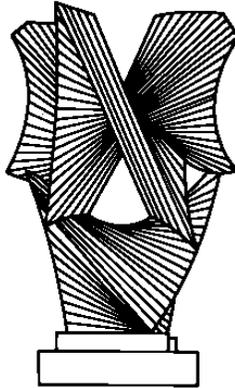


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MEAD IN THE TRENCHES

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MEAD IN THE TRENCHES

Adrian Vermeule*

My task is to introduce the George Washington Law Review's annual survey of the D.C. Circuit's work. In past years introductory essays have worked with a wide-angle lens, addressing large themes. I shall work in close-up, focusing on the D.C. Circuit's attempts to make sense of the most important administrative law decisions in many years: *United States v. Mead*¹, which constricted (to an uncertain degree) the scope of deference afforded to agencies' statutory interpretations. I shall suggest that the Circuit's day-to-day experience with *Mead* has been unfortunate, that its *Mead*-related work product is, in a nontrivial number of cases, flawed or incoherent. But I shall also suggest that these mistakes are traceable to the flaws, fallacies and confusions of the *Mead* decision itself. The blame for the *Mead* muddle, then, lies with the Supreme Court.

So maybe there is a large theme here after all, about the relationship between the Supreme Court and the nation's premier court of appeals. The line officers and soldiers who fought in the trenches at Verdun and the Somme were put in an untenable position by generals who hadn't sufficiently accounted for structural conditions of modern warfare, who thought that exhorting the troops to go over the wire was good enough. So too *Mead*'s attempt to develop a fine-grained jurisprudence of deference, sensitive to the differences among the multiple policymaking instruments that agencies use—in short, its exhortation to “tailor deference to variety”²—overlooks the increasing cognitive and institutional load that the increasing complexity of *Mead*'s legal regime imposes on lower courts. We might simply exhort the judges to do better, but I shall suggest we should take their mistakes as reason to question the wisdom of the underlying orders they are striving to execute.

A. *What did the Court say?*

The questions at issue in *Mead* were clear enough: should the two-step test for deference articulated by *Chevron U.S.A. v. NRDC*³ apply to a letter ruling of the Customs Service, and if not, should the less formal deference standard of *Skidmore v. Swift & Co.*⁴ apply instead? The Court's nominal answers were also clear enough: No to the first question, and Yes to the second. Yet the majority opinion is opaque even by Justice Souter's standards. With the help of subsequent commentary, we may piece together the following account of the decision.⁵

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¹ 533 U.S. 218 (2001).

² *Id.* at 236.

³ 467 U.S. 837 (1984).

⁴ 323 U.S. 134 (1944).

⁵ See *Administrative Law Discussion Forum*, 54 ADMIN. L. REV. 1 (2002).

The *Chevron* opinion itself is best read as an attempt to simplify and clarify the preexisting, and notoriously muddled, law of deference to agency interpretations. Doctrinally, *Chevron* announced a straightforward set of ideas: Congress sometimes intends to delegate lawmaking authority to agencies; such delegations may be express or implied; statutory ambiguities and gaps will be taken as implied delegations of agency authority to make law by interpreting the ambiguity in one direction or the other, or by filling in the gap. From this follows the famous *Chevron* two-step, under which courts first ask whether Congress has spoken clearly to the question at hand, and, if not, whether the agency interpretation is reasonable. The first question asks whether there is an ambiguity or a gap to be filled, the second asks whether the agency's chosen interpretation falls, permissibly, within the domain of the ambiguity, or impermissibly outside it. On this view, the key innovation of *Chevron* is to create a global interpretive presumption: ambiguities are, without more, taken to signify implicit delegations of interpretive authority to the administering agency.

Mead reverses this global presumption. Rather than taking ambiguity to signify delegation, *Mead* establishes that the default rule runs against delegation. Unless the reviewing court affirmatively finds that Congress intended to delegate interpretive authority to the particular agency at hand, in the particular statutory scheme at hand, *Chevron* deference is not due and the *Chevron* two-step is not to be invoked. This need not mean that, absent a delegation, the reviewing court decides the interpretive question without regard to the agency's views. The agency's views are, under *Skidmore*, still deserving of "respect," due to the agency's policy expertise and to the intrinsic persuasiveness of its position. Note, however, that (both before and after *Mead*) there is a set of interpretive questions as to which the agency's views are irrelevant, except to the extent that any litigant's views are considered; an example is the interpretation of the Administrative Procedure Act itself. So *Mead* establishes a finely-graded structure of deference with three categories or tiers: *Chevron* deference, *Skidmore* deference, and no deference. Justice Scalia's dissenting view, by contrast, would have recognized only two tiers: *Chevron* deference, and no deference at all.

