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United States v. Mead Corp.: Will Administrative Transparency Survive the Increasing Demand for National Security?

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I. INTRODUCTION

The tension between the rule of law and the discretion of administrative agencies to implement statutory schemes has long been recognized.[1] When

1. *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 434 (1999). The discussion about agency discretion subsumes

courts review the legal interpretations of administrative agencies, the scope of such judicial power of review represents a complex issue and "it is also a source of fragmentation on the [United States] Supreme Court, dividing its members in a variety of different regulatory contexts."[2] Rules determining the appropriate deference to be accorded to agency decisions have a broad impact because hundreds of federal agencies are in existence, and 'agency' is broadly defined to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[3]

With the passage of time, the role of the courts has changed. Originally, courts had an antagonistic role with respect to agencies and focused on the protection of personal rights.[4] Eventually, courts "lost their antagonism to agencies," still defending people's rights, although in a less demanding way, and adopting a deferential standard of review of agencies' decisions.[5]

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other issues such as: a) the extent to which agencies can set policy, b) the freedom of agencies to deviate from an established policy in particular circumstances, and c) whether agency discretion is plenary rather than subject to supervision. *Id.* at 432.

2. Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1108 (2001) (citing FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291 (2000) (where eight of the justices "agreed that *Chevron* applied, but disagreed on their assessment of the context of Congress' delegation of authority to the Food and Drug Administration to regulate cigarettes under the Food, Drug and Cosmetic Act.")).

3. 5 U.S.C. § 551(1) (1996). However, the rule expressly provides that the following are not considered as agencies for purposes of the Administrative Procedure Act: the Congress; the courts of the United States; the governments of the territories or possessions of the United States; the government of the District of Columbia; or except as to the requirements of section 552 of this title: agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; court martial and military commissions; military authority exercised in the field in time of war or in occupied territory; or functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix. *Id.* §§ 551(1)(A)-(H) (1996). An alphabetical directory of existing federal agencies is available at the internet address: http://www.lib.lsu.edu/gov/alpha (last visited Oct. 5, 2002). Contact information for each federal agency is available at: http://www.firstgov.gov/Contact/By_Agency.shtml (last visited Oct. 5, 2002).

4. William F. Funk, *To Preserve Meaningful Judicial Review*, 49 ADMIN. L. REV. 171 (1997) (citing as an example of such role the Court's decision in *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (holding that Congress may regulate the amount that wheat farmers may grow for own consumption through Commerce Clause because of the cumulative effect that consumption has on wheat prices)).

5. *Id.* at 171-72. *See also* SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943) (holding that if the action of an administrative agency rests upon a determination involving an exercise of judgment in an area which Congress has entrusted to the agency, that action may not be set aside because the reviewing court might have made a different determination were it empowered to do so); *cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 491-92 (1951) (holding that "[w]hether on the record as a whole there is substantial evidence to support findings of [National Labor Relations Board] is a question which Congress has placed in the keeping of the Courts of Appeals," and thus, the Court will intervene only in the "rare instance when the standard appears to have been misapprehended or grossly misapplied."). Such cases can be considered as the progenitors of the strong deferential review of agencies' decisions established in *Chevron*. *See* Funk, *supra* note 4, at 171-172.

In the 1960s and 1970s, the courts assumed a more active role in the administrative process, aiming at its improvement and expansion.[6] In *Skidmore*, a decision that can be fairly intended as the main step towards an increased cooperation between agencies and courts in the administrative process, the Court required agencies to convince the reviewing courts about the persuasiveness of their determinations.[7]

However, *Skidmore* had a limited impact,[8] and with the dissolution of the notion of collaboration between courts and agencies, the Court established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[9] a strong deferential standard of review for the agencies' decisions.

In fact, in *Chevron,* the Court instructed courts to defer to agency interpretations of law, maintaining that when a statute is silent or ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of statute" and therefore the court "may not substitute its own construction of a statutory provision" in lieu of a reasonable interpretation made by the agency.[10] The Court's decision in *Chevron* is representative of the post-modernist view of the role of the judicial power in the administrative process.[11]

The Court, in its decision in *United States v. Mead Corp.*,[12] has recently revisited and redefined the relationship between *Skidmore* and *Chevron* deference, and the related standards of review.[13] In *Mead Corp.*, the Court

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6. *Id.* at 172. In *Allegheny Ludlum Steel Corp.*, the Court held that some provisions in the Administrative Procedure Act were inapplicable in the circumstances and imposed new requirements on informal agency action. *See* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-57 (1972). During this period, the courts also expanded the scope of the protected rights and of the injuries justifying judicial remedies. *See* Funk, *supra* note 4, at 173. In addition, the Court expanded the scope of application and appropriateness of judicial review, including pre-enforcement review. *See id.* at 173-74.

7. *See Skidmore* v. Swift & Co., 323 U.S. 134, 138-40 (1944). The Court provided that the weight to be accorded to an agency's interpretation will depend "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade". *Id.* at 140.

8. *See* Rossi, *supra* note 2, at 1129.

9. 467 U.S. 837 (1984).

10. *Id.* at 843-44.

11. *See* Funk, *supra* note 4, at 174-75. Post-modernists agree that the role of the judiciary should be minimized but are split on the solutions: a) some, including Justice Scalia, aim at recognizing and embracing the political interests involved in the regulatory policymaking, arguing that the administrative process should be political; b) others see administrative regulation as a technocratic endeavor. *See id.* at 175-76. Both consider the administrative process as not well suited for judicial review. *Id.*

12. 533 U.S. 218 (2001).

13. *See id.* The dispute involved in this case arose because Mead Corp. imported "day planners"

held that administrative implementation of a particular statutory provision qualifies for *Chevron* deference only when it appears that "Congress delegated authority to the agency generally to make rulings carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[14] The Court held that "a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations" to engage in notice and comment rulemaking or formal adjudication.[15] After denying *Chevron* deference to the Customs' ruling letter at issue, the Court, however, indicated that this does not mean that the classification rulings are outside of any deference. In fact, *Chevron* did nothing to eliminate *Skidmore*'s deference.[16] Importantly, the Court also held that *Chevron* deference is proper, although no notice-and-comment authority is required or afforded, when Congress intends an agency to have such authority.[17] Such provisions are especially relevant at present time because the increasing concern for national security after the September 11th attacks and the related demand for enhanced discretion of law enforcement agencies could lead the courts to an expansive use of this "escape clause," thereby considerably diminishing the impact of the Court's decision in *Mead Corp.*[18]

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in to the United States, which for many years Customs had classified as "duty free." *See id.* However, pursuant to the Harmonized Tariff Schedule Act, the Customs Headquarters later issued a "ruling letter" classifying the items as "bound diaries" subject to a tariff. *See id.*

14. *See id.* at 226-227. The delegation of legislative authority to the agency that gives rise to *Chevron* deference need not be express, but rather, there are situations where it is apparent or implied from the agency's generally conferred authority that Congress expects the agency to speak with the force of law and therefore *Chevron* deference is appropriate. *See id.* at 229.

15. *See id.* at 229-30.

16. *See id.* at 234. The court held that *Chevron* deference was not warranted in this case because the Customs' process in making such ruling letters is far removed from notice and comment rulemaking process and from "any other circumstances reasonably suggesting that Congress ever thought of classification rulings" as deserving *Chevron* deference. *Id.* at 231. The Court reasoned that "to claim that classifications have legal force is to ignore the reality that 46 different Customs offices issue 10,000 to 15,000 of them each year." *Id.* at 233. Even if the classification in this case had been made by a Headquarter, and was supported by developed reasoning, there is no indication that because of that it might have a stronger force. *See id.* at 233-34. The Court stated that there is room for a *Skidmore* claim when like here the regulatory scheme is highly detailed. *See id.* Therefore, a classification ruling in this situation may at least seek a respect proportional to the power to persuade. *Id.* at 235.

17. *See id.* at 231 (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) (holding that the Comptroller of the Currency is charged with the enforcement of banking laws to an extent that *Chevron* deference is warranted with respect to his deliberative conclusions as to the meaning of these laws)).

18. Such increasing demand for enhanced national security and agency discretion was clearly underlined by the United States Attorney General John Ashcroft, who after the September 11th attacks proposed changes to wiretapping and detention laws. He stated in front of a Congressional Committee that "'[e]very day that passes with outdated statutes and the old rules of engagement is a day that terrorists have a competitive advantage '. . .'[u]ntil Congress makes those changes, we are fighting an unnecessarily uphill battle.'" John Ibbitson & Campbell Clark, *The War on Terror:*

This Case Note is intended to analyze the Supreme Court's decision in *United States v. Mead Corp.* and its potential future impact on the judicial review of agencies' decisions. Part II examines the historical background of the case law regarding the judicial review of agencies' decisions.[19] Part III analyzes Justice Souter's opinion of the Court and Justice Scalia's dissenting opinion.[20] Part IV considers the direct impact of the *Mead Corp.* decision on the power of review of the courts, the indirect impact on the agencies' activities, the shift of the burden of proof that is provided, the importance of the "escape clause" created by the Court's decision, and, finally, the impact on the relationship between the *Charming Betsy* canon and the *Chevron* doctrine.[21] Part V concludes this Case Note with final considerations on the relevance of the Court's decision in *Mead Corp.*[22]

Canada and U.S. Tighten Borders, GLOBE & MAIL, Sept. 26, 2001, at A1. In the wake of the attacks and in such direction of enhanced agency discretion in the law enforcement field, Congress has approved the "Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001," which, among others, has as a stated purpose to "enhance law enforcement investigatory tools." "Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Such concern is not only expressed at the national level through an increase in powers and resources of law enforcement agencies, but also by the state administrations, even in a moment of financial deficit for the states. In his last state of the State address, Governor of California Gray Davis "outlined the increase in security measures he has taken to guard state bridges, waterways, highways and airports since the terrorist attacks of Sept. 11." Bill Ainsworth, *Budget Shortfall Tests Davis Governor Pledges to Put State's Finances in Order Without a Tax Increase*, THE SAN DIEGO UNION-TRIBUNE, Jan. 9, 2002, at A1. The relationship between increased discretion of law enforcement agencies and a higher national security level has often been stressed by the Heads of the law enforcement agencies involved, and lately United States Attorney General John Ashcroft reasserted, after the federal Grand Jury indictment of terrorist Richard Reid, the "shoe-bomber" of the American Airlines Flight 63 from Paris to Miami, that

> "[a]s was the case with the charges filed against John Walker Lindh yesterday our ability to prosecute terrorists has been greatly enhanced by the USA Patriot Act and thanked Congress for passing the law which allowed Reid to be charged with a terrorism count for allegedly attempting to wreck the airplane.

Wayne Washington, *Suspect in Bomb Attempt Indicted: New Charges Allege Ties To Al Qaeda*, THE BOSTON GLOBE, Jan. 17, 2002, at A1. It is evident, therefore, that the probability that concerns for national security will be used to justify *Chevron* strong deference to agency decisions, even where Congress did not expressly provide for through notice and comment authority or formal adjudication, is real and might lead through the liberal use of the "escape clause" in *Mead Corp.* in a field where the potential encroachment of individual rights is very high.

19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part IV.

22. *See infra* Part V.

II. HISTORICAL BACKGROUND

A. Skidmore Deference

Administrative agencies make varying interpretive choices, whether or not the Congress has delegated authority to elucidate a specific provision.[23] The level of deference that should be accorded to such decisions "has been understood to vary with the circumstances" and historically, in order to reach such determination, courts have looked at diversified factors such as the degree of the agency's care, its consistency, its formality, and its expertness.[24] Such debate has produced a spectrum of judicial responses varying from great respect on one side, to substantial deference and to indifference at the far end.[25]

The Court's decision in *Skidmore v. Swift & Co.*[26] summed up these various approaches, thus providing a more uniform framework for the courts' determination.[27] The *Skidmore* case involved an action brought by seven employees against their employer under the the Fair Labor Standards Act (FLSA).[28] The plaintiffs were employed by defendant in a packing plant and they orally agreed to remain in the fire hall of the company for three to four nights a week beyond their daytime employment, with the duty to answer alarms in case of a fire or a sprinkler set off due to some other reason.[29] The issue was whether such waiting time constituted working time for purposes of the statute.[30]

The court held that "no principle in the statute or in Court decisions precludes waiting time from also being working time."[31] The court noted that the responsibility of deciding whether or not a case falls within the

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23. *Mead Corp.*, 533 U.S. at 227.

24. *See id.* at 228 (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) (considering the thoroughness of the agency's consideration); Good Samaritan Hospital v. Shalala, 508 U.S. 402, 417 (1993) (considering the consistency of an agency's position); Reno v. Koray, 515 U.S. 50, 60-61 (1995) (holding that an internal agency guideline is only entitled to "some deference" insofar as its interpretation was a permissible construction of the statute)).

25. *Mead Corp*, 533 U.S. at 228 (citing Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389-90 (1984); Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-213 (1988)).

26. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

27. *See Mead Corp.*, 533 U.S. at 228.

28. *See Skidmore*, 323 U.S. at 135-36. The action was brought under 29 U.S.C. § 201 *et seq.* The employees tried to recover overtime, liquidated damages and attorney's fees. *Id.*

29. *Id.* During such periods no fire occurred and the company provided the workers with a heating system, air conditioning, a recreation area and sleeping facilities. *Id.* at 136.

30. *Id.* at 136-38.

