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The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards

Thomas W. Merrill
Columbia Law School, tmerri@law.columbia.edu

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United States v. Mead Corp.[1] is the Supreme Court's most important pronouncement to date about the scope of the *Chevron* doctrine.[2] According to Justice Antonin Scalia's dissenting opinion, *Mead* is "one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action."[3] Justice Scalia also thought that the consequences of "the *Mead* doctrine," as he called it, "will be enormous, and almost uniformly bad."[4]

Justice Scalia's indictment of *Mead* was driven by his attachment to rules and dislike of standards.[5] He saw *Mead* as shifting the practice of deference away from the more rule-like *Chevron* toward the more standard-like doctrine associated with *Skidmore v. Swift & Co.*[6] As he noted sarcastically: "The Court has largely replaced *Chevron* … with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."[7] Justice Scalia urged, instead, that *Chevron* be declared the sole

* John Paul Stevens Professor of Law, Northwestern University.

[1] 121 S.Ct. 2164 (2001).

[2] So named of course for Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[3] *Mead*, 121 S.Ct. at 2189 (dissenting opinion).

[4] *Id.* at 2178, 2189.

[5] *See generally* Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. Chi. L. Rev. 1175, passim (1989).

[6] 323 U.S. 134 (1944).

[7] *Mead,* 121 S.Ct. at 2178 (Scalia, J. dissenting).

measure of judicial deference to agency interpretations of statutes, with *Skidmore* relegated to the dustbin of history as an "anachronism."[8]

The majority responded with an air of patient resignation. "Justice SCALIA's first priority over the years has been to limit and simplify," Justice Souter observed in his opinion for the Court, whereas others would "tailor deference to variety."[9] Justice Souter could afford to take a detached attitude toward Justice Scalia's fulminations. In his campaign to award the field to *Chevron* as the sole survivor in a battle against *Skidmore*, Justice Scalia failed to attract a single additional vote.[10]

But the choice between rules and standards was present in *Mead* not only at what might be called the primary decisional level – the level where courts decide whether to accept any particular agency's interpretation of a statute. The same choice is also implicated at the meta-level where the court must decide which legal doctrine to use (*Chevron* or *Skidmore*) in determining whether to accept the agency interpretation. Assuming – as eight Justices evidently do – that we have two deference doctrines, the more rule-like *Chevron* and the more standard-like *Skidmore*, how do we determine where *Chevron* stops and *Skidmore* starts within the system of judicial review? Do we police this boundary by means of a meta-rule or a meta-standard?

As to this higher-order issue, there was no meaningful debate between Justice Souter and Justice Scalia. Justice Souter began his opinion by announcing what appeared to be a two-part rule: "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise that

[8] *Id.* at 2183.

[9] *Id.* at 2176.

authority."[11] By the time Justice Souter had finished his analysis, however, the inquiry had collapsed into a formless consideration of "factors" of unspecified weight. That is to say, the majority ended up with a meta-standard. Justice Scalia, for his part, also started with what appeared to be meta-rule: *Chevron* should apply to any interpretation "by the administering agency that is authoritative – that represents the official position of the agency."[12] But on closer examination this too turned out to be a multi-factoral standard, albeit one that Justice Scalia insisted was more "bright-line" than the standard employed by the majority.[13]

I argue in this commentary that both the majority and the dissent were mistaken in seeking to define the domain of *Chevron* with anything other than a meta-rule. The majority was on the right track in holding that they key to the scope of *Chevron* is whether Congress has delegated authority to an agency to make rules with the force of law, and the agency has exercised that authority. The next logical step was to define what it means for an agency to act with "the force of law." The traditional understanding is that agency action has such an effect when it is not open to further challenge and it subjects a person who disobeys to some sanction, disability, or other adverse legal consequence. Fiinal legislative rules, both substantive and procedural, have this effect, as do final, self-executing adjudicatory orders. Other types of agency action do not. A reasonably clear meta-rule was thus within the grasp of the Court. It should have seized it. As we shall see, using a meta-rule to determine the scope of *Chevron* deference has a number of desirable consequences that will be diluted or lost under a meta-standard.