Under what circumstances should the reviewing court find affirmative evidence of congressional intent to delegate (thereby assigning the issue to category one, *Chevron* deference, rather than category two, *Skidmore* deference)? One idea, pressed by some academics and members of the administrative bar, would have been to say the following: that *Chevron* deference is owed if, but only if, the agency possesses a statutory delegation of rulemaking or formal adjudicative authority and has used that authority to produce the interpretation at issue. Below I shall give some reasons for thinking that this approach would in fact be unacceptable. Such a ruling would however, at least have had the virtue of simplicity.

Mead, however, does *not* adopt this relatively simple approach. The opinion is quite clear that although the agency's authority to use, and actual use of, the relevant procedural formats—formal rulemaking or adjudication and informal rulemaking—should be taken as sufficient to evidence a congressional intent to delegate,⁶ it is not

⁶ Or all-but-sufficient; see Thomas Merrill, The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards, 54 Admin. L. Rev. 807 (2002).

necessary to do so.⁷ The requisite delegatory intent may be found even as to agency action outside these categories—including informal adjudication, interpretive or procedural rules excepted from notice-and-comment obligations, and other varieties of action—so long as “circumstances” evidence a delegatory intent. *Mead* is notoriously vague about what circumstances count as evidence of such an intent, and what the evidentiary weights of various circumstances are; one commentator gives no less than three alternate readings of the opinion on this score.⁸ I shall indicate some of the relevant considerations below. It is clear, however, that the Court was greatly concerned that making procedural formality a necessary condition for *Chevron* deference, as well as a sufficient condition, would be too crude an approach; it would fail adequately to “tailor deference to variety,” here the variety of formats by which agencies generate interpretations.

B. *What did the D.C. Circuit hear?*

So *Mead* creates a complex, finely-reticulated structure of analysis that courts must apply at the preliminary stage of deciding what deference is due, before deciding the ultimate merits of the interpretive question at hand. In the trenches of the D.C. Circuit, however, *Mead*'s ambitious recasting of deference law has gone badly awry, for reasons that expose deficiencies in the decision itself. Important cases purporting to apply *Mead* have devolved into extensive, and likely inefficient, litigation over threshold questions; have taken *Mead*, quite mistakenly, to license an all-things-considered de novo judicial determination whether the agency's interpretation is correct or incorrect; and have taken *Mead*'s threshold inquiry into delegation to support a sort of generalized hostility to delegated agency authority. Here I shall look at a few examples of *Mead* gone wrong in the trenches—merely to introduce themes, and with no pretense of comprehensiveness.

A preliminary caveat: The sample of post-*Mead* cases in the D.C. Circuit is small, and in an appreciable fraction of those cases the panel recites and applies (some reasonable approximation of) the *Mead* analysis, without significant controversy or obvious error. Neither of those facts contradicts the thesis that the Circuit is struggling with *Mead*. As to the former point, we may always hope that future panels will work out the kinks; the claim here is simply that our best current information gives reason for pessimism. As to the latter point, most cases in courts of nondiscretionary jurisdiction, even courts of appeal, are uncontroversial; the base rate, with or without *Mead*, is that most appellate decisions on administrative law are relatively unproblematic. Any Supreme Court decision is, in this sense, marginal in the present; but important law for the future is made, and unmade, at the margins.

⁷ See *Mead*, 533 U.S. at 230-31. For later reaffirmations of this point, see *Barnhart v. Walton*, 122 S. Ct. 1265, 1272 (2002) (the fact that the Agency previously reached its interpretation through means less formal than “notice and comment” rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due”); *Edelman v. Lynchburg College*, 122 S. Ct. 1145, 1150 (2002) (“deference under *Chevron* . . . does not necessarily require an agency’s exercise of express notice-and-comment rulemaking power”).

⁸ See Merrill, *supra* note 6.

1. *Federal Election Commission v. National Rifle Association of America*

*Federal Election Commission v. National Rifle Association of America*⁹ posed, inter alia, the question whether to afford *Chevron* deference to a formal advisory opinion of the FEC. The opinion at issue barred corporations (including nonprofits such as the NRA) from providing the paid services of its employees to its own segregated political fund to work on congressional campaigns, where the value of the services was subsequently reimbursed. The panel held that the opinion should receive *Chevron* deference, primarily because the opinion had “legal effect” or “the force of law.”¹⁰ Three features of the statutory scheme were said to produce this conclusion. First, the statute established a “detailed framework for issuing advisory opinions.” Second, in issuing advisory opinions, “the Commission fulfills its statutorily granted responsibility to interpret the Act.” Third, “advisory opinions have binding legal effect on the Commission,” creating safe harbors for parties who rely on them.¹¹ Having found *Chevron* deference to apply, the panel swiftly concluded that the FEC’s resolution of the ultimate statutory question—whether the payments for employee time, reimbursed after the fact, counted as an direct or indirect “advance” and thus as an illegal corporate contribution—was a reasonable one under *Chevron* step two.