31. *Id.* at 136. The Court noted that it is a fact intensive inquiry that requires scrutinizing the agreement between the parties, the nature of the service and the surrounding circumstances. *Id.* at 137.

statute is a decsion for the courts.[32] However, Congress created the Office of the Administrator, which can bring injunctions to restrain violations of the FLSA and has set forth interpretations of the application of the FLSA under different cirucmstances in an interpretative bulletin and in informal rulings.[33]

As to the issue before the Court, the office of the administrator thought that a flexible, rather than rigid, solution was required.[34] According to the agency's interpretation, the sleeping time and eating time of the employees should have been excluded but the other time spent on call, even though spent in recreative ways, should have been considered working time under the FLSA.[35]

The Court specifically inquired about the measure of deference that is appropriate to the Office of the Administrator's opinions. The Court noted that the the agency's findings are not reached as a result of adversary proceedings, and thus are not conclusive on the cases to which they either directly or indirectly relate, and therefore are not binding on a District Court.[36] Importantly the Court pointed out that "[c]ongress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act" but instead, "it put this responsibility on the courts."[37] It is evident from this passage that the Supreme Court envisioned the role of the agency as peripheral to the interpretive process, placing instead the courts as the center of gravity of such a process and using congressional intent as the motivating factor for such choice.

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32. *Id.*

33. *Id.* at 136-38. The bulletin and the informal letters provide a guide for employers and employees. *See id.* at 138.

34. *Id.* The Office of the Administrator provided guidelines in his bulletin. The agency noted that there are some occupations where periods of inactivity during the night are not considered working time even though the worker is subject to call and that the answer depends "'upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call . . . without being required to perform active work.'" *Id.* The agency's reasoning and method of analysis give further light on the importance in this area of law of deference to agency's decisions of the need of flexibility. It is a strongly perceived need because of the fact intensive inquiries in which agencies are often involved and such concern for flexibility has been at the origin of the Court's decision in *Chevron*.

35. *Id.* at 138-140. The Office of the Administrator reasoned that such time on call, even if pleasurably spent, was not spent in ways that they would have chosen had they been free to do so. *Id.*

36. *Id.*

37. *Id.* at 136-138.

However, the Court recognized that this does not mean that the agency's ruling at issue is not entitled to deference at all.[38] The Court reasoned that the Office of the Administrator acts pursuant to an official duty, has a specialized experience, and operates on the basis of "broader investigations and information than is likely to come to a judge in a particular case."[39] Furthermore the necessity of good administration of the FLSA, as well as effective judicial administration, require that the standards for public enforcement and those for the determination of the private rights be justified by very good reasons.[40]

The Court held that the rulings, interpretations and opinions of the Office of the Administrator are not controlling on the courts but constitute a body of experience and informed judgment that are proper guidance for the courts in their determination.[41] Their weight will depend on their thoroughness of considerations, validity of reasoning, consistency with earlier and later pronouncements, and persuasiveness.[42] Accordingly, the Court held that the waiting time could have been considered working time and remanded the case for proceedings consistent with such intepretation of the FLSA.[43]

To understand the rationale of the Court's decision in *Skidmore* it is important to consider that the assessment of the "persuasiveness" of an agency's legal interpretation is separate from the inquiry about the Agency's "power to persuade."[44] In fact, such interpretations under *Skidmore* are not controlling because of their authority.[45] However, they may be persuasive because of their institutional source which because of its expertise, specialized experience, or high level of information deserves judicial deference according to the persuasiveness of its findings.[46]

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38. *See id.*

39. *Id.* at 139.

40. *Id.* It is clear from the Court's reasoning that it was concerned and conscious of the better capability and expertise that agencies usually enjoy in the determinations relevant to the Court's inquiry.

41. *Id.*

42. *Id.* Under the *Skidmore* test a court must look at thoroughness, logic, and expertness of the agency's interpretation and whether it fits any prior interpretations and any other sources of weight. *See Mead Corp*, 533 U.S. at 235. Justice Scalia strongly criticizes the *Skidmore* test because it resembles "the old totality of the circumstances test." *Id.* at 241 (Scalia, J., dissenting). He argues that while *Skidmore* deference was fine earlier times, in the modern world it can only bring to unpredictability, uncertainty, and endless litigation, due to the numerous federal agencies existing today. *Id.* at 250.

43. *See Skidmore*, 323 U.S. at 140. The court remanded for such determination to the District Court based upon the reasoning that the District Court in deciding the case had been guided by the erroneous understanding that waiting time can never be working time under the law. *Id.*

44. Rossi, *supra* note 2, at 1134.

45. *Id.*

46. *Id.*

However, in the framework of judicial deference envisioned under *Skidmore*, the central role in the process of statutory interpretation is still left to the courts, which represent the center of gravity in such a process. This explains why *Skidmore* deference is referred to as "weak deference."[47]

B. Chevron Deference

The Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*)[48] embodies the idea of a highly deferential judicial review of Agency action.[49] Such decisions and the related judicial review system, so prone to meeting the flexibility needs of agencies, found as progenitors several decisions issued in the 1940s and early 1950s.[50]

The *Chevron* decision clearly put an end to the notion that the administrative process was a "collaborative enterprise"[51] in which courts and agencies could have an equal role. From this perspective, *Chevron* represents the victory of post-modernism and its effort to minimize the judicial role of administrative regulation.[52] With respect to the limitation of

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47. *Id.* at 1118. The Court's decision in *Skidmore*, as to such weak deference, resembles two precedent cases. *Id.* (citing United States v. American Trucking Ass'ns., 310 U.S. 534, 549 (1933) (holding that the interpretation of the meaning of statutes, as applied to justifiable controversies, is exclusively a judicial function); Norwegian Nitrogen Products, Co. v. United States, 288 U.S. 294, 322-23 (1933) (holding that Tariff Commission cannot fix meaning of words as used by Congress or courts, but has power to interpret its own rules and phrases contained in them).

48. 467 U.S. 837 (1984).

49. Funk, *supra* note 4, at 172.

50. *Id.* (citing SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943) (holding that if the action of an administrative agency rests upon a determination involving the exercise of judgment in an area which Congress has entrusted to the agency, that action may not be set aside because the reviewing court might have made a different determination were it empowered to do so); Universal Camera Corp. v. NLRB, 340 U.S. 474, 491-92 (1951) (holding that

> "[w]hether on the record as a whole there is substantial evidence to support agency findings [of the National Labor Relations Board] is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied)).

51. Funk, *supra* note 4, at 174.

52. *See id.* at 175. Post modernists, although united in the idea that the paramount goal is the limitation of the judicial role, are divided into two groups: one is scholarly, while the other derives from the judiciary. Under the scholarly point of view of post-modernism, judicial review is seen as counter-productive because it only contributes to the judicialization of the administrative process and interferes with the completion of the agencies' objectives. *Id.* The judicial prong of post-modernism, of which Justice Scalia is an advocate, argues that the purpose of judicial review is to guarantee individual rights and not to assure fidelity of the law, as that is the executive's job. *Id.; see also* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Post-modernists are additionally split on the solution for the future. *See* Funk, *supra* note 4, at 176.

powers that *Chevron* imposes on courts, *Chevron* has been described as "the 'counter-Marbury' for the administrative state."[53]

The *Chevron* decision arose out of a dispute over the interpretation of a provision in the Clean Air Act by the United States Environmental Protection Agency (EPA).[54] After several states had not achieved the national air quality standards previously set forth by the EPA, in 1977, Congress required non-complying states to establish a permit program regulating "new or modified stationary sources" of air pollution.[55] In order to issue such permits, several stringent requirements had to be met.[56] In the following years, the term "stationary source" was interpreted by the EPA to preclude the use of a plantwide definition, thus imposing even higher burdens on the non-complying states.[57] However, in 1981, after a new administration took office, the EPA issued a new regulation implementing the permit requirement created by Congress, adopting a plantwide definition of the terms "stationary source" and interpreting such term to include, for pollution purposes, "the same industrial grouping as though they [single polluting devices] were encased within a single bubble."[58]

After the issuance of the EPA regulations, respondent, National Resource Defense Council, filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.[59] The Court of Appeals disagreed with the EPA's statutory interpretation, and thus set aisde the regulations as contrary to the law.[60] The Court of Appeals held that the

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Some, including Justice Scalia, strive to recognize and embrace the political interests involved in regulatory policymaking, and feel that this process should be political and is not suited for judicial review. *Id.* Others, including Justice Breyer, see regulation as a technocratic thing, that should be left to the experts and rather than to a judge. *See id.* at 176.

53. Rossi, *supra* note 2, at 1108. The decision has been so described because in *Marbury v. Madison*, Justice Marshall exhorted that it is "the province and duty of the judicial department to say what the law is." *Id.* at 1114 (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).

54. *See* 42 U.S.C. § 7502 (1955) (containing pollution prevention and control provisions).

55. *Chevron U.S.A. Inc.*, 467 U.S. at 840. A stationary source was defined by Congress as "any building, structure, facility or installation which emits or may emit any air pollutant subject to regulation under the Act." 42 U.S.C. § 7502(b)(6)(1955). The Act defines a "building, structure, facility or installation" as "all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of a vessel." 40 C.F.R. §§ 51.18(j)(1)(i)(ii)(1983).

56. *See Chevron U.S.A. Inc.*, 467 U.S. at 840.

57. *Id.* at 839.

58. *Id.* at 840. The permit program created by Congress and to which the definition of "stationary source" related had the purpose of accomodating the conflict between economic and environmental interests. *See id.*

59. *Id.* at 841. The petition for review was filed directly in the Court of Appeals pursuant to statutory authorization under 42 U.S.C. § 7607(b)(1). *See* 42 U.S.C. § 7607(b) (1) (1955) (regarding administrative proceedings and judicial review of administrative decisions issued pursuant to the Clean Air Act).

60. See Nat'l Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718, 728 (D.C. Cir. 1982).

bubble concept was "inappropriate" to programs that were enacted for the purpose of improving the quality of the air.[61] The court reasoned that neither the Clean Air Act nor its legislative history provided a precise definition of "stationary source" for purposes of the permit program.[62] Consequently, the Court of Appeals emphasized that according to its interpretation, the purpose of the Clean Air Act was to improve the quality of the air.[63] Relying on two of its prior decisions, the Court reasoned that although the bubble concept is usable in programs designed to maintain present levels of quality in the air, it is not usable when a program such as the Clean Air Act, is aimed at improving it.[64] Following the decision of the Court of Appeals, the United States Supreme Court granted certiorari to consider this issue.[65]

In *Chevron*, the Supreme Court, according to general principles of interpretation, recognized that when Congress "has directly spoken" to the question at issue, both agencies and courts are bound by the statutory interpretation provided by the legislature.[66] However, the Court in *Chevron* held that when Congress has not directly addressed "the precise question at issue," or an ambiguity is present, the courts cannot merely impose their own construction of a statute on an agency.[67] The Court clearly held that in such a case, the proper inquiry is not whether the court agrees with the agency's solution, but rather "whether the agency's answer is based on a permissible construction of the statute."[68]

The Court recognized that agency authority to fill in the gap in statutory schemes through its own interpretation can originate by either an express or an implied delegation of powers by Congress.[69] The Court held that agency regulations emanate pursuant to express delegation of power to interpret a statutory provision, and thus must be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[70] With

61. *Chevron U.S.A. Inc.*, 467 U.S. 840, 841-42 (1984).

62. *Id.*

63. *Id.*

64. *See id.* (citing Alabama Power Co. v. Costle, 636 F.2d 323, 396-97 (1979)(holding that the EPA must employ a scheme designed to maintain air quality in clean areas); ASARCO Inc. v. EPA, 578 F.2d 323, 327-329 (1979)(declaring that the bubble concept was impermissible when the congressional objective was improvement, rather than simply preservation, of existing air quality).

65. *See Chevron U.S.A. Inc.*, 467 U.S. at 842.

66. *Id.* at 842-43. If, following this preliminary inquiry, it is shown that Congress has directly spoken on an issue, then both courts and agencies are prevented from adopting a non-conforming interpretation.

67. *Id.* at 843.

68. *Id.*

69. *Id.* (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

70. *Id.* at 844 (citing United States v. Morton, 467 U.S. 822, 834 (1984); Schweiker v. Gray

respect to an implied delegation of authority, the Court provided that as long as the statutory interpretation promulgated by an agency is reasonable, the courts cannot substitute the agency's construction with their own.[71]

The Court justified providing such strong deference to the agencies' interpretations in light of the enhanced expertise that the agencies enjoy in the fields in which they operate.[72] In fact, the Court expressly noted that such deference has been especially warranted in the past whenever "a full understanding of the force of the statutory policy has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."[73]

As to the decision of the Court of Appeals, the Court held that the lower court had adopted a judicial definition of the term "stationary source" that was too static in nature.[74] The Court determined that the lower court misconceived its role because once it determined that Congresss left a gap as to the applicability of the bubble concept, the proper question should have been whether the agency's view was reasonable rather than whether the court agreed with such an interpretation.[75] The Court reasoned that although Congress did not specificially intend to apply the "bubble" concept in those cases, the use of that concept by the EPA was permissible.[76]

Under the Court's opinion such use was permissible and reasonable because the single items defined in Paragraph 11(a)(3) of the Clean Air Act as being part of a "stationary source" could reasonably imply a bubble concept: each item is enumerated as if it were encased in a bubble.[77] Accordingly, the Court again stressed the special importance of the

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Panthers, 453 U.S. 34, 44 (1981)).

71. *Id.*

72. *Id.*

73. *Id.* (citing INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 87 (1975)).

74. *Id.* at 845. Through this consideration, the Court impliedly recognizes that one of the functions of agencies is to interpret statutory terms not in a static manner but according to the evolving circumstances in which its application is required.

