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Amy J. Wildermuth

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### Cover Page Footnote

Associate Professor of Law, Wallace Stegner Center for Land, Resources and the Environment, University of Utah S.J. Quinney College of Law; Law Clerk to Justice John Paul Stevens, October Term 2002. I'd like to thank Fordham University School of Law and Abner Greene for organizing and hosting an outstanding conference; Kathryn Watts, Judy Stinson, Daniel Medwed, Alexander Skibine, Kenneth Manaster, and the rest of my fellow panelists for their helpful comments on earlier drafts of this paper; Cara Baldwin for her research assistance; and, most importantly, Justice Stevens for continuing to teach and inspire all of us.

## PANEL III: ADMINISTRATIVE LAW/ STATUTORY INTERPRETATION

### SOLVING THE PUZZLE OF *MEAD* AND *CHRISTENSEN*: WHAT WOULD JUSTICE STEVENS DO?

Amy J. Wildermuth\*

#### INTRODUCTION

One area in which I teach and have become increasingly interested over the last few years is administrative law. Although one might expect at a symposium honoring the jurisprudence of Justice Stevens that I might focus solely on his most famous administrative law opinion, *Chevron v. Natural Resources Defense Council, Inc.*,<sup>1</sup> and its two-step test that requires a court to defer to a reasonable agency interpretation if the statute is ambiguous, I have instead decided to take on the United States Supreme Court's more recent consideration of what to do with those actions agencies take that, unlike the bubble rule<sup>2</sup> at issue in *Chevron*, likely do not go through any required Administrative Procedure Act ("APA") process and lack the "force of law." The deference owed to these agency guidance documents, interpretive rules, and other more informal actions was the subject of *Christensen v. Harris County*<sup>3</sup> and then more fully explored in *United States v. Mead Corp.*<sup>4</sup> This area is of particular interest to me (1) because it causes my students more anxiety than any other area of administrative law (which is saying something since administrative law was never considered an easy field before the additional wrinkle of *Christensen* and *Mead* came along), and (2) because it is an area that I think is calling out for Justice

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1. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

2. *Id.* at 840-41 (citing 46 Fed. Reg. 50,766 (Oct. 14, 1981)).

3. 529 U.S. 576 (2000).

4. 533 U.S. 218 (2001).

Stevens's unique blend of theory and pragmatism, the sort that was on display in that famous *Chevron* case.

I first focus on *Christensen* and *Mead* and provide an explanation of what the Court held in those cases. Next, I provide a brief summary of what the lower courts have done in the wake of these cases as they have tried to apply the Court's instructions. Finally, I propose a new approach that builds on Justice Stevens's original two-step test of the *Chevron* case but adds new steps aimed at resolving the current confusion, including better directions regarding when *Chevron* applies as well as a slightly modified test for *Skidmore* deference. My guess is that the Justice would probably agree with the slight modifications I have made to the Court's *Mead* holding. Even more importantly, however, I think that he would, as I have attempted to do, provide clearer directions for the lower courts to follow.

### I. ONE AND A HALF PILLARS: *CHRISTENSEN* AND *MEAD*

Ultimately, both *Christensen* and *Mead* address two fundamental questions: (1) When does *Chevron* apply?; and (2) If *Chevron* does not apply, what, if any, deference ought to be afforded to an agency's determination or interpretation? As I explain below, the first case, *Christensen*, says little with respect to either question but began the debate that I take up here. I therefore refer to it as the half pillar. *Mead*, in turn, more fully explores both questions. Accordingly, *Mead* is the full pillar in this structure.

#### A. *Christensen*

In the first of these cases, *Christensen*, the Court was asked to resolve the question of whether, under the Fair Labor Standards Act ("FLSA"),<sup>5</sup> a state or its political subdivisions could compel its employees to use their compensatory or "comp" time.<sup>6</sup> Here's how the question arose: The statute provides that employees who work more than forty hours in a week are entitled to compensation for the additional hours at a rate of no less than one and a half times their regular hourly wage.<sup>7</sup> When the Court concluded in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>8</sup> that states and their subdivisions were subject to the requirements of FLSA, states and Congress alike became concerned that the statute would overwhelm government budgets.<sup>9</sup> The statute was therefore amended to give states and

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5. 29 U.S.C. §§ 201-219 (2000).

6. *Christensen*, 529 U.S. at 578.

7. 29 U.S.C. § 207(a)(1).

8. 469 U.S. 528 (1985).

9. See generally *Moreau v. Klevenhagen*, 508 U.S. 22, 26 (1993) ("The projected 'financial costs of coming into compliance with the FLSA—particularly the overtime provisions'—were specifically identified as a matter of grave concern to many States and localities." (quoting S. Rep. No. 99-159, at 8 (1985))).

their political subdivisions the ability to compensate employees with “comp” time rather than cash for their overtime.<sup>10</sup>

But FLSA also limits the number of comp time hours that an employee may accrue to 480 hours for an employee who works “in a public safety activity, an emergency response activity, or a seasonal activity”<sup>11</sup> and to 240 hours for those employees engaged in other types of work.<sup>12</sup> If an employee who has accumulated the maximum comp time hours works additional overtime hours, she must be compensated for that time in cash.<sup>13</sup> Moreover, an employee who is terminated is entitled under FLSA to cash compensation for any comp time that she has remaining at the time of termination.<sup>14</sup>

In the early 1990s, officials in Harris County, Texas, “became concerned that [the county] lacked the resources to pay monetary compensation to employees who worked overtime after reaching the statutory cap on compensatory time accrual and to employees who left their jobs with sizable reserves of accrued time.”<sup>15</sup> They therefore asked the Department of Labor, the agency charged with administering FLSA,<sup>16</sup> whether the county could require its employees to use their comp time.<sup>17</sup> The Department responded that unless the employer and its employees had a prior agreement that permitted the employer to require its employees to use their comp time, it was the Department’s position that the employer could not do so.<sup>18</sup>

Although Harris County did not claim to have such an agreement with its employees, it nevertheless instituted a policy requiring its employees to use their comp time, contrary to the recommendation in the Department’s letter.<sup>19</sup> Shortly after this policy was instituted, members of the Harris County Sheriff’s Department objected to the policy and then sued the county, asserting, among other things, that the compelled use of their comp

10. 29 U.S.C. § 207(o)(1).

11. *Id.* § 207(o)(3)(A).

12. *Id.*

13. *Id.*

14. *Id.* § 207(o)(4).

15. *Christensen v. Harris County*, 529 U.S. 576, 580 (2000).

16. See Pub. L. No. 99-150, § 6, 99 Stat. 79, reprinted in 29 U.S.C. § 203 note (2000) (directing the Secretary of Labor to “promulgate such regulations as may be required to implement [the] amendments” regarding comp time).

17. *Christensen*, 529 U.S. at 580.

18. See Opinion Letter from Wage & Hour Div., Dep’t of Labor (Sept. 14, 1992), 1992 WL 845100.

19. *Christensen*, 529 U.S. at 581.

After receiving the letter, Harris County implemented a policy under which the employees’ supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee’s stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times.

time violated § 207 of FLSA, the section on comp time, and the regulations that implement that section.<sup>20</sup>

Justice Thomas wrote the opinion for the majority and began the analysis by looking at the statute in question. He concluded for the Court that FLSA “says nothing about restricting an employer’s efforts to *require* employees to use compensatory time” and therefore cannot be read to prohibit an employer from requiring an employee to use her comp time.<sup>21</sup> The opinion then turned to the question of deference to the agency’s position as announced in the opinion letter. First, it pointed out that, unlike interpretations arrived at after notice-and-comment rulemaking or formal adjudication, opinion letters and things like them such as “interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law[,] do not warrant *Chevron*-style deference.”<sup>22</sup> But not only did the letter not warrant *Chevron* deference according to the majority, it warranted no deference whatsoever:

[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the ‘power to persuade,’ *ibid.* As explained above, we find unpersuasive the agency’s interpretation of the statute at issue in this case.<sup>23</sup>

Justice Scalia concurred in part and concurred in the judgment. His principal disagreement with the majority involved the use of *Skidmore* deference, which he viewed as an “anachronism” after the Court’s decision in *Chevron*.<sup>24</sup> In Justice Scalia’s view, the Court should engage in the *Chevron* analysis when it is called on to determine the deference to be accorded to “authoritative agency positions”<sup>25</sup> regardless of what form those positions take. Justice Scalia viewed the position espoused in the Department’s opinion letter as the kind of authoritative position that might be entitled to *Chevron* deference.<sup>26</sup> But this was not the end of the matter: In Justice Scalia’s view, the Department’s position failed at step two of *Chevron*,<sup>27</sup> that is, Justice Scalia would not defer to the agency’s position under *Chevron* because it was not a permissible or reasonable construction of the statute.<sup>28</sup>

Justice Stevens, joined by Justices Ginsburg and Breyer, dissented in the case, and wrote at length regarding what he viewed as the majority’s errors in resolving the statutory interpretation question. Although Justice

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20. Brief of Petitioner at 18, *Christensen v. Harris County*, 529 U.S. 576 (2000) (No. 98-1167).

21. See *Christensen*, 529 U.S. at 582-86.

22. *Id.* at 587.

23. *Id.* (citation omitted).

24. *Id.* at 589-90 (Scalia, J., concurring in part and concurring in the judgment).

25. *Id.* at 590.

26. *Id.* at 591.

27. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

28. *Christensen*, 529 U.S. at 591.

Stevens's take on this question is interesting and persuasive, for the purposes of the administrative law issue in the case—in particular the question of affording *Skidmore* deference—the very end of Justice Stevens's opinion merits close attention.

After his statutory analysis, Justice Stevens states that “it is not without significance in the present case that the Government department responsible for the statute's enforcement shares my understanding of its meaning.”<sup>29</sup> He then explains why the Department's position is reasonable, and, after citing *Skidmore*, states that “[b]ecause there is no reason to believe that the Department's opinion was anything but thoroughly considered and consistently observed, it unquestionably merits our respect.”<sup>30</sup>

There are two important points to make at this juncture. First, the majority opinion said nothing of the agency's consideration or consistent observation of its position although both factors are included in *Skidmore*'s list of factors to consider when determining the weight to be given to an agency position of this sort: “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.”<sup>31</sup> Second, Justice Stevens phrases the deference to be accorded here as “merit[ing] our respect.”<sup>32</sup> I will return to this wording later, and will consider then whether it is a better way to articulate the amount of deference to be afforded under *Skidmore*.

Finally, Justice Breyer, joined by Justice Ginsburg, separately dissented in *Christensen* to disagree with Justice Scalia that *Skidmore* was “an anachronism.”<sup>33</sup> In Justice Breyer's view, if an agency had been delegated the legal authority to make a determination, the agency's determination should be accorded *Chevron* deference.<sup>34</sup> But “where one has doubt that Congress actually intended to delegate interpretive authority to the agency,”<sup>35</sup> *Skidmore* should be used to determine the weight to be accorded to the agency's position.<sup>36</sup> It is important to note that Justice Breyer makes no mention of the form of the agency's determination—be it in an opinion letter, a notice-and-comment rulemaking, or the result of a formal adjudication—and concedes that Justice Scalia “may well be right”<sup>37</sup> that the agency position in *Christensen* might be an authoritative agency view entitled to *Chevron* deference.

29. *Id.* at 594 (Stevens, J., dissenting).

30. *Id.* at 595; see also discussion *infra* Part II.B.2.

31. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

32. *Christensen*, 529 U.S. at 595 (Stevens, J., dissenting).

