DAVID J. BARRON AND ELENA KAGAN

CHEVRON'S NONDELEGATION DOCTRINE

American public law today recognizes only one nondelegation doctrine, and even that one almost always in the breach. This nondelegation doctrine, of course, refers to Congress's ability to hand over to a given agency official the authority to make policy decisions. But beyond the transfer of power from Congress to an agency official lies the potential for still a further delegation, this time from the official whom Congress has specified to her bureaucratic underlings. And because this is so, beyond the congressional nondelegation doctrine lies the potential for another, concerning the agency official's ability to subdelegate her decision-making authority to others.

In this article we contend that such an internal agency nondelegation doctrine should determine the rigor of judicial review of an agency's interpretive decisions—or, otherwise stated, should define the sphere in which courts defer to these decisions under *Chevron U.S.A., Inc. v Natural Resource Defense Council, Inc.*[1] The idea here is not to prohibit congressional delegatees from giving authority to lower-level agency officials to fill in gaps and resolve ambiguities in legislation. Such a bar would be, if not impossible, at the least unwelcome. The idea, instead, is to distinguish among

---

David J. Barron is Assistant Professor, Harvard Law School. Elena Kagan is Professor, Harvard Law School.

AUTHORS' NOTE: We thank Dick Fallon, Jerry Frug, Martha Minow, John Manning, Dan Meltzer, Todd Rakoff, Chris Schroeder, and Bill Stuntz for very helpful comments and Michelle Glassman for excellent research assistance. The Harvard Law School Summer Research Fund supported work on this article.

[1] 467 US 837 (1984).

0-226-36250-7/2002/2001-0003$10.00

exercises of this authority based on the identity of the final agency decision maker and then to reward, through more deferential judicial review, interpretations offered by more responsible officials. This approach would make the institutional choice reflected in the *Chevron* doctrine—the choice, that is, between agencies and courts in ultimately resolving statutory ambiguities—dependent on a matter of prior institutional design that courts today fail to consider: the decision of the agency as to whether, within the agency's four walls, the congressional delegatee or, alternatively, a lower-level official is to exercise interpretive authority.

Our reflections on this score arise from *United States v Mead Corp.*,[2] the latest and most important in a line of cases in which the Supreme Court has attempted to demarcate the scope of the *Chevron* doctrine, or what one recent article has termed "*Chevron*'s domain."[3] The question in *Mead* was whether the *Chevron* deference rule applied to a tariff classification ruling of the U.S. Customs Service. The Court held that the tariff ruling fell outside the scope of *Chevron* and so could not claim its strong brand of deference. The eight-member majority first framed the issue as an inquiry into whether Congress, in enacting the statute at issue, had intended for the courts to defer to this kind of interpretive decision. The majority then reasoned that the lack of formal procedures preceding the decision, as well as its highly particularistic nature, indicated to the contrary. Surveying the landscape after *Mead*, Justice Scalia in lone dissent charged that an "avulsive change in judicial review of federal administrative action" had taken place.[4] No longer was an agency's interpretation of its own organic statute—regardless of the interpretive decision's pedigree, form, or character—presumptively entitled to *Chevron* deference.

The issue addressed in *Mead* assumes its consequence from the heavy reliance of agencies today on relatively informal, "nonrulelike," or decentralized forms of administrative action. *Chevron* arose from a major rule, which the administrator of the EPA issued in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA).[5] But many—indeed, the vast

---

[2] 121 S Ct 2164 (2001).

[3] Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 Georgetown L J 833 (2001).

[4] 121 S Ct at 2177 (Scalia dissenting).

[5] 5 USC §§ 551–59, 701–06 (1994 & Supp IV 1998).

majority of—agency decisions have nothing like this aspect. They may emerge, like the tariff ruling of *Mead*, from processes considerably more streamlined than those detailed in the APA. They may apply, like the tariff ruling, in this case and this case only, rather than as a general prescription. And they may proceed, as in *Mead*, not from the central hierarchy of the agency but from branch offices or limited subject matter divisions. Assuming *Chevron* to have even a fraction of the significance that the countless judicial decisions and law review articles on the case would indicate, the question whether or which of these various administrative actions merit *Chevron* deference thus becomes of critical importance to the operation of the administrative state.

We first argue in this article that an inquiry into actual congressional intent, of the kind the *Mead* Court advocated, cannot realistically solve this question. Although Congress has broad power to decide what kind of judicial review should apply to what kind of administrative decision, Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases. (The statute at issue in *Mead* complicates but also underlines our basic point; although the statute contains unusual indicia of legislative intent, these point in the exact opposite direction from the one the Court took, thus demonstrating the hazards of the Court's approach.) Given the difficulty of determining actual congressional intent, some version of constructive—or perhaps more frankly said, fictional—intent must operate in judicial efforts to delineate the scope of *Chevron*. After considering other alternatives, we aver that this construction should arise from and reflect candid policy judgments, of the kind evident in *Chevron* itself, about the allocation of interpretive authority between administrators and judges with respect to various kinds of agency action.

Underneath the rhetoric of legislative intent, an approach of this kind in fact animates the *Mead* decision, but the Court's reliance on the two stock dichotomies of administrative process failed to generate the most appropriate distribution of interpretive power. The Court emphasized most heavily the divide between formal and informal procedures, suggesting that, except in unusual circumstances, only decisions taken in formal procedural contexts merit *Chevron* deference. But this preference for formality in ad-

ministration, even in cases when not statutorily required, fails to acknowledge the costs associated with the procedures specified in the APA, which only have increased in significance since that statute's enactment. The Court similarly noted at times the divide between generality and particularity in administrative decision making, suggesting that actions exhibiting the former trait should receive greater judicial deference. But administrative law doctrine long has resisted, for good reason, the temptation to pressure the choice between general and particular decision making, in light of the many and fluctuating considerations, usually best known to an agency itself, relevant to this choice. None of this is to say that interpretive authority in areas of statutory ambiguity or silence always should rest with agency officials; it is only to say that in allocating this power in a way consistent with important administrative values, courts can do better than to rely on the two usual (indeed, hoary) "either-ors" of agency process.

We contend that the deference question should turn on a different feature of agency process, traditionally ignored in administrative law doctrine and scholarship—that is, the position in the agency hierarchy of the person assuming responsibility for the administrative decision. More briefly said, the Court should refocus its inquiry from the "how" to the "who" of administrative decision making. If the congressional delegatee of the relevant statutory grant of authority takes personal responsibility for the decision, then the agency should command obeisance, within the broad bounds of reasonableness, in resolving statutory ambiguity; if she does not, then the judiciary should render the ultimate interpretive decision. This agency nondelegation principle serves values familiar from the congressional brand of the doctrine, as well as from *Chevron* itself: by offering an incentive to certain actors to take responsibility for interpretive choice, the principle advances both accountability and discipline in decision making. At the same time, the nondelegation principle, as applied in the administrative context to determine the appropriate deference regime, escapes the well-known difficulties of the congressional nondelegation doctrine: the administrative principle will neither lead to excessive centralization nor prove incapable of judicial enforcement. Critical to this analysis is a more general phenomenon often disregarded in discussions of administrative law, yet highly significant for the

creation of doctrine: the interplay of political with judicial constraints in shaping agency behavior.

The aspect of institutional design we emphasize here—call it the high level/low level distinction—justifies the result the Court reached in *Mead*, but only by fortuity. In other cases our approach would diverge significantly from the Court's—in granting deference even in the absence of formality or generality and, conversely, in refusing deference even in the face of these attributes. This approach also would diverge from Justice Scalia's, given the nearly unlimited deference he favors. But oddly enough, we see our approach as in some sense, even if in a sense unrecognized by the Justices themselves, present in all of their different views on the issue: because this is so, we see some potential for the Court to move toward, and even converge on, the *Chevron* nondelegation doctrine we advocate.

The article proceeds in five parts. Part I sets the stage by describing the emergence after *Chevron* of issues relating to that decision's reach and summarizing the contrasting approaches to these issues taken in the *Mead* opinions. Parts II and III are critique. Part II argues that the Court's reliance on congressional intent should give way to a frankly policy-laden assessment of the appropriate allocation of power in the administrative state. Part III contends that the underlying policy evaluation of the Court misidentifies the criteria that should govern this allocation by focusing on the presence of formal procedures and generality. Parts IV and V offer our alternative approach. Part IV describes and defends the *Chevron* nondelegation principle as facilitating responsible agency decision making. Part V applies our analysis to *Mead* and discusses its potential application in other contexts.

I. Background

In the beginning (at least for the purposes of this article), there was *Chevron*. The question in that case concerned whether the Environmental Protection Agency (EPA) had acted lawfully when it issued a rule, in accordance with applicable notice-and-comment procedures, defining the term "stationary source" in the Clean Air Act to refer to whole plants, rather than each pollution-emitting device within them. In sustaining the rule, the Court pre-

scribed a by now well-known, two-step inquiry to govern judicial review of an agency's interpretation of a statute that the agency administers. The first question is "whether Congress has directly spoken to the precise question at issue";[6] if so, the agency must comply with that judgment. The second question, reached only if Congress failed to speak clearly, is whether the agency has adopted a "reasonable" interpretation of the statute;[7] if so, the courts must accept that interpretation.

Nearly as soon as *Chevron* issued, questions began to arise about its reach—in particular, its application to agency interpretations rendered in contexts other than notice-and-comment rulemaking. The Court in several subsequent cases granted *Chevron* deference to interpretive decisions issued in formal adjudications,[8] but the Court's failure specifically to address the question left some lower courts and commentators uncertain as to whether all or only some of these decisions now stood beneath the *Chevron* umbrella.[9] The Court gave even less guidance as to whether more informal agency interpretations, of both the general and the particular variety, should receive *Chevron* deference. The range of possible questions stretched as wide as the range of decisional formats used by agencies. Should *Chevron* deference extend to interpretations contained in rules exempted from notice-and-comment procedures by virtue of their subject matter or exigency, but identical in force to the rule in *Chevron?*[10] Should deference extend to legal conclusions in what Peter Strauss has termed "publication rules,"[11] including general statements of interpretation and policy as well as staff man-

---

[6] *Chevron*, 467 US at 842.

[7] Id at 845.

[8] See, e.g., *INS v Aguirre-Aguirre*, 526 US 415 (1999); *ABF Freight System, Inc. v NLRB*, 517 US 392 (1996); *Fort Stewart Schools v FLRA*, 495 US 641 (1990).

[9] See, e.g., *Bob Evans Farms, Inc. v NLRB*, 163 F3d 1012, 1018–19 (7th Cir 1998) (holding that the NLRB's adjudicative decisions merit *Chevron* deference only when they have an inherently rulemaking quality); *Trans Union Corp. v FTC*, 81 F3d 228, 230–31 (DC Cir 1996) (addressing but not deciding the question whether *Chevron* deference applies to the adjudications of an agency lacking rulemaking authority); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?* 7 Yale J Reg 1, 47–52 (1990) (proposing a multifaceted scheme for determining which agency adjudications are entitled to *Chevron* deference).

[10] See 5 USC § 553(a), (b)(B) (stating subject matter and "good cause" exemptions from notice-and-comment requirements); Merrill and Hickman, 89 Georgetown L J at 905–07 (cited in note 3) (discussing these issues).

[11] Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L J 1463, 1467 (1992).

uals and instructions, which issue without notice and comment, but which may form the basis for enforcement proceedings against regulated parties?[12] Should deference extend to interpretations arising in informal adjudicative settings, or through the initial issuance of case-specific opinion and no-action letters?[13] The inquiries could (and did) go on and on.

Although these questions might appear to be arcana, they are anything but. Notice-and-comment regulations doubtless have, on average, both a higher profile and a greater import than other administrative forms of decision. The mass of agency action today, however, occurs in these other modes. One study showed that well over 40 percent of even the regulations published in the Federal Register in the first half of 1987 went into effect without notice and comment, usually in either overt or implicit reliance on the APA's "good cause" exemption;[14] and there is little reason to think that this percentage has declined since that time. Peter Strauss has calculated that publication rules appearing in a variety of informal media take up tens or even hundreds of times the library shelf space of regulations printed in the Federal Register.[15] And adjudicative or other particularistic action swamps general regulation in many agencies, with as many as 95 percent of administrative adjudications occurring without the formal procedures specified in the APA.[16] Amid this mass of non-notice-and-comment decision mak-

---

[12] Compare, e.g., *Wagner Seed Co. v Bush*, 946 F2d 918, 922–23 (DC Cir 1991) (granting *Chevron* deference to interpretive rules), with, e.g., *S. Ute Indian Tribe v Amoco Production Co.*, 119 F3d 816, 832–34 (10th Cir 1997) (denying *Chevron* deference to interpretive rules), revd on other grounds, 526 US 865 (1999).

[13] Compare, e.g., *Owsley v San Antonio Independent Sch. D.*, 187 F3d 521 (5th Cir 1999) (denying *Chevron* deference to an opinion letter), with, e.g., *Herman v Nationsbank Trust Co.*, 126 F3d 1354 (11th Cir 1997) (granting *Chevron* deference to an opinion letter).

[14] Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 Admin L J 317, 339–40 nn 86–87 (1989). Of the 2,061 rules (excluding technical corrections) published in this time period, 900 issued without notice and comment—547 explicitly relying on the good-cause exemption, 164 implicitly doing so, and 189 resting on another APA exemption. See id. In about one-fourth of the good-cause cases, however, the agency requested post hoc comments for consideration prior to the agency's issuing the rule in final form. See id at 412.

[15] See Strauss, 41 Duke L J at 1469 (cited in note 11). As Strauss notes, "formally adopted regulations of the Internal Revenue Service occupy about a foot of library shelf space, but Revenue Rulings and other similar publications, closer to twenty feet; [and] the rules of the Federal Aviation Administration (FAA), two inches, but the corresponding technical guidance materials, well in excess of forty feet." Id.

[16] See Peter L. Strauss, *An Introduction to Administrative Justice in the United States* 142 (Carolina Academic Press, 1989).

ing reside some agency actions of great significance, not only to individual parties but to whole classes of regulatory beneficiaries and targets. Whether courts will accept agency resolutions of statutory ambiguity made in these various forms or, alternatively, will apply independent judgment in such cases thus becomes a principal question of administrative law.

The Supreme Court first addressed this question directly in *Christensen v Harris County*.[17] The case concerned the legality under the Fair Labor Standards Act of Harris County's policy of compelling employees to take, rather than continually accrue, compensatory time (time off earned in exchange for overtime worked).[18] Prior to commencement of the litigation, the Department of Labor's Wage and Hour Division had issued an opinion letter to the county stating that the implementation of such a policy would violate the Act. The employees challenging the policy, as well as the United States, urged the Court to give *Chevron* deference to this interpretation. The Court refused, contrasting an "interpretation contained in an opinion letter" with one "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking."[19] The former, the Court declared—"like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law"—do not warrant *Chevron* deference.[20] These modes of agency decision making were entitled only to the "respect" that the half-century-old decision in *Skidmore v Swift & Co.* had instructed courts to give to agency positions that have (but only those that have) the "power to persuade."[21] Finding the view expressed in the opinion letter "unpersuasive," the Court sustained the county's policy.[22]

Mead followed hard on *Christensen*'s heels. *Mead* involved a tariff classification ruling, issued under the authority of the Tariff Act and pursuant regulations. The Tariff Act provides that the Cus-

---

[17] 529 US 576 (2000).

[18] The county adopted the policy to avoid paying monetary compensation to employees who left their jobs with substantial reserves of compensatory time or who exceeded a statutory cap on accrual.

[19] 529 US at 587.

[20] Id.

[21] 323 US 134, 140 (1944).

[22] 529 US at 587.

toms Service "shall, under rules and regulations prescribed by the Secretary [of the Treasury] . . . fix the final classification and rate of duty applicable to [imported] merchandise"[23] under the Harmonized Tariff Schedule of the United States (HTSUS),[24] which sets forth taxation rates for specified categories of imports. The Act further provides that the Secretary "shall establish and promulgate such rules and regulations . . . (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned) . . . as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry."[25] According to the Secretary's regulations, the Customs Service, through an official of either one of the forty-six port-of-entry offices or the headquarters office, will endeavor, on request, to "issue a ruling letter setting forth a determination with respect to a specifically described Customs transaction."[26] This letter, from the time of issuance, "represents the official position of the Customs Service with respect to the particular transaction . . . and is binding on all Customs Service personnel . . . until modified or revoked."[27] Further, the "principle" contained in the ruling letter "may be cited as authority in the disposition of transactions involving the same circumstances."[28] But because a ruling letter, under the regulations in effect at the relevant time, was subject to change without notice to any person except the initial addressee,[29] the regulations provided that "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described."[30]

---

[23] 19 USC § 1500(b).

[24] 19 USC § 1202.

[25] 19 USC § 1502(a).

[26] 19 CFR § 177.8(a); see 19 CFR § 177.2(b)(2)(ii)(B).