75. *See id.* The question was not whether the bubble concept was appropriate in the judgment of the Court of Appeals. Instead, the Court of Appeals considered the term "source" so flexibly as to cover either a plant-wide definition, a "unit within a plant" definition, or a dual definition applicable to both a bubble and its components. *See id.* at 859. It then interpreted the policies to mandate a plant-wide definition. *Id.* This reasoning is clearly wrong under the test created by the Court in *Chevron* where at least, if an agency interpretation is reasonable, the court must defer to it.

76. *Id.* at 866. The Court reasoned that there was no specific intent on the part of the Congress because, like the Court of Appeals, it found that both the statute and its legislative history were silent as to this application of the bubble concept. *Id.* at 862. Furthermore the Court recognized that the EPA interpretation was consistent with the allowance of a reasonable economic growth, which represented a policy concern that the legislative history "plainly identifies." *Id.* at 862-63.

77. *Id.* at 861. The Court further emphasized that any overlapping and illustrative terms that might have been used were intended to enlarge and not to confine the Agency's power to regulate particular sources to effectuate the policies of the Act. *Id.* at 862.

agencies' special expertise, and noted that the EPA has consistently intepreted the term "source" flexibly in the context of a technical and complex arena, rather than in a sterile vacuum.[78] The fact that the interpretation of the term changes over time does not mean that deference is not warranted.[79] Therefore, the Court in *Chevron* expressly recognized the pivotal role of agencies in shaping and changing statutory interpretation in order to better meet societal needs,a task which agencies are better suited than the courts to accomplish, given their expertise and technical knowledge.

The Supreme Court in *Chevron* not only justified such strong deference because of pragmatic reasons such as efficiency and expertise, but also envisioned that it was mandated and rooted in the separation of powers existing between the executive and the judicial branch.[80]

The Court reasoned that as agencies are part of the political branch and are accountable to the people, although indirectly, it is therefore more appropriate for them to resolve ambiguities or gaps left by the legislative bodies than it is for the judicial branch to do so.[81] From this perspective the Court's decision in *Chevron* is strongly supported by the Constitution.

The *Chevron* case clearly created a strong deference in favor of agency decisions and a presumption in favor of agency determinations.[82] Even if its impact has been overstated, after *Chevron*, the affirmance rate increased by almost 15% and remands and reversals declined 40%.[83] As such, "the Supreme Court's decisions regarding standards of review for agency action have had very real consequences for appeals of agency decisions."[84]

C. The Christensen Decision

In the years following the Court's decision in *Chevron*, in several instances, courts have refused to accord *Chevron* strong deference to agency interpretations that were made "in the context of informal agency decisions

78. *Id.* at 863.

79. *Id.* It is therefore evident the importance of deference in allowing a statutory interpretation that is consonant with changing societal needs.

80. *See id.* at 865.

81. *Id.*

82. *See id.* In *Mead Corp.*, Justice Scalia particularly stresses this feature of the *Chevron* decision, stating that "*Chevron* made no mention of any need to find such an affirmative intent; instead it said that in the event of statutory ambiguity, agency authority to clarify was to be *presumed*." *Mead Corp.*, 533 U.S. at 252. In Justice Scalia's opinion, *Chevron* rendered *Skidmore* anachronistic and when courts owe any deference, it has to be *Chevron* deference. *See id.* at 237.

83. *See* Rossi, *supra* note 2, at 1115.

84. *Id.* at 1115.

or statements, such as appellate briefs, manuals, and opinion letters."[85] Such decisions were issued in the name and spirit of *Skidmore* and raised questions as to the appropriate scope of application of *Chevron* deference.[86] However, it was not until *Christensen v. Harris County*[87] that the Court addressed the scope of application of *Chevron* strong deference.[88]

The Court's pronunciation in *Christensen* clarified the application of the deference doctrine first articulated in *Skidmore*.[89] It represents a clear retreat from the application of the *Chevron* deference.[90]

In *Christensen*, the dispute arose out of the interpretation of the provisions of the Federal Fair Labor Standard Act (FLSA) authorizing states and their political subdivisions to compensate their employees for overtime work by granting them permission to take time off from work at full pay.[91] As the absences due to compensatory time off became an increasing cost, Harris County implemented a policy in the form of an informal letter, setting a limit to the compensatory time accruable and thus allowing the supervisors to order employees to take voluntary compensatory time even against the employees' will.[92] Some of the employees of the County's Sheriff Office challenged this policy.[93]

Although under *Chevron* the policy issued by Harris County should have been upheld as long as embodying a permissible construction of the statute, the Court held that the County's policy statement was subject to the weaker *Skidmore* deference and therefore should be upheld only if persuasive.[94] First, the Court reasoned that such lower deference was

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85. *Id.* at 1118 (*comparing* Stinson v. United States, 508 U.S. 36, 44-45 (1993)(finding no *Chevron* deference for Sentencing Commission Guideline commentary), *and* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256-58 (1991) (*finding* EEOC guidelines not entitled to *Chevron* deference but only to *Skidmore* deference), *with* Reno v. Koray, 515 U.S. 50, 62 (1995) (according *Chevron* deference to Program Statement by the Bureau of Prisons)).

86. *Id.*

87. 529 U.S. 576 (2000).

88. Rossi, *supra* note 2, at 1118. Professor Robert Anthony is one of the strongest proponents of the view that "*Chevron* deference should not apply to agency interpretations" adopted pursuant to informal decision-making procedure because "[w]here the format is an informal one, it ordinarily does not carry the force of law." Robert Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990). If the court determines that Congress did not intend an interpretation to carry the force of law, then the court should accord *Skidmore* deference. *See id.* at 41.

89. *See* Rossi, *supra* note 2, at 1105.

90. *Id.* at 1120.

91. *Christensen*, 529 U.S. at 578 (citing 29 U.S.C. §§ 206-207 (1938)).

92. *See id.* at 578-81. The policy was issued by Harris County after having requested the advice of the Department of Labor's Wage and Hour Division. *Id.* at 580. The agency issued an opinion letter that was disregarded by Harris County because it provided that the position of agency was that, absent a prior agreement on the point, neither the statute nor the regulations would permit an employer to force an employee to use accrued compensatory time. *See id.*

93. *Id.* at 578.

94. *Id.* at 586-87.

mandated by the fact that informal letters do not carry the force of law as do other more formal modes of agency decisions, such as formal adjudication or notice and comment rulemaking, as "Congress did not intend the informal mode of statement that the agency had chosen to be binding on courts."[95] Therefore, in determining whether *Chevron* deference applies, the proper inquiry is not only whether there was a gap or ambiguity in the statutory scheme but also whether Congress intended in that specific case for the agency interpretation to carry the force of law.[96]

Secondly, focusing on the procedure followed by agencies in arriving at their interpretations, the Court reasoned that in the specific case *Chevron* deference was not warranted because the policy statement was not issued following a type of deliberation that afforded public participation and that allowed the creation of an explanatory record for the agency decision.[97] The Court distinguished between the informal procedure utilized in the present case and formal adjudication or notice and comment rulemaking, which instead, pursuant to the provisions of the Administrative Procedure Act, enhance public participation and create an explanatory record of the decision, thus justifying *Chevron* deference.[98]

In *Christensen,* all justices, except Justice Scalia, agreed that the County's interpretation was subject to *Skidmore* deference.[99] Justice Scalia argued that *Chevron* applied, but notwithstanding such strong deference the policy could not stand because it was based on an unreasonable interpretation of the relevant statute.[100] The other justices, although agreeing on the application of the *Skidmore* test, had differing views as to its application. Under the approach to the *Skidmore* test employed by the majority in the decision, a court must first interpret a statute, then comparing such interpretation to the one given by the agency, the court then determines if it is persuaded that the agency's interpretation is better, and if it is not so

95. *Id.* at 587 (citing Reno v. Koray, 515 U.S. 50, 61 (1995); EEOC v. Arabian Am. Oil Co., Inc., 499 U.S. 244, 256-58 (1991) (stating that interpretive guidelines do not deserve *Chevron* deference); Martin v. OSHRC, 499 U.S. 144, 157 (1991) (holding that interpretive and enforcement guidelines are not entitled to *Chevron* deference)).

96. *Id.*

97. *See id.* at 587.

98. *Id. See also* Rossi, *supra* note 2, at 1123 n.86 (citing 5 U.S.C. § 553(c) (1994) (providing that interested persons have the right to participate in rulemaking through submission of written data, views or arguments, and requiring a general statement of basis and purpose for rules)); 5 U.S.C. § 554 (1994) (providing interested persons with the opportunity to submit and have considered facts and arguments in adjudicative hearings prior to final agency decision).

99. *See Christensen*, 529 U.S. at 587-89; 596-96.

100. *Id.* at 591-92.

persuaded, then no deference is due under *Skidmore*.[101] Justice Stevens instead proposed an approach relying more heavily on the factors that were enumerated in the *Skidmore* decision itself, and held that in light of the agency's thoroughness of consideration and of its position in reaching the decision, respect was warranted.[102] Justice Breyer instead viewed *Skidmore* as a test integrated with the *Chevron* test in which *Skidmore* deference is a type of *Chevron* step two reasonableness inquiry.[103]

The Court's decision in *Christensen* clarified that *Skidmore* and not *Chevron* deference applies in cases of informal decisions not carrying force of law. However, although a first important step towards the definition of the boundaries between *Skidmore* and *Chevron*, the *Christensen* decision did not clearly define their relative fields of operation. Furthermore, in light of the varying approaches proposed by the differing opinions presented in the case, it did not provide a clear test for the application of the *Skidmore* deference.

III. *UNITED STATES V. MEAD CORP.*

Although *ex post facto* review of agency interpretations has contributed to "slowing agency rulemaking processes and making it costlier," such judicial review serves important functions.[104] First, it represents a considerable counter-balance to the agency power with regard to regulatory schemes that involve and affect a large segment of the population and may cost taxpayer money.[105] Second, judicial review of agency decisions "may serve a legitimating function in our democratic system" and help diminish the abuses of the regulatory system created by Congress in statutory schemes.[106] Therefore, in the context of the discussion regarding the permissible and appropriate extent of unchecked or extended agency discretion, "one should evaluate the extent to which various aspects of ex-post review help check abuses and the extent to which these aspects impose superfluous costs on the regulatory system."[107]

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101. *See id.* at 587.

102. *Id.* at 595-96.

103. *See id.* at 596-97. Justice Breyer's dissent stated that "the Labor Department's position in this matter is eminently reasonable, hence persuasive, whether one views that decision through *Chevron*'s lens, through *Skidmore*'s lens, or through both." *Id.* at 597 (Breyer, J., dissent).

104. Seidenfeld, *supra* note 1, at 458.

105. *Id.* at 458-59.

106. *Id.*

107. *Id.* at 459.

A. The Majority Opinion

The Supreme Court's decision in *United States v. Mead Corp.*, delivered by Justice Souter, addressed the question of what degree judicial deference should be given to an informal tariff classification ruling letter issued by the United States Customs Services (Customs) pursuant to the harmonized tariff schedule of the United States (HTSUS).[108]

Pursuant to the HTSUS, goods imported into the United States are taxed according to the different categories to which they belong, and their final classification and rate for taxation purposes is determined by Customs.[109] Such classification is performed by the Customs through the issuance of binding ruling letters prior to the entry of the imported goods.[110] If a change of practice or other modification is not present, such letters constitute authority in the disposition of identical future transactions, however, they are subject to modification or revocation "'without notice to any person, except the person to who [sic] the letter was addressed,'"[111] and before being issued they are not subject to notice and comment because they respond to "transactions of the moment."[112]

Defendant, Mead Corp., imported day planners that for many years were classified by the Customs as items free of duty.[113] However, in 1993 the Customs headquarters issued a ruling letter classifying Mead Corp.'s day planners in the subcategory of "'[d]iaries, notebooks and address books, bound. . .'" subject instead to a 4% import duty.[114] The Customs' ruling reasoned that "diary" comprehended also a "book including 'printed dates

108. *Mead Corp.*, 533 U.S. at 218.

109. *See* Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1500 (1930) (providing that Customs "shall, under rules and regulations prescribed by the Secretary [of the treasury] . . . fix the final classification and rate of duty applicable to such . . . merchandise").

110. *See* 19 U.S.C. § 1502(a) (1930) (providing that "[t]he Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned)). These rulings are performed by the Customs through the issuance of ruling letters, as authorized by the Secretary of Treasury. 19 C.F.R. § 177.8 (2000).

111. *Mead Corp.*, 533 U.S. at 223 (*quoting* 19 C.F.F. § 117.9 (c) (2000).

112. *Id.* (citing 19 U.S.C. § 1625(a) (1930)). Most ruling letters contain little or no reasoning, but simply describe goods and state the appropriate category and tariff, while few letters in fact set forth a rationale for the determination. *Id.* at 224. The ruling letters may be issued by any of the offices of the Customs at the port of entry of the merchandise or by the Customs Headquarters Office. *Id.*

113. *Id.* at 225.