33. *Id.* at 596 (Breyer, J., dissenting).

34. *Id.*

35. *Id.* at 597.

36. *Id.*

37. *Id.* at 596.

The question of the legal authority delegated by Congress to an agency or, in Justice Thomas's terms, what agency determinations have "the force of law,"<sup>38</sup> leads us to *Mead*.

### B. *The Prelude to Mead*

Shortly after *Christensen* was decided—in fact, in the same month that *Christensen* was decided—the Court granted certiorari in *United States v. Mead Corp.*<sup>39</sup> This was fortunate since the lower courts began to struggle with *Christensen* soon after it was issued.

For example, in *Gonzalez v. Reno*,<sup>40</sup> the Court of Appeals for the Eleventh Circuit was asked to reexamine its prior decision in the case<sup>41</sup> in light of *Christensen*. In particular, the court had to reach an issue that appeared to have been left open by the *Christensen* opinion: Does an informal adjudication by the Immigration and Naturalization Service ("INS") fall within the scope of *Christensen*? Although *Christensen* indicated that formal adjudications were entitled to *Chevron* deference, the court of appeals concluded that the Court's list was "not to be an exhaustive or complete list of agency acts due deference"<sup>42</sup> and that the INS's position in this circumstance was "final and binding"<sup>43</sup>—or had the force of law—which entitled it to *Chevron* deference.

What makes this case somewhat puzzling is that the Eleventh Circuit's earlier opinion that did not reference *Christensen* seemed to indicate that some lesser *Chevron* deference was due in this situation, sounding, it turns out, quite a bit like *Christensen* and the sliding scale of *Skidmore* in the process:

The INS policy toward Plaintiff's application was not created by INS lawyers during litigation, but instead was developed in the course of administrative proceedings before litigation commenced. While the policy announced by the INS may not harmonize perfectly with earlier INS interpretative guidelines (which are not law), the parties have cited, and we have found, no statutory provision, no regulatory authority, and no prior agency adjudication that "flatly contradicts" the policy. That the

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38. *Id.* at 587 (majority opinion).

39. *United States v. Mead Corp.*, 530 U.S. 1202 (2000) (granting certiorari).

40. 215 F.3d 1243, 1245-46 (11th Cir. 2000) (denying rehearing and rehearing en banc but clarifying prior opinion). It is worth noting that this case involved Elian Gonzalez, a six-year-old Cuban boy who had arrived in the United States after he and his mother escaped from Cuba. Elian's mother died at sea but Elian was rescued. While his relatives in the United States sought to have Elian remain in the United States, his father in Cuba demanded Elian's return. Elian's case became the focus of intense media scrutiny and popular debate. *See, e.g.*, David Gonzalez & Lizette Alvarez, *Havana Welcome: Father Takes Son Home After Appeal by Kin in Miami is Denied*, N.Y. Times, June 29, 2000, at A1 ("Hours after the United States Supreme Court declined to hear arguments in the Elian Gonzalez case, the 6-year-old left behind seven months of contention, conflict and court battles, and returned home to Cuba tonight with his father.").

41. *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

42. *Gonzalez*, 215 F.3d at 1245 n.3.

43. *Id.* at 1245.



INS policy was developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does not render the policy altogether unworthy of deference. And that the INS policy may not be a longstanding one likewise affects only the degree of deference required. The INS policy, therefore, is entitled to, at least, some deference under *Chevron*; and that deference, when we take account of the implications of the policy for foreign affairs, becomes considerable.<sup>44</sup>

Accordingly, in addition to resolving what deference, if any, was owed to determinations resulting from informal adjudications, the Court needed to address whether there existed a “some” or lesser *Chevron* deference category. Fortunately, the Court appeared to have its vehicle for resolving those questions in *Mead*.

### C. Mead

The central issue in *Mead* was what, if any, deference was owed to a United States Customs Service’s tariff classification.<sup>45</sup> The Mead Corporation imported day planners, which are three-ring binders that provide writing space for each calendar day so that one can take notes and keep a schedule.<sup>46</sup> The planners also have a space for phone numbers and addresses.<sup>47</sup> At the time when the dispute arose, day planners fell into one of two subcategories under the Harmonized Tariff Schedule of the United States:<sup>48</sup> If day planners fell into the first subcategory—“[d]iaries, notebooks, and address books bound; memorandum pads, letter pads, and other similar articles”<sup>49</sup>—Mead would be required to pay a four percent tariff. If day planners were considered “other items,” Mead would pay no tariff.<sup>50</sup>

For several years, day planners were treated under the “other” category and Mead paid no tariff on them.<sup>51</sup> In 1993, the Customs Service changed course and put the day planners in the “diaries” category.<sup>52</sup> This, of course, meant that Mead was required to pay a tariff, a prospect Mead was none too pleased about.

When Mead challenged its switch in position, the Customs Service responded with a “carefully reasoned but never published”<sup>53</sup> letter indicating why it had decided to change the classification of the day

44. *Gonzalez*, 212 F.3d at 1350-51 (footnotes and citations omitted).

45. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

46. *Id.* at 224.

47. *Id.*

48. 19 U.S.C. § 1202 (2000).

49. *Mead*, 533 U.S. at 224 (quoting Harmonized Tariff Schedule of the United States subheading 4820.10.20).

50. *Id.* at 225 (quoting Harmonized Tariff Schedule of the United States subheading 4820.10.40).

51. *Id.* at 225.

52. *Id.*

53. *Id.*

planners.<sup>54</sup> When the Customs Service rejected Mead's subsequent protest against the new ruling and new letter, Mead filed suit in the Court of International Trade.<sup>55</sup> In that court, the Customs Service was granted summary judgment without any discussion of deference.<sup>56</sup> On appeal to the Federal Circuit, the question was whether *Chevron* deference or no deference was owed,<sup>57</sup> particularly in light of the Court's then recent opinion in *United States v. Haagar Apparel Co.*,<sup>58</sup> in which the Court concluded that Customs Service regulations were entitled to *Chevron* deference.<sup>59</sup> It appears that the issue of *Skidmore* deference or some other intermediate type of deference was not raised in the lower courts.

In the Supreme Court, the issue of *Skidmore* deference versus *Chevron* deference was front and center. In the end, Justice Souter wrote the majority opinion joined by, among others, Justice Stevens.<sup>60</sup> Justice Scalia dissented.<sup>61</sup>

Justice Souter began the analysis by delineating those instances in which *Chevron* deference will apply. *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>62</sup> There are a "variety of ways,"<sup>63</sup> according to the majority, for Congress to demonstrate its intention to delegate to an agency the authority to make rules with the force of law, such as "by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."<sup>64</sup>

Justice Souter later provided the following additional explanation to determine when *Chevron* applies:

We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. It 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. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that

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54. *See id.*

55. *See Mead Corp. v. United States*, 22 Ct. Int'l Trade 707 (1998).

56. *See id.*

57. *See Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999).

58. 526 U.S. 380 (1999).

59. *Id.* at 394.

60. *United States v. Mead Corp.*, 533 U.S. 218, 220-21 (2001).

61. *Id.* at 239.

62. *Id.* at 226-27.

63. *Id.* at 227.

64. *Id.*

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, see, e.g., *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257, 263 (1995). The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*.<sup>65</sup>

In other words, *Chevron* deference is usually appropriate when an agency is required to engage in and has undertaken a notice-and-comment rulemaking or when it is required to employ and has afforded a formal adjudication. One also assumes that formal rulemaking,<sup>66</sup> a less often used but available option under the APA,<sup>67</sup> would also qualify in this list.

Justice Souter leaves the door open for Congress to override this presumption by providing in clear terms that, although it is requiring the agency to engage in, for example, notice-and-comment procedures, the rules adopted by the agency are not to have the force of law. Where there are ambiguous rulemaking grants, however, the Court's assumption (whether correct or not<sup>68</sup>) is that those grants give the agency power to act with the force of law and therefore are afforded *Chevron* deference.

Justice Souter leaves us with a final caveat: There also may be instances in which no formal process was required but that the agency action nevertheless warrants *Chevron* deference.<sup>69</sup> This is a somewhat confusing category<sup>70</sup> for which Justice Souter provides only a single example in support: In *NationsBank of N.C., N.A. v. Variable Annuity Life Insurance Co.*,<sup>71</sup> the Court held that the Comptroller of the Currency's conclusions with respect to the banking laws warranted *Chevron* deference. Given the reliance on a solitary case, one imagines that the exception was intended as a narrow category. That is, when Congress does not require some APA process, i.e., informal notice-and-comment rulemaking, formal rulemaking, or formal adjudication, *Chevron* deference should be afforded only where it is clear that Congress intends the agency to have the power to make rules with the force of law. But the opinion is less than clear as to when

65. *Id.* at 229-31 (citations and footnotes omitted).

66. See 5 U.S.C. § 553(c) (2000) ("When rules are required by statute to be made on the record after an opportunity for an agency hearing, sections 556 and 557 of this title [providing the formal procedures] apply."). See generally *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973) (discussing when formal rulemaking is triggered).

67. 5 U.S.C.A. §§ 551-706 (West Supp. 2005).

68. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 472 (2002) (arguing that, from the 1920s until 1945 and perhaps as recently as 1967, "Congress followed a drafting convention that signaled to agencies whether particular rulemaking grants conferred authority to make rules with the force of law as opposed to mere housekeeping rules" but that in the 1960s, two influential opinions construed facially ambiguous rulemaking grants, inconsistent with the convention, as authorizing legislative rulemaking; that assumption has remained to this day).

69. See *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001).

70. See Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 813-14 (2004).

71. 513 U.S. 251 (1995).

Congress has acted in such a way as to indicate that this exception should apply.<sup>72</sup>

While examining the particular Customs Service ruling at issue, Justice Souter provided additional guidance that is helpful to determine whether an agency decision warrants *Chevron* deference.<sup>73</sup> As Professor Thomas Merrill has persuasively argued, this portion of the opinion is probably best read as providing three factors<sup>74</sup> to be considered when determining whether a particular agency interpretation has the force of law: “(1) whether Congress has prescribed relatively formal procedures; (2) whether Congress has authorized the agency to adopt rules or precedents that generalize to more than a single case; and (3) whether Congress has authorized the agency to prescribe legal norms that apply uniformly throughout its jurisdiction,”<sup>75</sup> i.e., requiring like cases be treated alike.<sup>76</sup> None of these factors, however, appears to be either necessary or sufficient.<sup>77</sup>

In the *Mead* case, the Customs Service’s ruling letter was not issued after a required APA process. It was conclusive between the Customs Service and the importer<sup>78</sup> but, Justice Souter noted, the “binding” nature of the letter “stops short of third parties.”<sup>79</sup> Finally, given the large volume of rulings issued every year by a number of different Customs offices, it was unlikely that there was uniformity in the rulings, that is, it was unlikely that like cases were being treated alike.<sup>80</sup> Accordingly, the opinion concluded that the letter was “best treated like ‘interpretations contained in policy statements, agency manuals, and enforcement guidelines,’”<sup>81</sup> all of which “are beyond the *Chevron* pale.”<sup>82</sup>

So if we are beyond *Chevron*’s pale, should any deference whatsoever be afforded to the agency’s determination? Justice Souter answered this question with the answer every first-year law student learns to love: Maybe.<sup>83</sup> Justice Souter explained that the classification ruling in this case

72. See Merrill, *supra* note 70, at 813 (“Justice Souter did not identify any triggering condition for determining when an agency has been given the power to act with the force of law.”).

73. *Mead*, 533 U.S. at 231-34.

