that political activity has been an integral component of FedEx's business growth and operations. FedEx successfully used its political influence to shape legislation, and FedEx's political success, in turn, shaped its overall business strategy. Moreover, in identifying the specific components of FedEx's political activity, the Article highlights the range of mechanisms that corporations use to engage in politics, revealing that the exercise of political influence is far more complex than the purchase of political favors in a spot market.

Regulation is becoming an increasingly important factor for United States businesses. As a result, corporations must integrate political activity into their overall business strategy and must develop and manage their political capital in the same way that they manage other business assets. The FedEx story demonstrates the

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importance of politics to business and explains the growing investment by corporations in political capital. It further explains how the business world has responded, and will continue to respond, to regulatory restrictions by developing alternative mechanisms for exerting political influence. By understanding how and why corporations participate in politics, policymakers can better address concerns about the effect of corporate political influence.