114. *Id.* at 224 (citing 185 F.3d 1304,1305 (C.A.Fed. 1999) (citing subheading 4820.10.20)). The letter moved such day planners from one subcategory to another individuated by HTSUS 4820.10, thus causing an import tax to be imposed on the day planners. *Id.* at 225.

for daily memoranda and jottings; . . .'" and "bound" included also "a reinforcement or fittings of metal, plastics, etc. . . ."[115]

After the Customs rejected Mead Corp.'s protest, Mead Corp. filed suit in the Court of International Trade (CIT) and subsequently in the United States Court of Appeals for the Federal Circuit.[116]

The Court of Appeals held that such ruling letters deserve neither *Chevron* deference, nor any other deference, because they were not issued pursuant to notice and comment power and therefore do not carry force of law.[117] Therefore, after rejecting Customs' reasoning on the classification, the Court of Appeals reversed the judgment of the CIT.[118]

The United States Supreme Court granted certiorari to consider the limits of the *Chevron* deference owed to administrative practice in applying a statutory scheme.[119] The majority of the Court held that the Customs ruling at issue fails to qualify for *Chevron* deference but remanded the case because of the possibility that it deserves some deference under the *Skidmore* decision.[120]

As to the specific legal standard applicable in the deference determination, the majority of the Court held that administrative implementation of a particular statutory provision qualifies for *Chevron* deference only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and that the agency interpretation was promulgated in pursuance of that authority.[121] According to the Court, such delegation may be shown when Congress either provided an agency with the power to engage in formal adjudication or in notice and comment rulemaking.[122] Furthermore, and very notably, it provides that

115. *Id.* Such reasoning was not provided in the first ruling letter, but a second ruling letter specifically referred to the Oxford English Dictionary definition of "diary" in reaching the interpretation therein. *Id.*

116. *Id.* The Court of International Trade granted a summary judgment in favor of the Customs Service adopting the Customs' reasoning but not providing any holding about the deference warranted to the ruling letters. *See id.*

117. *Id.* at 226.

118. *Id.* The Court of Appeals rejected Customs' reasoning, holding that Mead Corp.'s day planners were not "diaries" because there was not extensive space for notation, and furthermore, they were not "bound" because otherwise the category of "unbound diaries" would be left unfilled. *Id.*

119. *Id.*

120. *Id.* at 227. As to the question whether a ruling letter is subject to *Skidmore* deference, in *Federal Election Commission*, the Circuit Court for the District of Columbia held that agency interpretations such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law, do not warrant *Chevron*-style deference; instead, interpretations contained in formats such as opinion letters are entitled to respect under the Supreme Court's *Skidmore* decision. *See* Fed. Election Comm'n v. National Rifle Ass'n of America, 254 F.3d 173, 184 (D.C. Cir. 2001).

121. *Mead Corp.*, 533 U.S. at 226-27.

122. *Id.* at 227.

such delegation of power can take place also "by some other indication of a comparable congressional intent."[123] Therefore, it is patent that the inquiry as to the appropriate deference warranted to an agency's decision will be both fact intensive and connected to the specific statutory scheme that the agency is administering and the general duties of an agency. The rule, as shaped, is very flexible as to what causes the *Chevron* deference to apply or not to apply and requires a case specific insight and analysis of the Congressional intent. The Court says that whether or not the Congress has delegated authority to elucidate a specific provision, agencies make all sorts of interpretive choices, and the fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances.[124]

The majority of the Court expressly recognizes and reasserts the principle originally set forth in *Chevron*, that in case of express delegation by the Congress of the power to fill a gap in the statutory scheme by regulation, "any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[125] However, analogous to its decision in *Chevron*, the Court also considers the specialized technical expertise and the "well-reasoned views" of agencies implementing a statute and held that notwithstanding the absence of an express delegation, such views "constitute a body of experience and informed judgment" which can provide courts with proper guidance and "may influence courts facing questions the agencies have already answered."[126] Furthermore, the Court expressly recognizes that considerable weight is to be accorded "to an executive department's construction of a statutory scheme it is entrusted to administer."[127]

The majority opinion exposes that courts throughout the years have considered different factors in determining, under the circumstances, the fair amount of deference to be given to an agency decision, and a considerable fragmentation in the field of judicial deference to agency decisions developed as a result.[128] The courts have inquired into the degree of care exercised by the agency, its consistency of decisions, its relative expertise in a particular field, and the level of persuasiveness of its position.[129] In this

123. *Id.*
124. *Id.* at 227-28.
125. *Id.* at 227 (citing *Chevron*, 467 U.S. at 822).
126. *Id.* (citing Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).
127. *Id.* (citing *Chevron*, 467 U.S. at 844).
128. *See id.* at 228.
129. *Id.* (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) (considering the

context of fragmentation, the Court found that its decision in *Skidmore* represents an effective synthesis of these factors, which is capable of providing a test granting the necessary flexibility appropriate in the field. Accordingly, the deference which should be accorded to an agency decision in a specific case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[130]

Furthermore, the majority of the Court recognizes that an enhanced level of deference is not only appropriate in case of express delegation but also when it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law. . . ."[131] In the case of such implied delegation, analogous to the case of express delegation, the court held that the agency decision cannot be rejected simply because it is unwise, but instead the Court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable."[132]

The Court indicates that *Chevron* strong deference is appropriate, and delegation of force of law power is present both when Congress has given an agency the prerogative to engage in rule making or adjudication producing "rulings for which deference is claimed."[133] This represents the so-called notice and comment power. In addition, delegation of power to issue decisions having the force of law is present when Congress has provided for agency decisions, a relatively formal administrative procedure "tending to foster the fairness and deliberation . . . ."[134] However, the Court importantly determines that the fact that the ruling given in the case at hand was not pursuant to notice and comment authority does not *per se* exclude application of *Chevron* deference because the Court has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[135]

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thoroughness evident in the agency's consideration); Good Samaritan Hosp.v. Shalala, 508 U.S. 402, 417 (1993) (considering the consistency of an agency's position as a factor in assessing the weight to the accorded); Reno v. Koray, 515 U.S. 50, 61 (1995) (holding that internal agency guideline is entitled only to some deference); Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 390 (1984) (considering the relative expertness of the agency)).

130. *Skidmore*, 323 U.S. at 140.

131. *Mead Corp.*, 533 U.S. at 229.

132. *Id.*

133. *Id.*

134. *See id.* at 230.

135. *Id.* at 231. This statement is important because this can be used in the future to guarantee *Chevron* deference even to cases where political or contingent reasons require it. This provision, which can be defined an "escape clause," seriously impacts the forseeability of the standard of

Even if the above considered "escape clause," under some circumstances, can justify *Chevron* deference in absence of notice and comment power of formal adjudication power, the majority of the Court held that in the present case such circumstances were not present, and therefore *Chevron* deference was improper.[136] The Court reasoned that the amount of such rulings itself refuted any possibility of providing each one of such letters with the force of law.[137] In particular, "to claim that classifications have legal force is to ignore . . . that 46 different Customs offices issue 10,000 to 15,000 of them [classification ruling letters] each year."[138] As in the present case, the ruling letter was issued by the Customs' headquarters and not by one of the 46 satellite offices; an argument was made that a higher level of deference was appropriate.[139] However, the Court considered this factor as not determinative because there was no evidence that the statutory scheme recognized letters issued by the headquarters as different from the others, not even when, as in the present case, the letters were also accompanied by a developed reasoning.[140] Therefore, the Court held that the Customs' classification ruling at issue does not deserve *Chevron* strong deference but is instead best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines."[141]

However, the determination that *Chevron* deference is not applicable to the Customs' ruling did not lead the Supreme Court to agree with the Court

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review. *See id.*

136. *Id.* at 231. The Court reasoned that "[t]he authorization for classification rulings, and Customs' practice in making them, present a case far removed not only from notice and comment process but also from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving [*Chevron*] deference." *Id.* 231. In particular: a) there is no indication that the terms in the statute meant to delegate authority to make classification rulings with force of law (the Court, however, notes that it is not making a general statement on the general authority of Customs); b) even if 19 U.S.C. § 1502(a) authorizes rulings prior to the entry of merchandise, the rulings bind only the parties to the ruling; c) even if 19 U.S.C. § 1502(a) seems to assume that such rulings may be precedents, the precedential value alone does not add up to *Chevron* entitlement (this is important because the Court is stating that, without notice and comment or formal adjudication the mere fact that a decision is precedent does not determine by itself that *Chevron* deference is appropriate); d) any precedential claim of a classification ruling is then balanced by the independent review of the CIT; and e) a letter's binding character as a ruling stops short of third parties. *See id.* at 231-32.

137. *Id.* at 233.

138. *Id.*

139. *Id.* at 225.

140. *Id.* at 233-34. Neither the statutory changes show such congressional intent because notice and comment procedures are required only when modifying or revoking a prior classification and under its regulations the Customs are obliged to produce notice and comment only when changing a practice so as to produce a tariff increase. *Id.*

141. *Id.* (citing *Christensen*, 529 U.S. at 587).

of Appeals that no deference at all to such rulings was the appropriate outcome. In fact, "*Chevron* did nothing to eliminate *Skidmore*'s" holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and access to broader investigations and information'" that it had.[142] It is evident therefore that the consideration of the agencies' specialized knowledge and expertise, which was explicitly the basis for the decision in *Chevron*, plays an important role generally in the field of judicial deference to the agencies' decision and represents a significant factor. The Court considers that in the specific case, in light of the details of the statutory scheme and the specialized experience of the Customs, the classification ruling can at least seek a deference which is proportional to the persuasiveness of the decision, and therefore a claim of deference under *Skidmore* can be raised.[143]

The Court further elucidates that its decision in *Mead Corp.* is grounded in the choice to provide a multifarious and various spectrum of possible levels of judicial deference in order to tailor such levels to the variety present in the statutory schemes authorizing agency action.[144] Although different from the solution proposed by Justice Scalia, the majority of the Court specifically recognizes that the conclusion it reaches originates from the common need to deal with "the great variety of ways in which the laws invest the Government's administrative arms with discretion . . . ."[145]

The Court indicates that *Chevron* did nothing to eliminate *Skidmore* but simply recognized that in case of explicit or implied delegation, a higher level of deference was appropriate.[146] In support of this point, the majority specifically recalls its recent decision in *Christensen*, reaffirming that *Skidmore* deference was not swept away by *Chevron*.[147] The Court says that

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142. *Id.* (citation omitted). There is room for a *Skidmore* claim when, like here, the regulatory scheme is highly detailed and therefore a classification ruling in this situation may at least seek a respect proportional to the power to persuade. *See id.* Under *Skidmore*, look at "thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." *Id.* at 235.

143. *Id.*

144. *See id.*

145. *Id.* at 236-37.

146. *Id.* at 234-35.

147. *Id.* at 235. The significance of the *Skidmore* decision beyond *Chevron* and *Mead* was recently stated by the court in *Glover v. Standard Federal Bank*, 238 F.3d 953 (8th Cir. 2002). In *Glover*, Plaintiffs challenged the term of a loan provided by Defendant as violative of the Real Estate Settlement Procedure Act (RESPA) and Defendant argued that the disputed fees were allowed by policy statements issued by the Department of Housing and Urban development ("HUD"). *Id.* at 956-57. The court held that the HUD policy statements were not entitled to *Chevron* deference under *Mead* because they constituted agency interpretation of its own regulations and not of a statutory scheme. *Id.* at 962. However, the court reasoned that the agency's determination was to be accorded some deference, even if not *Chevron* deference, holding therefore that the agency decision was entitled to *Skidmore* deference. *Id.* Accordingly, the court upheld such HUD determinations because they were "reasoned" and derived from the HUD expertise in the field. *Id.* at 962-63. It is evident, therefore, that *Skidmore* deference was viewed by the court as having significance separate

its choice favors variety and the continued recognition of *Skidmore* is necessary for the reasons that Justice Jackson gave when *Skidmore* was decided.[148] Accordingly the Court remanded the case for proceedings consistent with the opinion.[149]

B. Justice Scalia's Dissenting Opinion

Justice Scalia strongly challenges the majority opinion in *Mead Corp.*, basing his attack on objections not simply directed at the standard of review set out in *Skidmore*, but also to collateral, yet significant, observations regarding the effect that the insertion of such a standard creates on the burden of proof. In fact, Justice Scalia first notes that the "avulsive change in judicial review" of administrative action introduced by the decision in *Mead Corp.* regards precisely the presumption applicable in the field.[150] While before there was a general presumption of authority of agencies to interpret the statute they administer, it has been changed to a presumption of no such authority.[151] Justice Scalia points out that such a presumption will be overcome only by affirmative legislative pronunciation showing a contrary intent.[152]

Secondly, Justice Scalia asserts that as a corollary, the Court's decision in *Mead Corp.* will increase the normative complexity in the field. In fact, when agency authority to resolve ambiguity did not exist, no deference was accorded to the agency by the courts, while now courts are directed to give an indeterminate amount of deference under *Skidmore*.[153]

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from *Mead* and applicable to the vast body of law represented by agencies' interpretation of their own regulations.

148. *Mead Corp.*, 533 U.S. at 238 n.19. According to the majority of the Court, it cannot treat thousands of classification rulings by Customs as substantive law. *Id.* To avoid this problem, Justice Scalia proposes that *Chevron* deference should be accorded only to those official pronouncements that are approved at the highest hierarchical levels in the agency. *Id.* Justice Scalia finds *Chevron* deference due because, in the case at issue, the Secretary approved the government's position in its brief to the Court. *Id.* However, the Court dismisses such an argument because the deference was not formed until after the beginning of the litigation and would be deference to the brief rather than to the classification ruling and, as such, the contention of Justice Scalia was not accepted. *Id.*.

149. *Id.* at 239.