74. Professor Merrill also “readily admit[s] that the number and correct characterization of the factors invoked in the majority opinion is open to debate” and provides the arguments for viewing the Court’s discussion as providing either four or five factors, instead of just three. Merrill, *supra* note 70, at 814 & n.41.

75. *Id.* at 814.

76. See *id.* at 817.

77. See *id.* at 815-17.

78. *Mead*, 533 U.S. at 233 (citing 19 C.F.R. § 177.9(c) (2000)).

79. *Id.*

80. See *id.* at 233-34; Merrill, *supra* note 70, at 817.

81. *Mead*, 533 U.S. at 234 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

82. *Id.*

83. *Id.* There is an excellent book intended to make this point to first-year law students. See Richard Michael Fischl & Jeremy Paul, *Getting to Maybe: How to Excel on Law School Exams* (1999).

might deserve *Skidmore* deference but that deference—not just whether deference is appropriate but the very amount of deference—will depend again on a variety of factors.<sup>84</sup> More specifically, instead of the clear deference standard of *Chevron*—“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”<sup>85</sup>—*Skidmore* deference is on a sliding scale “from great respect on one end . . . to near indifference at the other.”<sup>86</sup> Courts are to determine at which end an agency’s determination falls, *Skidmore* instructs, by looking to “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 the power to control.”<sup>87</sup> After reciting this standard, the Court remanded the case for an assessment under *Skidmore* as to whether the Customs Service ruling was owed any deference.<sup>88</sup>

Justice Scalia dissented in a lengthy opinion.<sup>89</sup> With respect to both questions—determining when *Chevron* applies and identifying the contours of *Skidmore* deference—Justice Scalia roundly criticized the majority.

On the first question, Justice Scalia asserted that the majority’s test for determining when *Chevron* applies was bound to confuse. Rather than employ the majority’s “grab bag”<sup>90</sup> of factors, Justice Scalia would afford *Chevron* deference when the agency’s position is “authoritative,”<sup>91</sup> that is, when the agency’s determination represents the “official position of the agency.”<sup>92</sup> Like the majority’s test for when *Chevron* applies, Justice Scalia’s test considers several factors such as

- (1) whether the interpretation has been endorsed at the “highest levels” in the agency as opposed to by “some underlings;”
- (2) whether the general counsel has defended the interpretation in court;
- (3) whether the interpretation has been supported by a brief filed by the Solicitor General; and
- (4) whether the interpretation is more than a “post hoc

84. See *Mead*, 533 U.S. at 235; see also *id.* at 228 (discussing the factors to consider when determining the weight to give to an agency determination under *Skidmore*).

85. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

86. *Mead*, 533 U.S. at 228 (footnotes omitted).

87. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Justice Souter provides a similar but slightly different articulation of this principle at the outset of his opinion: “The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.” *Mead*, 533 U.S. at 228.

88. *Mead*, 533 U.S. at 238-39. On remand, the Federal Circuit concluded that the Customs letter lacked the power to persuade under *Skidmore* and thus the day planners fell under the “other” category, which meant that *Mead* would be not be charged a tariff. *Mead Corp. v. United States*, 283 F.3d 1342, 1350 (Fed. Cir. 2002).

89. *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

90. *Id.* at 245.

91. *Id.* at 257.

92. *Id.*

rationalizatio[n]” or a legal position developed by the agency in litigation.<sup>93</sup>

Although Justice Scalia readily admits that his is not a bright-line test, it is, in his view, “infinitely brighter than the line the Court asks us to draw today.”<sup>94</sup>

As to the second question, Justice Scalia derides the majority for its resurrection of *Skidmore* altogether. Most troubling to Justice Scalia is that, when *Skidmore* applies, the clear standard of deference found in *Chevron* is replaced with “th’ol’ ‘totality of the circumstances’ test.”<sup>95</sup>

Based on these two overarching concerns, Justice Scalia provides a list of what he believes will be the four negative “practical effects”<sup>96</sup> of the majority’s new rule: (1) protracted confusion in the lower courts as to what gets *Chevron* deference as opposed to what gets *Skidmore* deference, determined, as discussed above, by what Justice Scalia calls a “grab bag”<sup>97</sup> of factors;<sup>98</sup> (2) “an artificially induced increase in informal rulemaking” because it is a safe harbor; that is, it will get *Chevron* deference;<sup>99</sup> (3) “ossification of large portions of our statutory law”<sup>100</sup> because where the agency’s decision is subject only to *Skidmore* deference, the court interpretation of the statute is final and cannot be changed by the agency, either through notice-and-comment procedures or otherwise<sup>101</sup> (this can be contrasted with *Chevron*, which allows an agency to change its mind so long as the interpretation remains within the scope of the ambiguity<sup>102</sup>); and (4) “uncertainty, unpredictability, and endless litigation”<sup>103</sup> because of the indeterminate nature of *Skidmore* deference.

The question is, was Justice Scalia right?

## II. LIFE AFTER *MEAD*: THE FALLOUT

### A. *The Difficult-to-Confirm Predictions*

Two of Justice Scalia’s predicted effects, an artificial increase in informal rulemaking and an increase in litigation, are difficult to verify in the short time frame since *Mead* was decided, particularly when one is mindful of the many other variables that might contribute to both phenomena were they to emerge. Accordingly, it is likely too early to tell whether he was correct on

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93. Merrill, *supra* note 70, at 818 (quoting *Mead*, 533 U.S. at 258 & n.6 (Scalia, J., dissenting)).

94. *Mead*, 533 U.S. at 258 n.6.

95. *Id.* at 241.

96. *Id.* at 245.

97. *Id.*

98. *Id.*

99. *Id.* at 246.

100. *Id.* at 247.

101. *Id.*

102. *Id.* at 247-48.

103. *Id.* at 250.

either front. Moreover, were we to wait a few years for more data, it might be difficult or perhaps even impossible to control for the other variables that might increase either rulemaking or litigation, which would prevent one from drawing a defensible conclusion with respect to these predictions.

Likewise, Justice Scalia's third prediction regarding ossification might also require years before meaningful data would be available for collection and evaluation and, just as with the other predictions, such a study would have to control for the other variables that might be at play. We need not worry about these difficulties, however, because last Term the Court did away with the premise of this prediction in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.<sup>104</sup>

### 1. *Brand X*

*Brand X* involved a conflict between a ruling by the Federal Communications Commission ("FCC") interpreting a particular statutory provision<sup>105</sup> and a prior decision of the Court of Appeals for the Ninth Circuit that had interpreted the same provision.<sup>106</sup> The Ninth Circuit, relying on a case Justice Scalia cited in his *Mead* dissent, *Neal v. United States*,<sup>107</sup> concluded that its prior interpretation of the statute "trumped" the agency's later interpretation of that same statutory provision.

Reversing, Justice Thomas, writing for the Court, explained that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."<sup>108</sup> Accordingly, if the court does not indicate that its interpretation of a statute is the only one possible because the statute is unambiguous, "the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."<sup>109</sup>

As Justice Scalia conceded in dissent, the majority's holding in *Brand X* solves any potential ossification effect that he had predicted as a result of *Mead*.<sup>110</sup> But this did not, in Justice Scalia's view, come without a cost: "The Court today moves to solve this problem of its own creation by inventing yet another breathtaking novelty: judicial decisions subject to reversal by Executive officers."<sup>111</sup>

104. 125 S. Ct. 2688 (2005).

105. Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798 (2002).

106. *AT & T, Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

107. 516 U.S. 284 (1996).

108. *Brand X*, 125 S. Ct. at 2700.

109. *Id.* at 2701.

110. *See id.* at 2719 (Scalia, J., dissenting).

111. *Id.*

Interestingly, although he joined the majority opinion, in his separate concurrence, Justice Stevens carved out an exception to the majority's rule that would permit an agency to trump a prior judicial opinion. In his view, applying the rule to interpretations of courts of appeals is permissible.<sup>112</sup> But "a decision by [the Supreme Court] . . . would presumably remove any pre-existing ambiguity"<sup>113</sup> and thus the rule permitting agency trumping might not apply to interpretations of the Supreme Court.<sup>114</sup>

As Justice Scalia suggests, *Brand X* may be "full of promise for administrative-law professors in need of tenure articles,"<sup>115</sup> particularly in light of Justice Stevens's intriguing concurrence. With respect to Justice Scalia's ossification prediction, however, there is little more to say, although Justice Scalia may be correct that another problem has been created.<sup>116</sup> I will therefore turn now to Justice Scalia's last two predictions: protracted confusion in the lower courts as to when *Chevron* applies and uncertainty and unpredictability due to the indeterminate weight of *Skidmore* deference.

### B. *The Confirmable Predictions*

Justice Scalia appears to be most concerned with the first of his predictions, the confusion that occurs when a court must determine whether *Chevron* deference applies, since his criticism of this portion of the majority opinion is especially pointed.<sup>117</sup> Justice Scalia's second concern, the unpredictability of the result when *Skidmore* deference applies, is based on the notion that it is unclear how that test will turn out *ex ante* because the weight of deference afforded an agency's interpretation under *Skidmore* is determined by a variety of factors and on a sliding scale. I will begin with the first of Justice Scalia's concerns.<sup>118</sup>

#### 1. When Does *Chevron* Apply?

Before analyzing any cases from the lower courts, I briefly note that Justice Breyer and Justice Scalia took up the debate regarding when *Chevron* applies again in *Brand X*. Justice Scalia continued to criticize the Court's approach in determining when an agency position would get

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112. *See id.* at 2712 (Stevens, J., concurring).

113. *Id.*

114. *Id.*

115. *Id.* at 2721 (Scalia, J., dissenting).

116. *See, e.g.*, Kathryn A. Watts, Reassessing the Allocation of Interpretational Authority Between the Courts and Agencies After *Brand X*: A Call for an Interactive Model (Dec. 12, 2005) (unpublished manuscript, on file with author) (proposing an interactive approach to statutory interpretation post-*Brand X*).

117. *United States v. Mead Corp.*, 533 U.S. 218, 240-41, 243-46 (2001) (Scalia, J., dissenting).

118. *Id.* at 250; *see also id.* at 247 ("*Skidmore* deference gives the agency's current position some vague and uncertain amount of respect . . .").



*Chevron* deference, noting that much of the Court's test remained "unspecified."<sup>119</sup>

Justice Breyer, on the other hand, reiterated that a required APA process is "neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute."<sup>120</sup> His explanation as to why it is an unnecessary condition is, as one would expect, because "an agency might arrive at an authoritative interpretation of a congressional enactment in other ways"<sup>121</sup> such as in *NationsBank*.

Justice Breyer's explanation for why following a required APA process is not sufficient to afford *Chevron* deference, however, is more puzzling. Justice Breyer claims that Congress may not have intended an agency pronouncement that has gone through a required APA process to have the force of law "where an unusually basic legal question is at issue."<sup>122</sup> Justice Breyer does not explain what an "unusually basic legal question" is and thus the potential candidates for this category remain unclear. Indeed, the creation of yet another additional "mushy" category does not add any clarity or substance to the analysis but instead would seem to make this exercise exponentially more difficult. In my view, it is more plausible that following a required APA process would not be sufficient to garner *Chevron* deference either because Congress made clear it did not intend for the agency to act with the force of law by employing specific language to that effect (indicating that the agency's action is "without the force of law" or by providing that the agency's determination is "advisory" and "nonbinding") or because Congress provided an implicit but obvious clue as suggested by Professors Merrill and Kathryn Watts such as where Congress has not "included a provision in the statute that prescribes sanctions or other legal consequences for violations of agency action."<sup>123</sup>

Turning, however, to whether the lower courts have in fact been confused on this front, we should begin with Professor Adrian Vermeule's analysis of three opinions from the United States Court of Appeals for the District of Columbia Circuit issued shortly after the decision in *Mead*.<sup>124</sup> Those three cases are *Federal Election Commission ("FEC") v. National Rifle Ass'n of America ("NRA")*,<sup>125</sup> *Motion Picture Ass'n of America, Inc. v. FCC*,<sup>126</sup> and *Michigan v. EPA*.<sup>127</sup> With respect to two of the three, Professor Vermeule explains that in both *Motion Picture Ass'n v. FCC*—which involved an FCC notice-and-comment rulemaking<sup>128</sup> to which the panel afforded no

119. *Brand X*, 125 S. Ct. at 2718, 2719 & n.9 (Scalia, J., dissenting).