[27] 19 CFR § 177.9(a).

[28] Id.

[29] See 19 CFR § 177.9(c). Subsequent to the Customs decision in *Mead*, Congress amended the Tariff Act to provide for public notice and an opportunity to comment prior to any modification of a ruling in effect for at least sixty days. See 19 USC § 1625(c). Even prior to the statutory change, which had no effect on *Mead*, the Treasury Department's regulations provided that the Customs Service would give notice to the initial addressee before modifying a ruling letter and would refrain from retroactively applying the modification to that person except in unusual circumstances. See 19 CFR § 177.9(d)(2).

[30] 19 CFR § 177.9(c).

The Mead Corporation imported "day planners," three-ring binders with pages on which users could note their daily schedules, phone numbers and addresses, and the like. If classified as "bound" "diaries" under the HTSUS, these products were subject to an import duty; if, conversely, viewed as either not "bound" or not "diaries," the products could enter the country without any duty applying.[31] An initial ruling letter regarding Mead's day planners, issued at Mead's request by a port-of-entry official, found that Mead's day planners were not bound diaries and thus not subject to tariff.[32] But two subsequent rulings, issued by the director of the Commercial Rulings Division at Customs Headquarters, found to the contrary.[33] Mead accordingly filed suit. Although the Court of International Trade, the specialized court with jurisdiction over such challenges, sustained the Customs Service,[34] the Federal Circuit reversed on appeal, holding that Customs classification rulings should not receive *Chevron* deference.[35]

Justice Souter's opinion for the Supreme Court reached the same conclusion as to *Chevron*, relying on a theory of the *Chevron* doctrine as a reflection of congressional intent and at least partially equating that intent with a preference for proceduralism and generality in agency decision making. Whether *Chevron* should govern, the opinion averred, depends on whether "the agency's generally conferred authority and other statutory circumstances" make apparent that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."[36] Implicitly recognizing that Congress seldom makes this expectation plain, the Court approved the use of a "variety of indicators" to determine if Congress would want, given statutory ambiguity, an agency's conclusions to control.[37] Though the opinion refrained from cataloguing

---

[31] Subheadings 4820.10.20, 4820.10.40, of the HTSUS, 19 USC § 1202.

[32] See NY 864206 (June 19, 1991) (Jean F. McGuire, Area Director, New York Seaport), 1991 US Custom NY LEXIS 344.

[33] See HQ 955937 (Oct 21, 1994), 1994 WL 712863; HQ 953126 (Jan 11, 1993), 1993 WL 68471. The first headquarters ruling followed from a request by the port-of-entry official for central review of her decision, the second from Mead's own administrative protest.

[34] 17 F Supp 2d 1004 (1998).

[35] 185 F3d 1304 (1999).

[36] 121 S Ct at 2172.

[37] Id at 2176.

these indicators, it suggested that chief among them is the degree of procedural formality involved in the action. Said the Court, pointing to both notice-and-comment rulemaking and formal adjudication: "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 . . . deliberation."[38] More submerged but also present within the opinion was reference to the level of generality of the agency action: did the decision "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling[?]"[39] Because the ruling in *Mead* proceeded from no formal procedures and purported to bind no party other than Mead, only weak, *Skidmore*-style deference should apply.

And so the contours of *Chevron* seem set, running alongside the two great fault lines of administrative law (formality vs. informality and generality vs. particularity), though subject always to change in the event that a reviewing court sees indicia of a contrary congressional desire. Procedural formality creates a usually safe haven, enabling an agency to ensure that a court will defer to, and not just respectfully consider, its judgments about how to proceed in the face of congressional silence. Outside that haven, *Chevron* remains potentially applicable—"we have," cautioned the Court, "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded"[40]—but less likely to provide the standard of review. The presumption against deference for informal action appears especially strong when an agency acts in an individual case only, in effect adopting the decision-making paradigm associated with judges rather than legislators. Exactly what it takes to reverse this presumption the Court did not say, but even in this reticence lies the suggestion of a heavy burden.

For Justice Scalia, in dissent, the question of deference to agency action, even given its manifold forms, ought to have been simpler. In line with his usual preference for rules, Scalia objected to the

---

[38] Id at 2172.

[39] Id at 2174.

[40] Id at 2173 (citing *NationsBank of NC, NA v Variable Annuity Life Insurance Co.*, 513 US 251, 256–57, 263 (1995) (deferring, on grounds of long-standing precedent, to the Controller of the Currency's determination to grant a national bank's application to broker annuities)).

variability and unpredictability of the Court's analysis; in line with his frequent taste for executive power, Scalia protested the diminution of agencies' discretion to interpret ambiguous statutory language. For him, a single question was determinative of the deference inquiry (assuming Congress had not said anything explicit about the matter): was the interpretation in question "authoritative" in the sense that it "represents the official position of the agency"?[41] Because the interpretation contained in the Customs ruling letter met this test—evidenced by the signatures of the Solicitor General of the United States and the General Counsel of the Department of the Treasury on a brief stating so much—the *Chevron* deference rule should govern.

II. Congressional Intent

Mead represents the apotheosis of a developing trend in *Chevron* cases: the treatment of *Chevron* as a congressional choice, rather than either a constitutional mandate or a judicial doctrine. In one sense, this new focus is fitting: Congress indeed has the power to turn on or off *Chevron* deference. In another and more important sense, however, this focus is misdirected. Although Congress can control applications of *Chevron*, it almost never does so, expressly or otherwise; most notably, in enacting a standard delegation to an agency to make substantive law, Congress says nothing about the standard of judicial review. Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court's view of how best to allocate interpretive authority. Behind all its rhetoric about actual congressional intent, even the *Mead* Court may have understood these points: *Chevron* is a congressional doctrine only in the sense that Congress can overturn it; in all other respects, *Chevron* is a judicial construction, reflecting implicit policy judgments about what interpretive practices make for good government.

The *Chevron* doctrine began its life shrouded in uncertainty about its origin. *Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate

[41] Id at 2187.

directions. Most prominent in the Court's explanation were functional considerations, relating to the accountability and deliberativeness of interpretive decisions. The Court stressed that agencies had a link, through the President, to a public "constituency," and averred as well that they would consider complex regulatory issues in a "detailed and reasoned fashion."[42] These references implied that the rule of deference sprang from legal process principles: in effect, the Court was creating a common law of judicial review responsive to institutional competencies. But interspersed with these ideas ran a strand of thought relating the deference regime to Congress: here, the Court emphasized that "Congress ha[d] delegated policy-making responsibilities" to the agency and that in this context gaps and ambiguity in legislation themselves might count as delegations to the agency to "elucidate . . . the statute by regulation."[43] On this theory, the Court's decision to defer was an act of obeisance to congressional dictate. In the years following *Chevron*, courts and commentators discussed the deference rule in both these ways,[44] while occasionally also arguing that *Chevron* arose from separation-of-powers principles, which favor agencies over courts in making the policy decisions inherent in the resolution of statutory ambiguity.[45]

In recent Supreme Court decisions, the statutory theory of *Chevron* has become dominant, largely (if, after *Mead*, ironically) at the hands of Justice Scalia. In an early law review article on the subject, Justice Scalia dismissed the institutional competence argument, arguing that it provided "a good practical reason for accepting the agency's views, but hardly a valid theoretical justification for doing so."[46] That theory, Justice Scalia wrote, could

---

[42] 467 US at 865–66.

[43] Id at 865, 845.

[44] For discussion of these competing rationales and their treatment in the courts, see Merrill and Hickman, 89 Georgetown L J at 867–72 (cited in note 3); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex L Rev 113, 203–07 (1998).

[45] For variants of this argument, which has received more attention from scholars than courts, see Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin L J 269, 278, 287–90 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J Reg 283, 308 (1986); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 Tex L Rev 469, 520–24 (1985).

[46] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 514.

come only from congressional command: "The extent to which courts should defer to agency interpretations of law is ultimately a function of Congress's intent on the subject."[47] The *Chevron* deference regime proceeded from this insight along with a preference for broad rules over case-by-case determinations: *Chevron* represented a presumption that when Congress gave an agency the power to implement a statute, Congress also gave the agency broad interpretive authority. In his article, Justice Scalia spoke in realist terms about this justification, stating that the relevant congressional intent was in fact "fictional."[48] In his opinions, however, this concession dropped out of the description. "We accord deference to agencies under *Chevron*," Justice Scalia wrote, "because of a presumption that Congress when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[49] Other Justices acceded to this claim as the primary basis for *Chevron* deference.[50]

Mead goes a step further, hoisting Justice Scalia on the petard of his own "valid theoretical justification."[51] Take a theory emphasizing *Chevron*'s legislative origins, place that theory in the hands of Justices not overly concerned with the "rulelike" nature of law, and the result is a search for actual legislative intent in each instance. Indeed, the *Mead* Court criticized Justice Scalia's dissent primarily on the ground that his "efforts to simplify" by using a presumption would produce results at odds with Congress's wishes.[52] For the Court, the scope of *Chevron* deference should emerge from a particularistic consideration of Congress's views on this issue.

---

[47] Id at 516 (quoting *Process Gas Consumers Group v Department of Agriculture*, 694 F2d 778, 791 (DC Cir 1982) (en banc)). Justice Scalia also rejected the constitutional rationale, arguing that separation-of-powers principles permitted courts to engage in the kind of policymaking incident to statutory interpretation. See id at 515–16.

[48] Id at 517.

[49] *Smiley v Citibank (SD), NA*, 517 US 735, 740–41 (1996).

[50] See Merrill and Hickman, 89 Georgetown L J at 863 (cited in note 3) ("The Court, in recent descriptions of the *Chevron* doctrine, has rather consistently opted for the congressional intent theory.").

[51] Scalia, 1989 Duke L J at 514 (cited in note 46).

[52] 121 S Ct at 2177.

The *Mead* Court's emphasis on actual legislative intent serves one useful, if limited function: it underlines that Congress has ultimate authority over whether and when *Chevron* deference should operate. Scholars occasionally have raised doubts about this proposition, relying on constitutional claims of directly opposing character. If *Chevron* arises from the Constitution because courts must refrain from "policymaking,"[53] or if, conversely, *Chevron* violates the Constitution because courts must possess dispositive power over "legal interpretation" (the authority "to say what the law is"[54]), then Congress could have nothing to say about *Chevron* deference one way or the other. But both these arguments are fallacious. The functions of policymaking and legal interpretation in the context of statutory ambiguity (the only context in which *Chevron* operates) are so intertwined as to prevent any strict constitutional assignment of the one to agencies and the other to courts. And even to the extent that the Constitution dictates some separation of these functions, once Congress has designated either the courts or an agency to resolve statutory ambiguity, other constitutional interpreters should assume, if only by virtue of the doctrine of constitutional avoidance,[55] that the resulting scheme involves the exercise of appropriate authority.[56] In focusing on legislative intent, *Mead* thus clears away some constitutional underbrush associated with the *Chevron* doctrine and places Congress in its rightful position of control.

But to say that Congress has this authority is not to say that Congress uses it, and by suggesting the latter as well as the former,

---

[53] For arguments along this line, see sources cited in note 45.

[54] *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803). For an argument to this general effect, see Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum L Rev 452, 476 (1989) ("It is surely a far more remarkable step than *Chevron* acknowledged to number among Congress's constitutional prerogatives the power to compel courts to accept and enforce another entity's view of legal meaning whenever the law is ambiguous.").

[55] See *Edward J. DeBartolo Corp v Florida Gulf Coast Building & Construction Trades Council*, 485 US 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Ashwander v TVA*, 297 US 288, 348 (1936) (Brandeis concurring).

[56] Consider *Bowsher v Synar*, 478 US 714, 749 (Stevens concurring) ("[A]s our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned. For this reason, '[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it.'") (quoting *INS v Chadha*, 462 US 919, 951 (1983)).

the *Mead* Court obscured the nature of the judicial task involved in defining *Chevron*'s domain. Judges can put into effect congressional decisions about the scope of the *Chevron* doctrine only if Congress, as an initial matter, makes these decisions. If Congress does not, then the courts, whatever their rhetoric, must resort to other sources and rely on other methods to shape the law in this area. And in fact, Congress usually does not make decisions about *Chevron* review, thus forcing courts to consider how best to fill the vacuum.

Federal statutes almost never speak directly to the standard of review of an agency's interpretations. Congress surely believes that the allocation of interpretive authority as between agencies and courts rests within its constitutional prerogatives. And since *Chevron*, both judges and commentators essentially have invited Congress to exercise this prerogative.[57] Yet only a few times has Congress made clear a desire to flip the *Chevron* rule of deference so as to give to courts, rather than agencies, primary interpretive authority.[58] To be sure, Congress's usual silence on this matter may express agreement with a broad rule of deference to agency interpretations. But this explanation seems improbable given (1) Congress's similar passivity on this issue prior to *Chevron*, and (2) Congress's certain appreciation of variety in both administrative statutes and administrative decision-making processes. It is far more likely that Congress, unless confronting a serious problem in the exercise of some interpretive authority, simply fails to think about this allocation of power between judges and agencies.

Some Justices and scholars may protest that this conclusion comes too soon. A burgeoning theory in *Chevron* scholarship holds that Congress does speak to the issue of interpretive authority, although in a kind of code. This argument posits that when Congress grants an agency the power to implement a statute in a way that has binding legal effect on parties, whether by issuing rules

---

[57] See, e.g., Scalia, 1989 Duke L J at 517 (cited in note 46) (describing *Chevron* as "a background rule of law against which Congress can legislate"); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L J 969, 978 (1992) (referring to *Chevron* as a "default rule," which Congress can change).

[58] See, e.g., Gramm-Leach-Bliley Act, Pub L No 106–102, 113 Stat 1409 (1999), codified at 15 USC § 6714(e) (2000) (providing that in a dispute between federal and state insurance regulators over the preemptive effect of a federal statute, the court shall decide the issue "without unequal deference").

or by conducting adjudications, Congress necessarily grants the agency the power to resolve ambiguities in the statute.[59] Stated otherwise, a delegation to an agency to take action having the "force of law" as to parties logically entails a command that any interpretations made in the course of that action (but only those interpretations) should have the "force of law" as to judges.[60] This argument has appeared in several recent Supreme Court decisions. In *Christensen*, for example, the Court distinguished agency actions having the "force of law" from those lacking this quality and stated that *Chevron* deference should extend only to the former.[61] And the argument played a significant, if confusing, role in *Mead*. Although an unadorned version of the theory cannot explain the result in *Mead*, given that the Customs ruling had binding legal effect on the party to whom issued, the Court's initial statement of its holding declared that an agency interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules [through rulemaking or adjudicative proceedings] carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[62]

---

[59] See Merrill and Hickman, 89 Georgetown L J at 873–89 (cited in note 3); Duffy, 77 Tex L Rev at 199–203 (cited in note 44); Anthony, 7 Yale J Reg at 36–40 (cited in note 9).

[60] Merrill and Hickman, 89 Georgetown L J at 837 (cited in note 3); Anthony, 7 Yale J Reg at 3 (cited in note 9).

[61] See text accompanying note 20; see also *EEOC v Arabian American Oil Co.*, 499 US 244, 257 (1991) (declining to give deference to the EEOC's interpretation of Title VII because that statute does not give the EEOC rulemaking authority); *Martin v Occupational Safety and Health Review Commission*, 499 US 144, 157 (stating in dicta that the interpretive rules of an agency lacking rulemaking power are not entitled to "the same deference as norms that derive from the exercise of . . . delegated lawmaking powers").

[62] 121 S Ct at 2171; see id at 2172 (also making reference to the "force of law"). The oddity of this statement, given that the ruling letter had the force of law as to the importer in question, is explicable in either of two ways. First, the Court may have used the phrase "force of law" here to refer only to an agency action that would have controlling effect on a reviewing court, as distinct from an action that would have binding legal effect on a party. But if that is the case, the "force of law" concept is doing no work at all: the Court might just as well have said that an agency interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules qualifying for *Chevron* deference," with the question still left open how to determine whether such a delegation has taken place. Second, the Court may have believed it necessary for the agency action in question to have binding legal effect not only on the single importer but on all others in the same position. See id at 2174 (noting that "a letter's binding character as a ruling stops short of third parties"); text accompanying note 39. The Court's position then would comport with Merrill and Hickman's view that to have the "force of law," for purposes of *Chevron*, an agency action must legally bind not only the parties involved,

But this equation—of delegations to make binding substantive law through rulemakings or adjudications with delegations to make controlling interpretations of statutory terms—has little to support it. Contrary to the theory, Congress might wish for an agency, in implementing a statute, to issue binding rules and orders subject to an understanding that the courts, in the event of a legal challenge, will review fully any interpretations of ambiguous terms made in the course of these actions. The power to make binding substantive law, after all, involves much more than the power to make controlling interpretations of ambiguous statutory terms; to deny the agency the latter is in no way to make meaningless the grant of the former. Indeed, the point here is even stronger. Prior to *Chevron* (when the most important regulatory statutes were enacted), Congress must have contemplated (to the extent it thought about the issue) some division of substantive lawmaking authority from interpretive authority; the APA's provision on judicial review permits this division,[63] and courts at the time put it into practice in countless administrative law decisions.[64]

---

but also "other agency personnel," in the sense that they will treat the action as controlling in future cases, involving other parties, that raise the same issue. See Merrill and Hickman, 89 Georgetown L J at 908 (cited in note 3). But this reasoning ill comports with ordinary notions of when a decision has force of law—in Merrill and Hickman's own words, "when, of its own force and effect, it commands certain behavior and subjects parties to penalties or sanctions if they violate this command." Id at 881. The reasoning in fact substitutes another criterion—generality—for the supposed criterion of force of law in the effort to determine congressional intent as to deference. We consider later in this part, see text accompanying notes 68–70, the relationship of generality, as well as of procedural formality, to understandings of this congressional intent.