I. IN SEARCH OF THE *MEAD* DOCTRINE

[11] *Mead*, 121 S.Ct. at 2171. *See also id.* at 2177 (stating that *Skidmore* rather than *Chevron* applies when "circumstances indicate no intent to delegate general authority to make rules with the force of law, or where such authority was not invoked [by the agency]").

[12] *Id.* at 2187 (Scalia, J. dissenting).

[13] *Id.* at 2188 n.6 (Scalia, J. dissenting).

Chevron, of course, is the Court's most important decision about the most important issue in modern administrative law: the allocation of power between courts and agencies "to say what the law is."[14] *Chevron* describes a now-familiar two-step procedure for resolving this issue, asking first whether Congress has "spoken directly" to the contested issue of interpretation, and if not, whether the agency's interpretation is "permissible" or "reasonable."[15] The inquiry seems rule-like because each step is defined in terms of the examination of a single variable: whether or not Congress has answered the question (step one), and whether or not the agency interpretation is reasonable (step two).[16]

As any administrative lawyer can attest, this rule-like appearance is deceptive. Many different considerations can be brought to bear in determining at step one whether a statute is clear or ambiguous; an equally wide-range of variables are implicated in asking at step two whether the agency has adopted an interpretation that is reasonable. Still, as compared to the multi-factoral approach that preceded *Chevron*, and that lives on under the mantle of *Skidmore*, the *Chevron* doctrine narrows significantly the range of factors that courts may consult in deciding whether to accept or reject an agency reading of a statute. In that sense, the *Chevron* doctrine is, if not a rule, at least more rule-like[17] than *Skidmore*, which "set forth a sliding scale of deference owed an agency's interpretation of a statute that is dependent 'upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to

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[14] *See* Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum. L. Rev. 2071 (1990) (discussing *Chevron* as a "counter-*Marbury*" for the administrative state).

[15] *Chevron*, 467 U.S. at 842-43.

[16] "A rule singles out one or few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard's rationale." Mindgames, Inc. v. Western Publishing Co., Inc., 218 F.3d 652, 656 (7th Cir. 2000) (Posner, J.).

[17] As others have recognized, rules and standards are not a dichotomy but exist along a continuum. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court 1991 Term, Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 57 (1992) (noting that rules and standards fall along a "continuum of discretion").

persuade, if lacking power to control.'"[18]

For many years after *Chevron*, it was unclear whether *Chevron* had superseded *Skidmore*, or if not, when courts should apply *Chevron* and when they should turn to *Skidmore*.[19] The Court took its first important step toward resolving these issues just two years ago in *Christensen v. Harris County*.[20] The question was whether an agency interpretation advanced in an opinion letter written by an agency official, and later endorsed in an amicus curiae brief filed with the Supreme Court, is eligible for *Chevron* deference. Five Justices, in an opinion by Justice Thomas, held that *Chevron* does not apply in these circumstances. The majority stated that agency interpretations are eligible for *Chevron* deference only if they have been advanced in a decisional format that has the "force of law," and an opinion letter, whether or not endorsed in an agency amicus brief, does not have the force of law.[21] The Court made no attempt to explicate what it means for agency action to have the force of law, or how the force of law criterion links up with the underlying rationale of *Chevron*.

Christensen elicited two dissents with respect to the scope of *Chevron*. Justice Scalia argued that the agency opinion letter was entitled to *Chevron* deference, because it reflected the "authoritative" view of the agency.[22] Justice Breyer, joined in relevant part by Justices Stevens and Ginsburg, opined that the majority had overstated the distinction between *Chevron* and *Skidmore*, and suggested that *Chevron* simply identified "an additional, separate legal reason for deferring to certain agency determinations."[23]

Sensing that further clarification was needed, the Court almost immediately granted the

[18] *Mead*, 121 S.Ct. 2183 (Scalia, J. dissenting) (quoting *Skidmore*, 323 U.S. at 140).

[19] *See generally* Thomas W. Merrill and Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L. J. 833, 848-852 (2001) (cataloguing numerous unresolved questions about when *Chevron* applies).

[20] 529 U.S. 576 (2000).

[21] *Id.* at 587.

[22] *Id.* at 589 (Scalia, J., dissenting).