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

121. *Id.*

122. *Id.* at 2713.

123. Merrill, *supra* note 70, at 828; *see also* Merrill & Watts, *supra* note 68, at 582-83.

124. Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 *Geo. Wash. L. Rev.* 347 (2003).

125. 254 F.3d 173 (D.C. Cir. 2001).

126. 309 F.3d 796 (D.C. Cir. 2002).

127. 268 F.3d 1075 (D.C. Cir. 2001).

128. *Motion Picture Ass'n*, 309 F.3d at 800.

deference because the panel concluded that the FCC had not been delegated the authority to make such a rule under the statutory section it had relied on<sup>129</sup>—and *Michigan v. EPA*—which, like the *Motion Picture* case, involved a notice-and-comment rulemaking<sup>130</sup> that the panel refused to defer to because it concluded that the statute did not authorize the rules<sup>131</sup>—the court's *Mead* analysis was simply wrong.<sup>132</sup> Moreover, while Professor Vermeule does not contend that the analysis in *FEC v. NRA* is incorrect, he argues that the panel wasted its time analyzing whether *Chevron* or *Skidmore* applied:

[R]esolving that uncertainty produces highly inefficient meta-litigation that precedes and in some respects hampers, rather than contributes 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.<sup>133</sup>

In the end, Professor Vermeule concludes that “the D.C. Circuit’s day-to-day experience with *Mead* has been unfortunate, [and] that its *Mead*-related work product is, in a nontrivial number of cases, flawed or incoherent.”<sup>134</sup> In baseball terms, the D.C. Circuit was batting .333—not a bad batting average, but a failing grade in most academic exercises and certainly well below what we would expect from a federal court of appeals. Moreover, even in the single case where the court arguably got the analysis “right,” it came at what Professor Vermeule viewed as an excessive cost because, in the end, the difference in the degree of deference afforded made no difference in result and therefore did not justify the amount of time the court was required to expend deciding the issue.<sup>135</sup>

The cases from the federal courts of appeals in the four years since *Mead* indicate that the courts remain somewhat confused on this question but perhaps less so than the D.C. Circuit appeared to have been in the three early cases examined by Professor Vermeule.<sup>136</sup> In particular, courts seem to have less trouble with the analysis when the agency decision was made in the course of a required APA process, but this is likely the result of considering such process sufficient despite the Court’s explicit instructions not to do so. That is, most courts appear to collapse the analysis into a

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129. *See id.* at 801.

130. *Michigan v. EPA*, 268 F.3d at 1080-81.

131. *See id.* at 1082.

132. Vermeule, *supra* note 124, at 351-52, 355.

133. *Id.* at 350.

134. *Id.* at 347.

135. *See id.* at 351, 357.

136. It is useful to note that no other circuit seems to be as enamored (or what others might refer to as distracted) by the nondelegation doctrine as the D.C. Circuit and it may be, as Professor Adrian Vermeule notes, that the injection of the nondelegation doctrine into the *Mead* analysis is at the core of why the D.C. Circuit appears to lose its way in the early cases. *See id.* at 352-55.

single inquiry: If the APA-required process was followed, *Chevron* deference is warranted.

This is not to say that any of these cases were wrongly decided. Indeed, the Court itself suggested in *Mead* that “a very good indicator of delegation meriting *Chevron* treatment [is found] in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”<sup>137</sup> But while these cases may not be “wrong,” they nevertheless illustrate the pervasive “shortcutting” of the *Mead* analysis.

For example, in *New York Public Interest Research Group v. Whitman*,<sup>138</sup> when the Second Circuit was presented with an interpretation promulgated by the Environmental Protection Agency (“EPA”) after notice-and-comment procedures, it determined *Chevron* deference was appropriate after declaring in a single sentence that “[s]ince there is no question that the EPA’s interpretation was promulgated in the exercise of rulemaking authority delegated to it by Congress, *Mead* is satisfied.”<sup>139</sup> Likewise, in *BCCA Appeal Group v. United States EPA*,<sup>140</sup> the Fifth Circuit appeared to overemphasize the role of process in the analysis, which is most evident in its conclusion: “Because notice-and-comment rulemaking is a formal process, EPA’s final rules approving the Houston [State Implementation Plan], to the extent they involve the reasonable resolution of ambiguities in the [Clean Air Act], will be afforded *Chevron* deference.”<sup>141</sup> Similarly, in *Perez-Olivo v. Chavez*,<sup>142</sup> the First Circuit stated that “the [Bureau of Prisons’] interpretation of the statute . . . is embodied in 28 C.F.R. § 523.20, which was adopted pursuant to the notice-and-comment procedure of the Administrative Procedure Act . . . . [and therefore] is entitled to full deference under *Chevron*.”<sup>143</sup>

137. *United States v. Mead*, 533 U.S. 218, 229 (2001).

138. 321 F.3d 316 (2d Cir. 2003).

139. *Id.* at 329. The court cited a D.C. Circuit case, *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002), in support of its conclusion. In *Sierra Club*, the D.C. Circuit did not mention *Mead*, let alone engage in any analysis regarding what level of deference was owed; it simply stated, “We review the EPA’s interpretation of the Clean Air Act under the standards set out in *Chevron*.” *Id.* at 160. One might argue that there was no need to engage in such an analysis since *Chevron* itself involved the Clean Air Act just as these cases did. This may be true, but if so, one would expect the courts to cite the passage in *Mead* indicating just that: “*Chevron* itself is a good example showing when *Chevron* deference is warranted.” *Mead*, 533 U.S. at 237 n.18.

140. 355 F.3d 817 (5th Cir. 2003).

141. *Id.* at 825. Again, because this case also involved the Clean Air Act, one would assume that the Fifth Circuit could have cited to footnote 18 in *Mead* rather than engage in the analysis under *Mead*.

142. 394 F.3d 45 (1st Cir. 2005).

143. *Id.* at 52 n.6; *see also* *Ind. Family & Soc. Servs. Admin. v. Thompson*, 286 F.3d 476, 480 (7th Cir. 2002) (“*Mead* . . . makes clear that not all agency interpretations of its own laws are entitled to full *Chevron* deference. Only those subject to notice-and-comment or comparable formalities qualify.”); Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 13 (4th ed. Supp. 2005) (“[L]egislative rules and formal adjudications are always entitled to *Chevron* deference, while less formal pronouncements like interpretative rules and informal adjudications may or may not be entitled to *Chevron* deference.”).

An interesting exception to the cases that overemphasize required APA procedures is the Ninth Circuit's decision in *Hall v. United States EPA*.<sup>144</sup> In that case, the court concluded that rules that had gone through required notice-and-comment procedures were not entitled to *Chevron* deference because the rules indicated that they were nonprecedential, i.e., that they would not apply to others outside of the original ruling.<sup>145</sup> Here, then, instead of overemphasizing the formality of procedures, this court seems to have focused solely on the single factor of precedential effect. In sum, all of these cases illustrate the courts' preference to turn the test into one that considers a single factor determinative rather than evaluating the three factors provided in *Mead* and then reaching a resolution.<sup>146</sup>

Determinations that are made without APA-required process also seem to fall prey to a similar problem. In these cases, although the courts may again get it "right," they tend to overemphasize the process and downplay (if mention at all) the factors of general applicability and uniformity. For example, in *Chao v. Russell P. Le Frois Builder, Inc.*,<sup>147</sup> the court concluded that because the agency view was a litigation position, "[t]his is not a case, then, in which we owe deference to 'the fruits of notice-and-comment rulemaking or formal adjudication.'"<sup>148</sup> The court then noted that the agency also presented no reason to follow the ruling in *NationsBank*.<sup>149</sup> Although this single sentence could have served as a proxy for the other two *Mead* factors, the court never explicitly considered them as *Mead* seems to require.

The emphasis on process is likewise clear in *Matz v. Household International Tax Reduction Investment Plan*.<sup>150</sup> In that case, the court held that

[a]lthough the Supreme Court indicated in *Mead* that *Chevron* deference may apply to interpretations developed from less formal rulemaking procedures, it did not expressly outline when this would be the case. The IRS'[s] position in the *amicus* brief was not born from a formal policymaking procedure. We do not believe that a position set forth in an *amicus* brief, supported by some Revenue Rulings and an agency manual are formal enough to warrant *Chevron* treatment.<sup>151</sup>

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144. 273 F.3d 1146 (9th Cir. 2001).

145. *See id.* at 1155-56.

146. *Cf. Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 190 (2d Cir. 2005) (refusing to afford *Chevron* deference to an immigration judge's rulings largely on the basis of the lack of binding effect beyond the parties without discussion of the formality of the procedures involved).

147. 291 F.3d 219 (2d Cir. 2002).

148. *Id.* at 227 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)).

149. *Id.*

150. 265 F.3d 572 (7th Cir. 2001).

151. *Id.* at 575; *see also* *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 155 (3d Cir. 2004) ("To grant *Chevron* deference to informal agency interpretations would unduly validate the results of an informal process." (quoting *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 186 (3d Cir. 2000))); *U.S. Dep't of Labor v. N.C. Growers Ass'n, Inc.*, 377 F.3d 345, 353 (4th Cir. 2004) ("The [Department of Labor's] interpretative bulletins,

The Supreme Court itself may, like the lower courts, have shortcut the analysis on occasion. In *Wisconsin Department of Health & Family Services v. Blumer*,<sup>152</sup> the majority concluded without any analysis that the agency's position set out in what appears to have been policy statements<sup>153</sup> "warrants respectful consideration."<sup>154</sup> The Court engaged in no analysis of the sort found in *Mead* but appears to have assumed that because no APA process was required or followed, this was a situation that did not qualify for *Chevron* deference. Again, this is not to suggest that the Court's ultimate conclusion regarding the proper deference to afford was incorrect. It simply illustrates the lack of interest in engaging in the sort of analysis that *Mead* appears to require.

In addition to shortcutting, the Court also appears to have set aside the *Mead* analysis at times. In *Barnhart v. Walton*,<sup>155</sup> the Court added more confusion by somewhat altering the *Mead* analysis by listing several factors—"the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"<sup>156</sup>—none of which appear in the *Mead* case as factors to consider when determining whether *Chevron* or *Skidmore* deference applied. If anything, all of these "new" considerations are closer to the *Skidmore* factors for determining the weight of deference to be afforded than the *Mead* factors for determining whether *Chevron* applies.<sup>157</sup> Not surprisingly but further contributing to the uncertainty in this area, several lower courts have followed this analysis rather than the one established in *Mead*.<sup>158</sup>

Finally, perhaps because of the complications and thus excessive cost (as Professor Vermeule described it) of the initial *Mead* inquiry, there are cases in which courts refuse to decide whether they are affording the agency

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however, were adopted without notice and comment rulemaking and without a formal adjudication, and accordingly, lack the force of law."); *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1091 n.7 (11th Cir. 2004) ("We note, however, that when, as here, the agency interpretation does not constitute the exercise of its formal rule-making authority, we accord the agency consideration based upon the factors cited in *Skidmore* . . ."); *Wells Fargo Bank, N.A. v. FDIC*, 310 F.3d 202, 208 (D.C. Cir. 2002) ("[W]e doubt whether the FDIC is entitled to *Chevron* deference because, although it had issued the Rankin Letter at the time Wells Fargo acquired the three Oakar banks, it had not yet exercised its formal rulemaking authority . . .").