[63] Section 706 of the APA provides that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions." 5 USC § 706. Some scholars have suggested that this provision in fact *requires* independent judicial review of interpretive judgments, thus precluding *Chevron* deference. See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum L Rev 2071, 2080–81, 2086 (1990); Farina, 89 Colum L Rev at 472–73 (cited in note 54). The issue never has troubled the Court unduly, nor do we think it should. As Sunstein himself concedes, the interpretive decisions that the court shall render under Section 706 may incorporate some measure of judicial deference; the courts, in other words, can decide the relevant legal question by holding that the agency is entitled to deference in some sphere and then policing its limits. See 90 Colum L Rev at 2081 n 46. The APA thus may well leave the level of deference to the courts, presumably to be decided according to common law methods, in the event that an organic statute says nothing about the matter. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum L Rev 612, 635 (1996) (noting that the APA's provisions on judicial review contain "faint expressions of legislative purpose" and "came from a tradition that used flexible common law methods to review administrative action").

[64] Pre-*Chevron* law on judicial review was highly complex and variegated, but rarely did courts provide the equivalent of *Chevron* deference to agency interpretations, even when these interpretations arose in the course of rulemakings or adjudications having binding

And just as Congress might desire this division, Congress might desire the converse: to give interpretive authority to an agency separate and apart from the power to issue rules or orders with independent legal effect on parties. Again, the point follows from an understanding that the connection between the power to resolve statutory ambiguity and the power to issue binding rulings under that statute is situational rather than logical, contingent rather than necessary. Consider, for example, the National Labor Relations Board (NLRB), whose adjudicative orders become legally binding only when brought to and ratified by a court. Perhaps this statutory structure signifies, as some scholars have suggested, that Congress so distrusted the NLRB's adjudications as to preclude legal interpretations made there from receiving judicial deference;[65] but perhaps this structure signifies only that Congress wanted some other aspect of the agency's decision making—its fact-finding, for example—subject to prompt judicial review, thus leaving the NLRB, consistent with both pre- and post-*Chevron* decisions,[66] with primary interpretive authority when acting in its adjudicative, no less than in its legally binding rulemaking, capacity.[67]

Nor does it aid in the effort to determine congressional intent respecting *Chevron* deference to ask, as the *Mead* Court did, whether the agency action possesses the attributes of procedduralism and generality. These two aspects of agency action, of course, overlap but do not coincide with "force of law" effect (as well as with each other); as the Court discovered, these factors may point in opposing directions.[68] But more significant, neither

---

effect. For a cogent account of this doctrine, see Merrill, 101 Yale L J at 972–75 (cited in note 57).

[65] See Merrill and Hickman, 89 Georgetown L J at 892 (cited in note 3).

[66] See, e.g., *NLRB v Curtin Matheson Scientific, Inc.*, 494 US 775, 786–87 (1990); *Beth Israel Hospital v NLRB*, 437 US 483, 499 (1978); *NLRB v Hearst Publications*, 322 US 111, 131 (1944).

[67] We do not mean to claim here that the nature of a substantive delegation never implies a congressional intent as to *Chevron* deference. To take an extreme example that helps to make the point, a delegation to the Department of Labor to implement a workplace safety statute naturally will prevent the Department of Health and Human Services from gaining deference for its interpretations of that statute. For similar reasons, a very limited delegation of substantive authority to an agency may suggest a legislative decision as to the impropriety of granting *Chevron* deference. This is to say no more than what every Justice since *Chevron* has accepted: that an agency must "administer" a statute to obtain *Chevron*'s benefits. See, e.g., *Smiley*, 517 US at 739; *Chevron*, 467 US at 865.

[68] See text accompanying note 62 (noting that the Customs decision in *Mead* had binding legal effect, although lacking generality and procedural formality).

procedural formality nor generality has any apparent relevance to the question of actual (as opposed to fictive) legislative intent. It may be thought good regulatory policy to promote these traits by rewarding them with *Chevron* deference—though in the next part of this article, we contest this notion. But with all due respect to Congress, the ascription of the "best" regulatory policy to that institution's handiwork is not a reliable, and therefore not a usual, method for reflecting legislative desires. And nothing in the structure of administrative statutes suggests such a policy. As we will discuss,[69] Congress sometimes has authorized agencies to act without procedural formality and often has enabled them to choose between general and particular decision-making modes. In the areas in which such legal choice exists, Congress never has suggested a differential scheme of judicial review (or indeed any other set of differential incentives). To the contrary, the provision on review in the APA, to take the most notable example, cuts across all these distinctions, notwithstanding that they form the very core of the statute.[70]

Our general point regarding the unreliability of attempting to define *Chevron* doctrine through a search for congressional intent takes a strange twist in *Mead* itself, though in the end emerging all the stronger. The statute at issue in the case contains unusual indicia of legislative intent regarding judicial review of agency decisions, thus suggesting that we have condemned the Court's analysis too quickly. The problem for the Court is that the statute appears to command the precise reverse of the Court's holding. According to the statute, a tariff classification decision "is presumed to be correct" in a legal action.[71] The most natural understanding of this provision, as applied to a case like *Mead*, is that it directs a court to defer to a Customs Service determination that a particular statutory term encompasses a particular imported good, unless in the words of *Chevron* that determination is "unreasonable."[72] The Court conceivably could have shown that this interpretation would overread the provision—that, taken in context, the provision does no more than place the burden of proof on the

[69] See text accompanying notes 102–04.

[70] See 5 USC § 706.

[71] 28 USC § 2639.

[72] 467 US at 845.

importer. The Court, however, essayed no such argument, relegating the statute's "presumption of correctness" language to a footnote and briefly noting two provisions—one enabling the reviewing court to consider new grounds for decision and the other requiring the court to develop a record—which not two years earlier the Court had held in no way to preclude *Chevron* deference.[73] The failure of the Court to engage all this language in any sustained or coherent way bodes ill for a method of defining *Chevron*'s domain that focuses on statutory interpretation.[74]

But if the Court usually cannot give content to the *Chevron* doctrine in this way—most importantly, if perhaps not in *Mead*, because Congress usually does not give the Court the material to do so—then how is the Court to proceed? The Court inevitably must create a set of background rules against which Congress can (but should not be expected to) operate—otherwise put, must establish a constructive substitute for an actual statement of legislative desire. These default rules potentially could reflect any of three considerations. First, the Court could appeal to constitutional principles.[75] Second, the Court could resort to notions of legislative self-interest. Here the Court would select the set of rules most likely to give Congress the greatest influence, on the theory that Congress, were it to consider the matter, usually would prefer these rules to any other.[76] And third, the Court could refer to its own sense of sound administrative policy. We believe that the third option is alone capable of sustaining a forthright and productive discussion of the appropriate allocation of interpretive authority.

---

[73] See *United States v Haggar Apparel Co.*, 526 US 380, 391 (1999) (discussing the relevance of 28 USC §§ 2638 and 2640(a) to the *Chevron* inquiry).

[74] The Court's cavalier attitude toward the relevant statutory language also suggests a certain disingenuousness in describing the *Chevron* doctrine as a product of legislative decision. See text accompanying notes 85–87.

[75] See, e.g., Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin L J 187, 189–90, 202–03 (1992) (invoking constitutionally based understandings of institutional roles as a reason for the Court to distinguish in deference analysis between legislative rules and interpretive rules); Randolph J. May, *Tug of Democracy: Justices Pull for America's Separation of Powers*, Legal Times 51 (July 9, 2001) (applauding *Mead* on the ground that its limitation of *Chevron* comports with constitutional principles relating to government structure).

[76] Professor Einer Elhauge offers a complex version of this position in *Preference-Estimating Statutory Default Rules* (forthcoming). He argues that *Chevron* doctrine (including *Mead*) both should and does allocate authority between courts and agencies in the way best designed to ensure that the resolution of statutory ambiguity will match "current governmental preferences," by which he means policies that Congress would enact into law.

An appeal to constitutional principles cannot give content to the *Chevron* doctrine because the only clear principle does nothing more than restate the dilemma. We have argued earlier, in accord with the Court's apparent view, that separation-of-powers law usually neither prohibits nor requires *Chevron* deference.[77] Indeed, this law fails to suggest even a tiebreaking principle in the event of congressional silence, given the equally plausible (or implausible) constitutional claims made on both sides of the deference question. All the constitutional structure suggests is that Congress has control over the allocation of authority to resolve statutory ambiguity. But if that is so, the appeal to constitutional norms is a strategy of infinite regress, as the failure of Congress to exercise its power forces the Court to look to constitutional principles, which then merely point back to Congress.

The resort to an implicit legislative intent reflecting legislative self-interest similarly cannot solve the problem. As an initial matter, the assumption that Congress always (or even usually) wants the administrative structure that increases its own institutional power finds little support in either practice or theory.[78] Consider the many legislative decisions inconsistent with this assumption: to delegate broadly to agencies in the first instance, to lodge most of this power with executive rather than with independent agencies, and to accede to ever greater assertions of presidential control over the entire sphere of administrative activity. As these decisions reflect, Congress protects its own institutional interests sporadically at best when it allocates governmental authority. And this frequent "failure" makes perfect sense given that Congress is far less a unitary institution than a congeries of members with cross-cutting partisan, ideological, geographical, and constituency interests. In highly fact-dependent ways, a majority coalition of these interests often will conflict with and subordinate considerations of institutional prerogative.

And even if this were not the case, the Court would confront an impossible task in translating a goal of legislative aggrandizement into a scheme for judicial review of interpretative decisions.

---

[77] See text accompanying notes 53–56.

[78] See Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245, 2314–15, 2330 (2001); Terry M. Moe and William G. Howell, *The Presidential Power of Unilateral Action*, 15 J L Econ & Org 132, 143–48 (1999).

Congressional self-interest may comport with a deference rule because Congress more easily can control agencies than courts through oversight proceedings and budgetary and other legislation.[79] But congressional self-interest just as easily may dictate the opposite result because agencies, especially but not exclusively those in the executive branch, are subject to the authority of the President, Congress's principal competitor for governmental power.[80] Once again, then, Congress's view on deference (were Congress to consider the matter) likely would hinge on numerous case-specific and agency-specific variables, not readily susceptible to judicial understanding or analysis.

The only workable approach is the approach that *Chevron* took in the beginning: to fill in legislative silence about judicial review by making policy judgments based on institutional attributes, with Congress then free to overrule these conclusions.[81] Recall that in *Chevron* the Court nodded to the idea of a congressional delegation, but stressed more heavily the virtues of placing interpretive decisions in the hands of accountable and knowledgeable administrators. This method is endemic in administrative law when Congress has left its intentions unclear. Consider, for example, *Vermont*

---

[79] See Mark Seidenfeld, *Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 Tex L Rev 83, 136 (1994) (arguing that, as compared with stringent judicial review, *Chevron* "gives Congress greater control over the interpretive process").

[80] See Herz, 6 Admin L J at 187 (cited in note 75) (stating that the "rivalry between the legislative and executive branches" should make Congress "prefer relatively stringent judicial review of agency interpretations"). That an agency is formally "independent," in the sense that the President cannot remove its head at will, may but need not affect the analysis; Presidents often have a good deal of actual control over independent agencies—sometimes more than they have over executive branch agencies—by virtue of their appointments and other powers.

Judge Posner and Professor Landes make a different argument to the same ultimate effect in claiming that an enacting Congress may desire strict judicial review "in order to assure that the agency, in its eagerness to serve the current legislature, will not stray too far from the terms of the legislative 'deal'" that the agency is charged with implementing. See William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J L & Econ 875, 888 (1975).

[81] Cass Sunstein has described the Court's task in much this way. In Sunstein's words:

> [I]f Congress has not made a clear decision one way or the other [on the question of deference], the choice among the alternatives will call for an assessment of which strategy is the most sensible one to attribute to Congress under the circumstances. This assessment is not a mechanical exercise of uncovering an actual legislative decision. It calls for a frankly value-laden judgment about comparative competence.

Sunstein, 90 Colum L Rev at 2086 (cited in note 63).

Yankee Nuclear Power Corp v NRDC[82] (which held that agencies, but not courts, may add to the APA's procedural requirements) and *SEC v Chenery Corp*[83] (which held that agencies may choose to proceed by adjudication rather than rulemaking free from judicial constraint). These decisions at least implicitly concede the indeterminacy of statutory language and focus on the policy consequences of placing certain kinds of decisions in the hands of administrative or judicial actors. Regardless whether the Court attempts to frame these efforts to promote better lawmaking as "interpretive," they are in fact judicial constructions. But that is not to say they should arouse suspicion. When Congress has not spoken to the allocation of authority between courts and agencies, the choice inevitably falls to courts, and courts can do no better than assess how and when different institutions promote accountable and considered administrative governance.[84]

Indeed, this approach lies beneath *Mead*'s surface rhetoric about congressional intent, even though the Court cannot bring itself to put the matter plainly.[85] When the Court says that "[i]t is fair to assume generally" that Congress intends for the courts to give *Chevron* deference to agency actions emerging from formal procedures because these procedures "foster . . . deliberation,"[86] the

---

[82] 435 US 519 (1978).

[83] 332 US 194 (1947) (*Chenery II*).

[84] The APA's provision on judicial review, discussed in note 63, fairly invites, though does not require, such policy-based analysis. The very open-endedness of this provision suggests that, in the absence of an organic statute to the contrary, courts should set the level of deference in accordance with common law methods, which (as the examples in the text suggest) may include consideration of comparative institutional attributes and their relation to interpretation. Consider Manning, 96 Colum L Rev at 635 (cited in note 63) (noting that courts since the APA have "draw[n] upon their own sensibilities" about good government in giving content to that statute's judicial review provision).

[85] Justice Breyer, in extrajudicial commentary, years ago made the identical point about judicial decisions defining the scope of review of agency interpretations:

> For the most part courts have used "legislative intent to delegate the law-interpreting function" as a kind of legal fiction. They have looked to practical features of the particular circumstance to decide whether it "makes sense," in terms of the need for fair and efficient administration of that statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation.

Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L Rev 363, 370 (1986); see text accompanying note 48 (noting Justice Scalia's recognition that the delegation rationale for *Chevron* is fictional).

[86] 121 S Ct at 2172.

Court is making its own determination of when agencies should be "assume[d] generally" to make better interpretive decisions than can courts. And when the Court, again ostensibly as a matter of statutory interpretation, asks whether the agency interpretation "bespeak[s] . . . legislative type of activity,"[87] binding more than the parties in a single proceeding, the Court is following the same course. Perhaps the Court attributes its policy judgments to Congress to emphasize that Congress can reverse the decision. Perhaps the Court does so to emphasize the "judicial" nature of what it is doing. Perhaps, and least generously understood, the Court does so to cloak judicial aggrandizement; it may be no coincidence that when ceding power in *Chevron*, the Court spoke the language of policy, whereas when reclaiming power in *Mead*, the Court abandoned this language. The explanation, in the end, is of no great importance. What matters is that the Court's rhetoric not becloud the essential nature of its judgment, and that this judgment not escape evaluation on its actual, policy-based terms. We accordingly turn to that analysis.

III. Proceduralism and Generality

Because the *Mead* Court's discussion of policy issues is veiled, it is susceptible of two readings. On one interpretation, which Justice Scalia adopts, *Mead* suggests an unstructured, case-by-case inquiry into whether deference to an agency interpretation "makes best sense." If courts take this approach, it will prove harmful, given the need for clarity and predictability in *Chevron* doctrine. But this understanding of *Mead* misses what is most significant about the decision. A truer interpretation would recognize in *Mead* two dominant (though not congruent) dichotomies, widely used in administrative law—the first, and most notable, between procedural formality and informality, and the second between general and particular action. *Mead* rewards more formal and general forms of decision making—particularly, notice-and-comment rulemaking—in the implicit hope that these forms will correspond with accountability and discipline in administrative decision making. In encouraging agencies to adopt these forms, *Mead* threatens

[87] Id at 2174.

to impose substantial costs—to diminish needed flexibility in, and enhance existing pathologies of, the administrative system. And as we will discuss in the remainder of this article, in linking deference to these forms, *Mead* fails to serve as well as it could the very values that underlie it.