[23] *Id.* at 596 (Breyer, J., dissenting)..

government's petition for certiorari in *United States v. Mead Corp.,*[24] which presented the question whether tariff classification rulings issued by the Customs Service are entitled to *Chevron* deference. When a ruling finally emerged in *Mead*, it revealed a new alignment. Eight Justices, including the five who had joined the Thomas opinion in *Christensen* plus the three who joined the Breyer dissent, united behind an opinion by Justice Souter holding that tariff classification rulings are not entitled to *Chevron* deference. This time, only Justice Scalia dissented, again asserting his view that any "authoritative" interpretation should be eligible for *Chevron* deference.

Tariff classification rulings are letter rulings issued by the Customs Service in response to a request by an importer for advice as to what tariff applies to a proposed importation of foreign goods. Such rulings are expressly authorized by statute, which speaks of them as "binding" rulings,[25] and the implementing regulations state that they are "binding on all Custom Service personnel" until modified or revoked.[26] However, this binding effect is limited to the specific import transaction described, and other importers are cautioned not to rely upon the rulings "in connection with any transaction other than the one described in the letter."[27] In the typical case, no public notice or opportunity to comment is provided before tariff classification rulings are rendered, nor is the importer entitled to a hearing beyond the request for a ruling and the responsive letter, which may or may not include a statement of reasons.[28] Tariff classification rulings are extremely numerous; over 10,000 are issued by 46 different Customs offices every year.[29]

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[24] 530 U.S. 1202 (May 30, 2000).

[25] 19 U.S.C. § 1502(a).

[26] 19 CFR § 177.9 (2000).

[27] *Id.* § 177.9(c).

[28] *Mead*, 121 S.Ct. at 2169.

[29] *Id.* at 2174 (citing Brief for Customs and International Trade Bar Association as Amicus Curiae at 6).

Mead is written like a major statement about the nature and scope of the *Chevron* doctrine, and in many respects the opinion succeeds in providing some clarification. At the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent. Throughout the opinion, the Court refers continually to congressional intent, expectations, contemplations, thoughts, and objectives.[30] The opinion makes clear that the ultimate question in every case is whether Congress intended the agency, as opposed to the courts, to exercise primary interpretational authority. This should put to rest speculation that *Chevron* rests on something other than congressional intent, such as the doctrine of separation of powers or a judge-made canon of interpretation.[31]

Mead is also emphatic in reaffirming that the choice is not between *Chevron* and no deference. If the triggering conditions for *Chevron* deference are not satisfied, courts nevertheless may be required to defer to agency interpretations under *Skidmore*, which applies when the agency has some special claim to expertise under the statute but its interpretation is not legally binding. Thus, after *Mead* we have three degrees of deference to agency interpretations of statutes: *Chevron* – a rule-like doctrine that requires courts to accept reasonable agency interpretations of ambiguous statutes; *Skidmore* – a standard that requires courts to consider agency interpretations under multiple factors and defer to the interpretation if it is persuasive; and no deference, which applies when independent judicial review is required, for example, where the agency action is alleged to violate the Constitution or where statutes designed to constrain agency discretion like the Administrative Procedure Act (APA) are at issue.

Finally, *Mead* reaffirms and elaborates on *Chrestensen*'s basic proposition that *Chevron* applies only when the agency interpretation has the "force of law." The Court held that a two-part inquiry

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[30] *See Mead*, 121 S.Ct. at 2172 (expectations); *id*. at 2171 n. 11 (intent); *id*. at 2173 (thoughts); *id*. at 2175 (objectives); *id* at 2176 (intent); *id* at 2177 (intent).

[31] For a discussion of different jurisprudential arguments justifying *Chevron* deference, endorsing congressional intent as the most plausible, see Merrill and Hickman, *supra* note 19 at 863-873.

should be undertaken in determining whether *Chevron*-style deference is in order:[32] The court should ask, first, whether Congress has delegated to an agency general authority to make rules with the force of law. If the answer is in the affirmative, the court should then ask whether the agency has rendered its interpretation in the exercise of that authority. Thus, the key question that must be resolved at the threshold in determining whether *Chevron* applies is one of legislative intent: whether Congress intended to delegate power to the agency to take action having the force of law.