152. 534 U.S. 473 (2002).

153. *See id.* at 484-85.

154. *Id.* at 497.

155. 535 U.S. 212 (2002).

156. *Id.* at 222.

157. *See Merrill & Watts, supra* note 68, at 576 n.615.

158. *See, e.g., Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 59-61 (2d Cir. 2004) (following *Barnhart* factors rather than *Mead* factors to conclude that *Chevron* deference should be afforded); *In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 81-82 (2d Cir. 2004) (noting a lack of formal procedures and then evaluating several factors that look more like *Skidmore* considerations but never commenting on uniformity or precedential effect); *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279-80 (D.C. Cir. 2004) (citing and applying *Barnhart*).

position *Chevron* or *Skidmore* deference. These courts simply conclude that the issue is not outcome determinative and therefore they need not engage in the analysis.<sup>159</sup>

## 2. How Much Deference Is Afforded Under *Skidmore*?

As to the second type of uncertainty—a lack of clarity as a result of a sliding scale of deference—it is hard to measure whether the courts have been getting this “right” or “wrong” since it is a multifactor, totality of the circumstances test. We can, however, make a few observations.

Like standards of review, varying degrees of deference can often be difficult to sort out.<sup>160</sup> But *Skidmore* deference is unique in that it does not dictate a set amount of deference: Instead, “agency interpretations receive various degrees of deference, ranging from none, to slight, to great, depending on the court’s assessment of the strength of the agency interpretation under consideration.”<sup>161</sup> Although Justice Souter takes Justice Scalia to task for his efforts to “limit and simplify,”<sup>162</sup> one wonders whether it is possible to sort the varying degrees of deference *Skidmore* imagines. Would this be a spectrum of something like “no” deference, “a little” deference, “some” deference, “a good deal” of deference, and finally, “a lot” of deference? And how would each of these ultimately play out in terms of interpreting an ambiguous statute? That is, can we say that when we just give something “a little” deference, it ought not carry the day but that when we afford “a good deal of deference,” it should? And does that mean “some” deference might go either way so it is effectively useless in the analysis?

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159. See, e.g., *NRDC v. Nat’l Marine Fisheries Serv.*, 421 F.3d 872, 878-89 (9th Cir. 2005) (“We need not resolve this question here, because even under the *Chevron* standard of review, the 2002 quota was based on an impermissible construction of the Act. We therefore will assume that *Chevron* review is appropriate.”); *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem’l. Hosp.*, 374 F.3d 362, 369 (5th Cir. 2004) (“We do not need to decide whether the [Pension Benefit Guaranty Corp.’s (“PBGC’s”)] interpretation of annuity starting date warrants *Chevron* deference because it is clear that the PBGC’s order may be upheld as a matter of law under the less deferential standard set forth in [*Mead*].”); *Comty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002) (“We therefore accord [the Centers for Medicare and Medicaid Services’] interpretation considerable deference, whether under *Chevron* or otherwise.”); cf. *United States v. Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004) (“Without determining whether full *Chevron* deference is owed to this ATF interpretation of § 922(g)(5)(A) in light of the criminal nature of that statute, we unquestionably owe ‘some deference’ to the ATF’s regulation.” (citation omitted)). It should be noted that although the Fifth Circuit in *Pension Benefit* refused to engage in the analysis, it did at least list the three factors to be considered when making the determination as to whether *Chevron* or *Skidmore* applies. See *Pension Benefit*, 374 F.3d at 369.

160. See Vermeule, *supra* note 124, at 356 (citing “constitutional standards of review that even academic experts find it nigh impossible to differentiate”).

161. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L.J. 833, 855 (2001).

162. *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

Faced with this uncertainty, courts have simply decided not to engage in the analysis where they would reach the same conclusion as the agency. For example, in *FTC v. Garvey*,<sup>163</sup> the court

decline[d] to decide to what degree of deference the Guides may be entitled or whether the Guides can form an independent basis for spokesperson liability. Such a determination is not necessary to the resolution of this case. Even if the Guides had the full force of law, we would find that Garvey is not liable under them.<sup>164</sup>

Alternatively, courts have decided to afford some amount of deference but have found it unnecessary to delineate exactly how much deference to be afforded or explain why. The best example of this is found in *Community Health Center v. Wilson-Coker*,<sup>165</sup> in which the Second Circuit wryly concluded that it “owe[d] some significant measure of deference”<sup>166</sup> to the agency’s position but it did not need to “decide the exact molecular weight of the deference”<sup>167</sup> it would accord. Indeed, the court stated that it would afford the agency position what it called “considerable deference, whether under *Chevron* or otherwise.”<sup>168</sup>

Finally, in this same vein, there is the simple answer of “we defer.” There are no nuances, no varying degrees, no varying weights. These courts simply conclude at the end of the analysis that they will defer.<sup>169</sup> For example, in *Vernazza v. SEC*,<sup>170</sup> the court’s *Skidmore* analysis was summed up in a single sentence providing no weight or nuance to the deference that was afforded: “In this case, we defer to the Commission’s experience and

163. 383 F.3d 891 (9th Cir. 2004).

164. *Id.* at 903-04 (footnote omitted); see also *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 34 n.6 (2d Cir. 2005) (“Because . . . we would independently reach the same conclusion as the SEC on the applicability of § 10(b) jurisprudence to the meaning of [the statute’s] ‘in connection with’ requirement, we need not engage in exhaustive analysis of these factors.” (citation omitted)). One might argue that in *Dabit*, the court simply performed a *Chevron* step one analysis, that is, it found the statute unambiguous and that is the end of the matter. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The courts tend not to frame their analyses in these terms, however. See *Dabit*, 395 F.3d at 34 n.6 (discussing factors considered in *Skidmore* analysis).

165. 311 F.3d 132 (2d Cir. 2002).

166. *Id.* at 137.

167. *Id.*

168. *Id.* at 138.

169. See, e.g., *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 389 (3d Cir. 2005); *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004); *Ammex, Inc. v. United States*, 367 F.3d 530, 535 (6th Cir. 2004); *Brown v. United States*, 327 F.3d 1198, 1206 (D.C. Cir. 2003); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 228 (2d Cir. 2002); cf. *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem’l Hosp.*, 374 F.3d 362, 370 (5th Cir. 2004) (“Consequently, we find the PBGC order . . . to be very persuasive, entitled to significant respect, and should be upheld.”). In this vein, one might be tempted to fault a court for a decision that concludes simply that the court will not defer. A conclusion of no deference, however, is consistent with *Skidmore*’s sliding scale so long as all of the factors have been considered. See *De La Mota v. U.S. Dep’t of Educ.*, 412 F.3d 71, 80-82 (2d Cir. 2005) (concluding that there was no basis for deference after finding that none of the *Skidmore* factors were satisfied to any extent).

170. 327 F.3d 851 (9th Cir. 2003).

expertise in determining that investment advisers are knowledgeable enough to recognize that an arrangement such as the [Shareholder Servicing Agreement] creates potential conflicts of interest.”<sup>171</sup>

In addition to giving up on or shortcutting the analysis in various ways, when courts do employ the *Skidmore* test, the consequence appears to be that the courts defer to agency action less often. Based on his analysis of federal cases decided in the six months after *Mead* was handed down, Eric Womack concluded that the view of the agency was unlikely to prevail where *Skidmore* deference was afforded:

Of the twenty-nine cases citing *Skidmore* in the context of the *Mead* test, only nine (around thirty-one percent) upheld the agency’s opinion. Of these nine cases, four affirmed the agency’s decision in what can only be described as a coincidence that favored the agency, as the court applied essentially *de novo* review in each case. Thus, the number of courts that granted meaningful deference to the agency’s decision fell to five (around seventeen percent).<sup>172</sup>

Whether these results are “correct” is difficult to assess. The critical question, however, is whether the Court intended this sort of skewing against the agency as the result of *Mead*. Indeed, this becomes all the more acute when one considers that in the pre-*Christensen* cases when *Skidmore* deference was afforded, courts agreed with the agency in seventy-five percent of the cases,<sup>173</sup> as opposed to finding such agreement in (at most) thirty-one percent of the early post-*Mead* cases.

Recent cases from the courts of appeals confirm that although more decisions continue to be decided against agencies than for them when *Skidmore* applies, the trend is not as pronounced as in Womack’s initial analysis. Of the federal appeals court cases citing *Skidmore* since Womack’s work, many did not provide anything beyond a passing reference to *Skidmore* and *Mead* (they engaged in the shortcutting described above), and accordingly their holdings did not turn on affording a particular level of deference<sup>174</sup> or even on whether any deference whatsoever was

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171. *Id.* at 860.

172. Eric 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, 327-28 (2002) (footnotes omitted).

173. *See id.* at 327.

174. *See, e.g.,* *Vigil v. Leavitt*, 381 F.3d 826, 835 (9th Cir. 2004) (“We need not resolve the question whether the [agency’s] interpretation of the Act . . . is entitled to *Chevron* deference, because the result in the present case would be the same under any standard of deference.”); *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 490 (3d Cir. 2003) (explaining that the court need not decide whether *Chevron* or *Skidmore* applies because “whichever standard of deference is accorded, we agree with the [agency]”); *id.* at 490 n.9 (indicating that judges on the panel disagreed as to whether *Chevron* or *Skidmore* applied). I also include in this group those cases in which the court refers to any level of *Skidmore* deference as being sufficient since these cases also indicate that the amount of deference is not determinative. *See, e.g.,* *Scafar Contracting, Inc. v. Sec’y of Labor*, 325 F.3d 422, 428 (3d Cir. 2003) (“We conclude that the [agency’s] position . . . provides a sound and consistent



afforded.<sup>175</sup> But where a court engaged in something more than a cursory analysis of the appropriate level of deference, sixty-one percent of the courts sided against the agency,<sup>176</sup> which meant that thirty-nine percent sided with the agency.<sup>177</sup>

Again, without commenting on the correctness of the court's decision, *Coke v. Long Island Care At Home, Ltd.*<sup>178</sup> provides a striking illustration of the skewing tendency. In that case, the Second Circuit's analysis under *Skidmore* rather than *Chevron* led the Second Circuit to refuse to defer to a regulation, even though other courts had deferred to the regulation previously under *Chevron*.<sup>179</sup> In sum, it appears that the skewing suggested by Womack continues, although it may not be as pronounced as in the early cases.

### III. WHAT WOULD JUSTICE STEVENS DO?: A PROPOSAL

As I have discussed above, this area of administrative law appears to be in a state of disarray. The students who must take administrative law and the litigators who must figure out how to advise their clients and argue their cases face significant challenges. There appears to be, as Justice Scalia predicted, more confusion and uncertainty than necessary. Drawing on the image I began with, this structure is in need of another strong pillar.

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approach for interpreting the [act], irrespective of whatever level of *Skidmore* deference may be appropriate.”).