FEC v. NRAA is troubling in several respects. The FEC advisory opinion was not issued pursuant to any of *Mead*’s safe harbor categories (formal adjudication or rulemaking, or notice-and-comment rulemaking), so that *Mead*’s multifactor analysis came into play. The consequence is that what we might call the predecision—the analysis, under *Mead*, of whether the advisory opinion receives *Chevron* deference—is far more elaborate than the ultimate statutory decision itself. The point here is not that the panel misconstrues *Mead* or somehow gets the analysis wrong. Nor is it the simple, though certainly correct, point that *Mead*’s refined attempt to “tailor deference to variety” creates serious uncertainty for lower courts and litigants. The point, rather, is that resolving that uncertainty produces highly inefficient meta-litigation that precedes and in some respects hampers, rather than contributing to, the resolution of cases.

The costs of the elaborate predecision required by *Mead* will be highest whenever the difference between *Chevron* deference and *Skidmore* deference will make no difference to the resolution of the ultimate statutory question. *FEC v. NRAA* is just such a case. Whether the agency’s interpretation is binding or merely persuasive, it is hard to imagine that any sensible court would override an agency conclusion that the NRA’s thinly-disguised contribution to its own political fund would not fall within the statutory prohibition on “direct or indirect payment[s], . . . advance[s], . . . or any services, or anything of value.”¹² There is a view that the choice between *Chevron* deference and *Skidmore* deference never matters, but that view is implausible. Cases such as *FEC v. NRAA*, however, emphasize that the benefits of specifying the correct level of deference may, on net and over the run of cases, be swamped by the costs of the meta-litigation produced by that perfectionist approach.

⁹ 254 F.3d 173 (D.C. Cir. 2001).

¹⁰ *Id.* at 185.

¹¹ *Id.*

¹² 2 U.S.C. § 441b(b)(2).

2. *Motion Picture Ass'n of America v. FCC*

A different cost of *Mead*'s perfectionist enterprise is evident in *Motion Picture Association of America v. Federal Communication Commission*.¹³ At issue was an FCC notice-and-comment rulemaking that mandated "video description" of television programs—essentially audio narration of visual elements of the program's action—for the benefit of the visually impaired. The FCC relied on the grant of authority in the 1934 Communications Act; §1 provides that "this Act shall apply to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication,"¹⁴ while other sections give the Commission sweeping authority to make any rules and regulations needed to implement the Act's provisions.¹⁵

The panel opinion drew from *Mead* the proposition that "the principal question is whether Congress 'delegated authority' to the FCC to promulgate visual description regulations." With the question so defined, the panel proceeded to reject the FCC's rule, principally on the ground that §1 did not authorize it. Video description rules, the panel said, are a prescription of programming content, and the terms of §1 "focus on the FCC's power to promote the accessibility and universality of transmission, not to regulate program content."¹⁶ The correct reading of §1 was originalist, and originalist at a strikingly low level of generality. "Given the limited distribution of communications facilities in 1934," the reasoning went, "§1's mandate to serve 'all the people of the United States' is a reference to the geographic availability of service."¹⁷

With all due respect, this is a series of missteps. A warning sign here is that the panel never paused to ask the basic questions that *Mead* makes relevant to determining whether *Chevron* deference applies; nor did it ask whether, if *Chevron* deference did not apply, *Skidmore* deference supported the Commission's view. The panel opinion entirely collapses the predecisional inquiry mandated by *Mead*, which merely determines what level of deference is due the agency, into the separate, substantive question whether the agency possessed statutory authority for its action. The panel seems to have read *Mead* as a sort of abstract instruction to lower courts to decide, on an all-things-considered basis, and without affording any deference to agency views at all, whether Congress expressly delegated to the agency the power to take the very action it did take; if not, the agency loses.

This 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 §1 supplied the requisite authority, the Commission must lose. Not one sentence in *Mead*, however, supports this assumption. To the contrary, 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—as the following passage makes clear:

¹³ 309 F.3d 796 (D.C. Cir. 2002).

¹⁴ 47 U.S.C. §§ 151, 152(a).

¹⁵ 47 U.S.C. §§ 154(i), 303(r).

¹⁶ *Motion Picture Association*, 309 F.3d at 804.