Mead naturally lends itself to interpretation as a classic ad hoc balancing decision, and so a partial reversion to the doctrine of judicial review that prevailed before *Chevron*. The Court adverted to the "multifarious" nature of administrative action and declared as its aim "to tailor deference to variety."[88] The Court refused to articulate any simple test, on the ground that none could capture the range of considerations relevant to the question of deference.[89] The opinion thus provides more than enough material for (and, indeed, seems to revel in) Justice Scalia's critique: "The Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' 'totality of the circumstances' test."[90] This approach would bear more than a passing resemblance to the law that *Chevron* replaced. Although *Mead* does not revive the distinction between pure questions of law and mixed questions of law and fact that in part determined the level of deference prior to *Chevron*,[91] the "it all depends" attitude that Justice Scalia saw as pervading *Mead* featured notably in pre-*Chevron* doctrine, which also took into account the scope and nature of the delegation,[92] the importance and complexity of the interpretive question,[93] the degree of the agency's expertise,[94] and the thoroughness and history of the agency's interpretation.[95]

---

[88] Id at 2176. Although Justice Souter wrote *Mead*, the part of the opinion most fully expounding this approach echoes Justice Breyer's scholarly writing. See Breyer, 38 Admin L Rev at 377 (cited in note 85) (arguing that *Chevron* "cannot reasonably apply to all questions of statutory interpretation . . . [because] the way in which [these] questions . . . arise are too many and too complex to rely upon a single simple rule to provide an answer").

[89] See, e.g., 121 S Ct at 2173 ("That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

[90] Id at 2178 (Scalia dissenting).

[91] See, e.g., *Hearst Publications*, 322 US at 130.

[92] See, e.g., *Skidmore*, 323 US at 137; *Pittston Stevedoring Corp. v Dellaventura*, 544 F2d 35, 49–50 (2d Cir 1976) (Friendly, J).

[93] See, e.g, *Packard Motor Car Co. v NLRB*, 330 US 485, 491–93 (1947).

[94] See, e.g., *Pittston*, 544 F2d at 50.

[95] See, e.g., *Packard*, 330 US at 492; *Skidmore*, 323 US at 140.

Were this understanding of *Mead* accurate, we would join Justice Scalia in lamenting the absence of clarity and predictability in the new doctrine. The problem with an absence of structure in this sphere is not what Justice Scalia has stressed in the past—that Congress must have a stable background rule against which to legislate.[96] Given the scarce interest Congress has demonstrated in the judicial review of agency interpretations,[97] such solicitude is wasted. The real problem concerns "litigants," as Justice Scalia noted in *Mead*—and, more particularly, the administrative agencies. Unclear law regarding judicial review no doubt would lead potential challengers of administrative action to make more errors in their selection of cases, but many of these parties would prefer unpredictability to near-automatic deference. For agencies, the shift in doctrine would count as no such mixed blessing. Agencies factor the scope of judicial review into their decisions, and uncertainty on this score would result in both excess caution and wasted effort.[98] And this problem is not one for agencies alone, but for the public as well. As the uncertainties associated with "hard look" review of an agency's decision-making processes have shown,[99] these consequences can exact a considerable toll on an agency's ability to perform coherently and effectively its regulatory mission.

But properly read, *Mead* imposes far more structure on the deference inquiry than this critique implies: *Mead* in fact counsels an administrative law variant of "categorical balancing." As noted earlier, the Court establishes safe harbors, defined by the kind of procedure an agency uses, within which interpretations will receive *Chevron* deference; whenever an agency engages in either notice-and-comment rulemaking or formal adjudication, the agency will

---

[96] See Scalia, 1989 Duke L J at 517 (cited in note 46) (praising *Chevron* on the ground that "Congress now knows that the ambiguities it creates . . . will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known").

[97] See text accompanying notes 57–58.

[98] Nor does the availability of *Skidmore* deference assist on this score. Even if *Skidmore* deference amounts to something more than a court saying "we will defer to the agency if we believe the agency is right," the application of *Skidmore* deference depends so much on context and circumstance—the kind of agency, the kind of issue, the kind of decision—as to preclude an agency from relying on it.

[99] See Jerry L. Mashaw and David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J Reg 257, 315–16 (1987) (discussing the adverse consequences to traffic safety regulation arising from the uncertainties involved in hard look review).

know that its reasonable resolution of statutory ambiguity will govern.[100] Although leaving some uncertainty outside these categories, the Court also indicates that in this sphere an absence of generality will deprive an agency of any real possibility of interpretive control.[101] Questions of course remain—the resulting structure lacks the rigorously rulelike nature of *Chevron*—but no agency counsel will find herself at a loss when asked to render advice on the consequences, for purposes of judicial review, of taking administrative action in a particular form. To a greater extent than Justice Scalia acknowledged in *Mead*, his repeated admonitions about the importance of predictability in *Chevron* doctrine have entered the consciousness of the Court.

The critical question in evaluating *Mead* thus has to do with the consequences of selecting the categories noted above as a way to give structure to *Chevron* doctrine. Administrative statutes, of course, often allow agencies to take action without formal procedures. The APA, which controls agency processes in the absence of more specific statutory provisions, exempts rulemaking from notice and comment when the rule concerns certain subject matters or takes certain forms or, more generally, when the agency has good cause to dispense with this procedural requirement;[102] similarly, the APA permits deviation from formality in adjudication except when the applicable organic statute requires a hearing and perhaps also an "on the record" determination.[103] And administrative law, ever since *Chenery*, has left to agencies, again in the absence of a statute addressing the matter, the decision whether to proceed by general rulemaking or by more particular adjudicative processes.[104] *Mead* exerts pressure on an agency selecting among

---

[100] See text accompanying note 38.

[101] See text accompanying notes 39–40. This is not to say that generality will ensure *Chevron* deference in the absence of formal procedures; the Court's slighting reference to interpretive rules—that they "enjoy no *Chevron* status as a class," 121 S Ct at 2174—makes clear that generality alone often will not suffice. The point here is only that *Mead*, in addition to favoring formality over informality in procedures, expresses a preference for general over particular decision-making forms.

[102] See 5 USC § 553(a), (b)(A), (b)(B).

[103] See id at § 554(a); compare *Seacoast Anti-Pollution League v Costle*, 572 F2d 872 (1st Cir 1978) (requiring formality when another statute requires a hearing) with *Chemical Waste Management, Inc. v EPA*, 873 F2d 1477 (DC Cir 1989) (requiring formality only when another statute requires an "on-the-record" hearing).

[104] 332 US at 201.

these legal options by means of denying the agency a valued benefit if it proceeds in one way rather than the other; the decision thus effectively narrows the scope of administrative discretion over (otherwise and previously) legitimate decision-making modes. We think this judicial channeling unfortunate.

Consider the matter of formal (including nominally informal, notice-and-comment) procedures. Two different arguments can support giving peculiarly deferential treatment to agency action that emerges from formal process. The first is essentially prophylactic in nature. Under this rationale, withholding *Chevron* deference from agency action that lacks a formal procedural pedigree ensures that agencies will provide such procedures when the law so requires. The second argument is straightforwardly preferential. On this reasoning, an agency should reap a benefit (deferential review) for acting through formal procedures because this kind of decision making better serves accountability and deliberative values. Whereas the first rationale intends merely to keep agencies within legal bounds, the second aims to influence the manner in which agencies exercise legal choice.

The prophylactic argument is insufficient to justify the decision. The problem to which the prophylaxis responds is of uncertain dimension; although courts sometimes invalidate administrative action for failing to comply with the APA's (or other statutes') required procedures,[105] no evidence points to systematic evasion of the law in this area.[106] More important, a prophylactic remedy does little except guarantee *over*enforcement. In any case in which a party can claim that an agency's interpretation of a statute should not receive *Chevron* deference, the party also can claim that the interpretation arose from an illegal (because not sufficiently formal) set of procedures. Nothing about this claim makes it peculiarly difficult for either a party to prove or a court to vindicate: the claim, for example, involves no exploration of motive or ma-

---

[105] See, e.g., *United States Telephone Association v FCC*, 28 F3d 1232 (DC Cir 1994); *Community Nutrition Institute v Young*, 818 F2d 943 (DC Cir 1987).

[106] We do not mean to deny here that agencies happily avail themselves of exceptions to formal procedural requirements, and indeed that they actively look for opportunities to do so. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L J 1385, 1393–96 (1992). But if the Court's aim in *Mead* is to deter these perfectly legal avoidance practices, then the rationale of the decision is, in the terminology we used above, more preferential than prophylactic. We address this reasoning in the next few paragraphs.

nipulation of hazy standards. Direct policing thus should safeguard adequately against violations of procedural law; the *Mead* rule works, in addition, only to promote thick proceduralism when it is *not* required.

This simple promotion of proceduralism disregards the considerations underlying the APA's exemptions from formal requirements. The "good cause" exception to notice-and-comment rulemaking, for example, arose from a recognition that the "public interest," in the language of the statute—more specifically, the interest in fulfilling the agency's statutory mission—might call for more expedition than rulemaking procedures permit and thus less participation than they require.[107] The same section's exception for interpretive rules similarly acknowledged the common need of agencies to interpret a statute without the delays involved in notice and comment, along with the strong interest of regulated parties in learning of these interpretations in advance of an enforcement action.[108] By depriving the rules issued under these exceptions of *Chevron* deference, *Mead* increases the likelihood that agencies will use notice and comment where it is inappropriate or that they will forgo any announcement of their interpretive views prior to embarking on enforcement. Much the same holds true in the sphere of adjudication, as *Mead* pushes toward greater proceduralism even when the matter at issue and the surrounding context suggest that informality better advances statutory objects. *Mead*, in short, upsets a balance reflected in the APA (as well as in other administrative procedure provisions) between procedural formality and procedural informality. The decision recognizes the values that counsel the former, but not the countervailing values that counsel the latter.

The dangers of this one-sidedness emerge starkly when account is taken of the current rulemaking context, which we and many

---

[107] 5 USC § 553(b)(B).

[108] See 5 USC § 553(b)(A) (using the term "interpretative" rules). As Judge Posner explained in *Hoctor v United States Department of Agriculture*, 82 F3d 165 (7th Cir 1996), "the agency would be stymied in its enforcement duties if every time it brought a case on a new theory it had to pause for a bout, possibly lasting several years, of notice and comment rulemaking"; given that this is so, and the true alternative to an interpretive rule is therefore often not a notice-and-comment rule but a simple enforcement action preceded by no rule at all, the agency does regulated interests "a favor if it announces the interpretation in advance of enforcement." Id at 167, 170.

others view as, even without *Mead*, too formal.[109] The story behind the so-called ossification of notice-and-comment rulemaking is by now familiar. To increase the influence of underrepresented interests, as well as to facilitate "hard look" judicial review, courts interpreted the APA, contrary to the design of its drafters, to compel agencies to conduct full-scale "paper hearings," involving extensive and often repeated notice of a proposed rule to affected groups, provision to them of the factual and analytical material supporting the rule, and detailed responses to any group's adverse comment or alternative proposal.[110] These procedures consume significant agency time and resources and thereby inhibit needed regulatory (or, for that matter, deregulatory) initiatives. *Mead* inevitably will channel additional agency action into this already overburdened administrative mechanism, as agencies sometimes adopt notice-and-comment procedures for no other reason than to gain *Chevron* deference.[111] By placing this new strain on notice and comment, *Mead* exacerbates a systemic problem impeding the development of optimal regulatory programs.

Even the ostensible virtues of notice-and-comment procedures are today open to serious question. As practiced in the shadow of the courts, notice and comment often functions as charade—or what one administrative expert has called "Kabuki theater."[112] The more courts have required agencies to give detailed notice of proposed regulatory action to interest groups, the more pressure agen-

---

[109] See, e.g., Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* (Harvard, 1990); McGarity (cited in note 106); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin L Rev 59 (1995); Paul R. Verkuil, *Rulemaking Ossification—a Modest Proposal*, 47 Admin L Rev 453 (1995).

[110] See, e.g., *Horsehead Resource Development Co., Inc. v Browner*, 16 F3d 1246, 1267–69 (DC Cir 1994); *Solite Corp. v EPA*, 952 F2d 473, 484 (DC Cir 1991); *Portland Cement Association v Ruckelshaus*, 486 F2d 375, 394 (DC Cir 1973).

[111] We do not mean to say that agencies always will adopt this course when they have a choice between formal and informal procedures; given the cost of formal procedures, they may do so only on the margin. Cf. text following note 165 (discussing the impact of our alternative deference regime on agency decision making). We mean only to say that some shift will occur and that it runs in the wrong direction.

[112] Professor E. Donald Elliott, a former General Counsel of the EPA, has written:

> No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.

Re-Inventing Rulemaking, 41 Duke L J 1490, 1492 (1992).

cies have felt to complete the bulk of their work prior to the onset of the rulemaking process. And the more work agencies put into their proposals, the less flexibility they show during rulemaking to respond to the concerns of affected parties. At the same time, notice-and-comment rulemaking today tends to promote a conception of the regulatory process as a forum for competition among interest groups, rather than a means to further the public interest.[113] This is not a necessary result of participatory opportunities, which may provide agencies with valuable information and prevent the factional domination of policymaking that sometimes occurs in nonpublic settings. But as ritualized by the courts and as appropriated by interest groups more than ever divorced from their nominal constituents,[114] notice and comment has taken on the aspect of an end in itself, both symbolizing and amplifying all that the public finds most distasteful in government. These facets of the process make *Mead*'s preference for procedural formality all the more doubtful.

The case against *Mead*'s secondary distinction, between general and particular agency action, is shorter and simpler, in part because it mirrors the half-century-old reasoning of *Chenery II*. In suggesting that informal agency action should get *Chevron* deference only (though not necessarily) when that action has a "legislative" quality[115]—or, otherwise put, when the action formally binds parties outside the proceeding—*Mead* appears to assume that generally applicable agency action betokens more considered judgment than action limited in its operation. This notion, in turn, may derive from two lines of reasoning: that the process of reflecting on a general rule forces an agency to engage in more comprehensive analysis,[116] or that the decision to issue a general rule shows a

---

[113] For discussion of these disparate understandings of the administrative process, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan L Rev 29, 31–35 (1985).

[114] See Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life*, in Theda Skocpol and Morris P. Fiorina, eds, *Civic Engagement in American Democracy* 461, 498–504 (Brookings, 1999).

[115] 121 S Ct at 2174.

[116] See Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L J 300, 308 ("Rulemaking yields higher-quality policy decisions than adjudication . . . because it encourages the agency to focus on the broad effects of its policy rather than the often idiosyncratic adjudicative facts of a specific dispute.").

firmer commitment by the agency to the decision.[117] But as the APA implied in providing for both adjudications and rulemaking, and as *Chenery II* stated, an agency decision to proceed case by case may reflect a deeply reasoned judgment that this method will promote the sensible development of law in an area, either because the issues are inherently "specialized and varying" or because they are too new to suggest an appropriate general resolution.[118] In using this method, the agency shows no more uncertainty about the choice it has made in the given case—which is the only choice to which a court would defer under *Chevron*—than a court does in deciding to cabin a holding. The denial of deference on this ground, rather than promoting more "serious" agency decisions, thus encourages a form of decision making that in some contexts will produce overbroad, premature, or otherwise ill-advised judgments.

The perverse incentives that *Mead* creates emerge from a consideration of that very case. To obtain *Chevron* deference under *Mead*, the Customs Service would have to forgo issuing a ruling letter as to a specific import in favor of announcing a general view, "bespeak[ing] . . . legislative . . . activity,"[119] on the meaning of the relevant tariff classification.[120] More, this general interpretive view would have to arise from full-scale notice-and-comment procedures. At the least, this mode of proceeding would entail substantial time and expense, no less adverse to the importer's than to the agency's interests. In addition, this method might produce worse results, insensitive to the varying ways and contexts in which the interpretive question might arise in the future. It is, indeed, hard to see who would support a move from the current fast, inex-

---

[117] Thomas Merrill and Kristin Hickman appear to take this view in support of their claim, essentially adopted in *Mead* as to informal (though not formal) adjudication, that an agency action must control more than the immediate case to qualify for *Chevron* deference. See note 62. On their reasoning, "[i]t would be extremely odd to give [adjudicative] decisions greater legal force in court than they have within the agency itself." See Merrill and Hickman, 89 Georgetown L J at 908 (cited in note 3).

[118] 332 US at 203.

[119] Id at 2174.

[120] Perhaps alternatively (if the Tariff Act permitted), the Customs Service could amend its procedural rules to provide for formal adjudications in tariff cases and thereby obtain *Chevron* deference. But because the agency probably would have to adopt this procedure across the board, this "option" seems a non-starter.

pensive, and precedent-based yet flexible method of making tariff classifications to a method that relies on notice-and-comment rulemaking. Yet that shift is precisely what *Mead* encourages.