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

151. *Id.*

152. *Id.* Justice Scalia discusses how that the presumption had been that the agency had authority according to *Chevron* whenever there was an ambiguity in the statute, while now this presumption doctrine had been collapsed, thus announcing that a presumption of agency discretion does not exist unless the statute, expressly or impliedly, provides otherwise. *Id.*

153. *Id.* Justice Scalia says that the Court has thus replaced *Chevron* in a large number of cases (where there is no express rule making authority or adjudication power) with the beloved test of

Justice Scalia's considerations are certainly meritorious, and by focusing his analysis on the shifting of the burden of proof, he implicitly conveys that he considers such shifting the strongest impact of the Court's decision. This is proved by his assertion that as a consequence of the decision, the *Mead* doctrine "has today replaced the *Chevron* doctrine, for years to come."[154] While technically the Court's decision in *Mead Corp.* only redefines the scope of application of *Chevron*, or at most partially replaces its application, such statement by Justice Scalia seems to be dictated by his conviction that the shift in the burden of proof will considerably limit the application of *Chevron*. In Justice Scalia's opinion, this new doctrine is not sound in principle. *Chevron* was important to the division of powers between the second and third branches because, when there was ambiguity in a statute, it gave *Chevron* deference to an agency's interpretation, independent of whether there was notice and comment rule power or adjudicative power expressly or impliedly given to the agency.[155] Justice Scalia exposes that the present decision is directly contrary to recent affirmations of the Court, which, instead of presuming that discretion did not exist unless explicitly or implicitly provided, clearly provided that "the ambiguity will be resolved first and foremost by the agency . . . ."[156]

After challenging the Court's opinion as to the burden of proof and level of simplicity of application, Justice Scalia directly attacks the application of the *Skidmore* test. Justice Scalia notes that the Court's decision, providing that *Chevron* deference is appropriate only in cases when an agency's power of formal adjudication or notice and comment rulemaking "resurrects, in full force, the pre-*Chevron* doctrine of *Skidmore* deference . . . ."[157] *Skidmore* deference is beloved by most courts because it constitutes, as characterized by Justice Scalia himself, the old "totality of the circumstances" test.[158]

In *Fontana v. Caldera*,[159] the court recently considered the test set-forth in *Mead Corp.* itself to determine whether *Chevron* or *Skidmore* applies as a

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Skidmore that is more like the old totality of the circumstances test. *Id.* at 241.

154. *Id.* at 258-59.

155. *Id.* at 241-42. The power of the agency was presumed because it was presumed that Congress intended to give the agency discretion in resolving the ambiguity. *Id.* Justice Scalia basically contends that the new rule provides that ambiguities in legislative instructions to agencies are to be resolved not by the agencies but by the judges. Such rule could only be departed from if congressional intent is shown to give rule making or adjudicatory power to the agencies. *Id.* However, even if the new framework set forth in *Mead Corp.* provides the courts with broader powers of review, it is not technically correct that, in absence of formal adjudication or notice and comment rulemaking, ambiguities will be resolved by the courts. Such ambiguities will still be resolved by the agencies, but subject to a less deferential standard of review in the situation where a controversy is brought before the courts, which are impartial parties in the litigation.

156. *Id.* at 257 (citing Smiley v. Citibank, 517 U.S. 735, 740-41 (1996)).

157. *Id.* at 241.

158. *See id.*

159. 160 F. Supp. 2d 122 (D.C. Cir. 2001).

totality of the circumstances test, thus echoing Scalia's complexity concerns.[160] In fact, if both these definitions are accepted, resulting in a totality of the circumstances test, and if the answer is negative, the court will be involved in a further totality of the circumstances determination, the *Skidmore* test itself. Justice Scalia exposes that this new legislative framework created by the Court in *Mead Corp.* "is neither sound in principle, nor sustainable in practice."[161] In his opinion, it is not valid in principle because the new rule created by the Court in *Mead Corp.* presumes that ambiguities are to be resolved by the judges and not agencies, therefore totally reversing the prior rule presuming intent in favor of agency interpretation.[162] Only in the case of notice and comment rulemaking, or formal adjudication, is *Chevron* deference appropriate, and on this point Justice Scalia strongly criticizes the Court's opinion. He argues that the court's rule is implausible, as "there is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law."[163]

In his dissenting opinion, Justice Scalia further argues that "protracted confusion" will derive from the present decision because of the uncertainty of the standard of judicial deference appropriate for the decisions which are

160. *See id.* at 128. It is therefore evident that Justice Scalia's concerns for normative complexity and lack of predictability are seriously grounded.

161. *Mead Corp.*, 533 U.S. at 241. As to principle, Scalia notes that the *Chevron* doctrine had its roots in the presumption that there was Congressional intent that all administrative agency interpretations deserve deference. *Id.* Such presumption is important to the division of powers between the executive and the judiciary and "was in accord with the origins of federal- court-judicial review," which was exercised principally through the writ of mandamus. *Id.* at 241-42.

162. *Id.*

163. *Id.* at 243. In Justice Scalia's opinion, such contradiction is proven by the fact that, in case of formal adjudication of the agency decision, the procedure is modeled after a trial. *Id.* However, courts are not given deference to resolve questions of law, and therefore it is not totally rational to accord deference to the agency's resolution of questions of law. *Id.* However, although this point in Scalia's dissenting opinion seems to be both powerful and convincing, it should be recognized that the analogy made between a court and an agency action on this issue in not completely correct. In fact, reasons of efficiency and economy are present in the agency context, which thus justify a higher degree of deference. Furthermore, court decisions as to issues of law could potentially have a much higher impact from the legal point of view, which justifies the necessity of de novo review of resolution of law issues on appeal. Justice Scalia emphasizes that in some cases, the agencies are also given the option of using informal rule making or a case by case administration. *Id.* Under the Court's approach, this would change the deference given, so that both *Chevron* and *Skidmore* would depend on how the agency chooses to exercise authority. Surely, that cannot have been Congress' intent in creating statutes giving such a choice. *Id.* However, even Justice Scalia's last argument can be overcome, because as the Congress can decide to mandate a formal or informal procedure, it can also leave to the agency's discretional choice the decision as to the most appropriate procedure to be employed.

neither notice and comment rulemaking nor formal adjudication, and which are made personally by Cabinet Secretaries and other high level officers.[164] Justice Scalia finds it absurd that the decisions made so high in the hierarchy are to be accorded no deference.[165]

In addition, Justice Scalia contends that "protracted confusion" will originate not only because the *Skidmore* test is very imprecise but also due to the open ended exception in the "escape clause", which in practice requires a fact intensive determination in each case, further artificially increasing the use of notice and comment rulemaking decisions.[166] Moreover, the present

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164. *Id.* at 245.

165. *See id.* at 244 (citing United States v. Giordano, 416 U.S. 505, 508 (1974) (involving application of 18 U.S.C. § 2516 (1968)) (requiring wiretap applications to be authorized by the United States Attorney General or any Assistant Attorney General specially designated by the Attorney General); *see also* D.C. Fed'n of Civic Ass'ns. v. Volpe, 459 F.2d 1231, 1248-1249 (D.C. Cir. 1971) (involving application of 23 U.S.C. § 138 (1966) (requiring the Secretary of Transportation to determine that there is "no feasible and prudent alternative" to the use of publicly owned parkland for a federally funded highway.)). Although Justice Scalia in this part of the opinion raises an important weakness in the framework created by the Court in *Mead Corp.* (discussed *infra*, part IV), at the same time, he mischaracterizes the majority opinion on this point. *Mead Corp.*, 533 U.S. at 244-45. For even if *Chevron* did not apply to such decisions, the determination would not then be left without any deference, but rather, *Skidmore* deference remains, which is still deference, even if not as strong as the one accorded by the Court in the *Chevron* decision. Furthermore Justice Scalia should have recognized that the Court's opinion addresses these concerns in the "escape clause," which necessarily creates a flexible rule. As discussed in the impact section, considering the increasing demand for national security following the September 11 terrorist attacks, this will be the area of application of the Court's decision which will most test the real strength of the *Mead Corp.* decision. In fact, the broad reach of *Mead Corp.* will be seriously impaired if considerations of national security and effectiveness of law enforcement activities in general were to prevail on transparency and the increased individual rights protection fostered by a heightened level of judicial scrutiny.

166. *Id.* at 245-46 (Scalia, J., dissenting). First, such imprecision derives from the fact that the Court recognizes that other procedures, different from notice and comment rulemaking or formal adjudication, in precise cases can denote a congressional intent to provide force of law to agency interpretations. *Id.* Second, Justice Scalia is concerned with what can be defined the "escape clause" in *Mead Corp.*: the provision whereby the Court states that "the absence of notice and comment rulemaking . . . is not enough to decide the question of *Chevron* deference 'for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.'" *Id.* at 245. Justice Scalia's concerns are surely appropriate, and as discussed *infra* Part V, the real success and power of the present decision will be mostly measured by looking at the capacity of the Court to use the "escape clause" as an exceptional tool to afford *Chevron* deference and not as an ordinary instrument to distort the meaning of the present decision. Notice and comment rulemaking will be artificially increased because it warrants the agency *Chevron* deference and is not subject to the limitations of formal adjudication that must be mandated by statute or constitutional provision. *Id.* With regard to this issue, courts will face complications because in the national security field, different agencies will likely share responsibility in the enforcement of statutory schemes. In fact, "if more than one agency can interpret a given statutory term . . . discerning presumed congressional intent necessarily becomes a more complex endeavor." Daniel Lovejoy, Note, *The Ambiguous Basis For Chevron Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879, 880 (2002) (referring as an example to the definition of "disability" in the Americans with Disabilities Act as a term that each agency needs to define and have such definition accorded deference in order not to frustrate the purpose of the *Chevron* defense).

decision will have an adverse effect because of the longstanding rule that courts must defer to the agency's interpretations of its own regulations, thereby encouraging agencies to create "ambiguous rules construing statutory ambiguities, which [the agency] can in turn further clarify through informal rulings entitled to judicial respect.[167]

Furthermore, Justice Scalia contends that the majority of the Court in its opinion can assert that the precedents are in accordance with the present decision only because of the use of a fictional tool, the "escape clause", which allows the Court to consider the prior decision as showing "the multifarious ways in which the congressional intent can be manifested."[168]

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167. *Mead Corp.*, 533 U.S. at 246 (Scalia, J., dissenting). In Justice Scalia's opinion, it will only lead to the agencies rushing to produce ambiguous rules construing ambiguous statutes, and relying on the old principle (left untouched by *Mead Corp.*) that judges must defer to reasonable agency interpretations of their own regulations. *Id.* at 246. With regard to this problematic situation, the court in *Glover*, as discussed previously, seemed provide an answer to Justice Scalia's concern by subjecting the agency's interpretations of its own regulations to *Skidmore* deference, thereby limiting the adverse effects envisioned in the dissenting opinion in *Mead Corp.* *See* Glover v. Standard Fed. Bank, 283 F.3d 953, 962-63 (8th Cir. 2002). Furthermore, Justice Scalia contends that the new rule will lead to the ossification of large portions of our statutory laws. *See Mead Corp.*, 533 U.S. at 247. This is because, under *Chevron*, the agency could change interpretations. However, for post-*Chevron* decisions, after the first judicial pronouncement, ambiguity and flexibility will cease, and it will become unlawful for the agency to take a different position. *Id.* According to Justice Scalia, this could cause an unprecedented abdication of judicial power because it is possible to envision the situation where one agency interpretation rendered without the formalities that deserve *Chevron* deference is not agreed on by the court, but is then rendered by the same agency with those formalities so to get *Chevron* deference and avoid the power of the court. *See id.* at 250. Justice Scalia criticizes the sliding scale of *Skidmore* as a truism and a trifling statement of the obvious. He says that *Skidmore* deference was fine in older world but not in modern world with a lot profusion of federal agencies and in this setting it can only bring to unpredictability, uncertainty and endless litigation. *Id.* The idea that the inquiry adopted by the Court in *Mead* will not solve interpretive problems is shared by those considering the "search of congressional intent chimerical." David J. Barron & Elena Kagan, *Chevron's NonDelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (2001). This would be the result of the fact that Congress rarely discloses its view behind a statutory scheme. *Id.* The proposed alternative is denominated by its proponents as the high level/low level distinction, in which higher deference should be accorded to decisions according to the "position in the agency hierarchy of the person assuming responsibility for the administrative decision." *Id.* at 204-05. The major problem such an approach poses approach is in making the determination of the real source of intent behind a decision, as opposed to the formal source - the mere formal origin of the determination. However, Mead and *Skidmore* incorporate an inquiry into the persuasiveness and expertise of an agency, which in turn relates also to the hierarchy of those issuing it in the agency. This is also recognized by those proposing the high level/low level distinction, which recognizes that their approach "even if in a sense unrecognized [is] . . . present in all of their different views on the issue." *Id.* at 205.

168. *Mead Corp.*, 533 U.S. at 257. (Scalia, J., dissenting). Justice Scalia contends that the new rule announced by the majority in *Mead Corp.* is rendered meaningless when it says that "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 when no such administrative formality was required and none was afforded." *Id.* at 245. With this

Significantly, after stressing the point at the beginning, Justice Scalia further attacks the majority decision because, in contrast with the presumed intent of *Chevron*, it shifts the burden of proof requiring the agency to prove an affirmative Congressional intent that the agency interpretation carries the force of law.[169]

In addition, Justice Scalia criticizes the Court's reliance on *Christensen*, asserting that interpretive opinion letters not issued pursuant to notice and comment rulemaking or formal adjudication do not carry the force of law and are not entitled to *Chevron* deference.[170] In his opinion, such a provision was only dictum, unsupported by the cases cited in the decision. Furthermore the majority impermissibly broadened its reach allowing *Chevron* deference in case of "some other procedure indicating comparable congressional intent."[171]

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consideration Justice Scalia individuates in a way a logical "flaw" in the majority decision. However, such a "flaw", even if seemingly used only as a mean of reconciling the present decisions with *Mead Corp.*, is a necessary instrument of flexibility in the hands of the judiciary. Justice Scalia notes that the Court cites as an example of situation in which *Chevron* deference is afforded in cases outside of notice and comment rulemaking and formal adjudication: the "deliberative conclusions" of the Comptroller of Currency as to the meaning of the banking laws. *Id.* at 251 (citing Nationsbank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995)). Justice Scalia contends that if Congress was aware of the "longstanding precedent" regarding such decisions, then it similarly must have been aware of such precedent with regard to Customs' interpretations in the present case. *Id.* at 251-52. As to this point, even if Justice Scalia's analogy seems convincing, the present decision is reconcilable with the fact specific approach according to *Chevron* authority, and which under the "escape clause" is required.