¹⁷ *Id.*

Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be 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.¹⁸

Mead, in other words, assumes that *Chevron* deference applies by virtue of an *implied* delegation so long as (1) the agency is given rulemaking powers and (2) the rule at issue is promulgated through the prescribed procedures, even if the agency's express grants of authority do not, standing alone, encompass the rule at issue.

Doesn't all this simply mean that the panel misapplied *Mead*? Yes, to be sure; but we also need to ask whether the panel's blurry rendition of the decision may itself be a predictable consequence of *Mead*'s infirmities. It is a strike against a higher-level decision, like *Mead*, that it produces predictable error on lower-court panels, even though perfect lower-court judges would not have committed the error. Lower-court judges are predictably imperfect, so the differential effect of Supreme Court decisions on the frequency and gravity of lower-court mistakes is a critical institutional variable, one that ought not be assumed away by saying, simplistically, that mistakes can be avoided if lower-court judges would simply get the cases right.

In the particular setting of the *Motion Picture Associations* case, we may speculate that *Mead*'s revision of the *Chevron* default rule produced the sort of overreaction that is, in hindsight at least, all too predictable. While *Chevron* adopted a global presumption that statutory ambiguity would be taken as an implied delegation of interpretive authority, *Mead* instead requires a case-specific inquiry into congressional intent to delegate. The tempting mistake—and this was the panel's mistake -- is to assume that a case-specific inquiry must necessarily be a free-form, all-things-considered judicial inquiry into whether the statutory text, read as if there were no agency in the picture, authorizes the action at hand.

Mead, of course, avoided this pitfall by developing a series of proxies for congressional intent that would structure the inquiry, but several features of the Court's enterprise combine to make it inevitable that lower courts will subordinate the proxies to the ultimate question, treating the proxies as rules of thumb that merely inform the all-things-considered inquiry, rather than as mediating rules. One such factor is the sheer complexity of the proxies; another is the obscurity of their connection to Congress' delegatory intent. If lower-court judges find it hard, as do others, to understand what the formality of procedure has to do with delegation—if, at the limit, they subscribe to the view that congressional intent is fictional, and constructed by judicial decision themselves¹⁹—then the (supposed) proxies will prove unstable.

Finally, and most importantly, there is the Court's sneering dismissal of Justice Scalia's argument for an exclusive reliance on *Chevron*'s global, relatively rule-like approach. The Court dismissed the global *Chevron* alternative by invoking the stock

¹⁸ *Mead*, 533 U.S. at 229

¹⁹ David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 at 203.

argument that rules are overinclusive relative to their purposes; Justice Scalia’s approach, which would afford *Chevron* deference even where the majority’s approach would find no delegatory intent, failed sufficiently to “tailor deference to variety.” But of course the *Mead* majority could have gone even farther than it did to “tailor deference to variety”; instead it chose to develop procedural proxies that serve as sub-rules. The question is why the Court chose to stop where it did on the continuum defined, at one end, by Justice Scalia’s approach and at the other by a genuine totality-of-the-circumstances test. The unfortunate, and almost surely unintended, implication of the Court’s sneer is that any attempt to limit the range of considerations to less than all the relevant circumstances amounts to an impermissible failure to capture congressional intent, even if the costs of the all-things-considered search are much higher than the costs of a more structured inquiry would be.

Taken together, these considerations suggest that *Mead*’s compromise position, suspended uneasily between *Chevron*’s relatively clear global presumption and a genuine totality-of-the-circumstances test, is intrinsically unstable. At the Supreme Court level, it may well slip in one direction or another, either back towards *Chevron*’s former scope or (more plausibly) in the other direction, towards an even soupier approach than the *Mead* Court was willing to permit. At the lower court level, perhaps more importantly, it will predictably produce decisions like the panel opinion in *Motion Picture Associations*, decisions that are mistaken because they take *Mead* to license a free-form inquiry into delegatory intent—an inquiry that, when answered, collapses into the merits question whether the agency’s action was authorized.

3. *Michigan v. EPA*

One of the most notable post-*Mead* cases is *Michigan v. Environmental Protection Association*.²⁰ The panel invalidated EPA rules promulgated through notice-and-comment rulemaking, principally on the ground that EPA lacked statutory authority to administer a federal operating permits program, under the Clean Air Act, on lands whose status as “Indian country” has yet to be conclusively determined, one way or another. The court buttressed its conclusion with a maxim, of dubious provenance, to the effect that “[a]gency authority may not be lightly presumed.”²¹ The panel quoted prior D.C. Circuit decisions saying that “[w]ere courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well”—and also, the panel added, “out of keeping with *Mead*”.²² Relying, in part, on this presumption against agency authority, the panel concluded that the critical statutory grant of authority over “Indian country”—that is, “area[s] within the tribe’s jurisdiction”—must be presumed not to grant EPA authority to operate a federal permitting program in areas arguably subject to tribal authority, but whose precise status has not yet been settled.