And even beyond these harmful consequences, there is a simple reason to reject *Mead*'s focus on formality and generality: the availability of an alternative approach that better serves the administrative values the Court is using these proxies to further. As we have suggested, the Court's focus appears to follow from the view that deference should depend on whether agency action has a connection to the public and whether that action results from disciplined consideration. As the next part of this article will make clear, we agree with that view. We think, however, that the categories the Court selects are not the best suited to make these inquiries. The Court's approach, when measured against the values of accountability and discipline, denies deference to actions that have earned it and gives deference to actions that do not deserve it. The approach makes the judiciary the principal decision maker when the agency should be, and vice versa. We turn now to consideration of an alternative test, which better matches these values—a test that makes deference dependent on the "responsibility" of the administrative official making the decision or, otherwise put, on nondelegation.

IV. Chevron and Delegation

In hinging *Chevron* deference on the usual "hows" of administrative process (whether "the agency" has acted with sufficient proceduralism or generality), the *Mead* Court disregarded the "who" of that process (what official within the agency has assumed responsibility for a decision). The legal rule that the Court fashioned renders essentially irrelevant whether a decision comes from a cabinet secretary or a civil servant. The Court's approach treats agencies as unitary actors—each an undifferentiated "black box," from which decisions issue impersonally. But agencies are multifaceted organizations, made up of diverse actors with diverse attributes and orientations.[121] And, in particular, agencies are hierarchi-

[121] Several administrative law scholars have focused on the internal functioning of agencies and particularly on the diverse perspectives that diverse actors within the bureaucracy bring to bear on policymaking. See Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale, 1983); Thomas O. McGarity, *Reinventing Rationality: The Role of*

cally structured organizations in which different levels of actors respond to different constraints and incentives, thus making different decisions, and in turn provoking different reactions from outside parties. Persons who work in agencies, as well as those who seek to influence them, know that upper- and lower-level actions often diverge. Perhaps only the courts, among those concerned with administration, routinely neglect this aspect of internal agency structure.[122] The courts, as exemplified in *Mead*, thus fail to create doctrine that appropriately responds to and influences critical methods and norms of agency decision making.

Our approach to *Chevron* would shift the inquiry by focusing on who within an agency has made a decision.[123] Under this approach, *Chevron*'s question of institutional choice (should a judge or agency exercise interpretive power in areas of statutory ambiguity?) would turn on a question of institutional design (to whom has the agency assigned decision-making functions?).[124] The agency would wrest primary interpretive authority from the courts if but only if a particular agency official—the official Congress named in the relevant delegation—personally assumed responsibility for the decision prior to issuance. The courts would retain primary interpretive au-

---

Regulatory Analysis in the Federal Bureaucracy (Cambridge, 1991). But none, so far as we know, has tied this inquiry to the *Chevron* question or to other doctrines of judicial review.

[122] There are a few exceptions. Administrative law has shown awareness of this issue in considering the appropriate structure for handling adjudicatory proceedings. In this area, courts long have debated the relative benefits of insulating adjudicators from or, alternatively, subjecting them to the control of higher-ranking policymakers. See Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 BU L Rev 1, 5–9, 29–36 (1986) (reviewing the debate). In addition, courts occasionally have considered the level of decision making within an agency in the context of deciding whether an agency action is sufficiently final to require the use of notice-and-comment procedures. See *Natl Automatic Laundry & Cleaning Council v Schultz*, 443 F2d 689 (DC Cir 1971).

[123] Certain legal doctrines outside the area of administrative law recognize the relevance of how institutions structure their internal decision making and, more particularly, whether a given decision emanates from a high- or a low-level official. The law of municipal liability under Section 1983, for example, depends in part on whether a high policymaker made the decision for which the plaintiff seeks damages. See *City of St. Louis v Praprotnik*, 485 US 112 (1988); see also Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 Georgetown L J 1753, 1772–79 (1989) (criticizing this standard on the ground that much municipal policymaking occurs at the street level).

[124] Two scholars recently have contrasted the questions of institutional choice (as between the courts and Congress) and institutional design (within Congress itself) in discussing congressional interpretation of the Constitution. See Elizabeth Garrett and Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 Duke L J 1277 (2001). Their analysis does not, as ours does in the administrative context, make the former turn on the latter.

thority (subject only to *Skidmore*-style deference) if, alternatively, this named person passed her decision-making authority to lower-level officials. In short, decisions that statutory delegatees make their own would receive *Chevron* deference, and decisions they delegate would not.[125] We call this the *Chevron* nondelegation doctrine.[126]

In this part, we first flesh out the proposal and then turn to its normative basis. The initial task involves specifying in detail the institutional design characteristics that should trigger *Chevron* deference: the identity of the decision maker and the mode and timing of her decision. As we lay out the proposed prerequisites for *Chevron* deference, we will discuss rationales for the choices we make, but more to demonstrate the cogency and realism of our standard than to present affirmative reasons for its adoption. We then will offer the normative case, explaining how our standard would promote appropriately accountable and considered decision making—much as the congressional nondelegation doctrine is intended to do—by pushing responsibility toward (and away from) certain officials. This argument inevitably raises the question whether an administrative nondelegation doctrine would suffer from the same flaws that have made its legislative counterpart so weak. We accordingly close this part by showing that the different context and way in which our standard operates ensure that it will neither over-

---

[125] A more dramatic version of this approach would save *Chevron* deference for cases in which the President has assumed some responsibility for an administrative decision. One of us has suggested just such a revision of *Chevron* doctrine, implemented primarily through a distinction between executive branch and independent agencies. See Kagan, 114 Harv L Rev at 2372–80 (cited in note 78). The normative case for this change has distinct similarities to the one we lay out here, but this greater revision depends on contested understandings of the role of the President within administration that do not enter into the analysis offered in this article.

[126] Our approach has affinities to several constitutional decisions that suggest a link between the courts' posture toward a governmental decision and the identity of the institution responsible for that decision. See Laurence H. Tribe, *American Constitutional Law* 1677–87 (Foundation, 2d ed 1988) (discussing these decisions). In *Hampton v Mow Sun Wong*, 426 US 88 (1976), for example, the Court invalidated on equal protection grounds the Civil Service Commission's ban on the federal employment of aliens, but suggested that Congress or the President might impose such a ban consistently with the Constitution. See also *Regents of the University of California v Bakke*, 438 US 265 (1978) (Powell concurring) (rejecting an affirmative action policy in part because the state's Board of Regents, rather than the legislature, had adopted it). These decisions effectively prevent a legislature from delegating certain kinds of decisions to certain kinds of institutions. Our proposed nondelegation doctrine differs in looking within an institution and making doctrinal distinctions on the basis of the decisional structure that the institution has adopted prior to taking an action.

centralize the decision-making process nor depend for enforcement on a standardless judicial inquiry.

The key player in our approach is the statutory delegatee—the officer to whom the agency's organic statute has granted authority over a given administrative action. Almost all delegations of power to agencies designate such a person—perhaps the secretary of the department, perhaps the head of a departmental bureau—to take action within the scope of the delegation.[127] The critical question for *Chevron* deference should be whether this statutory delegatee took the action at issue, rather than subdelegating that action to other officials or employees within the agency.[128]

The question whether to defer to action taken under a subdelegation arises because most administrative statutes permit these subdelegations.[129] The result is that lower- (and sometimes simply low-) level officials carry out a wide range of agency action pursuant to internal delegations. In particular, the vast majority of agency action taken outside of notice-and-comment or good-cause rulemaking or formal adjudicative processes issue under the name of these officials.[130] So agencies exercise delegated power not in

---

[127] In the rare cases when a statute names only an office, our standard uses, as noted in the final part of this article, the head of that office as the relevant delegatee. See text accompanying notes 203–04.

[128] If a statute authorizes the named delegatee to delegate the decision making to another specifically named actor within the agency—as opposed to any other officer or employee—the second named actor likewise should count as a statutory delegatee.

[129] See, e.g., *Touby v United States*, 500 US 160, 169 (1991) (upholding the Attorney General's delegation of power to establish classifications of controlled substances pursuant to a statute authorizing her to delegate this power "to any officer or employee of the Department of Justice"); Cass, 66 BU L Rev at 3–7 (cited in note 122) (discussing statutory provisions that allow agency heads to deny review of adjudicative decisions). An occasional statute will make certain functions nondelegable by the designated official. For example, the statutory provision authorizing the Attorney General to approve wiretaps specifically limits her delegation power. See *United States v Giordano*, 416 US 505 (1974). Similarly, statutes that provide for formal adjudication may grant adversely affected parties the right to appeal all the way to the Secretary before a decision may take effect against them. See Cass, 66 BU L Rev at 3–7 (cited in note 122). Assuming that a party invokes this right, a statutory provision of this kind effectively prohibits delegation of the decision. When such a nondelegation provision is in effect, final action almost always will merit *Chevron* deference because (by statutory command) the delegatee herself will have issued the decision. For a qualification to this statement, deriving from the need not only to issue formally but to assess the decision in a meaningful way, see text accompanying notes 132–33.

[130] See Strauss, 41 Duke L J at 1467 (cited in note 11) (contrasting legislative rules, which are "invariably an act of the particular individual or body to whom that authority has been delegated," with other interpretive rulings, which are "typically effected by agency staff without participation at the agency's head").

one but in two senses—the first (and often discussed) relating to Congress's statutory grant, the second (and rarely mentioned) relating to the agency's own establishment of a decision-making structure.

In proposing to limit *Chevron* deference to action of the statutory delegatee, we claim not that Congress intended this result, but that policy considerations counsel it. In Part II of this article we showed the fallacy of grounding deference doctrine in congressional intent, and particularly of contending that deference to an administrative interpretation follows from a congressional delegation to the agency.[131] Similarly here. That Congress has delegated power to a named person within an agency does not mean that Congress has instructed courts to defer to that person's actions; and, conversely, that Congress has made this delegation does not mean that Congress has instructed courts to review independently any other agency official's actions, especially given that Congress has authorized, either explicitly or implicitly, the internal delegation. Our designation of the statutory delegatee as the key figure in the *Chevron* deference inquiry follows from two facts. First, the statutory delegatee is likely to be the secretary of a department, commission of an independent agency, or other high policy official whose participation in administrative action will promote, in ways that we discuss below, accountable and disciplined policymaking. Second, even assuming that the designation of the named delegatee functions as an imperfect (both overinclusive and underinclusive) mechanism for advancing these policy goals, that designation results in an easily identifiable actor to stand at the center of the *Chevron* inquiry.

But what must this statutory delegatee do to qualify an agency interpretation for *Chevron* deference? What does it mean for this person to make the interpretation hers in the way we would require? As an initial matter, the delegatee must issue the interpretation under her name. Authorship is a familiar concept in agency practice; indeed, agencies today are admirably (if surprisingly) punctilious about this feature of their interpretive rulings and other actions. Though agencies may seem faceless bureaucracies, they demonstrate daily that their decisions have human sources.

---

[131] See text accompanying notes 57–70.

Neither the Federal Register nor the agency web pages that now serve much of the Register's traditional function set forth disembodied pronouncements. Like judicial opinions, agency interpretations have authors, sometimes the statutory delegatee, but often not—perhaps the secretary of a department, perhaps the head of a division, perhaps a lower-level officeholder. This practice reflects a desire on the part of agencies to make clear that not all of their interpretations issue from the top and, in so doing, provides a hook for applying the contingent deference rule we propose. Only when an interpretation bears the name of the statutory delegatee has she adopted it as her own.

Adoption in the delegatee's name, however, should not be sufficient; this adoption must follow a meaningful review of the interpretation by the delegatee or her close advisors. This aspect of the standard perhaps is superfluous: we know of no agency that routinely affixes its top official's name to agency interpretations in the absence of such review; and, as we explain below, we doubt that any agency will adopt a practice of "rubberstamping" just to gain *Chevron* deference.[132] An explicit statement of the requirement nonetheless makes clear the purpose of hinging deference on the identity of the agency decision maker; it is, after all, the substantive impact, and not the mere form, of high-level involvement that promotes sound administration. This substantive review (unlike the ultimate formal adoption) of agency action could involve, or even fall wholly to, members of the delegatee's immediate staff (say, a chief of staff or special assistant) or members of other offices with general supervisory responsibility (say, a deputy secretary or general counsel).[133] Given the extensive responsibilities and time commitments of most statutory delegatees, they necessarily—and indeed, wisely—will rely on their senior advisors in important respects.[134] We will return below to the question whether the

[132] See text accompanying notes 173–82.

[133] We contrast these "central" advisors to advisors located within a given substantive unit of the agency. So, for example, if a statute assigned the Secretary of Health and Human Services the power to issue rulings concerning welfare benefits, she would not receive deference for a ruling reviewed only by the assistant secretary of the office responsible for formulating welfare policy.

[134] The Court has recognized, in the context of enforcing the principle that "the one who decides must hear," that agency heads necessarily will rely on staff-level assistance. See *Morgan v United States*, 298 US 468, 481 (1936) (*Morgan I*). In *Morgan*, the Court noted that the requirement that a departmental head "hear" the evidence in a case before rendering a decision did not preclude him from relying on reviews and summaries that his

involvement of these other central actors in a secretary's (or other delegatee's) decision undermines the benefits that accrue from lodging responsibility at this level.[135] For now, we note only that a sizable distinction remains between an agency head using her top aides to make a decision that she will issue and an agency head delegating wholesale to a subordinate the authority to make and publish the decision.

Finally, given that our standard is designed to preclude *Chevron* deference for agency decisions made pursuant to internal delegations, the statutory delegatee must adopt the agency's decision as her own prior to its final issuance.[136] Postdecisional ratification of a judgment made and published in final form lower down the chain of command does not withdraw the delegation of decisional power. That action merely stamps the exercise of the delegation with approval post hoc. The standard we propose thus would go unmet by, say, a statutory delegatee's assertion in a brief that she agreed with a ruling previously issued by a hearing examiner.[137]

---

staff had compiled. See id at 481–82. As Judge Friendly explained in a later, similar case, a prohibition on such staff-level input would beggar reality:

> With the enormous increase in delegation of lawmaking power which Congress has been obliged to make to agencies, both independent and in the executive branch, and in the complexity of life, government would become impossible if courts were to insist on anything of the sort. It would suffice under the circumstances [which involved a record comprised of tens of thousands of documents] that [the Commissioner] considered the summaries of the objections and of the answers contained in the elaborate preambles and conferred with his staff about them.

National Nutritional Foods Association v FDA, 491 F2d 1141, 1146 (2d Cir 1974).

[135] See text accompanying note 151.

[136] Whether to gain *Chevron* deference or to achieve some other objective, agencies can (and even now do) structure their internal processes in a variety of ways to select matters appropriate for the statutory delegatee to decide herself prior to the issuance of a ruling. The agency can leave it to lower-level officials to make case-by-case determinations as to which matters should go to the top. This method places control over the decisional flow in the hands of employees with intimate knowledge of an issue, but also with a potential incentive to avoid scrutiny and reversal. Alternatively (or in some combination), the agency can establish categorical rules or presumptions respecting which decisions to handle at the delegatee's level. This method enables the delegatee to set her own priorities, independent of the potentially conflicting judgments of lower-level employees, but risks substantial imprecision (both overinclusion and underinclusion) in the selection of cases for high-level resolution. Finally, the delegatee herself may become aware of and reach out for matters otherwise ensconced in the bowels of the bureaucracy. The appropriate choice among (or mix of) these approaches depends on context and circumstance, which the delegatee can best evaluate.

[137] We discuss further the normative basis for this position at text accompanying notes 197–202.

The normative case for applying *Chevron* in this way rests on the capacity of an agency nondelegation doctrine to promote the values of accountable and disciplined decision making, in much the way the congressional nondelegation doctrine is meant to do in another context. We have noted that these values explicitly underlay *Chevron* and implicitly underlay *Mead*, and we have argued that they provide the best touchstones to guide the deference inquiry, given Congress's usual silence.[138] With this much accepted, a nondelegation principle offers itself as a potential key to the *Chevron* question. The congressional nondelegation doctrine, after all, long has rested on the twin propositions that it places decision making in the hands of politically accountable actors[139] and that it serves to discipline administrative behavior.[140] The two doctrines, to be sure, are not identical. The congressional nondelegation doctrine is a tenet of constitutional law, the administrative variant a policy-based default rule of statutory interpretation. The former determines the very lawfulness of delegations, the latter only the rigor of judicial review due in their wake. But the established, congressional nondelegation doctrine remains suggestive in that it responds to concerns about the accountability and discipline of administrative action by focusing on the identity of the decision maker. This focus, when applied within the administrative context,

---

[138] See text accompanying notes 42, 75–87.