175. See, e.g., *In re New Times Sec. Servs, Inc.*, 371 F.3d 68, 87 (2d Cir. 2004) (“[E]ven if we were not to adopt the [agency’s] interpretation as a matter of *Skidmore* deference, we would independently conclude that it is the proper interpretation of the statute.”); *Bullcreek v. Nuclear Regulatory Comm’n*, 359 F.3d 536, 541 (D.C. Cir. 2004) (“[T]he result is the same whether the court applies *de novo* review, deference under [*Skidmore*], or *Chevron* deference.”).

176. See *Orlando Food Corp. v. United States*, 423 F.3d 1318 (Fed. Cir. 2005); *Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246 (3d Cir. 2005); *Lin v. U.S. Dept. of Justice*, 416 F.3d 184 (2d Cir. 2005); *De La Mota v. U.S. Dept. of Educ.*, 412 F.3d 71 (2d Cir. 2005); *Warner-Lambert Co. v. United States*, 407 F.3d 1207 (Fed. Cir. 2005); *Coke v. Long Island Care At Home, Ltd.*, 376 F.3d 118 (2d Cir. 2004); *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004); *Structural Indus., Inc. v. United States*, 356 F.3d 1366 (Fed. Cir. 2004); *Malacara v. Garber*, 353 F.3d 393 (5th Cir. 2003); *Butterbaugh v. Dep’t of Justice*, 336 F.3d 1332 (Fed. Cir. 2003); *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103 (3d Cir. 2003); *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489 (5th Cir. 2003); *Tax & Accounting Software Corp. v. United States*, 301 F.3d 1254 (10th Cir. 2002); *Mead Corp. v. United States*, 283 F.3d 1342 (Fed. Cir. 2002).

177. See *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384 (3d Cir. 2005); *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352 (Fed. Cir. 2005); *Aeroquip-Vickers, Inc. v. C.I.R.*, 347 F.3d 173 (6th Cir. 2003); *Rubie’s Costume Co. v. United States*, 337 F.3d 1350 (Fed. Cir. 2003); *Cal. State Legislative Bd. v. Mineta*, 328 F.3d 605 (9th Cir. 2003); *Brown v. United States*, 327 F.3d 1198 (D.C. Cir. 2003); *Omohundro v. United States*, 300 F.3d 1065 (9th Cir. 2002); *Jewelpak Corp. v. United States*, 297 F.3d 1326 (Fed. Cir. 2002); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002).

178. 376 F.3d 118 (2d Cir. 2004).

179. *Id.* at 135.

Although Justice Stevens has never shied away from writing separately, he has not authored any of the majority opinions in this area and thus has never crafted the test. And this has been, in my view, our loss. I think we are in need of Justice Stevens's pragmatic and steady hand. So I have imagined, based largely on his clear and sensible *Chevron* test as well as his other separate opinions, how Justice Stevens might better articulate—and refine in the process—the *Mead* test were he to write the next majority opinion on the issue. I have done so in seven steps—which is admittedly not as catchy as the *Chevron* two-step<sup>180</sup>—but, I hope, has retained the same feel as the original approach since it employs the Justice's language.

Before turning to the test that I have imagined Justice Stevens crafting, let me briefly address why I have not suggested changing some portions of the test as they exist today. First and foremost, I should note that I attempted to avoid dramatically changing the *Mead* test because Justice Stevens joined the Court's *Mead* opinion. In other words, because he has already indicated his support for that general approach, I think it unlikely that he would change directions altogether. Instead, I imagine that he would be more receptive to sensible, smaller modifications to the test that are in the same vein as the original decision. I have therefore attempted to limit the revised test to those circumstances.

But this does not entirely account for why I have not suggested sweeping changes. I have selected a more modest approach largely because I agree in the main with much of the *Mead* opinion, assuming that my reading of Justice Souter's opinion is correct. In addition, many of the proposals to modify *Mead* seem to be more unwieldy and unsound than *Mead* and thus would not be an improvement over what is currently in place. Indeed, in most instances, the biggest problem with *Mead* is discerning *what* is required rather than disputing the merits of those requirements.

Let me comment, however, on some of the alternative proposals. I will begin with proposals to create a different test to determine when *Chevron* applies.<sup>181</sup>

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180. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2702 (2005).

181. There are also those who have suggested that the Court "has lost its way on the deference issue, and needs to rethink this area of the law," from its inconsistent applications of *Chevron* to its decision in *Mead*. See, e.g., Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 Admin. L. Rev. 173, 175 (2002) [hereinafter Weaver, *The Emperor*]. Although he seems to like the idea of abandoning *Chevron* and *Mead* and starting over altogether, Professor Weaver nonetheless suggests that "one might . . . argue that dual approaches [found in *Chevron* and *Mead*] produce an important benefit because they establish 'mood points' which give courts an attitudinal perspective on their work." *Id.* at 179. But he notes that even if the Court wanted to employ his "mood point" suggestion, it would have to design a system in which courts still retained their "constitutionally required . . . 'checking role' designed to prevent administrative abuse." *Id.* at 180. Professor Weaver did not propose such a system in his 2002 piece, see *id.* at 181, but in a later article he argued for an amendment to the Administrative Procedure Act ("APA") that would apply a single level of deference to all administrative interpretations but would retain a "checking" function for the courts. See Russell L. Weaver, *An APA Provision on Nonlegislative Rules?*, 56 Admin. L. Rev. 1179

One such proposal offered by Professors David Barron and Elena Kagan would afford *Chevron* deference where “the official Congress named in the relevant delegation . . . personally assumed responsibility for the decision prior to issuance.”<sup>182</sup> Professor Vermeule criticizes this proposal on several grounds<sup>183</sup> but his most important critique appears to be that it creates an incentive for lower agency officials to make decisions that an agency head then “rubberstamp[s]”<sup>184</sup> in order to get *Chevron* deference, that is, circumventing the requirement of personal responsibility for the larger benefit afforded by triggering *Chevron* deference.<sup>185</sup> Professors Barron and Kagan claim that political and institutional pressure will be sufficient to deter an agency head from this sort of circumvention.<sup>186</sup> But, as Professor Vermeule points out,

[t]he authors have avoided the enforceability problem only by undermining the significance of their own proposal. If . . . 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.<sup>187</sup>

In other words, one suspects that even though there are significant institutional and political pressures on an agency head, *Chevron* deference may be enticing enough to elicit bad behavior.

Expecting this criticism, Professors Barron and Kagan argue that even if they have underestimated “cheating” of the sort described above, there is a relatively simple solution to this new problem: They would permit courts to “preclud[e] *Chevron* deference on a finding that a delegatee consistently has approved low-level decisions without providing for their review.”<sup>188</sup> But this review is limited to those circumstances in which there has been “wholesale evasion”<sup>189</sup> and would require courts to decline “to explore the review that a delegatee has accorded to any particular interpretive decision.”<sup>190</sup>

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(2004) [hereinafter Weaver, *An APA Provision*]. Although it appears unnecessary to amend the APA to accomplish Professor Weaver’s goals—that is, the Court could overturn its prior precedent and simply adopt Professor Weaver’s new test—it is likely that Professor Weaver has suggested an amendment because of the difficulty in convincing the Court to entirely uproot and start over in this area. I therefore consider this proposal, like others seeking to entirely rewrite this area of law, better suited for Congress to take up and thus beyond the scope of this Article.

182. David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 235 (2001).

183. See Vermeule, *supra* note 124, at 359-60.

184. Barron & Kagan, *supra* note 182, at 253.

185. See Vermeule, *supra* note 124, at 360.

186. See Barron & Kagan, *supra* note 182, at 253-55.

187. Vermeule, *supra* note 124, at 360.

188. Barron & Kagan, *supra* note 182, at 255.

189. *Id.* at 256.

190. *Id.*

While it is true that this solution would not require much in terms of a court's resources<sup>191</sup>—because it sets the bar very high, one imagines a court will only be called to investigate the most obvious of cases—it also suffers from its simplicity. That is, it would require an agency head to act with only a bit of savvy to create what appears to be more review in order to avoid a finding of misbehavior under the test suggested by Professors Barron and Kagan. For example, they suggest that one way to demonstrate that an agency head is acting inappropriately under their test is to provide “evidence that a statutory delegatee had signed hundreds of opinion letters on many matters within a short period of time.”<sup>192</sup> But this is quite easy to overcome: An agency head could spend no more time on each letter but simply sign only a certain number each day. In short, because there does not appear to be an adequate and easily enforceable means of restraining the circumvention that would likely result from this proposal, it appears unwise to adopt it.

Justice Scalia's proposed test for determining whether an agency's position is “authoritative” and thus should be afforded *Chevron* deference includes considerations that are similar to those proposed by Professors Barron and Kagan, such as whether an agency decision has been endorsed at the highest levels.<sup>193</sup> It therefore appears to suffer from the same flaw as the Barron and Kagan test, that is, it could be easily manipulated by an agency head to suit her purposes. This is perhaps more so with Justice Scalia's test since he would allow confirmation from the agency during litigation—after the dispute has arisen when there are undoubtedly advantages to the agency if it is afforded *Chevron* deference—that the determination reflects the agency's authoritative view.<sup>194</sup>

Another popular proposal is to afford *Chevron* deference when the agency determination is the result of a required APA process such as notice-and-comment rulemaking or formal adjudication.<sup>195</sup> This proposal has all the benefits of a rule.<sup>196</sup> It is easy to apply and leaves little room for discretion. But it would leave out a whole category of agency determinations that Congress intended would have binding effect even though it did not require any APA process.<sup>197</sup> And while they may disagree as to where the line should be drawn when it comes to what decisions

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191. *See id.*

192. *Id.* at 256 n.186.

193. *See United States v. Mead Corp.*, 533 U.S. 218, 258 & n.6, 259 (2001) (Scalia, J., dissenting).

194. *See id.*

195. *See Vermeule*, *supra* note 124, at 360 (citing 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)).

196. Merrill, *supra* note 70, at 819-20.

197. *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)).

should be afforded *Chevron* deference, more than a majority of the Court is unwilling to leave out this category entirely.<sup>198</sup>

A similar proposal has been offered by Professor Ronald Krotoszynski, Jr., who has cogently argued that “[w]hether *Chevron* deference applies in a given case should not turn on the legal fiction of an implied delegation of lawmaking power but rather on whether the materials at issue reflect and incorporate agency expertise.”<sup>199</sup> As such, in his view,

[i]f an administrative agency resolves a statutory ambiguity, whether through an adjudication, a rulemaking, or a policy statement, the relevant question to be asked and answered is whether the agency possesses relevant expertise over the subject matter and whether, on the record, the agency actually brought that expertise to bear in creating the work product in question.<sup>200</sup>

While this test certainly has its benefits, it appears at bottom to collapse into the same test offered by those who would afford deference based solely on the process involved in the agency’s determination. That is, Professor Krotoszynski argues that “an agency’s decision should receive a level of judicial deference that is more or less proportionate to the degree of confidence that the reviewing court has in the procedure associated with the agency reaching its decision.”<sup>201</sup> As an example of the higher end of this deference, he suggests that “[w]hen an agency relies upon a procedure that is virtually certain to result in a sound decision (e.g., formal rulemaking or adjudication), a court should invalidate the agency action only when it is demonstrably inconsistent with the expressly declared intent of Congress.”<sup>202</sup> On the other hand, “[w]hen an agency does not utilize procedures likely to ensure a rational decision, a reviewing court must take a closer look at the agency’s decision and the reasons that support it.”<sup>203</sup> Like the example above, however, while Krotoszynski’s test might be easier to apply (and perhaps offer a bit more nuance than just relying on process as the measure), it would not appear to allow for affording greater deference in those instances in which APA process is not required even if Congress intended the agency action to be binding. As discussed above,

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198. *See id.*; *id.* at 257 (Scalia, J., dissenting). Although two new Justices recently joined the Court, a shift in the majority view on this issue is unlikely even if these two new members disagree with the rest of the Court.

199. Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 *Admin. L. Rev.* 735, 737 (2002).

200. *Id.* at 738; *cf.* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612, 681 (1996) (arguing that “the Court should modify *Seminole Rock* by embracing the approach of *Skidmore v. Swift & Co.*, which adopts a standard of review that accounts for agency expertise and experience when Congress has not delegated interpretive lawmaking authority under statutes” (footnote omitted)).

201. Krotoszynski, *supra* note 199, at 754.

202. *Id.*

203. *Id.*

this is a proposition that, to this point, no Justice has been willing to accept.<sup>204</sup>

Professors Merrill and Watts have advocated adopting a test under which an agency's determination will be afforded *Chevron* deference if "Congress has included a provision in the statute that prescribes sanctions or other legal consequences for violations of agency action."<sup>205</sup> Although this suggestion is adopted in part below, the under-inclusiveness<sup>206</sup> of their test is troubling, making it an unlikely candidate for wholesale adoption. In particular, the Merrill and Watts test prevents National Labor Relations Board ("NLRB") rules and orders and certain Food and Drug Administration ("FDA") rules from being afforded *Chevron* deference because their organic statutes do not contain a sanctions provision,<sup>207</sup> despite the formality of the process those agencies are required to undertake<sup>208</sup> as well as the intended precedential and binding nature of the agency action.<sup>209</sup> This can be remedied, however, by not limiting the test to Merrill and Watts's single requirement but instead incorporating this requirement as one element in the analysis of what agency decisions have the force of law, as I do below.<sup>210</sup>

With respect to the question of what deference ought to be afforded when *Skidmore* applies, I begin with Justice Scalia's argument that it ought to be

204. See *supra* note 198.

205. Merrill, *supra* note 70, at 828; see also Merrill & Watts, *supra* note 68, at 582-83.

206. See Merrill, *supra* note 70, at 831.

207. See *id.* at 831-32; cf. Merrill & Watts, *supra* note 68, at 557-70 (discussing the history of these two agencies and the powers delegated to them under their organic statutes).

208. See Merrill & Watts, *supra* note 68, at 569-70 (discussing *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 609-10 (1991), which approved the National Labor Relations Board's use of notice-and-comment rulemaking); *id.* at 559 (explaining how the Court assumed in *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973), that the Food and Drug Administration ("FDA") has power to issue rules through notice-and-comment rulemaking under the general rulemaking grant in the organic statute); *id.* at 563-64 (discussing *National Ass'n of Pharmaceutical Manufacturers v. FDA*, 637 F.2d 877, 878 (2d Cir. 1981), which involved FDA rules that had gone through the "notice-and-comment procedures contemplated by 5 U.S.C. § 553").

209. See, e.g., *Collective-Bargaining Units in the Health Care Industry*, 52 Fed. Reg. 25,142, 25,144-45 (July 2, 1987).

The Board is of the opinion that rulemaking, though perhaps time consuming at the outset, will be a valuable long-term investment, paying dividends in the form of predictability, efficiency, and more enlightened determinations as to viable appropriate units, leading ultimately to better judicial and public acceptance . . . [as well as the] advantage of settling, finally, the difficult question of appropriate bargaining units in the health care industry.

*Id.* In *Pharmaceutical Manufacturers*, the court quoted the proposed FDA rule as providing that

[t]he Commissioner intends for [the] regulations to become binding specific requirements that must be complied with; failure to do so shall render a drug product adulterated under section 501(a)(2)(B) of the (Act) . . . . Binding regulations will . . . serve to inform courts of FDA's expert judgments regarding current good manufacturing practice for drugs in the United States; this will expedite and assist enforcement proceedings to assure compliance with section 501(a)(2)(B) of the act.

637 F.2d at 878.

210. See *infra* pp. 1908-09 (Step 3).

*Chevron* deference or no deference.<sup>211</sup> This argument appears to turn on a point I readily concede: It is often difficult to differentiate between multiple layers or tiers of deference.<sup>212</sup> In fact, the more levels of deference that are added, the harder it is to tell the difference between them, which results in judges performing a time-consuming and nearly impossible task that likely makes little difference in the outcome.<sup>213</sup>

I do not agree, however, that there can be nothing between *Chevron* deference and no deference. That is, I think there can be an intermediate level of deference between those two points and, more importantly, that judges can meaningfully differentiate between them. Accordingly, my suggestion is to eliminate the sliding scale of *Skidmore* deference because it is difficult for courts to distinguish between these too-many-possible levels of deference.<sup>214</sup> I then suggest replacing the sliding scale with an intermediate, thumb-on-the-scale type of deference that affords the agency's determination less than *Chevron* deference but more than no respect whatsoever.<sup>215</sup>

With these caveats, I turn to the new seven-step test. I note that, in the vein of the original two-step test of *Chevron*, it is not necessary to work through all of the steps of the new test when analyzing a particular agency

211. See *United States v. Mead Corp.*, 533 U.S. 218, 256 (2001) (Scalia, J., dissenting).

212. See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 Cal. L. Rev. 1457, 1502 (2003) ("The precise degree of deference commanded by the different standards is somewhat ambiguous and certainly not quantifiable."); Weaver, *An APA Provision*, *supra* note 181, at 1186 ("Quite frankly, I do not see a meaningful difference between *Chevron* deference and *Skidmore* deference. The reality is that courts do not strictly adhere to any deference standard."); Weaver, *The Emperor*, *supra* note 181, at 175 ("First, dual deference standards are unrealistic. Deference standards are not precise instruments that are rigorously applied by the courts. . . . [I]t is doubtful whether courts actually apply dual standards, and whether it is useful to articulate them."); cf. *Dickinson v. Zurko*, 527 U.S. 150, 162-63 (1999) (describing the difference between the "substantial evidence" standard of review and the "clearly erroneous" standard as "a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard"); Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 Admin. L. Rev. 771, 782-83 (2004) ("There is ample room for debate about whether judicial efforts to calibrate *Skidmore* deference, by resort to individualized 'deference factors,' tend to add helpful data to the dialogue, or, instead, to clutter it with makeweight arguments.").

213. See Vermeule, *supra* note 124, at 357 (offering the critique that "adding an extra tier of deference is, in a pragmatic sense, simply not feasible, given the cognitive constraints under which real-world adjudication occurs. Judges can operate in a mode of deference, and in a mode of independent decision-making, but more refined, intermediate modes are either psychologically unattainable or nonexistent."); cf. *Zurko*, 527 U.S. at 162-63; Vermeule, *supra* note 124, at 357 (quoting Judge Posner as stating that "[judicial] endorsement of multiple standards of review . . . greatly exaggerates the utility of verbal differentiation" in *United States v. McKinney*, 919 F.2d 405, 423 (7th Cir. 1990) (Posner, J., concurring)). A related issue is the "judicial tendency to transmogrify the rhetoric of review standards," regardless of what standards are involved. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1394 (1995). Although a detailed examination of this issue is beyond the scope of this Article, Judge Wald's argument on this front lends support for crafting deference standards that are clear and fixed.

214. See *supra* text after note 162.

215. See *infra* pp. 1911-12 (Step 7).

determination. Indeed, one might describe the new seven-step approach as a “clear intent” stairway that then splits into two “deference corridors.”<sup>216</sup> If the intent of Congress is clear, one may stop on the landing of the stairway; she need not head down either of the deference corridors. If the intent is not clear, however, one needs to head down the proper deference corridor and then determine if that level of deference is appropriate in the circumstances. So let’s begin the journey:

1. *“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.”*<sup>217</sup> *There is no question of deference where we can, “employing traditional tools of statutory construction,”*<sup>218</sup> *discern Congress’s intent.*

This is *Chevron’s* step one; it is the beginning point for every analysis of statutory interpretation involving an agency regardless of the type of agency action that is taken when interpreting the statute.

2. *If, on the other hand, the “statute is silent or ambiguous with respect to the specific issue,”*<sup>219</sup> *we must determine if the agency has provided a construction of the statute in question. Before an agency’s answer is given any weight whatsoever, it must be clear that the agency is construing a statute that it has the authority to administer.*

This step contains the first part of *Chevron’s* second step, which asks, once it is determined that a statute is ambiguous, whether the agency has construed the statute. Also at this step, it is important to be sure that the agency is construing a “statute which it administers.”<sup>220</sup> For example, it does not make sense to defer to an agency interpretation of the National Environmental Policy Act<sup>221</sup> unless the agency construing the statute is the Council on Environmental Quality, the agency charged with administering that Act.<sup>222</sup>

216. One of my colleagues has suggested that I call this new approach the “Stairway to Hell,” drawing on the famous Led Zeppelin song *Stairway to Heaven*. Although this might reflect how some, including Justice Scalia, might feel about the exercise, I will continue to call it a seven-step test.

217. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

218. *Id.* at 843 n.9.

219. *Id.* at 843.

220. *Id.* at 842.

221. 42 U.S.C. §§ 4321-4370e (2000).

222. See Kenneth A. Manaster, *Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation*, 74 *Fordham L. Rev.* 1963, 2008 n.207 (2006) (citing *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), in which the Court afforded the Council on Environmental Quality substantial deference with respect to interpretations of the National Environmental Policy Act (“NEPA”)); *cf.* *City of N.Y. v. Minetta*, 262 F.3d 169, 177 (2d Cir. 2001).

Although the Secretary [of Transportation] is not charged with administering NEPA, his conclusion that an [environmental impact statement] was not required was based not on his interpretation of NEPA but, rather, on his construction of [a different law], which he is charged with administering. We must, therefore, if necessary, apply *Chevron* deference to his decision.



In this vein, one might also ask whether there are any circumstances under which an agency's construction of a statute that it administers would not be afforded any deference because of something unique about the issue raised. For example, if the issue involves the reach of the agency's jurisdiction,<sup>223</sup> if the question is whether a statutory deadline applies to an agency,<sup>224</sup> or if the agency has a pecuniary stake in the matter,<sup>225</sup> it could be argued that the agency's interpretation should not be given any weight or deference because the agency is self-interested in the question posed. Although a few Justices have sided with these concerns,<sup>226</sup> there has never been a majority opinion embracing such a limit.

One novel way of dealing with these issues can be found in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*,<sup>227</sup> in which the Court concluded at step one of *Chevron* that Congress did not intend for the FDA to regulate tobacco products under its organic statute, the Food, Drug, and Cosmetics Act.<sup>228</sup> One reading of the Court's opinion is that

whether an agency is entitled to *Chevron* deference turns ultimately on congressional intent. With respect to "ordinary" gaps in a statutory scheme, *Chevron* represents a presumption that Congress intends the agency to be primary interpreter. It does not follow, however, that Congress harbors the same intent with respect to "extraordinary" gaps that implicate the scope of an agency's authority. . . . [E]xtraordinary questions are those as to which one can say, based on the totality of the statutory circumstances, that Congress clearly would not want the courts to give mandatory deference to agency interpretations of law.<sup>229</sup>

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*Id.* The Supreme Court has also refused to afford deference to an agency's interpretation of the APA because it "is not a statute that the [agency] is charged with administering." *Metro Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997).