Here the panel is using *Mead* to revive a line of D.C. Circuit decisions from the mid-1990s that read *Chevron* grudgingly, in barely implicit reliance on the dubious idea

²⁰ 268 F.3d 1075 (D.C. Cir. 2001).

²¹ *Id.* at 1082.

²² *Id.* at 1082 n.2.

that the Constitution constrains Congress' power to delegate authority to administrative agencies by legislation.²³ The point of these decisions was, as the passage previously quoted suggests, to rebut the idea that *Chevron* deference is triggered whenever there is a statutory gap or ambiguity—an idea that the *Chevron* opinion itself explicitly endorses. These decisions undermine the core command of *Chevron* by invoking a nondelegation canon, *Chevron*'s antithesis; they may even be seen as part of a more general enthusiasm for the nondelegation doctrine on the part of a circuit that the Supreme Court recently rebuked for attempting to revive that doctrine.²⁴ It is true that the current Supreme Court has revived nondelegation as a canon of statutory interpretation, but never as the sort of general, free-floating presumption against agency authority found in the mid-1990s decisions. Even the current high-water mark of statutory nondelegation jurisprudence, the decision in *FDA v. Brown & Williamson*,²⁵ says that the nondelegation canon is triggered only where the “economic and political significance” of the issue at hand is so great as to negate any inference of an implied congressional delegation—something that can hardly be said of routine administrative-law issues at stake in *Michigan v. EPA*.

Mead's emphasis on delegation, rightly understood, provides no better support for such a free-floating nondelegation presumption. *Mead*'s emphasis on delegation is entirely procedural, not substantive. *Mead* established a default rule that requires an affirmative finding of delegatory intent in order to decide what level of deference is due. But *Mead* carries no suggestion whatever that once the applicable level of deference has been determined, and the ultimate question of statutory interpretation has been reached, the statutory analysis is to be informed by a substantive presumption against agency authority. The EPA's use of notice-and-comment rulemaking should, under *Mead*, have sufficed for *Chevron* deference on the ultimate question.

A straightforward criticism, then, would be that the *Michigan v. EPA* panel just got the *Mead* analysis wrong. Here too, however, that reaction seems simpleminded. *Mead*'s procedural, rather than substantive, use of a presumption against delegation is a refined jurisprudential tool, and cases like *Michigan v. EPA* suggest that it may be too refined, too precious, for day-to-day use in the trenches of administrative law. It is hardly surprising, especially against the background of the circuit's repeated flirtations with different versions of the nondelegation doctrine, that the procedural use of a nondelegation presumption would slip over into its substantive use. A task for the Supreme Court will be to clarify, in the near future, the relationship between *Mead*, the constitutional nondelegation doctrine, and interpretive nondelegation canons; on the evidence of *Michigan v. EPA*, the task will not be an easy one.

C. Some generalizations

Even on the basis of the handful of cases examined here, it is not too early to offer some tentative generalizations about the heavy burdens of implementing *Mead*. From the Supreme Court's relatively detached and abstract perspective, the global *Chevron* alternative urged by Justice Scalia might have seemed unacceptably crude. Adding a

²³ For an argument that the Constitution does no such thing, see Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. (2002).

²⁴ See *Whitman v. American Trucking Associations*, 531 U.S. 457, 476 (2001).

²⁵ 529 U.S. 120 (2000).

layer of refinement to the deference analysis may well have seemed an obviously sensible move, an easy way to “tailor deference to variety.” In the trenches, however, the theory has worked out badly, producing a great deal of confusion and error. Why might this be so?

1. *Uncertainty, error and decision costs*—The most obvious point, or set of points, emerges from the literature on rules and standards.²⁶ When and why might it be best for high courts in a jurisdiction to use rules rather than standards? One type of answer draws on principal-agent models, in which lower courts are taken as agents and the high court as principal. Standards raise the costs to the principal of monitoring the behavior of its agents, so a higher court may use rules in part to confine the discretion of lower-court judges, who would otherwise exploit standards to implement their own preferences.²⁷

But rules might have other benefits, even where all lower-court judges attempt to faithfully implement the high court’s instructions. The principal benefits are that rules might, all else equal, reduce uncertainty in the legal system, reduce the cost to lower courts of reaching decisions, and even reduce the rate and gravity of the errors that lower courts make. Rules might reduce uncertainty for litigants, if they make planning easier; they might reduce decision costs for lower courts, because they reduce the range of facts and questions that are legally relevant. Most surprisingly, rules might sometimes reduce error on the part of lower-court judges even though rules are overinclusive and underinclusive, relative to the rules’ background justifications. If the cognitive load imposed by open-ended standards is large, so that decisionmakers using such standards will frequently (even in good faith) stray widely from the background justification, then even the distortion that rules create might produce greater net accuracy than would a comparable standard. As to all of these points there are many variables to be considered.