[139] See *Industrial Union Department, AFL-CIO v American Petroleum Institute*, 448 US 607, 685 (1980) (*Benzene Case*) (Rehnquist concurring) (stating that the congressional nondelegation doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our government most responsive to the popular will"); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 133 (Harvard, 1980) ("That legislators often find it convenient to escape accountability is precisely the reason for a nondelegation doctrine.").

[140] See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?* 98 Mich L Rev 303, 337 (1999) (noting that the congressional nondelegation doctrine fosters "rule of law" values, in part by "cabining the discretionary authority of enforcement officials, who might otherwise act abusively or capriciously"). Kenneth Davis originated this strand of justification for the congressional nondelegation doctrine. See Kenneth Culp Davis, *A New Approach to Delegation*, 36 U Chi L Rev 713 (1969). A nondelegation doctrine premised on rule-of-law values need not require Congress to establish limits on agency action; indeed, Davis suggested that agencies themselves could establish such limits. See id at 729. The D.C. Circuit recently advocated a similar approach, but the Supreme Court reversed, pointedly noting that an agency's own adoption of disciplining mechanisms could not "cure an unlawful delegation." *Whitman v American Trucking Associations, Inc.*, 531 US 457, 472 (2001). The Court thus refused to sever the accountability and rule-of-law rationales for the nondelegation doctrine.

mitigates many of the usual concerns about deferring to an agency's exercise of broad delegated authority.[141]

Consider first accountability. *Chevron* posited that this value supports a rule of deference because agency officials have connections to political institutions and through them to the general public that the judiciary does not.[142] But is this true of all agency officials? We think not. Career agency staff, as a rule, are (proudly) resistant to broad political influence;[143] not for them the kind of "responsive[ness] to the popular will" that then-Justice Rehnquist heralded in a famous opinion concerning the congressional nondelegation doctrine.[144] To the extent that politics colors these employees' judgments, it is likely to be of the special interest variety, which may enter into their decision making as a result of enduring ties with and significant dependence on repeat players in the administrative process (often regulated parties).[145] The appropriate inquiry, to be sure, is comparative in nature, contrasting the public accountability of agency decision makers with that of courts. But still the conclusion remains much the same: the notion that low-level agency employees have a significant advantage on this dimension stretches the imagination.

It is only the presence of high-level agency officials that makes plausible *Chevron*'s claimed connection between agencies and the public; and it is only the involvement of these officials in decision making that makes possible the kind of political accountability that

---

[141] Some scholars might claim that our approach undermines, rather than runs parallel to, the congressional nondelegation doctrine by demanding that courts grant *Chevron* deference in some circumstances. See Farina, 89 Colum L Rev at 487–88 (cited in note 54) (arguing that *Chevron* and the congressional nondelegation doctrine work at cross-purposes). But there is no tension, much less conflict, between *Chevron* and the congressional nondelegation doctrine. Under the nondelegation doctrine, Congress may set the terms of a delegation so long as those terms provide an "intelligible principle." And under *Chevron*, agencies must conform their interpretations to the terms that Congress has established. *Chevron* thus does not enhance Congress's constitutional power to delegate authority, but only provides the background principles for construing delegations that conform to constitutional requirements.

[142] See 467 US at 865–66 (focusing on an agency's link to the President).

[143] See James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 59–62 (Basic, 1989) (discussing the substantial influence that independent professional norms have on low-level agency actors).

[144] *Benzene Case*, 448 US at 685.

[145] See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv L Rev 1669, 1684–87 (1975) (discussing the causes, scope, and limits of interest group capture of agency personnel).

Chevron viewed as compelling deference. The delegatee named in an administrative statute, as contrasted with lower-level officials, usually has more frequent and direct links with a wide range of political institutions and public constituencies. A statutory delegatee typically assumes her position as the result of action by both the President and the Senate.[146] Once appointed, she remains subject to the direct oversight of the White House and Congress in a way not true of employees lower down the bureaucratic chain. She is the person most likely to appear before Congress on a regular basis; indeed, agencies may prohibit many of their nonpolitical appointees from giving congressional testimony. And the statutory delegatee has greater visibility than her subordinates to the public. The press (both general and specialized) covers her more extensively; the full panoply of interested parties attends to her more closely. As a result, a decision made by this official usually is both more responsive and more transparent to the public than a decision made in the depths of the bureaucracy.

Even when the statutory delegatee is not a cabinet secretary or similarly prominent official, a distinction between the delegatee and her subordinates, for purposes of according deference, will serve these accountability values. By pushing key decision making (the kind of decision making for which agencies desire deference) to a small set of identifiable actors, the deference regime we propose will counter the tendency of agencies to diffuse and cloak responsibility. As one of us has argued elsewhere, "to the extent possible, consistent with congressional command and other policy objectives, there is good reason to impose clear lines of command and to simplify and personalize the process of bureaucratic governance."[147] This method of structuring an agency's internal processes, by enhancing intelligibility and transparency, encourages a certain attitude on the part of decision makers; understanding that they possess—and that others will see that they possess—the last

---

[146] The Court has posited that the Appointments Clause establishes this mode of selection as the default rule for the appointment of all "officers of the United States" precisely to promote values of political accountability. See *Freytag v Commissioner*, 501 US 868, 883–84 (1991).

[147] Kagan, 114 Harv L Rev at 2332 (cited in note 78); see Charles Fried, *Order and Law: Arguing the Reagan Revolution—a Firsthand Account* 153 (Simon & Schuster, 1991) (arguing that "[t]he lines of responsibility [within the administrative state] should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizens subject to it").

word on a matter, these officials will approach decision making with an increased attentiveness to political and public reaction.

At the same time, the confinement of judicial deference to the statutory delegatee—and the consequent centralization of agency decision making—promotes the disciplined consideration of policy throughout the agency, even (or especially) at the lower levels. Decisions that the statutory delegatee reviews and issues still will involve extensive work at the civil servant rank, but now the quality and rigor of this work will assume greater significance. The prospect of high-level review occasions scrupulous consideration of proposed agency action within the bureaucracy. Participants in decisions headed for review want to make a good showing before the Secretary (or other statutory delegatee)—to have persuasive reasons for a recommendation and ready answers to her potential questions. The spotlight of the secretary's own attention, focused on the shadowy world of administrative action, enhances preparation; as a decision advances from line actors to unit heads to the secretary's political advisors to the secretary herself, so too does deliberation step up and, accordingly, improve agency decisions.

High-level review similarly furthers the coherence of administrative action, both by preventing deviations from agency policy and establishing a mechanism to implement that policy in a coordinated manner. A General Accounting Office survey published some two decades ago reached the unsurprising conclusion that agency heads exercise discretionary authority over the decisions of administrative law judges as a way of ensuring that these decisions are "in accordance with agency policy."[148] That high-level review often is needed to accomplish this object surely remains true today—and not only with respect to administrative law judges' decisions. A deference rule contingent on secretarial review and action would protect against agency outliers, acting through ignorance or guile inconsistently with general policy.[149] More affirmatively, such

[148] Peter L. Strauss et al, *Gellhorn & Byse's Administrative Law: Cases and Comments* 891 (Foundation, 8th ed 1987) (quoting 1978 GAO survey).

[149] See McGarity, *Reinventing Rationality* at 183 (cited in note 121) ("[T]o the extent that upper-level decision makers carefully monitor the decision making process, it helps ensure that lower-level staff continue to adhere to the policy preferences of politically-appointed decision makers, rather than following their own hidden agenda."); Ronald A. Cass, *Agency Review of Administrative Law Judges' Decisions*, in Administrative Law Conference of the United States, *Reports and Recommendations* 115, 133 (1983) ("[A]bsent some form of review, it is difficult to reward conforming behavior or punish behavior that departs from [the agency head's] wishes, the stuff incentives are made of.").

a rule would promote the integration of diverse agency actions into a coordinated stream of policy aimed at achieving set objectives. Standing at the apex of many agency components, the statutory delegatee can see the interrelationships among different interpretive positions (and the bodies of expertise giving rise to them), determine the combination that most effectively will advance the agency's substantive goals, and choose the order, timing, and form of action that best will support this combination. In short, the delegatee's involvement militates against administrative ad hocery.[150]

That our scheme would provide deference even when a statutory delegatee relies on central advisors to review administrative action undermines none of these arguments. The delegatee, as noted earlier,[151] necessarily operates less as a person than an office. She does not—and cannot—handle all matters herself; like every Washington "principal," she uses assistants to perform a range of functions: to select the matters that require her personal attention, to speak for her to persons within and outside the agency, and even to speak in her own name by writing "her" speeches, preparing "her" memos, and so forth. But this concession to reality in no way renders the delegatee either a cipher or a puppet. Given the typically small size of a delegatee's central staff, the loyalty and understanding that this intimacy breeds, and the usual coincidence of interests of this staff and the delegatee, slippage between the principal and these agents usually remains at tolerable levels. Consider the analogous argument in the context of the congressional nondelegation doctrine. No one would say that the existence of legislative staffs undermines the doctrine; no one would say that congressmen's decisions do not remain congressmen's decisions in a way that mat-

---

[150] This point holds even though a high-level official's intervention may cause shifts in agency policy. None of what we have said is meant to suggest that a statutory delegatee's involvement in decision making necessarily will support the status quo. To the contrary, such an official may have less compunction than a lower-level employee about breaking with past practice or setting out in an uncharted direction. See Wilson, *Bureaucracy* at 230 (cited in note 143) (discussing the unique role that high-level actors can play in altering an agency's course). A deference rule that encourages high-level agency decision making thus may lead to aggressive rather than to cautious interpretations. But a rule permitting altered policy is not equivalent to a rule permitting aberrant or ad hoc policy. If confined to high-level decision making, *Chevron* would function as the first kind of rule, but not as the second. That result, allowing the transformation but not the subversion of agency policy, is correct. The goal here, reflecting the value of disciplined consideration evident in *Chevron*, *Mead*, and the congressional nondelegation doctrine, is to prevent arbitrariness and unruliness, not to arrest all capacity for change.

[151] See text accompanying note 134.

ters. So too here, when the relevant principal is an agency secretary or other top official.

In suggesting an approach to *Chevron* doctrine that focuses on the assignment of decision-making responsibilities within an agency, we have drawn a broad analogy to the congressional nondelegation doctrine. We have done so to highlight the ways in which our constitutional tradition in general, and administrative law in particular, have expressed concern with delegated decision-making authority. Our analysis suggests similar reasons to worry about internal agency delegations and similar reasons to believe that agency decision making will improve if pushed upward.

We cannot disregard, however, the apparent archaicism of our approach. The congressional nondelegation doctrine had its last good year in 1935 (and perhaps its first good year then as well).[152] Just last term, a few months before announcing *Mead*, the Court dealt another and seemingly lethal blow to calls to revive the doctrine as a working part of the Constitution.[153] And the Court did so for good reason. We find sound the principal criticisms of the congressional nondelegation doctrine—that it insists on too much centralization of decision-making authority in the hands of Congress and that it resists any principled method of judicial enforcement.[154] We accordingly must address why our proposal to reformulate *Chevron* as a kind of internal nondelegation doctrine would not fall prey to the same concerns.

Consider first the argument respecting centralization. Critics of the congressional nondelegation doctrine aver that given the complexity of modern government, Congress cannot address all issues demanding resolution and that, even if Congress could do so, its decisions often would reflect deficient knowledge and experience.[155] For this reason, the objection proceeds, a meaningfully enforced nondelegation doctrine would have severe adverse consequences for effective governance.[156] Similarly, some administrative

---

[152] See Sunstein, 98 Mich L Rev at 330–35 (cited in note 140) (chronicling the rise and fall of the doctrine).

[153] See *American Trucking*, 531 US 457.

[154] See Sunstein, 98 Mich L Rev at 337–39 (cited in note 140) (summarizing the arguments against the doctrine).

[155] See id at 338–39.

[156] See id. Even proponents of a revived nondelegation doctrine appear to concede that members of Congress could respond to its demands only by increasing their reliance on legislative committees. See Ely, *Democracy and Distrust* at 133 (cited in note 139); cf. David

experts might claim, an internal agency nondelegation doctrine would result in excessive centralization.[157] Agency heads (even with their central staff), like members of Congress (with their staffs), cannot as a practical matter review and render a final determination on every matter of policy. And even were this supervision possible, it would succeed only in diminishing the quality of agency decision making by subordinating the knowledge, experience, and professionalism of lower-level employees. For these reasons, the argument might go, an agency nondelegation doctrine has a (familiarly) deficient warrant.

For two reasons, however, the charge of impracticality loses its punch when applied to the doctrine we propose. The most important relates to the divergent effects of applying a robust congressional nondelegation doctrine and reformulating *Chevron* as an administrative analogue. Under the congressional nondelegation doctrine, the consequence of a too-broad delegation is prohibition—or, conversely put, a command that Congress decide the matter, even against all evidence that it can do so. The proposal at issue here, by contrast, does not invalidate internal delegations;[158] all that it would do is affect *Chevron* deference. Agency decision making could proceed identically except that the courts would review it more independently. There is nothing "unthinkable" about this consequence; it merely reverts to the world before *Chevron.*

Moreover, a nondelegation doctrine can work more easily in the administrative than in the legislative sphere because of the greater capacity of high-level agency officials than of members of Congress to comply with the doctrine while leaving most of the effort associated with policymaking in the bureaucracy. In the legislative context, the nondelegation doctrine effectively forces Congress to take very burdensome action or to do nothing. Although Congress conceivably could erect a system to review and vote on agency

---

Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* 237–38 (Cambridge, 1999) (discussing the effects of a revived nondelegation doctrine on Congress's decision-making processes). Opponents of the doctrine might find yet a further reason for objection in this "cure," given the special interest orientation of many congressional committees. Consider Kenneth A. Shepsle, *The Giant Jigsaw Puzzle: Democratic Committee Assignments in the Modern House* 231–34 (Chicago, 1978) (discussing the factional leanings of many congressional committees).

[157] See McGarity, *Reinventing Rationality* at 119 (cited in note 121) (discussing the disadvantages associated with upper-level officials' monitoring the rulemaking process).

[158] We discuss this issue further at text accompanying notes 173–74.

recommendations,[159] the enormous mass of agency action, combined with the existence of other congressional responsibilities, combined with the constitutionally mandated form and cumbersome nature of legislative decision making (which requires coordinated action of 535 individuals with different party and geographic affiliations who are divided into numerous committees within two separate chambers) would make the effective operation of this system contingent on an unprecedented feat of governmental engineering.[160] A statutory delegatee within an agency, by contrast, has resort to more feasible means of monitoring and controlling, while taking advantage of, the efforts of the bureaucracy. As compared with Congress, she has a more limited body of decisions to review and a more limited set of nonreview functions. She is usually a unitary actor, or at most a board or commission made up of several members, and so can act with greater expedition. And because she both sits within the agency itself and faces no constitutional constraints on the form of her action, she can select from a variety of processes—relying on close staff or not, operating at an early or late stage, and so on—to perform the meaningful review necessary to satisfy the nondelegation requirement.[161]

Such a combination of "central" and "local" influence on agency decision making promises the highest quality administration, contrary to the claim that high-level supervision inappropriately suppresses professionalism and expertise. We in no way denigrate the importance of these bureaucratic attributes. Neither do we deny that high-level review of agency decision making will inject more "political" concerns into that process. (This result is but the corollary of the greater accountability of top officials to political institutions and the public.) The point here is that the inclusion of the central, more political perspective, even aside from serving

---

[159] Congress of course could not satisfy a strong nondelegation doctrine through the use of a legislative veto mechanism; indeed, Congress cannot any longer adopt this mechanism for any purpose. See *INS v Chadha*, 462 US 919 (1983).

[160] Justice (then Judge) Breyer proposed in the wake of *Chadha* that Congress experiment with a scheme of this kind, incorporating the use of fast-track procedures to facilitate the "confirmation" of agency policy. See Stephen Breyer, *The Legislative Veto After Chadha*, 72 Georgetown L J 785, 788–89 (1984). That Congress never considered seriously the idea suggests much about its feasibility.

[161] See McGarity, *Reinventing Rationality* at 31, 76–77, 120 (cited in note 121) (describing the variety of processes by which high-level officials and their staffs communicate policy preferences as to particular matters to lower-level employees).

accountability values, counters the excesses—most notably, the excesses of tradition and inertia—of local, more bureaucratic decision makers.[162] The very professional norms and institutional memory that these actors possess often blind them to new and beneficial policy approaches. Precisely because central decision makers are less rooted in existing agency culture, they add value to the administrative process. The ideal, then, is neither pure centralization, in which high-level actors execute directives for ministerial application, nor pure decentralization, in which lower-level actors decide matters autonomously. It is, instead, a system that encourages a relationship between the organization's parts and captures the benefits each can offer.[163]

The deference regime we have proposed likely will promote this kind of interactive, iterative exchange between high- and low-level perspectives. Almost everything about agencies—their size and scope, their strong institutional cultures, their attachment to past practice, the complexity of the issues they decide, the distribution of information within them, the interests of their permanent employees in avoiding political influence, and the existence of long-term relationships between employees and outside parties—all conspire to ensure that a statutory delegatee is greatly bounded in her ability to impose her judgments on the agency. Even when a statutory delegatee makes a final decision, she rarely will have considered the matter from scratch. Lower-level employees compile and scrutinize documents, offer legal opinions, provide regulatory analyses, and effectively shape and limit decisional options. This preparatory work powerfully influences the delegatee's judgments.[164]

---

[162] See Wilson, *Bureaucracy* at 62 (cited in note 143) (noting the way professional norms can cause "blind spots" within agencies); Bruce Ackerman, *The New Separation of Powers*, 113 Harv L Rev 633, 701 (2000) ("Bureaucracies are intellectually conservative creatures—full of old-timers who have invested heavily in obsolete conventional wisdom.").