169. *Id.* at 252 (Scalia, J., dissenting). Justice Scalia emphasizes that the precedents have always presumed such congressional intent, even in a lot of cases in which the agency interpretations were not released until the formal adjudication or notice and comment rulemaking was. *Id.* at 252-53 (citing Nationsbank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 252 (1995) (guaranteeing *Chevron* deference to a letter of a Senior Deputy Comptroller because he represented the official position of the agency); FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 438-39 (1986) (according *Chevron* deference to interpretation of Federal Deposit Insurance Corporation because such embodied the official position of the agency); Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986) (according *Chevron* deference to Secretary of Health and Human Services statutory interpretation); Mead Corp. v. Tilley, 490 U.S. 714, 725-26 (1989) (according *Chevron* deference to the Pension Benefit Guaranty Corporation's statutory interpretation contained in opinion letters)). Justice Scalia's further discussion about the shift in the burden of proof reinforces the argument that he perceived such a shift as the major change in the applicable law that would have the highest potential of impacting agency's power. *Id.* at 251-52 (Scalia, J., dissenting).

170. *Id.* at 251.

171. *Id.* at 240. According to Justice Scalia, it was dictum because in *Christensen*, the Court found that the Secretary of Labor's interpretation "made little sense," and therefore it could not even have been sustained using *Chevron* deference. *Id.* at 254. The cases cited in *Christensen*, according to Justice Scalia, did not support the holding in such case. *See id.* at 255 (citing Reno v. Koray, 515 U.S. 50 (1995) (cited for the contention that this case is not supportive because it did not consider the level of deference accorded to the Bureau of Prison's statutory interpretation set forth in agency guidelines because the Court would have arrived on its own at the same result); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (cited due to Justice Scalia's assertion that this case is not supportive because the decision accorded *Skidmore* deference but only because it was based on a pre-*Chevron* decision); Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144

In resolving the present controversy, Justice Scalia expresses that adherence to the original formulation of the *Chevron* doctrine would have been more appropriate, thereby presuming that "absent some clear textual indication to the contrary," the resolution of ambiguities by the administrative agency "must be accepted by the courts if it is reasonable.[172] Notwithstanding the Court's explanations to the contrary, Justice Scalia strongly asserts that nothing in the statute that the Customs Service administers modifies "the background presumption on which deference is based."[173]

In open contrast to the Court's opinion, Justice Scalia argues that the Secretary's rulings on "valuation, rate of duty . . . entry requirements . . ." should be accorded *Chevron* deference, and it is not "hard to imagine" a conforming Congressional intent.[174]

(1991) (cited as not supportive because the case did not consider the level of deference to be accorded, but only which of two interpretations deserved deference)). Furthermore, Justice Scalia criticizes the majority opinion due to his belief that it impermissibly broadens the reach of the *Christensen* rule. In fact, through the "escape clause," it envisions cases beyond those considered in *Christensen* in which *Chevron* deference would be appropriate. *Id.* However, even if Justice Scalia's consideration is factually accurate, from the juridical point of view is not very relevant. First, because it is dictum, the *Christensen* consideration is not binding on the instant case, and therefore, its extension arguably does not have all of the legal significance as stressed in the dissenting opinion. Furthermore, the majority decision aims at reaching an appropriate balance in the scope of application of *Chevron* deference. Broadening the reach of *Skidmore* authority as envisioned in *Christensen*, the *Mead Corp.* ruling effectively moves towards the reaching of a compromise with those who, like Justice Scalia, would instead allow a more liberal use of *Chevron* deference.

172. *See id.* at 256-57 (Scalia, J., dissenting).

173. *Id.* at 257 (Scalia, J., dissenting). Contrary to what is asserted by the majority in *Mead Corp.*, in Justice Scalia's opinion, the statute does not support the Court's ruling. *Id.* Rather, according to Justice Scalia, reliance by the Court on two provisions would be misplaced: 1) 28 U.S.C. § 2640 (1980), providing that the CIT "shall make its determinations upon the basis of the record made before the court," would only allow the introduction of new evidence at the CIT stage but not speak to judicial review; 2) 28 U.S.C. 2638 (1980), cited by the majority, providing that the CIT "by rule may consider any new ground in support" of a challenge to a ruling, does not have a connection with the judicial deference to be accorded to the ruling. Instead, in Justice Scalia's opinion, 28 U.S.C. § 2639 (1980), requiring the CIT "to accord a 'presum[ption of] correct[ness]'" to the Customs Service's interpretation of its statute, is a much more important provision with regard to the present controversy. *Id.* at 257-58 (Scalia, J., dissenting).

174. *Id.* at 258, n.5 (Scalia, J., dissenting). Although this argument is convincing, it also fails to recognize that the Court's consideration leaves open the door to a future resolution in favor of *Chevron* deference in such a case, if ad hoc considerations justified the application of the "escape clause." Furthermore, Justice Scalia seems to stretch his argument too far when he asserts that if *Chevron* deference were not warranted to the Secretary's personal rulings, no deference would apply. *See id.* This is not correct, as in such a case, the *Skidmore* deference would apply. Furthermore, even if *Skidmore* deference is not a level of deference as strong as that afforded by *Chevron*, it is deference, and in such a case, a ruling issued by such as high position in the administration would probably be considered as highly persuasive by the reviewing court.

The Solicitor General filed a brief that was co-signed by the General Counsel of the Department of Treasury, which reasserted the official position of the Customs Service that was first asserted in the ruling; that the letter should be accorded *Chevron* deference.[175] Reliance on such later administrative action would be permissible because it is not contended that it is "merely a 'post hoc rationalization' or an 'agency litigating position . . .'wholly unsupported by regulations, rulings, or administrative practice."[176]

Finally, Justice Scalia argues that even accepting the majority's formulation of the rule, he would accord *Chevron* deference to the Customs' interpretive letter because there is a longstanding tradition "of great deference to the opinions of the [Customs'] head."[177]

For the above reasons, Justice Scalia dissented, and emphasized his belief that the Court's decision is extremely significant, and will have enormous and "uniformly bad" consequences.[178]

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

176. *Id.* at 258 (Scalia, J., dissenting) (citing *Christensen*, 529 U.S. at 591 (Scalia, J., concurring in part and concurring in judgment)). Justice Scalia attacks the majority, arguing that he agrees that 10,000 letters a year cannot all be substantive law, but that there would be nothing wrong in giving more deference if later the Solicitor General files a brief endorsing a decision. *See id.* at 258 n. 6. However, even if one considers the absence of post hoc rationalization of administrative action, it is possible to find a logical coherence in this argument. Allowing such later administrative action to change the standard of review diminishes the ability of a challenger to the decision to predict the outcome, and unfairly leaves open the possibility that the Solicitor General or some other high ranking official could file a brief as a "Damocles' sword" on the challenger's head. Justice Scalia also argues that the interpretation in the letter was reasonable. *See id.* This majority evidentially agreed, because otherwise remand would not be necessary, because if unreasonable it would be invalid under both *Chevron* and *Skidmore*. But remand is necessary for the majority of the Court (not for Justice Scalia) because the lower court still must judge the persuasiveness of the letter as it is not entitled to *Chevron* deference. *Id.* at 260.

177. *Id.* (citing NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995)). In this respect, Justice Scalia, analogizes the present case to the decision in *Nationsbank* as a case where *Chevron* deference was warranted notwithstanding the absence of formal adjudication, notice and comment rulemaking, or comparable administrative formality. *See id. See also* United States v. Haggar Apparel Co., 526 U.S. 380, 392-93 (1999)(holding that if Customs Service's statutory interpretation fills gap or defines term in a way that is reasonable in light of legislature's revealed design, then court will give agency's judgment controlling weight); Zenith Radio Corp. v. United States, 437 U.S. 443, 457-58 (1978) (holding that longstanding administrative construction of statute by the Customs Authority was not to be disturbed except for cogent reasons); PATRICK REED, THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS & INTERNATIONAL TRADE LAW 289 (1997) (arguing that Customs rulings are sustained as long as they are reasonable interpretations of the statute).

178. *Mead Corp.*, 533 U.S. at 261.

IV. IMPACT OF THE DECISION

A. Direct Impact on the Judicial Power of Review

First, the decision of the United States Supreme Court in *Mead Corp.* has a direct impact on the power of the courts to review agency determinations. In fact, it effectively enlarges the scope of operation of the intermediate standard of judicial review between the well-known *de novo* standard of review, and the permissive standard adopted in *Chevron*. Such a shift is in direct opposition to the post-modernist idea of the role of the judiciary. Post modernists agree that role of judiciary should be minimized and *Mead Corp.* clearly goes in the opposite direction, leading to Justice Scalia's strong dissent in both in *Mead Corp.* and in *Christensen*.[179]

Reaching a compromise between the two radically opposed positions of *Chevron* and *Mead Corp.* involves striking a balance between administrative discretion to ignore substantive limits, and recognizing the need to regulate the decision-making process, thus avoiding the unchecked flexibility likely "to undermine the mission of the regulatory program that reformers seek to further."[180] Even in limiting the reach of *Chevron*, the Supreme Court in *Mead Corp.* does not undermine the basis for an adequate power of agencies to interpret statutes in light of their underlying purpose, thereby preserving the important balance between the court and agency autonomy, which helps eliminate "the worst impact from statutory micromanagement" and "overly restrictive [statutory] prescriptions."[181]

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179. *See* Funk, *supra* note 4, at 174 – 75. In particular post-modernists see the regulation as a political endeavor that is not suited for courts because more similar to legislation. *Id.* at 177. On this point, the rule created by the Court in *Mead Corp.* is very similar to the balance proposed by William Funk. *Id.* In his opinion, courts must accept the political input in the regulatory process but at the same time use real scrutiny to be sure that the regulation meets the requirements of the law. *Id.* The rationale reasoning behind a point such as this is that absent meaningful judicial review the agencies might give low consideration to the statutory legal requirements and limitations.

180. Seidenfeld, *supra* note 1, at 438. *See also* PHILIPPE NONET & PHILIP SELZNIC, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 64 (1978) (analyzing the impact of the approach based on the rule of law); Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325, 335 (1996) (regarding the relationship between flexibility and agency activities).

181. Seidenfeld, *supra* note 1, at 447-48. As already mentioned, there is a need to assure that courts have sufficient power to guarantee a counterbalance to agencies, thus assuring a correct administration of statutory schemes. After *Chevron*, the Court recognized broad discretion; however, many courts restricted that decision by strict textual readings of the statutes. *Id.* Textualism is justified by some commentators on the ground that legislative history is only a fiction, or that is not a "reliable indicator" of congressional intent. *Id.* n.65. *See also* Frank Easterbrook,

A proper compromise between the power of the subjects involved in administrative regulation and judicial review is pivotal to addressing the societal concern for too much agency power, guarantee adequate legitimating functions to judicial review, and promote the diminishment of abuses.[182] In addressing such concerns, the process review as established by *Mead Corp.* requires the agency to explain why it reached a certain result and how the concerns of interest groups were addressed. Focusing process review on the reasoning of a decision ameliorates improper interest group influence, undue political influence, and biases from idiosyncratic staff cultures.[183]

Furthermore, administrative actions are not always shaped in the public light, nor are all administrative policies rendered public after being determined or reassessed. Therefore, an adequate level of judicial scrutiny is necessary, especially when in response to political pressure, to alter outcomes, or when an agency modifies "factual presumptions or burdens of proof."[184]

To the extent that *Mead Corp.* provided a rule of compromise, it adequately addresses the concern for the overreaching of the executive power while at the same time allowing adequate agency power when appropriate. In fact, Congress can always avoid inconsistency or the potential for uncertainty when necessary by giving the agency the power to rule with force of law, thus providing the agency *Chevron* deference, but thereby involving in the process the legislative branch's assurance of a more open public debate and transparency in the system. In addition, even in the

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Text, History, and Structure in Statutory Interpretation, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1993); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376-77 (1990).

182. *See* Seidenfeld, *supra* note 1, at 457. In particular, there is a strong threat of improper political influence for agency adjudications which are resolved outside of the public light. *Id.* This concern is particularly relevant at the present time where the increasing demand for national security and the related necessity for privacy and secrecy of some administrative agencies, like the INS (Immigration and Naturalization Service) or the FBI (Federal Bureau of Investigation), diminishes the role of public opinion as a counterbalance to power abuse, and thus requires an increased alert on the part of the courts to provide a forum to address possible concerns. *See id.* at 467. A relaxation of the standard of judicial review would likely cause: a) domination of agency decision making by special interest groups; b) improper political influence on agency decision making; c) agency imposition of idiosyncratic values via its regulatory decisions. *See id.* at 467, 481.

183. *Id.* at 491.