Along these lines it is a valid, if rather obvious, objection to *Mead* that it overvalues the decisional benefits of standards and undervalues the decisional benefits of rules. In some passages the *Mead* Court seems to talk as though the mere existence of a background goal or justification—here, the idea that deference is a function of congressional intent—entails as a conceptual or logical matter that only an all-things-considered inquiry into that justification is legally permissible. This is nonsense, of course; rules and standards are simply different, equally permissible devices for structuring the decisionmaking environment. (Nor did the *Mead* Court itself follow through on its claim; recall that the *Mead* Court, despite its sneer at Justice Scalia’s relatively rule-like alternative, filters the congressional intent inquiry through rule-like procedural categories designed to make the inquiry more tractable). Even short of that nonsensical claim, however, it is equally a mistake for higher courts to adopt doctrinal structures that require finely-tailored inquiries while ignoring or underestimating the resultant decisional burdens. In what follows I will explore less obvious variations on this theme. But it remains a forceful objection to *Mead* that it implements an ambitious, even perfectionist search for precision in the legal norms governing agency deference, precision whose benefits are, on the evidence to date, outweighed by the collateral costs.

²⁶ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

²⁷ For an application of this point in the setting of *Mead*, see Merrill, *supra* note 6.

2. *Predecision costs*—In a variety of areas, law incurs not only first-order decision costs, but what might be called predecision costs—costs of allocating decisions between or among different jurisdictions, different decisionmakers, or different standards of review by a given decisionmaker. Sometimes the legal system’s willingness to incur predecision costs reaches grotesque extremes, as when parties litigate which forum’s choice-of-law rule will determine which forum’s conflict-of-law rule will determine which forum’s substantive law will determine the merits,²⁸ or when judges or Justices extensively debate constitutional standards of review that even academic experts find it nigh-impossible to differentiate.²⁹ Predecision costs inflict deadweight losses whenever, ex post, the difference between alternative decisionmaking fora or standards of review makes no difference.

Mead requires lower courts to incur extensive predecision costs. As *FEC v. NRAA* illustrates, preliminary litigation over which standard of review applies to the ultimate statutory questions may consume far more lawyer-time and judge-time, and present many more complexities, than the statutory merits. Below I will canvass some possible reforms of *Mead* that might reduce predecision costs, but none are wholly satisfactory. And given that there is at least a substantial domain of cases that come out the same way under either *Chevron* or *Skidmore*—I have argued that *FEC v. NRAA* is one such—then the benefits of *Mead*’s fine-tuning of the applicable standards of review may be swamped by the extra predecision costs it creates.

3. *Are tiers of deference possible?*— The principal effect of *Mead* is to add an extra tier to the potentially applicable standards of judicial review: rejecting Justice Scalia’s proposal for a regime containing deference (*Chevron*) or no deference, *Mead* creates a regime with *Chevron* deference, *Skidmore* deference, and no deference. The analysis of predecision costs given above suggests that *Mead*’s attempt to refine the deference analysis is not cost-justified. A different, and more radical, critique suggests that adding an extra tier of deference is, in a pragmatic sense, simply infeasible, given the cognitive constraints under which real-world adjudication occurs. Judges can operate in a mode of deference, and in a mode of independent decisionmaking, but more refined, intermediate modes are either psychologically unattainable or nonexistent. As Judge Posner puts it:

[Judicial] endorsement of multiple standards of review . . . greatly exaggerates the utility of verbal differentiation. It reflects the lawyer's exaggerated faith in the Word. I think I understand the difference between plenary review and deferential review. In the former setting the appellate judge must say to himself, "The issue has been given to me to decide, and while I shall pay due attention to what the district judge (or other trier of fact) had to say on the question the ultimate decisional responsibility is mine and must be exercised independently." In the latter setting the appellate judge must say to himself, "The issue is not mine to decide; because the district judge (or magistrate or administrative agency or

²⁸ See, e.g., *Pfau v. Trent Aluminum Co.*, 263 A.2d 129 (1970); *Phillips v. General Motors Corp.*, 995 P.2d 1002 (Mont. 2000).