[163] See McGarity, *Reinventing Rationality* at 118–21 (cited in note 121) (urging agencies to establish decision-making structures that have this consequence); consider Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum L Rev 267, 314–23 (1998) (advocating a complex relationship between central and local decision makers, though in a way that focuses less than we do on the actual participation of central officials in decisions).

[164] See McGarity, *Reinventing Rationality* at 179 (cited in note 121) ("Because institutions lack a centralized nervous system steered by a single brain, institutional decision making tends to be very different from individual decision making. Most regulatory decisions are the products of numerous encounters between the various institutional entities that have roles to play in the decision making process, and they therefore represent a synthesis of many views."). For a description of how low-level actors may constrain the choice-set of a high-level agency actor, see id at 61 (discussing decision making in the EPA in the 1980s).

The real danger is that high-level review will insufficiently, rather than excessively, crowd out the orientations of lower-level officials.[165]

And even if high-level review suppresses expertise in a way more hazardous than we acknowledge, the deference regime we propose inevitably would have a self-limiting quality. No rule of deference will prompt high-level review of anything approaching all agency interpretations, given the agency's (including the delegatee's) interest in providing timely interpretations to regulated parties and the burdens to the agency (including to the delegatee) that necessarily accompany high-level review. The centralizing effects of an internal nondelegation principle on the agency's decision-making processes will occur at the margins—in those cases (or categories of cases) for which judicial deference seems most important, which likely are also those cases (or categories of cases) in which more than professional expertise is involved.

Still, this does not end the matter. There is another argument against the congressional nondelegation doctrine—relating to the feasibility of judicial enforcement—which also might cut against our approach to *Chevron*. This claim is that judges cannot distinguish in a principled way between permissible and impermissible delegations and that they therefore should refrain from applying the doctrine.[166] So too, the skeptic might say, courts cannot draw a principled line between internal agency delegations that meet our test for *Chevron* deference and those that do not. Indeed, the "meaningful review" requirement incorporated in this test (alongside the necessity of the delegatee's formal adoption of the agency action) may appear even more resistant to judicial application than the notoriously squishy "intelligible principle" requirement of the congressional nondelegation doctrine.[167]

---

[165] Indeed, by encouraging the involvement of high-level officials in decision making, our standard may enhance their responsiveness to policy proposals initiated within the ranks of the bureaucracy. See Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 Colum L Rev 1231, 1247 (1974) (noting the tendency of high-level agency officials to fail to respond to policy suggestions from below).

[166] See *Mistretta v United States*, 488 US 361, 415–22 (1989) (Scalia dissenting) (arguing that courts cannot distinguish between permissible and impermissible delegations); Stewart, 88 Harv L Rev at 1696–97 (cited in note 145) (claiming that "[s]uch judgments are necessarily quite subjective, . . . almost inevitably appear partisan, and might often be so").

[167] *National Broadcasting Company v United States*, 319 US 190 (1943) (upholding the Communications Act on the ground that its "public convenience, interest or necessity" standard

But the prospects for effective implementation of an internal nondelegation rule far exceed those for administration of the congressional nondelegation doctrine because of the way political constraints reinforce judicial constraints in the administrative context. Courts mainly can enforce the agency nondelegation rule through the simple expedient of insisting on the statutory delegatee's formal adoption of the administrative action; they then can rely primarily on a preexisting set of political incentives (and disincentives) to ensure satisfaction of the additional "meaningful review" requirement. In effect, political and institutional realities obviate the need for judges to police the agency's decision-making process to prevent "rubberstamping." Recognition—or perhaps better said, exploitation—of these realities will enable courts to limit their own inquiry and yet rest confident that the inquiry will achieve effective enforcement of the agency nondelegation principle within the application of *Chevron* doctrine.

Judges easily can enforce the requirement that a statutory delegatee formally adopt an agency interpretation. The adoption requirement means only that the delegatee must affirm and publish the interpretation, in all its specificity, as her own. It is not sufficient for the delegatee to indicate general agreement with a decision that lower-level employees have reached; she must make that decision hers by putting forward both the decision and the rationale for it. There is nothing complicated about this matter; courts need only check that the delegatee has placed her name on the decision and all its supporting materials. Courts today enforce a similar adoption requirement in policing the APA's provision that an adequate statement of "findings and conclusions, and the reasons or basis therefor,"[168] accompany an agency's adjudicative decisions. In that context, courts have made clear that the final decision maker must take responsibility for this full statement. So, for example, the Third Circuit in *Armstrong v Commodity Futures Trading Commission*[169] invalidated an adjudicative decision because the commission, on appeal, said only that the administrative law judge's

---

provides an "intelligible principle" for the FCC to enforce); see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv L Rev 1276, 1303 (1984) (arguing that all delegations both do and do not satisfy the "intelligible principle" test).

[168] 5 USC § 557(c).

[169] 12 F3d 401 (3d Cir 1993).

initial determination was "substantially correct."[170] This statement, the court reasoned, left unclear which aspects of the judge's decision the commission meant to endorse and so "d[id] not rise to the level of adoption."[171]

The dilemma for courts arises from the second aspect of our principle—that the statutory delegatee or her central aides engage in meaningful review of an agency interpretation prior to the delegatee's adoption of it. Assuming the delegatee does not attempt to "adopt" low-level action before it is taken (in which case courts can say that no review, meaningful or not, has occurred), the review requirement appears to confront courts with two unpalatable alternatives. First, a court could attempt to assess the quality of the delegatee's review of the low-level action. But this inquiry places the courts in a more hazardous position than does even the analogue in the congressional context: the former calls on judges to evaluate officials' conduct, whereas the latter calls on them to evaluate only statutory language. Are the courts to compel a statutory delegatee and her staff to submit timesheets detailing the quantum of high-level input? How will courts decide whether this input has reached a sufficient level? Such a judicial endeavor would be unenviable at best.[172] Second, a court could disdain enforcement of the requirement of meaningful review. But if a court adopts this route, the agency nondelegation principle would appear to become purely formal. For at that point, the statutory delegatee would need only to rubberstamp low-level interpretations to obtain *Chevron* deference.

But this dilemma disappears if, as we believe to be the case, the review requirement would be self-enforcing. Administrative norms may play some role in restraining delegatees from formally adopting all agency action; the delegatee's sense of her professional responsibility—and, sometimes more important in Washington, the delegatee's sense of her importance—may make her reluctant to attach her name indiscriminately to every action taken within her department.[173] More critical, though, are high-level officials' political and

[170] Id at 404.

[171] Id at 406.

[172] Courts traditionally have expressed reluctance, for the reasons suggested in the text, to conduct a factual inquiry into the way agency officials reach their decisions. See, e.g., *Morgan v United States*, 304 US 1, 18 (1938) (*Morgan II*).

[173] In addition, the delegatee or her legal staff may resist evasion of the requirement of meaningful review out of a felt obligation to give effect to the courts' pronouncements. Congress, to be sure, has failed to demonstrate any analogous scruples when it comes to

institutional interests, which support the nondelegation standard within agencies in a way wholly foreign to the congressional context. How could such an interest-based calculation protect the requirement of meaningful review? Very simply—if the delegatee would find it more advantageous to decline to adopt a decision than to adopt it without meaningful review (i.e., to rubberstamp the decision). What is striking here is that, given the political and institutional pressures the delegatee faces, this will almost always be true. The delegatee will want to adopt a decision only if she or someone she trusts has subjected that decision to close review.

Key to the analysis here is that the delegatee suffers no dire consequences from simply declining to adopt the typical agency interpretation. Under the administrative (as opposed to the congressional) nondelegation doctrine, delegation of the decision will not result in automatic invalidation; all that will happen is that the decision will not receive *Chevron* protection. That protection, to be sure, is a valued good in agency culture. But its existence often will not be decisive. Perhaps no one will challenge the interpretation; perhaps a court will uphold the interpretation under a stricter standard; perhaps a court will strike down the interpretation even under *Chevron.* From an ex ante perspective the delegatee has something less than an overwhelming reason to flout the internal nondelegation principle by formally adopting agency interpretations without meaningful review.

Now add to the delegatee's calculation the substantial political risks of attempting to end-run the agency nondelegation principle. Consider here an incident from the end of the Clinton Administration involving an opinion letter of the kind issued in *Mead.* In response to a company's request for a legal interpretation, the Occupational, Safety, and Health Administration (OSHA), located within the Department of Labor, ruled that federal workplace safety standards applied to home offices.[174] The letter, once posted on the department's website, drew the attention of the press and

---

delegations of authority. But in the congressional context, the Court more often has denied the existence of a robust nondelegation doctrine than recognized that doctrine but left its enforcement to Congress. Perhaps more important, both the greater ease of compliance and the lesser effect of noncompliance with a nondelegation principle in the agency context may enhance the effect of a simple judicial pronouncement.

[174] See *OSHA Advisory Opinion, Re: Application of OSHA Rules to People Who Work at Home* (Nov 15, 1999), available online at <http://www.techlawjournal.com>.

triggered a firestorm of protest from individuals, companies, members of Congress, and even the White House.[175] Caught in the middle of the controversy, both the Secretary of Labor and the administrator of OSHA were quick to point out that a lower-level OSHA employee had signed and issued the letter.[176] Replying to press and congressional inquiries, the secretary noted that her office had never received the letter for review[177] and the administrator insisted that the letter resulted from a "breakdown in internal clearance mechanisms" and did not represent OSHA's official policy.[178] At a congressional hearing, one member of Congress responded to the administrator's explanation with the comment, "If you can't come back here and tell us that you've held someone accountable for this, maybe you ought to consider resigning."[179] No resignation took place; presumably the administrator found someone else to hold accountable.[180]

This dispute highlights both the political hazards instinct in interpretive materials and the distancing mechanisms available to high-level officials. A statutory delegatee may face criticism from the President, Congress, constituency groups, and the press when any person within her agency issues an ill-considered, aberrant, or unpopular decision. But when the delegatee cannot disclaim responsibility—when she cannot point the finger of blame at some hapless, faceless bureaucratic official—her political peril increases. And deniability becomes less plausible when the delegatee personally has signed a decision. This fact of political life partly explains why statutory delegatees place the prestige of their offices behind only a small subset of agency decisions; and it explains why any

---

[175] For accounts of the controversy, see Kent Hoover, *OSHA Criticized After Home-Office Debacle*, Denver Bus J 1 (Feb 4, 2000); Frank Swoboda, *Labor Chief Retreats on Home Offices; OSHA Position Drew Criticism*, Wash Post A1 (Jan 6, 2000).

[176] Richard E. Fairfax, Director of the Directorate of Compliance Programs for OSHA, had signed the letter. See *OSHA Advisory Opinion* (cited in note 174).

[177] See Swoboda (cited in note 175).

[178] See Hoover (cited in note 175) (quoting Administrator Jeffress).

[179] Id (quoting Representative Schaffer).

[180] A similar flap, complete with the same downward finger-pointing, occurred in the first months of the Bush Administration when the website of the Department of Agriculture highlighted a new policy to abandon a contract provision requiring salmonella testing of ground beef served in federal school lunch programs. The Secretary withdrew the policy, explaining that a "low-level employee" had issued it without seeking review from her office. See Marc Kaufman and Amy Goldstein, *USDA Shifts Stance on Testing of School Beef; Agency to Continue Salmonella Screen*, Wash Post A1 (April 6, 2001).

increase in this practice responding to a *Chevron* nondelegation principle will go hand in hand with an increase in high-level review of bureaucratic decisions (which we expect to be incremental rather than dramatic[181]). Unless she knows and has confidence in what she is personally affirming, no amount of judicial deference will persuade a delegatee to make her own an interpretive decision.

In addition, the statutory delegatee likely will confront pressures from within her agency to resist practices that would evade the requirement of meaningful review. This point may be counterintuitive: Why would the bureaucracy spurn a system in which the delegatee rubberstamped—thus giving weight to without impinging upon—bureaucratic decisions? But an agency bureaucracy is not a monolith. It is a congeries of components that have separate or even antagonistic missions and interests.[182] Some components, most notably the litigating sections, may want the delegatee to gain *Chevron* deference for as many decisions as possible; some components may so desire deference for their decisions that they will accede to processes that also provide deference for the decisions of others. But other components—perhaps the majority—will think this trade-off not worthwhile. Consider, for example, whether the Civil Rights Division of the Department of Justice would support a proposal that automatically would place the Attorney General's name on interpretations of the Immigration and Naturalization Service (INS). The division surely would prefer that it have an advance opportunity to confer with the Attorney General on these decisions, or that the decisions issue only under the authority of the INS, so the Attorney General later has latitude to disclaim them. So, too, for many components in many agencies, which desire broad influence on, rather than broad deference for, other components' interpretative decisions.

Perhaps within some agencies, these political and institutional pressures will have less force than we believe. If so, courts can reinforce them by precluding *Chevron* deference on a finding that a delegatee consistently has approved low-level decisions without providing for their review. In making these determinations, courts rightly can take note of the sophisticated, as well as the simple-

---

[181] See text following note 165.

[182] For discussion of this point see McGarity, *Reinventing Regulation* at 160–61, 185–86 (cited in note 121); Wilson, *Bureaucracy* at 105–07 (cited in note 143).

minded, ways in which cheating can occur. At the same time, however, courts should draw the line at investigating and dissecting an agency's decision-making processes with respect to particular decisions.[183] The best analogue here is the kind of "systemic" review contemplated in *Heckler v Chaney*[184] for claims that an agency has failed to enforce a statutory scheme. The Court there explained that it usually would confine its review to allegations that an agency had " 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[185] So too in this context, courts can show vigilance as to claims of wholesale evasion, while declining to explore the review that a delegatee has accorded to any particular interpretive decision.[186]

In this way, courts can put in place a standard that conditions *Chevron* deference on the decision-making structure that an agency adopts to resolve an issue—and, more particularly, on the involvement of a high-level official within the agency. This standard will encourage high-level officials to assume full and visible responsibility for interpretive rulings, while ensuring that meaningful review lies behind these public acclamations. The standard demands no intensive, case-by-case investigation of internal agency decision-making processes. Courts can rely for effective implementation on the extralegal (political and bureaucratic) incentives and disincentives that follow from the simple requirement that a high-level official adopt a ruling to entitle it to *Chevron* deference. In essence, courts gain the ability to shape an agency's decision-making pro-

---

[183] See text accompanying note 172.

[184] 470 US 821 (1985).

[185] Id at 833 n 4.

[186] In handling these claims of systematic evasion, courts should adopt a high threshold for permitting discovery, consistent with their traditional (and appropriate) reluctance to require agencies to reveal their internal deliberative processes. See *Morgan v United States*, 313 US 409 (1941) (*Morgan IV*). But for our standard to have bite, courts must permit inquiries into these processes when the challenger of agency action has made a strong preliminary showing. Consider *National Nutritional Food Association v FDA*, 491 F2d 1141, 1145 (2d Cir 1974) (noting that courts after *Morgan IV* have required "strong preliminary showings of bad faith . . . before the taking of testimony has been permitted with regard to internal agency deliberations."). For example, evidence that a statutory delegatee had signed hundreds of opinion letters on many matters within a short period of time might justify a court in permitting discovery into the issue of high-level review. More direct evidence of rubberstamping, such as that obtainable form news reports or Freedom of Information Act requests, also might suffice.

cesses by recognizing a set of nonlegal factors that also affect these processes. Judicial sensitivity to an agency's organizational incentives thereby grounds judicial influence over an agency's organizational characteristics.[187]

V. Mead and Delegation

It is now time to return to *Mead.* So far, it might appear that our approach to *Chevron* deference is foreign to the Justices' analysis. In fact, this is not the case. Both the majority and the dissent in *Mead* refer to the agency's internal decision-making structure—and, specifically, to the level of the decision maker; these references count as the single point of commonality between the two warring opinions. In the end, however, each opinion, in different ways, reverts to the conventional understanding of the administrative agency as a unitary actor. After describing these forays and retreats, we apply in this part our *Chevron* nondelegation principle to the agency ruling in *Mead.* We then expand this analysis to suggest how the principle would apply more generally.