223. See *Merrill & Hickman*, *supra* note 161, at 909-14; see also *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 386-87 (1988) (Brennan, J., dissenting, joined by Marshall, J., and Blackmun, J.) (concluding that *Chevron* deference was inappropriate because "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies"); Stephen G. Breyer et al., *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 319 (2002) (citing the lower court division on this issue).

224. Breyer et al., *supra* note 223, at 319.

225. *Cf. Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 604-05 (1st Cir. 1991) (Breyer, J.) (concluding that deference to the agency's interpretation of an agreement provision was inappropriate because, among other things, the agency stood to benefit financially if the fee provision was interpreted in its favor).

226. See *supra* notes 223 and 225, although it should be noted that Justice Breyer has not repeated his concern motivating *Meadow Green-Wildcat* as a Justice.

227. 529 U.S. 120 (2000).

228. 21 U.S.C. §§ 301-399 (2000).

229. *Merrill & Hickman*, *supra* note 161, at 912-13; see also *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." (citation omitted)).

That is, instead of specifically concluding that there is ambiguity in the statute, the Court concludes that this is not the sort of provision Congress intended the agency to interpret and will therefore interpret the statute using the normal tools of statutory construction. Although one solution “would be to ask at ‘step zero’ whether Congress would want the particular question about the scope of agency authority to be resolved as a matter of mandatory deference (*Chevron*) or common-law deference (*Skidmore*),”<sup>230</sup> it appears to be more consistent with the Court’s current approach to place the inquiry at this juncture. Moreover, one need not worry about determining the “extraordinariness” of the statutory question posed if the statute is found at step one to be unambiguous. Accordingly, it would be appropriate to defer this question until this point in the analysis, when one is certain that it needs to be resolved.

3. *If the agency’s determination is the result of a required APA process, the agency’s answer will be evaluated under the Chevron deference standard so long as Congress has not clearly indicated that the agency is acting without the force of law. Congress will be considered to have “clearly indicated that the agency is acting without the force of law” if Congress provides that the agency “does not act with the force of law” when making its determination. It will also be sufficient to demonstrate that it does not intend an agency to act with the force of law if (1) Congress indicates that the agency’s determination is neither binding nor precedential and (2) Congress fails to provide in the statute “that persons who violate an agency’s rules or orders will be subject to the imposition of sanctions, disabilities, or other adverse consequences.”*<sup>231</sup>

This prong is like *Mead* in that it establishes a presumption of *Chevron* deference when an APA process is required by the statute and followed by the agency in reaching its decision.<sup>232</sup> It then allows for Congress to decide that required APA process is not enough by indicating explicitly that the agency’s determination still “lacks the force of law.” Congress may also indicate that the agency’s determination lacks the force of law implicitly by establishing a statutory scheme (1) that fails to give this type of agency determination binding and precedential effect with respect to other cases (the two factors other than formality of procedures found in *Mead*), and (2) that, drawing on the work of Professors Merrill and Watts,<sup>233</sup> provides no penalty for violating the agency’s determination.

As mentioned before, including agency determinations that the agency intends to be binding and precedential in the category of agency actions that have the force of law resolves the under-inclusiveness of the Merrill and

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230. *Id.* at 912.

231. Merrill, *supra* note 70, at 828.

232. *See* *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“[A] very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the process of rulemaking or adjudications that produces regulations or rulings for which deference is claimed.”).

233. *See* Merrill, *supra* note 70, at 828-33.

Watts test.<sup>234</sup> Under the Merrill and Watts test, both the NLRB and the FDA are agencies that are without the ability to act with the force of law in certain circumstances because their statutes “include no provision for sanctions or other adverse consequences for . . . violations.”<sup>235</sup> Professor Merrill suggests solving this, if it needs solving, through congressional action.<sup>236</sup> Under my proposal, however, both agencies would be considered to act with the force of law without congressional action if the rules or orders are adopted using the required APA process (typically notice-and-comment rulemaking or formal adjudication) and are intended to be given binding and precedential effect.<sup>237</sup> This means that these actions will be assessed under the *Chevron* deference standard, which is more consistent with past opinions in these areas.

4. *If the agency’s determination is not the result of APA-required process, the agency’s determination will be evaluated under the Skidmore deference unless it can be shown that Congress intended that the agency’s determination would have the force of law. Congress can demonstrate this by explicitly indicating that the determination “has the force of law,” or by indicating that this type of determination has binding, precedential effect and that all similar cases like the one before the agency will be treated alike, or by indicating that a violation of the agency’s determination will subject the violator to sanctions, disabilities, or other adverse consequences.*

Like step three, this step creates a presumption when an APA process is not required that *Skidmore* deference is appropriate. I retain *Skidmore* deference (which we will soon see that I have simplified) for this category of agency determinations, because regulated parties have an interest in some stability as to what to expect from regulators.

Additionally, there are three options available to Congress to indicate that it intends for a determination that is not required to go through an APA process to nevertheless have the force of law. These are the same as those included in the prior step and they are included here for the same reasons they were included above.

5. *When the Chevron deference standard applies, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute,”<sup>238</sup> not whether it is the interpretation that the court would have arrived at or would have preferred. If the agency’s answer is reasonable, it shall be upheld.*

This is *Chevron*’s original second step and is not intended to alter Justice Stevens’s original formulation.

6. *When the Skidmore deference standard applies, the court will evaluate “the thoroughness evident in [the agency’s] consideration, the*

234. See *id.* at 831-32; see also *supra* notes 206-09 and accompanying text.

235. Merrill, *supra* note 70, at 831.

236. See *id.* at 832.

237. See *supra* notes 208-09 and accompanying text.

238. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

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.”<sup>239</sup> When evaluating these factors, the court should consider them in terms of (1) whether the agency determination “reflect[s] and incorporate[s] agency expertise”<sup>240</sup> and (2) whether the decision is one that we can have confidence in to endure.

To the familiar *Skidmore* factors, I add that the analysis of these factors should be guided by two background inquiries: whether the agency has specific expertise on an issue and whether its decision reflects that expertise, and whether the process involved in making the decision ensures that the agency’s decision will endure. I will begin with agency expertise.

As I explained before, although I think it is unlikely that the Court will adopt Professor Krotoszynski’s test for when to afford *Chevron* deference, his arguments regarding agency expertise are particularly persuasive when incorporated into the *Skidmore* determination as to whether to afford an agency deference under that standard. Indeed, *Skidmore* itself refers to the “more specialized experience and broader investigations and information”<sup>241</sup> of an agency, thus recognizing that agency expertise was an important part of the Court’s calculation in that case. Likewise, in *Mead* the Court referred to the fact that the Customs Service “can bring the benefit of specialized experience to bear” on the question when suggesting that *Skidmore* deference might be appropriate in that case.<sup>242</sup> Accordingly, when considering the *Skidmore* factors—particularly when it comes to evaluating the validity of the agency’s reasoning as well as those other factors with the power to persuade—courts should focus on the agency’s expertise and whether the agency’s decision in fact reflects that expertise.

This, however, cannot be the only consideration because an agency might act based on its expertise but nevertheless fail to be consistent and/or thorough in its decision. It is therefore important to determine if the agency intended its decision to last for some time rather than as a temporary response to a particular situation, such as a calculation on the back of an envelope. In order to gauge the sticking or staying power of an agency determination, I suggest that courts consider the process, or lack thereof, engaged in by the agency to reach a decision when analyzing the *Skidmore* factors.

In one sense, process is an obvious way to think about the *Skidmore* factors since two of them—the thoroughness of the agency’s consideration<sup>243</sup> and the consistency with earlier and later

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239. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

240. Krotoszynski, *supra* note 199, at 737.

241. *Skidmore*, 323 U.S. at 139.

242. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

243. Professor Weaver has forcefully argued against the consistency requirement and would rely on retroactivity to curb any harsh effects from agency changes in position. See Weaver, *An APA Provision*, *supra* note 181, at 1191-93. While this is an interesting potential revision to the current test, because my revised standard of deference does not slide and thus this factor could not, standing alone, result in lesser deference, I think it remains a

pronouncements—are themselves process considerations. That is, consistency speaks not to the substance of the determination but rather it requires us to examine whether like cases are treated alike. Likewise, while thoroughness could no doubt include some substantive issues, it also includes an examination of factors such as how many parties participated in the decision-making process (single staff member decision versus many levels of review in the agency, including the agency head),<sup>244</sup> how many issues were raised and addressed,<sup>245</sup> and, perhaps most fundamentally, how much time and effort was spent in reaching the decision.<sup>246</sup>

This does not mean that process is a determinative factor in the *Skidmore* deference analysis, just as process is not determinative in the analysis of whether to apply *Chevron* or *Skidmore*. But it also does not mean that process should have no impact on the analysis. Indeed, the process by which an agency decision is made can provide valuable insight as to the sticking power of the decision, an important consideration when analyzing the *Skidmore* factors.<sup>247</sup>

7. *If the court concludes after its analysis of the Skidmore factors that the agency's determination warrants deference, the agency's determination should merit the court's respect.*<sup>248</sup> *That is, the agency's determination should be afforded a set or defined amount of deference that amounts to some weight but that can be overcome by other factors. This is not the same as the Chevron standard, which requires the court to defer so long as the agency's interpretation is reasonable. Instead, the court may, after according the agency's determination its respect, decide against the agency even if the agency's position is reasonable because the factors arguing against it are significant and outweigh the agency's position.*

In order to reduce confusion and uncertainty, this final step opts for a defined amount of deference—the agency's position merits respect—when it is shown, based on an analysis of the *Skidmore* factors, that the agency's position has the court's confidence. This new deference is not weighted in favor of the agency as heavily as *Chevron* deference, but it nevertheless

proper consideration in the analysis. Indeed, I could see in the scenario Professor Weaver imagines that if an agency provides a reasoned explanation for the change in position, the lack of consistency might well be “trumped” by the persuasiveness of the agency's current position as well as the reasoning employed by the agency that inspired the change.

244. *See, e.g., De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 80 (2d Cir. 2005) (“Thorough consideration requires a macro perspective that a staff member, acting alone, lacks.”).

245. *See, e.g., Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1356 (Fed. Cir. 2003) (concluding that there was thorough consideration under *Skidmore* where, among other things, the agency considered “767 comments [that] were received in response to the notice”).

246. *See, e.g., id.* (noting that notice-and-comment procedures were employed and that denial was not issued until after comments were received).

247. *Cf. Krotoszynski, supra* note 199, at 754 (“[A]n agency's decision should receive a level of judicial deference that is more or less proportionate to the degree of confidence that the reviewing court has in the procedure associated with the agency reaching its decision.”).

248. *See Christensen v. Harris County*, 529 U.S. 576, 595 (2000) (Stevens, J., dissenting).

gives the agency's interpretation some influence in the analysis. In simplest terms, it is a thumb on the scale for the agency but it does not go so far as to amount to a presumption in the agency's favor.

This more defined standard of deference should not only reduce confusion and pre-decision costs, it should also create a more predictable and thus more "correct" sort of skewing against the agency.<sup>249</sup> That is, even if this new deference standard results in less agreement with the agency when compared to instances in which a court affords *Chevron* deference (because in fact it is a lesser amount of deference that is afforded under this new *Skidmore* deference), that result will be intended by the Court, not just an inadvertent consequence of applying *Skidmore* deference as appears to be the case now.

#### CONCLUSION

While I have tried to imagine the sensible approach Justice Stevens might adopt with my seven-step test, I suspect that, if given the opportunity, the Justice would provide us with a better test than anything I am able to conjure up. And he would do so, no doubt, in much less time and far more eloquently. I simply hope this effort might provide a useful place to start.

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249. See *supra* notes 172-77 and accompanying text.