184. *Id.* at 478-79. Such a situation was addressed by the courts when the Reagan administration, in an effort to limit Social Security Disability Payments, influenced the SSA (Social Security Administration) to adopt a review program which encouraged ALJs (Administrative Law Judges) to deny more claims. *Id.* at 469. In that instance, there was not a statement or piece of legislation to be evaluated by the courts, which through judicial review had to scrutinize every fact finding—in the specific case, thousands of petitions for review. *Id.* at 469-70. With regard to agencies, amongst them the INS, FBI, or IRS, which regulate vital sectors from the public perspective but which can potentially infringe on important aspects of the private life, it is therefore evident that there is a need to maintain an adequate role for Courts as a counterbalance to agency discretion and potential abuse.

case that Congress has not provided for force of law, it is the Court itself that recognizes that a complete *de novo* review by the court is not feasible, and an intermediate level of review is appropriate. For example, the Court considered that:

> *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigation and information' available to the agency.... There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed. . . .A classification ruling in this situation may therefore at least seek a respect proportional to the power to persuade.[185]

Furthermore, as elucidated by the court in *Pesquera Mares Australes Ltda.*,[186] in accordance with *Mead Corp.*, there are situations in which even though no formal procedure is provided, an agency's specialized expertise in "complex and complicated matters" and the precedential value of its decisions, justify the accordance of *Chevron* deference.[187]

As to Justice Scalia's statement that *Skidmore* is a "truism and a trifling statement of the obvious," even if the *Skidmore* test certainly involves very fact intensive determinations, it also requires a balancing of factors such as that done by the courts in many other important and settled areas of the law.[188] This balancing is considered an expression of the longstanding tradition of the American legal system and of the role and functions of the judicial power in managing the administration of justice.[189] Furthermore, the specialized experience of an agency in administering a statutory scheme can be very influential in the persuasiveness determination, thereby considerably

185. United States v. Mead Corp., 533 U.S. 218, 234-35 (2001) (citation omitted).

186. 266 F.3d 1372 (Fed. Cir. 2001).

187. *Id.* at 1379-81. This case involved the review of a decision of the Department of Commerce determining dumping margin for imports of Atlantic fresh salmon from Chile. The court considered as a very important factor, which is relevant under *Mead Corp.*, that the precedential nature of agency determinations, while not sufficient to "'add up to *Chevron* entitlement' . . . militates in favor of the application of *Chevron*." *Id.* (citing *Mead Corp.*, 533 U.S. at 218).

188. *Mead Corp.*, 533 U.S. at 250-251 (Scalia, J., dissenting).

189. *Id.* at 250-51. Examples of such areas are the personal jurisdiction determination involving minimum contacts analysis, the forum non-conveniens, and the choice of law analysis. Furthermore the *Mead Corp.* decision also provides adequate guidance on the application of the *Skidmore* test, as opposed to the decision in *Christensen*, where the judges—although agreeing on the outcome—were split on the meaning of the *Skidmore* test. *See id.* at 255-56. Certainly, the Court does not seem to agree with Justice Breyer's interpretation in *Christensen* that *Skidmore* is a part of step two of *Chevron*, and seems to take an approach more similar to that of Justice Stevens. *Id.*

limiting the courts' freedom to disregard the agency's ruling. This is evidenced by the court's decision in *Heartland By-Products, Inc.*,[190] involving the review of a ruling letter by the Customs' service, where the court held that an appropriate consideration of the agency's specialized expertise and of its reasoning, "lends further persuasiveness to its ruling."[191]

B. Indirect Impact on Agencies' Activities: Increased Transparency

The Supreme Court's decision in *Mead Corp.* not only has a direct effect on the courts' powers of supervision, but it also indirectly promotes a heightened level of transparency in administrative action as well.

In fact, the debate about Agency discretion "subsume[s] more particular issues such as the extent to which agencies can set policy, the freedom of agencies to deviate from established policy in particular circumstances, and whether discretion is plenary, rather than subject to supervision by other institutions."[192] Furthermore, the tension between the rule of law and regulatory flexibility is not new.[193] These issues are interconnected, with one influencing the other, and thus the elimination of "all review of agency decisions formally would allow the agency complete freedom to set policy and deviate from it."[194]

Therefore, the Court's decision in *Mead Corp.*, while directly increasing the power of the courts to supervise administrative action, indirectly affects the power to set policy and to deviate from such policy, as it requires the agencies to show the persuasiveness of the outcome that they reach and thereby forces these agencies to increase the transparency of their action.

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190. Heartland By-Products, Inc. v. United States, 264 F.3d 1126 (Fed. Cir. 2001).

191. *Id.* at 1136. This case involved the review of a ruling letter issued by the Customs' Service, which modified previous decisions and reclassified Heartland's sugar syrup under 1702.90.10 HTSUS or 1702.90.20 of the HTSUS. *Id.*. at 1130. The court considered the specialized experience of the Customs Service in determining the classification of goods as determinative in assessing the persuasiveness of the Customs' Service under the *Skidmore* Test. *See id.* at 1136. Furthermore, the court reasoned that the revocation of the prior ruling was not controlling because the Customs Service has the power to revoke a prior classification of goods. *Id.* Thus, inconsistency with a prior ruling was not in itself a basis for denying all deference to a revocation ruling. *See id.* Furthermore, in reviewing an informal classification decision of the Customs Service, the court in *Four Seasons Produce, Inc. v. United States* further stressed the importance of the Customs Service's specialized experience in the *Skidmore* persuasiveness determination because "with the classification of merchandise, Customs can be said to possess the kind of 'experience and informed judgment to which courts and litigants may properly resort for guidance,' and can bring the benefit of specialized experience to bear the subtle question of' valuation." Four Seasons Produce, Inc. v. United States, No. 99-03-00142, 2001 WL 1636977, at *7 (Ct. Int'l. Trade, Dec. 20, 2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Mead Corp.*, 533 U.S. at 234)).

192. *See* Seidenfeld, *supra* note 1, at 432.

193. *Id.* at 436.

194. *Id.* at 432.

Ex post facto review of agency decisions, whether performed by Congress, the legislature, or the courts, has a huge impact on agencies both from the operational and from the financial perspective.[195] Notably, it forces an agency to collect relevant amounts of information that often is not used by the agency and "to devote a vast quantity of resources to formalities of explanation in order for the agency's policy to survive judicial . . . review."[196] Critics of increased *ex post facto* review claim that it has resulted in the "ossification" of the rulemaking process, and advocate that agencies be relieved of the "need to persuade reviewers of the wisdom of the agency policy."[197]

However, as currently practiced, process review is a crucial element in ensuring that administrative regulations are in pursuit of "the public interest embodied in the public's understanding and acceptance of the bases for agencies' authority."[198] It evaluates the reasons the agency gives for its action, considers the alternative solutions that were rejected by the agency, and judges the persuasiveness of the choice, therefore indirectly limiting and reviewing "improper interest group influence, undue political influence, and biases that derive from idiosyncratic staff cultures."[199] On this point, the Court's decision in *Mead Corp.* seems to find an adequate balance, allowing the courts to judge the persuasiveness of the agency's decision but still mandating an appropriate consideration of the "'specialized experience and broader investigations and information'" available to the agency.[200]

In *Mead Corp.*, the Court noted that "most ruling letters contain little or no reasoning, but simply describe goods and state the appropriate category and tariff. Few letters set out a rationale for the determination."[201] This particular consideration clearly shows how the present decision will force an agency, in this case the Customs Service, to makes its decisional process

195. *Id.* at 457-58.

196. *Id.* at 457. *See also* Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247 (1992) (discussing how uncertainty in standards of judicial review has led to a huge increase of records and length in the rulemaking process).

197. Seidenfeld, *supra* note 1, at 458 (citing Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992) (considering that heightened judicial review leads agencies to prepare for "worst case scenarios," thus constituting an "exceedingly time-consuming and resource-intensive" effort)). *See also* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (advocating that the simple notice and comment process has been complicated by the courts that caused the "ossification" of rulemaking).

198. Seidenfeld, *supra* note 1, at 493.

199. *Id.* at 491.

200. *See Mead Corp.*, 533 U.S. at 234 (quoting *Chevron*, 323 U.S. at 139).

201. *Id.* at 224.

more transparent. On the other hand, such requirements will also constitute a burden on the agency as well, even while it serves the important purpose of rendering the administrative action more comprehensible, transparent, and legitimate in the eyes of consumers, entrepreneurs, and citizens in general—all of whom are regularly affected by administrative action.[202]

Furthermore, the Court individuated in *Mead Corp.* that Congressional delegation of power to rule through formal adjudication or notice and comment rulemaking constitute "[a] very good indicator of delegation meriting *Chevron* deference."[203] However, the want of that procedure is not determinative because the Court "[h]as sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[204] From the standpoint of the analysis of the impact of the decision on the transparency of the administrative action, the presence of the "escape clause" is extremely important. In fact, in borderline cases, before a determination has been made by the Supreme Court (or by Congress) as to whether *Chevron* deference is appropriate, even absent formal adjudication or notice and comment rulemaking, agencies will probably be led to shape their action and their decision in order to meet the stricter *Skidmore* test. It is evident, therefore, that administrative transparency will be promoted not only in those cases clearly falling within the *Skidmore* realm of application, but also in those borderline cases where delegation of power to rule with force of law falls within the "escape clause" of the *Mead Corp.* decision.

C. The "Burden of Proof" Shift

The most extensive impact of the Supreme Court's decision in *Mead Corp.* will probably be a result of the shift in the burden of proving delegation of power to rule with force of law. The Court provided that agency authority to rule with force of law is no longer presumed, but instead must be positively proved by the agency before *Chevron* deference is warranted and "may be shown in a variety of ways."[205]

In *Chevron*, the Court held that after a court determines that a statute was silent or ambiguous on an issue, that court should give strong deference to the agency's construction of the statute, and overturn only if it was an impermissible construction.[206] In contract with *Chevron*, the normative framework in *Mead Corp.* is such that the burden is on the agency to prove that Congress delegated to the agency the authority to make rulings carrying

202. *Id.* at 237-38.
203. *Id.* at 219.
204. *Id.* at 231.
205. *Id.* at 227.
206. *Chevron*, 467 U.S. at 843.

the force of law.[207] Justice Scalia's strong dissent is especially grounded in the consideration of the strong impact which such a shift in the presumption will have.[208]

The important effects related to the shift in presumption are clearly shown by the *Mead Corp.* decision itself. In fact, the case was remanded to the lower court due to the fact that "the ruling at issue . . . fails to qualify."[209] It is clear that the agency, rather than the opposing party, failed to meet the burden of proof, which successfully showed that no *Chevron* deference was appropriate. Therefore, in borderline cases—those that are more likely to be disputed in court—the shift in the burden of proof will have its biggest impact. Frequently, this will cause *Skidmore* and not *Chevron* deference to apply because the agency cannot meet the threshold burden of proving Congressional delegation of power to issue decisions carrying the force of law. The extended reach of such burden of proof shift was clear in *Hall v. U.S. E.P.A.*,[210] where the court determined, against the EPA's arguments to the contrary, that *Chevron* deference was not due to the EPA's interpretation of the Clean Air Act, which had approved revisions to county's air quality plan modifying rules governing new stationary sources.[211] Applying the *Skidmore* test, the court then concluded that the EPA's decision was not persuasive because "the EPA ha[d] not offered any explanation of how the interpretation fits within the statutory scheme that the EPA administers or reflects the EPA's considered policy judgment about how best to administer the Act."[212] The important effect of the shift in the burden of proof was

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207. *See Mead Corp*, 533 U.S. at 227-28.

208. *Id.* at 245 (Scalia, J., dissenting). What before had been a general presumption of authority on the part of the agencies to interpret the statutes that they administer was changed to a presumption of no such authority, which may be overcome only by a showing of affirmative legislative intent to the contrary. *Id.* at 239 (Scalia, J., dissenting). In addition, when before agency authority to resolve ambiguity did not exist, the court did not have to give any deference to the agency, while now it must give this indeterminate amount of deference under *Skidmore*. *Id.* (Scalia, J., dissenting). In deciding the instant case, Justice Scalia would adhere to the original formulation of *Chevron* and therefore, absent congressional intent to the contrary, found that *Chevron* deference should be given to the Customs Service's interpretation of the HTSUS. *Id.* at 252 (Scalia, J., dissenting).

209. *Id.* at 227.

210. Hall v. United States E.P.A., 273 F.3d 1146 (9th Cir. 2001) (citing 42 USCA § 7410 (1970)).

211. *Id.* at 1156-57.

212. *Id.* It is important to note that the court, in deciding whether to remand for further consideration in accordance with the opinion, expressly recognized the limits and separation of the respective institutional roles stating that

> in light of the limited record before us and our circumscribed view of the broader context of pollution reduction efforts in which this case arises, we are well aware of the limits of our own ability to fashion an appropriate remedy. That task remains for the EPA, in the first instance.

further made clear in the *Matz* decision, where the Court, after according *Chevron* deference to an informal decision contained in an amicus brief filed by the *Internal Revenue Service*, held on remand (after *Mead Corp.* was decided) that *Chevron* deference was not warranted because delegation of power to rule with force of law was not proved by the agency.[213]

This constitutes an increased encouragement to dispute agency decisions because in the most controversial cases, the presumption, analogous to *Matz*, will dictate the outcome as to the applicable standard of review. It is evident, therefore, that the shift in the burden of proof will probably lead to an increase the amount of litigation and the dispute of agency decisions, thus creating a friendlier environment for plaintiffs involved in such disputes, and increasing the cases of remand and reversal of agency decisions.[214]

D. The "Escape Clause"

After formulating its general rule, the Supreme Court in *Mead Corp.* provided for the existence of what can be defined as an "escape clause." In fact, after finding in the specific case that no *Chevron* deference was warranted because no rule and comment or formal adjudication authority was granted to the Customs Service's ruling letter at issue, the Court held that:

> The want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded . . . . The fact that the tariff classification here was not a

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Id. at 1164.