Justice Souter's majority opinion takes note of the extreme decentralization of agency decision making in the case, but then submerges this point in articulating the appropriate legal standard. Three times the majority opinion points out that "46 different Customs offices" issue classification rulings.[188] "[T]here would have to be something wrong with a standard" that accorded deference to the decisions of all these offices,[189] the Court proclaimed; any suggestion that deference should apply in such cir-

---

[187] The above analysis suggests why ours is only a plea to the courts to reshape the *Chevron* inquiry to respond to internal delegations and not a plea to Congress to limit the power of agency heads (and other delegatees) to subdelegate. Congress no doubt can promote responsible decision making by prohibiting subdelegation in a few select areas. But for Congress to do much more risks defeating its objects. If the delegatee takes a broad nondelegation command seriously, overcentralization indeed will result, as the delegatee does too much—and because too much, also too little (of import). If, alternatively, as seems likely, the delegatee recognizes this danger, she will develop means of perfunctory compliance, confident that the political risks of doing so are less than those of ignoring her other responsibilities. It is when the delegatee retains the core power to subdelegate that nondelegation will reflect a conscious, considered judgment about the decision-making process and will entail her meaningful participation in that process. It is that judgment and that participation which is integral to any sound scheme of promoting responsibility in agency decision making.

[188] 121 S Ct at 2174; see id at 2175, 2177 n 19.

[189] Id at 2177 n 19.

cumstances would "ignore . . . reality,"[190] and indeed be "simply self-refuting."[191] All these references point toward a test that would make *Chevron* deference contingent on a decision by a central, high-level official. But rather than articulating this test, the Court resorted to the vacuities of congressional intent and the irrelevancies of proceduralism and generality. Indeed, the opinion strongly indicates that formal decisions issued by diverse, low-level officials are more worthy of deference than informal decisions of a single high-level official.[192]

Justice Scalia's dissenting opinion attacks just this result of *Mead*, suggesting the significance of the level at which agency decision making occurs. Justice Scalia observes that some statutes require Cabinet Secretaries personally to resolve disputes without any prescribed procedures; under such a statute, for example, the Secretary of Transportation must determine (often in a politically salient setting) that no feasible alternatives exist to the use of public parkland for a highway.[193] "Is it conceivable," Justice Scalia asks, "that decisions specifically committed to these high-level officers" are ineligible for *Chevron* deference when "decisions by an administrative law judge" receive it?[194] And in response to his own question: "This seems to me quite absurd."[195]

Yet Justice Scalia also backs away from a doctrine that would respond to this analysis, instead adopting a test that more often requires deference. Justice Scalia's test, as noted earlier, accords *Chevron* deference to any "authoritative" agency interpretation.[196] The "authoritative" character of an interpretation in turn resides in a subsequent decision—by, say, the agency general counsel or the Solicitor General—to defend the interpretation in litigation. The *Chevron* inquiry thus depends not on the participation of high-level officials in making a decision, but only on the involvement of these officials (though not necessarily the statutory delegatee) in defending the decision against legal challenge. Because

---

[190] Id at 2174.

[191] Id at 2175.

[192] See 121 S Ct at 2172–73.

[193] See id at 2189 (Scalia dissenting).

[194] Id.

[195] Id.

[196] Id at 2187; see text accompanying note 41.

this postdecision ratification will exist in almost any case that comes before a court, *Chevron* will follow as a matter of course—regardless (despite Justice Scalia's posing of the question) whether an ALJ or the Secretary of Transportation initially made the decision.

But postdecision ratification cannot substitute for predecision participation in advancing the values of accountability and consideration in agency decision making. Ratification often will occur within agencies in near automatic fashion; at this stage, a high-level official is unlikely to influence an agency's interpretations in any of the ways she would have prior to adoption (including by doing something other than accepting or rejecting in toto the proposed interpretation).[197] It is difficult to reverse a course once set, and perhaps especially so within large organizations.[198] A high-level official will confront greater resistance from the bureaucracy in changing a decision already taken than one in the process of formulation. She may believe that the agency will suffer embarrassment from an admission of error. Or she may think that a reversal will lead to a decline in the morale and loyalty of employees. For all these reasons, she often will refuse to reverse a decision she believes in error, decline to consider the merits of the decision at all, or even succeed in persuading herself that a decision she earlier would have rejected in fact constitutes sound policy.

The procedural costs and litigation risks involved in reversing a recent, final agency action reinforce this bias toward the status quo. The reversal of a prior agency interpretation requires at least the extent of procedural formality initially used in adopting the interpretation.[199] To change direction at this late stage (unlike be-

---

[197] Of course, if a statutory delegatee reverses a decision after it issues, the new decision would receive deference under our standard. The reasons for withholding deference when a statutory delegatee ratifies a decision post hoc do not apply when she reverses it.

[198] See Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U Pa L Rev 101, 135 (1997) (noting strong biases against revisions in corporate behavior); Susan T. Fiske and Shelley E. Taylor, *Social Cognition* 149–51 (McGraw-Hill, 2d ed 1991) (arguing that "[w]ell-developed schemas generally resist change"); Richard E. Nisbett and Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* 167 (Prentice-Hall, 1980) (stating similar findings).

[199] See *National Family Planning and Reproductive Health Association, Inc. v Sullivan*, 979 F2d 227 (DC Cir 1992) (prohibiting an agency from revising a notice-and-comment regulation through an interpretive rule issued without notice and comment). This requirement almost surely obtains even if the agency provided more procedural formality than necessary in the first instance.

fore the action becomes final) essentially doubles the cost of issuing an interpretation. At the same time, such a change may decrease the probability that the new agency interpretation will prevail against a legal challenge. Although the issue is far from settled, the Court sometimes has indicated that administrative interpretations in conflict with previously stated views should receive diminished deference on review.[200] No agency head can view with equanimity the prospect that her reversal of a final interpretation will force the agency to embark three times on its interpretive mission.

All these points increase in force when the decision whether to reverse an action occurs in the course of litigation. Agencies are loathe to admit error when confronted with a legal challenge. It is natural for agencies, no less than any other entities, to bunker down when attacked. In addition, an agency can justify a decision to defend a final action less as a firm commitment to the merits than as a reasonable means of giving the courts the final say on a disputed question. Litigation, to be sure, can force an agency to face the weaknesses of the arguments it originally proffered for an interpretation. But even when this result occurs, the agency more likely will attempt to reverse engineer its decision than to incur the cost of starting over.[201] Given the probability of ratification, Justice Scalia's approach reflects anything but a nondelegation principle. Despite the apparent attention he gives to agency hierarchy, his focus would serve not to distinguish (and influence the choice) between different structures of decision making, but instead to deny legal effect to, and indeed to disguise, these differences.[202]

---

[200] See *Good Samaritan Hospital v Shalala*, 508 US 402, 417 (1993) (stating that "the consistency of an agency's position is a factor in assessing the weight that position is due," but ultimately deferring to an agency's changed interpretation); *Pauley v Bethenergy Mines, Inc.*, 501 US 680, 698 (1991) (stating that the "case for judicial deference is less compelling with respect to agency decisions that are inconsistent with previously held views," but finding that the interpretation at issue was not so inconsistent); *Bowen v Georgetown U. Hospital*, 488 US 204, 212–13 (1988) (declining to give deference on the alternative ground that the interpretation at issue was "contrary to the narrow view of that provision advocated in past cases"). But see *Rust v Sullivan*, 500 US 173, 186–87 (1991) (reading *Chevron* to hold that a revised interpretation deserves deference and sustaining agency action on this ground).

[201] Courts usually refuse to sustain agency action on grounds that the agency offers for the first time in litigation. See *NLRB v Yeshiva U.*, 444 US 672, 685 n 22 (1980) ("We do not, of course, substitute counsel's post hoc rationale for the reasoning supplied by the Board itself."). Agency counsel, however, routinely massage agency decisions to strengthen their prospects in litigation.

[202] Justice Scalia's standard, by conferring deference on essentially any agency interpretation that arrives in court, does avoid one potential disadvantage of our approach. Under current law, when a court interprets statutory language without deference to an agency,

What the Justices in *Mead* should have said goes something as follows. The tariff classification ruling was not entitled to deference (contra Justice Scalia). The reasons bear no relation to the ruling's lack of procedural formality or generality of application, still less to notions of congressional intent (contra the majority). Deference should not attach because the relevant decision maker did not adopt the decision after meaningful review. Here, we must concede, there is some uncertainty about who this decision maker is. The organic statute at issue, rather than designating (as most statutes do) a particular agency official to exercise delegated power, assigned the power to issue tariff classifications only to the "Customs Service."[203] This peculiarity, however, cannot save the ruling. In a case involving such a statutory delegation, the values of accountable and disciplined decision making indicate that the head of the named agency—the Customs Commissioner—should count as the critical decision maker for *Chevron* purposes. This official did not issue the classification ruling in question. Neither the commissioner's nor any other official's post hoc decision to defend the ruling in litigation provides the necessary high-level input to qualify the ruling for *Chevron* deference (contra Justice Scalia again). Conversely, the ex ante issuance of a regulation providing that all classification rulings represent the official position of the Customs Service fails to meet the standard;[204] as earlier noted, prospective "adoptions," because they preclude meaningful review, do not suffice.[205] The ruling still may qualify for *Skidmore* deference. But the ruling has no claim on courts independent of the qualities of expertise and persuasiveness it reflects.

This approach doubtless would preclude most rulings of this kind from gaining *Chevron* deference. Because these decisions are so numerous, and because most are so mundane, no statutory delegatee will—or should—usually concern herself with them.[206] Rela-

---

the judicial decision forever locks in the agency, depriving it of the ability to claim deference for a different interpretation in the future. See *Neal v United States*, 516 US 284 (1996); *Lechmere, Inc. v NLRB*, 502 US 527 (1992). This doctrine, which we think may be misguided, means that the agency may have only one shot on a given issue to satisfy the conditions for judicial deference. The agency, however, retains the ability to factor in this danger when deciding whether the statutory delegatee herself should issue an interpretation.

[203] See 19 USC § 1500; text accompanying note 23.

[204] See 19 CFR § 177.9.

[205] See text following note 171.

[206] See text following note 165.

tively low-level officials will dispatch these opinions secure in the knowledge that the statutory delegatee (or her central staff) has neither the time nor the inclination to provide supervision. And in the absence of this supervision, for all the political and institutional reasons we noted earlier,[207] the delegatee almost always will decline to issue these decisions in her name; or if these constraints somehow fail to operate, a judicial backstop meant to detect policies of rubberstamping, also described earlier, should work to prevent the attachment of deference.

In select cases, however, our standard would accord deference to such rulings. A component within an agency may refer an issue like that in *Mead* to the statutory delegatee, or she may reach down herself to decide the issue. The reason for her participation might bear no relation to *Chevron*. She might become involved because the issue is especially nettlesome or sensitive; because the issue matters to more than one component of the agency; because the issue calls for a creative decision-making process, which she can best initiate; or because the issue has broad ramifications, which may make general, rather than case-by-case, resolution appropriate. Or the reason for her participation might flow from the *Chevron* nondelegation principle itself—because the agency has special reasons, not apparent in *Mead*, for wanting the courts to defer to a given interpretation. However the matter reaches the statutory delegatee's in-box and with whatever cause, if the delegatee adopts a decision, *Chevron* deference should follow.

This approach should govern all kinds of administrative action. It should apply regardless whether the action is accompanied by formal or informal procedures and regardless whether it is general or particular in nature. The proposed standard would decline to give *Chevron* deference to the result of a formal proceeding (either a rulemaking or an adjudication) conducted pursuant to an internal delegation. So, for example, if the Board of Immigration Appeals in the Department of Justice, which operates under authority delegated from the Attorney General, desires deference for a decision, the Attorney General would have to adopt that decision, as she occasionally does.[208] On the other hand, the proposed standard

---

[207] See text accompanying notes 173–87.

[208] This result would conflict with current doctrine. See *INS v Aguirre-Aguirre*, 526 US 415 (1999) (conferring *Chevron* deference on a decision of the Board of Immigration Appeals). Similarly, the proposed approach would decline to give deference to a formal rule

would accord *Chevron* deference to even informal decisions (either general or particular) that a statutory delegatee herself renders. Consider, for example, the Comptroller of the Currency's interpretive letters regarding the National Banking Act; whereas the *Mead* Court could not explain how its analysis comported with prior caselaw according deference to these interpretations,[209] our approach would provide a rationale for this precedent (assuming the comptroller signed the letter). Or consider, more importantly, the mass of rules that almost all agencies issue under the good-cause and other exceptions to the APA's notice-and-comment requirements;[210] whereas *Mead* would deny deference to these rules, our standard usually would confer deference on them.

Nothing in this approach, of course, would legitimize agency action that violates legal requirements relating to formal procedures or generality; *Chevron* deference would attach only to lawful action. The APA or other statutory law imposes a variety of constraints on the means by which and form in which agencies can issue interpretations. When an agency fails to comply with these requirements, the action is invalid and the question of *Chevron* deference does not arise.[211] But as demonstrated earlier, the range of legal agency action lacking formality or generality is broad.[212] The scope of *Chevron* deference should be correspondingly broad. An agency should not have to conform its decision making to some idealized notion of either general lawmaking or courtlike formality to receive judicial deference. Within the sphere of legality, all the agency need do is set up its decision-making processes and structures to ensure that a high-level official takes appropriate responsibility for the interpretation.

---

that a subordinate of the statutory delegatee adopts. The Court appears never to have addressed this issue. Consider *United States v Touby*, 500 US 160 (1991) (upholding a controlled substance classification that the Administrator of the Drug Enforcement Agency issued pursuant to a delegation from the Attorney General, but not addressing the *Chevron* question).

[209] See 121 S Ct at 2173 (affirming, but without explanation, *NationsBank of NC, NA v Variable Annuity Life Insurance Co.*, 513 US 251 (1995)).

[210] See text accompanying notes 14–16.

[211] An agency, for example, violates section 553 of the APA by giving final binding effect to a general policy statement adopted without notice and comment. Regardless whether a statutory delegatee has adopted the policy statement, this prohibition applies. So if an agency applies a policy statement to a party without conducting a separate enforcement proceeding, in which the party has an opportunity to contest the position taken in the statement, the court should invalidate the action without considering *Chevron*.

[212] See text accompanying notes 14–16, 102–04.

VI. Conclusion

Administrative law, as practiced and discussed, too much rests on two stock, though not parallel, dichotomies: that between formal and informal procedures and that between general and particular rulings. Once the *Mead* Court reached beyond its unhelpful rhetoric of congressional intent, the Court relied on just these categories to structure the deference inquiry. The Court's analysis rewards and thereby promotes procedural formality (principally) and generality (secondarily) on the view that these characteristics enhance the accountability and deliberativeness of agency action. But in ways that now should be familiar to observers of administrative law, the Court's emphasis on these dual features threatens to increase the ossification and inflexibility of agency process. And the Court's focus both denies and accords judicial deference in the wrong places—denying it to interpretations that, when measured against the Court's own values, properly should reside in agency hands and conferring it on interpretations that, when measured against those same values, should be subject to independent scrutiny.

The alternative approach offered in this article, which is within reach of the Court, makes the institutional choice question of *Chevron* dependent on a key aspect of agency organization—the level in the administrative hierarchy at which final decision making takes place. The congressional nondelegation doctrine, which aims to promote (as most of administrative law aims to promote) similar values as *Chevron* and *Mead*, suggests and informs this approach. An internal agency nondelegation doctrine, like the congressional analogue, would recognize the comparative responsiveness and visibility of certain officials (here, high-level administrators) to the public. And an agency nondelegation doctrine, once again like the congressional analogue, would acknowledge the ability of certain officials to discipline decision making throughout a large and unwieldy bureaucracy. This doctrine, implemented through *Chevron*, would avoid the well-known pitfalls of its congressional cousin. Given the likely interaction between legal incentives and political and institutional pressures in the administrative sphere, often overlooked in discussions of judicial review, the doctrine neither would lead to overcentralization of decision making nor prove incapable of principled enforcement.

In advocating this approach, we have in mind an objective beyond, as well as within, its boundaries. Both administrative law doctrine and administrative law scholarship, in focusing on the two stock dichotomies noted above, have disregarded other matters pertaining to administrative decision-making structures. We have emphasized a single variable: the vertical distribution of decision-making authority within an agency. But others might well have equivalent importance in one context or another: the horizontal distribution of this authority (for example, as between and among different agency components), the nature of the relationship between the agency and the White House, even the budgetary resources available to the particular agency decision maker. Any full understanding of agency process must take into account these institutional elements; administrative law scholarship thus should focus more than it does now on them. And administrative law doctrine—and, in particular, various doctrines of judicial review—profitably might reflect in ways beyond what we have discussed here these features of agency decision-making structure. Courts have disregarded most of the ways in which agencies organize their decision making; the state of administration and administrative law today suggests that it is time for courts to expand their field of vision.