²⁹ See *United States v. Virginia*, 518 U.S. 515 (1996); see also Kathleen Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735 (2002); Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CAL. L. REV. 819 (2002).

whatever) has a better feel for it, or for other institutional reasons (such as to discourage appeals), the responsibility for deciding has been given to him and I must go along unless persuaded that he acted unreasonably, or in other words unless I am clear in my mind that he erred." What is the intermediate position? There is none³⁰

If anything like this view is correct, of course, *Mead's* attempted refinement of *Chevron* is so much wasted paper. Its only effect will be to increase the frequency with which judges operate in a nondeferential mode as opposed to a deferential one; and when in the former mode judges will ignore the agency's views entirely. The *Motion Picture Associations* case is, plausibly, an example of this effect. The panel overlooks that it is supposed to be deciding on the level of deference, collapses the *Mead* inquiry into the merits, and decides the statutory question without affording the Federal Communications Commission even the polite nod that is *Skidmore* deference.

4. *Standards as Externalities*—Finally, we may again invoke rules and standards to analyze the relationship between the Supreme Court and the lower courts, although with a different emphasis. We have seen that a principal might choose rules over standards in order to minimize the costs of front-line decisionmaking by subordinate agents. But the converse point is that the articulation of standards by the highest court in a jurisdiction shifts decisionmaking costs onto lower courts. Those costs will not be truly externalized if the jurisdiction's high court will subsequently incur the costs of the standard-based regime, perhaps in the form of later appeals from fact-specific rulings in the courts below. But if the high court can avoid all or some of those subsequent costs, for example by strategic use of discretionary certiorari jurisdiction, then a genuine externalization is possible, in which case high courts may produce too many standard-based decisions, from the social point of view.

It is not hard to see *Mead* in this light. If the Court desires to cast its own jurisprudence in a more fine-grained fashion than the global *Chevron* regime that Justice Scalia urged, the costs of that jurisprudence will be felt most immediately and keenly by the D.C. Circuit rather than the Court itself. To the extent that the Court can use its discretionary certiorari jurisdiction to avoid entanglement in the fact-bound metalitigation that *Mead* requires—and there is every reason to believe that it not only can do this, but will—then the Court will have failed to account for the full social costs of its preferred legal regime.

D. Reforms?

So far I have been uniformly critical; I will conclude by canvassing some constructive proposals for reforming *Mead* to alleviate its collateral costs and to lighten the burden on the D.C. Circuit and other lower courts. (I will proceed roughly in reverse order of importance, from small proposals to large ones). The critical note persists, however, because no alternative for reforming *Mead* appears as promising as the largest possible reform—abandoning *Mead* as a failed experiment, adopting instead the simple rule-bound *Chevron* approach urged by Justice Scalia's dissent.

³⁰ *U.S. v. McKinney*, 919 F.2d 405, 423 (7th Cir. 1990) (Posner, J., concurring).

1. *Peeking at the merits*—A small but useful tool that judges may use to minimize predecision costs in many settings is to peek at the merits. Judges sometimes pretermitt complicated analysis of threshold requirements of procedure and jurisdiction in this way, and a similar technique might be useful in deference cases after *Mead*. In cases where a peek at the ultimate statutory question suggests an easy case, either for sustaining or invalidating the agency action, then the difference between *Chevron* deference and *Skidmore* deference makes no difference, and inefficient threshold litigation over deference rules can be avoided.³¹ Yet this is at best a partial solution. Peeking at the merits lower decision costs for judges, but parties must still invest in full argument of the threshold issues, given the inevitable uncertainty about whether judges peeking at the merits will find the issue sufficiently clear to pretermitt the questions *Mead* makes relevant. And a collateral cost of this *Mead*-avoidance strategy is to suppress the development of precedent that might, over time, enable future courts to resolve the threshold issues with increasing expedition.

2. *Internal nondelegation*—A notable recent proposal would reform *Mead* by creating a “*Chevron* nondelegation doctrine,” changing the trigger for *Chevron* deference from procedural formality to the identity of the official who acts for the agency.³² Agency action would receive *Chevron* deference only if “a particular agency official—the official Congress named in the relevant delegation—personally assumed responsibility for the decision prior to issuance.”³³ The idea is to design deference rules that promote political accountability and disciplined policymaking.

This is a potentially important reframing of the *Mead* Court’s project, yet the normative case for the proposal is undertheorized. The *Chevron* nondelegation doctrine appeals to the same norm of political accountability that is said to underpin the constitutional nondelegation doctrine; the former thus poses the same conundrums as the latter. Delegation is just one of the myriad policy tools that legislators and agency heads use. If ordinary politics is thought to generate a sufficient level of accountability to justify the use of those other policy tools, why is a special constitutional rule needed for delegation? After all, legislators and agency heads may be held accountable for the very decision to make the delegation. The stock claim that delegatory decisions are less visible to interest groups, concerned citizens and other outside monitors than are substantive policy decisions lacks any empirical support, and overlooks that the technology of monitoring is endogenous; in the long run, outsiders will not be consistently fooled by resort to low-visibility delegation.³⁴

The *Chevron* nondelegation doctrine, again like the constitutional nondelegation doctrine, may be judicially unenforceable. 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. The authors of the proposal are quite aware of this problem, and say that agency heads will often find it in their interest to

³¹ An example is *Arizona v. Thompson*, 281 F.3d 248 (D.C. Cir. 2002).