213. In *Matz v. Household Intern. Tax Reduction Inv. Plan*, the court, on remand from the Supreme Court, held that the Internal Revenue Service's (IRS) position contained in the *amicus brief* submitted in an ERISA action that both vested and non-vested plan participants were required to be counted in determining whether a partial termination of the ERISA plan occurred was an informal agency policy pronouncement not entitled to *Chevron* deference. Matz v. Household Intern. Tax Reduction Inv. Plan, 265 F.3d 572, 574-75 (7th Cir. 2001). The Court reasoned that although in the past it had held that the same informal rulings deserved *Chevron* deference, on remand and pursuant to *Mead Corp.*, the Court concluded that a different outcome was justified. *Id.* The Court found that it only deserved *Skidmore* deference according to its persuasiveness because such informal decision is analogous to "opinion letters, policy statements, agency manuals, and enforcement guidelines, [which] are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*." *Id.* Thus, it is clear from the *Matz* decision that *Mead Corp.* has a very important impact on judicial deference because it has resulted in the courts according *Skidmore* deference in cases where *Chevron* deference had previously been applied. *Id.*

214. This conclusion is particularly sustained *a contrariis* from the fact that after *Chevron*, affirmation rate increased by almost fifteen percent, and remands and reversals declined forty percent. *See* Rossi, *supra* note 2, at 1115. Indirectly, the increase in litigation will result in higher administrative costs for the agencies, both in financial terms and also in terms of the human resources to be devoted to such task.

product of such formal process does not alone, therefore, bar the application of *Chevron*.[215]

The Court will accord *Chevron* deference in the absence of such formal procedures when analogous delegation is shown "by some other indication of a comparable congressional intent."[216] The presence of such an "escape clause" is appropriate in light of the multifarious variety of administrative agencies, and because of the different duties and powers that they enjoy. It has recently been used by the court in *Fontana v. Caldera* to accord *Chevron* deference to an informal adjudication decision issued by the Army Board for Correction of Military Records (ABCMR).[217] However, the risk of its future abuse is great, possibly leading to the guarantee of *Chevron* deference too liberally when political or other contingent reasons require it. Such abuse would greatly reduce the forseeability of the standard of review, thereby causing a relaxation in the application of the general framework rule provided in *Mead Corp.*[218] However, as it is correctly shown in *American Federation of Government Employees v. Rumsfeld*,[219] this does not mean that courts could not accord a particular and heightened degree of deference under *Skidmore* to agencies' determinations in fields related to national

215. *Mead Corp.*, 533 U.S. at 230-31.

216. *Id.* at 227.

217. *See Fontana*, 160 F. Supp. 2d at 128. In the *Fontana* case, the ABCMR informally decided that two Army physicians did not complete Active Duty Service Obligation (ADSO) in return for undergraduate education at the United States Military Academy at West Point while they attended medical school at Uniformed Services University of Health Sciences (USUHS). *Id.* at 131-132. The court reasoned that *Chevron* deference was appropriate even in absence of formal adjudication because 10 U.S.C. § 1552(a)(1) grants discretion to the Secretary of a Military Department to correct any military record "when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1)(1956). Furthermore, the corrections "shall be made under procedures established by the Secretary concerned. *Id.* (citing 10 U.S.C. § 1552(a)(3) (1956)). Most importantly, '[e]xcept when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.'" *Id.* at 128(citing 10 U.S.C. § 1552(a)(4)(1956)).

218. *Mead Corp.*, 533 U.S. at 231-32. The court then held that the Customs ruling letter at issue failed to qualify for *Chevron* deference under the "escape clause" as well because the letter presented a case far removed not only from notice and comment and formal adjudication, but also "from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here." *Id.* at 237. The Court reasoned that even though the ruling letters may have some precedential value, any precedential claim of a classification ruling letter "is counterbalanced by the provision for independent review of Customs classifications by the CIT." *Id.* at 232; *see also* 19 U.S.C. § 1502(a) (1930); 28 U.S.C. §§ 2638-2640 (1980) (providing for independent review of Customs classifications by the CIT). Therefore, in future case, the Court might accord *Chevron* deference when faced with rulings having some precedential value and no independent judicial review is provided. However, as this case clearly demonstrates, this depends on the circumstances surrounding the determination.

219. Am. Fed'n of Gov't Employees v. Rumsfeld, 262 F.3d 649 (7th Cir. 2001).

security. For example, in the *Rumsfeld* case, after determining that the purpose of the Arsenal Act was to "preserv[e] the government's in-house military production capabilities", the court held that the Secretary of the Army's informal decision to contract with private parties for the production of tank gun mounts for the upgraded M1A2 Abrams tank and the development of the Lightweight 155mm ("LW155"), without first undertaking a cost analysis did not violate the Act. [220] The court reasoned that "[c]onsistent Army practice [and] legislative history" excepts such a decision from the requirement of the Arsenal Act, and therefore the Arsenal Act "does not affect the ability to award supply contracts to particular suppliers . . . to maintain their availability in the event of national emergency or industrial mobilization."[221]

However, in light of the increasing demand for heightened national security, it is reasonably foreseeable that in the future, the "escape clause" might enjoy a liberal application in connection with decisions of the agencies that are involved in the efforts to protect our Country.[222] Such use would be necessary in order to accord *Chevron* deference for decisions not involving notice and comment or informal rulemaking authority, but that for reasons of national security, need strong deference. Justice Scalia perceived the importance of this issue in *Mead. Corp*, and he posed the question(even if indirectly), and the use of this clause seems to give a reasonable answer to the activity of those agencies that for reasons of security necessarily cannot provide that level of transparency required to other agencies.[223] Furthermore, the "escape clause" seems particularly suited to answer Scalia's concerns, as it is capable of being used to allow *Chevron* deference to decisions made by high-level officers and when a statutory scheme is enforced by an agency with highly specialized expertise in a particular field.[224] Following *Mead*, the Court in *TeamBank v. McClure*[225] has found

220. *Id.* at 662-63 (citing 10 U.S.C. § 4532 (1956)).

221. *Id.* at 658, 661, 668. Notably, the persuasiveness of the Secretary of the Army's position was also endorsed by a "landmark decision of the Comptroller General." *Id.* at 661.

222. The demand for an increased level of national security that arose after the September 11, 2001, terrorist attacks not only impacted the following weeks, but also involved a relevant increase in state and federal budget devoted to agencies with police-like powers. In fact, U.S. Attorney General John Ashcroft and White House Homeland Security Director Tom Ridge "are pledging a tenfold increase in federal subsidies to police for antiterrorism." Robert Dreyfuss, *The Cops are Watching You: September 11 Is Being Used As a Reason to Build Up Police Intelligence Units*, THE NATION, June 3, 2002. With the unfolding of the permanent war on terrorism, "a decade may pass before the trauma of September 11 wears off and the pendulum begins to swing back." *Id.*.

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

224. *See id.* at 244. This issue is closely connected to the issue of national security, and one of the principal areas of application is likely to be seen in the wiretapping decisions issued by the U.S. Attorney General. *See* 18 U.S.C. § 2516 (1970) (requiring all wiretapping decisions to be authorized by "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General.").

225. TeamBank v. McClure, 279 F.3d 614 (8th Cir. 2002).

appropriate the use of the "escape clause" for decisions issued by the Comptroller of the Currency, in light of the extent to which such agency "is charged with the enforcement of banking laws."[226]

The impact and strength of the Court's decision in *Mead Corp.* will be measurable in the future according to the capacity of the Supreme Court, and of all other Federal and State courts, to guarantee that the use of the "escape clause" is not abused in cases involving national security. In fact, such an abuse would significantly diminish the supervisory powers of courts and the transparency of the administrative action in such a sensitive field, thereby significantly diminishing individual guarantees in those cases where constitutional individual rights are at stake. However, in light of the national emergency following the September 11th attacks and the increased demand for national security, it is possible, foreseeable, and to a reasonable level appropriate, that transparency be sacrificed in the name of a higher level of security.

E. Mead Corp's Indirect Impact on the Relationship Between the Charming Betsy Canon and the Chevron Doctrine

Limiting the realm of application of the *Chevron* doctrine, the Court's decision in *Mead Corp.* indirectly influences the relationship between the domestic and the international legal systems. In fact, it provides a clearer definition of the situations in which a judicial interpretation of a statute in conformity with an international obligation under the *Charming Besty* Canon trumps an agency's statutory interpretation that is inconsistent with such international obligation.

The *Charming Besty* Canon is a rule of statutory construction that arose out of a decision rendered by the United States Supreme Court in the early 1800s in which it held that "an act of Congress ought never to be construed

226. *Id.* at 619 n.5. In this case, TeamBank sought the approval of its merger with First National Bank from the Office of the Comptroller of the Currency OCC). *Id.* at 616. The Director of the Finance Division of the State of Missouri notified the OCC of its opposition to the merger because it was allegedly found to violate Missouri law. *Id.* In June 2000, the OCC approved the proposed merger, thus rejecting the State of Missouri's argument. *See id.* Thereafter, Teambank initiated action seeking declaratory judgment of the legality of the merger. *Id.* at 617. The Court in *TeamBank* found that the OCC's determination was not entitled to *Chevron* deference because it was not issued by notice and comment rulemaking or formal adjudication. *See id.* at 619. However, applying the "escape clause" in *Mead Corp.*, the Court determined that the decision of the OCC deserved *Chevron* deference in light of its expertise and of the fact that the OCC was accorded such deference by the Court in *Nationsbank*. *See Id.* (citing *Mead Corp.*, 533 U.S. at 234-35; *Nationsbank of N.C.*, 513 U.S. 251, 256-57(1995).

to violate the law of nations if any other possible construction remains."[227] The application of such canon of statutory interpretation and construction has posed the problem of defining the relationship between the *Chevron* doctrine and the *Charming Besty* Canon when an agency gives an interpretation of a statute contrary to an international obligation. In a situation such as this, the court on the one hand has the obligation under *Chevron* to defer to an agency's reasonable statutory interpretation, while on the other, under the *Charming Besty* Canon, the Court is bound to provide a statutory interpretation consonant with the international obligations of the United States.

As to this point, the Court in *DeBartolo Corp. v. Florida Gulf Coast Trade Council*[228] provided a rule of constitutional avoidance indicating that statutes should always be construed, where possible, so that they do not violate the Constitution, and held that this rule trumps the *Chevron* doctrine.[229] The Court of International Trade and some authors have interpreted this decision to mean that the *Charming Besty* Canon trumps the *Chevron* doctrine; however, this outcome is highly debated because it is both partly based on the use of a sentence that was not present in the *Charming Besty* decision, and because the Court in *DeBartolo* only indirectly addressed this issue.[230]

Therefore, considering the difficulty in reconciling the contemporaneous application of the two doctrines, the Court's decision in *Mead Corp.*, to the extent that it limits the use of *Chevron* deference for agency's decisions, indirectly decreases the potential for collision between the *Chevron* doctrine and the *Charming Besty* Canon. Thus, it allows the *Charming Besty* Canon

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227. Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

228. DeBartolo Corp. v. Florida Gulf Bld'g & Constr. Coast Trades Council, 485 U.S. 568 (1988).

229. *Id.* at 575. *See also* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 685-90 (2000); INS v. St. Cyr, 533 U.S. 2271, 2279 (2001) (holding that if an otherwise acceptable construction of a statute would raise serious constitutional problems, and an alternative interpretation of the statute is fairly possible, the court is obligated to construe the statute in order to avoid such problems).

230. Notably, in *NRLB v. Catholic Bishop of Chicago*, the Court, referring to Justice Marshall's statement in *The Schooner Charming Betsy* case, misstated the rule as set forth therein, holding that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." NRLB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979). However, *Charming Betsy* referred to the "law of nations," rather than to the "Constitution." The Court again repeated such a misstated citation in *DeBartolo*, holding that the constitutional avoidance canon trumps the *Chevron* doctrine. Consequently, the CIT has held on several occasions that the Supreme Court had concluded that the *Charming Betsy* Canon trumps the *Chevron* doctrine. *See* BRADLEY & GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS, 200 nn. 4-5 (2001) (citing Hyundai Elecs. Co. v. United States, 53 F. Supp. 2d 1334, 1344 (Ct. Int'l. Trade 1999). *Cf.* Ronald A. Brand, *Direct Effect of International Economic Law in the United States and European Union*, 17 NW. J. INT'L L. & BUS. 556, 571 N.76 (1996-97) (stating that the Supreme Court has taken the position that the *Chevron* rule of deference to agency interpretations of congressional intent is secondary to the *Charming Betsy* doctrine).

to trump more easily an agency's interpretation of a statute that is contrary to an international obligation because judicial bodies will more often face agency decisions that will be subject to the "weak deference" of *Skidmore* as opposed to the strong deference in *Chevron*.

Thus, it is evident that the Court's decision in *Mead Corp.* guarantees and promotes a broader consonance of the domestic legal system of the United States with its international obligations and the development and respect of the Law of Nations.

V. CONCLUSION

The United States Supreme Court decision in *Mead Corp.* is very incisive and presents various ramifications and fields of impact. Although at first view the strongest impact is represented by the creation of an intermediate standard of review between *de novo* and *Chevron* deference, it also promotes administrative transparency, places on the agencies the burden of proving congressional delegation of power to issue decisions carrying force of law, and significantly contributes to the development of a body of law that is consonant to international obligations.

However, its strength will best be measured with time because the political environment can potentially and relevantly affect its incisiveness, especially in present times, where an increased demand for national security favors a higher effectiveness of the agencies' activity thus possibly requiring a decreased transparency and a lower level of scrutiny by the judiciary.

In this struggle between increased security and transparency, the weight of the Court's decision in *Mead Corp.* will be determined according to the capacity of the courts to guarantee that the use of the "escape clause" does not deprive the general rule of *Skidmore* deference of its importance and effectiveness.

Giacomo Gallai*

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* J.D. Pepperdine University, School of Law, May 2003. Doctor of Jurisprudence, University of Florence, School of Law; Florence, Italy, April 1999. This case note is dedicated to my father Gaetano. I thank my wife Sasha, my mother Lorenza, my parents-in-law Salvatore and Anne, and my brother Stefano for all their encouragement and support. I also would like to extend my thanks

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