³² See Barron and Kagan, *supra* note 18.

³³ *Id.* at 235.

³⁴ See Posner & Vermeule, *supra* note 22.

decline to adopt a subordinate's decision, even at the price of foregoing *Chevron* deference, rather than rubberstamp a decision they have not actually reviewed.³⁵ That may well be so, but if true it merely suggests that the carrot of *Chevron* deference isn't very important to agencies in the first place; it is then unclear that either *Mead* or the possible substitutes for *Mead* are worth worrying about. The authors have avoided the enforceability problem only at the price of undermining the significance of their own proposal. If, on the other hand, the value of obtaining *Chevron* deference is large enough to provoke agency circumvention of the *Chevron* nondelegation doctrine, then the proposal will require just as costly and unmanageable a judicial inquiry as the excessively-refined *Mead* inquiry it is designed to replace.

3. *Process both necessary and sufficient*—A more obvious, but perhaps also more manageable, proposal for reforming *Mead* would make the Court's procedural-format test a necessary condition for *Chevron* deference as well as a sufficient condition.³⁶ Recall that, under *Mead*, agency action by means of rulemaking or formal adjudication will (almost) always receive deference, while informal action may or may not, depending on a complex multifactor inquiry. This proposal would bar *Chevron* deference for agency action outside the necessary formats. The proposal's principal advantage is to drastically reduce decision costs, relative to *Mead*'s complex structure.

The tradeoff here, however, is that reducing decision costs in this particular fashion may sharply increase the rate of false negatives—the occasions on which no *Chevron* deference is afforded to agency action which, under any plausible positive of congressional intent or any plausible normative account of administrative decisionmaking, ought to receive the greatest possible deference. “Several types of binding rules may be issued without notice and comment, yet the Court would surely not withhold *Chevron* deference from them—for example, rules relating to military or foreign affairs functions, some procedural rules, and rules adopted summarily because of urgency or some other ‘good cause’ for immediate action.”³⁷ It probably seemed to the Court that any test producing these results was unacceptable, far outside the feasible set of candidate tests.

To be sure, although a more rigorous version of the format test would produce false negatives, it is also true that *Chevron* produced false positives—occasions on which *Chevron* would mandate agency deference, in circumstances that in the Court's view did not warrant deference. It is hard to say, in the abstract, which class of errors is larger, so if we consider only the frequency of errors under the candidate tests it will be hard to choose between them. But the gravity of the respective errors matters, as well as their frequency. Where *Chevron* deference is afforded to informally produced rules, a subsequent administration may reverse the agency's decision, so any erroneous interpretations that will prevail by reason of *Chevron* deference may later be corrected without costly action by Congress. By contrast, where no *Chevron* deference is afforded

³⁵ Barron and Kagan, *supra* note 18 at 253.

³⁶ Which has long been advocated by, among others, Professor Robert Anthony. *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public*, 41 DUKE L.J. 1311 (1992).

³⁷ *See* Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771 (2002) at 793; *see also* 5 U.S.C. § 553(a), (b)(A)-(B) (2000).

to major binding rules adopted without notice and comment, such as military rules or foreign-policy rules, the resulting judicial interpretation is treated as though inscribed in the statute itself, and cannot be overturned by subsequent agency action in any procedural format. If the judicial interpretation is erroneous, the only possible means to correct it is new, more specific legislation. There is thus a profound asymmetry in the costs of correcting the false positives produced by *Chevron* and the false negatives that the rigorous format test would produce; so the latter errors are far more serious than the former.

Back to the Future?

This view suggests that the best way to understand *Mead* might be as a failed experiment. It was, *ex ante*, quite plausible to think that refining the *Chevron* test might have produced appreciable improvements at little cost. Perhaps the Court saw *Mead* as a small modification of the *Chevron* framework, mostly conceptual in character, and saw Justice Scalia's dissent, with its prophecies of disaster, as a wild overreaction. Nor can we say, definitively, that the *Mead* experiment has yet failed. But the evidence to date of the D.C. Circuit's struggles with the doctrine is hardly cause for optimism. It supports a different picture, one in which the Court has inadvertently sent the lower courts stumbling into a no-man's-land. We ought not condemn the experiment, but we ought to condemn those who refuse to reverse it if and when it becomes clear that it has gone badly wrong.

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