These clarifications are of considerable importance. Still, the decision leaves major uncertainties. Most notably, Justice Souter did not identify any triggering condition for determining when an agency has been given the power to act with the force of law. Instead, his opinion proceeds by discussing a number of factors suggesting that the Customs Service had *not* been delegated power to act with the force of law in issuing tariff classification rulings. He declined to identify any of these factors as being either necessary or sufficient conditions for finding the relevant type of delegation. In other words, the Souter opinion implicitly treats "force of law" as an undefined standard that invites consideration of a number of variables of indefinite weight.[33]

To make matters worse, the Souter opinion is most unclear as to exactly how many factors it regarded as being relevant. Depending on how one reads the opinion, the Court considered either three, four or five factors. My reading is that the discussion boils down to three factors: (1) whether Congress has prescribed relatively formal procedures; (2) whether Congress has authorized the agency to make

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[32] *Mead*, 121 S.Ct. at 2171; 2177.

[33] In a footnote near the end of the opinion, the majority appeared to go even further, suggesting that *Chevron*'s domain can only be determined through case-by-case, analogical reasoning:

> It is, of course, true that the limit of *Chevron* deference is not marked by a hard-edged rule. But *Chevron* itself is a good example showing when *Chevron* deference is warranted, while this is a good case showing when it is not. Judges in other, perhaps harder, cases will make reasoned choices between the two examples, the way courts have always done.

Id. at 2176 n.18. This suggests that the Court envisioned the choice between *Chevron* and *Skidmore* being determined through a process of pure casuistic reasoning. *See* Cass R. Sunstein, *Problems with Rules*, 83 Calif. L. Rev. 953 (1995) (explaining and defending casuistic reasoning).

rules or precedents that generalize to more than a single case; and (3) whether Congress has authorized the agency to prescribe legal norms that apply uniformly throughout its jurisdiction. Nevertheless, I readily admit that the number and correct characterization of the factors invoked in the majority opinion is open to debate.[34]

One factor clearly deemed relevant by the majority is whether the statute "provides for a relatively formal administrative procedure."[35] The majority opinion says that "a very good indicator" of the requisite intent is "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."[36] The point here will undoubtedly be the source of confusion. I do not think the Court was saying, as some commentators and lower courts suggested before *Mead*,[37] that if an *agency* adopts notice and comment or trial-type hearing procedures on its own authority, its interpretation is presumptively entitled to *Chevron* deference. Rather, the Court seemed to be saying that when *Congress* commands the use of notice and comment or trial type procedures, and the agency exercises this authority, then the resulting interpretation presumptively reflects a delegation of authority by Congress to act with the force of law.

This proposition seems correct as an empirical generalization. Congress will tend to command

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[34] The case for four factors would be that, in addition to whether Congress has authorized rules or precedents that transcend a particular case, the Court also considered whether the agency had sought to exercise such authority. *See Mead*, 121 S.Ct. at 2173-74 (breaking into two paragraphs the discussion of the nature of the congressional delegation and of the Customs practice). I discount this because the point of the Court consideration of agency practice in the second paragraph seems to be to confirm its construction of congressional intent. The case for five factors would be that, in addition to the preceding four, the Court also considered whether Congress has provided for de novo review of the agency action that incorporates the interpretation. *See id.* at 2174 & n. 16 (noting in text and accompanying footnote that the Court of International Trade (CIT) engages in independent review of tariff classification rulings). I discount this because it appears to be inconsistent with United States v. Haggar Apparel Co., 526 U.S. 380 (1999), which held that substantive regulations of the Customs are entitled to *Chevron* deference notwithstanding de novo review of Customs decisions by the CIT.

[35] *Mead*, 121 S.Ct. at 2172.

[36] *Id.*

[37] *See, e.g.*, Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *with the Architecture of* Chevron*,* 42 Wm & Mary L. Rev. 1105 (2001).

the use of relatively formal procedures only when the action has important consequences, and agency action that binds with the force of law has important consequences. Thus, commands to use formal procedures will tend to be positively correlated with actions having the force of law. As Justice Scalia correctly observed, however, "[t]here is no necessary connection between the formality of the procedure and the power of the entity administering the procedure to resolve authoritatively questions of law."[38] For example, the APA authorizes agencies to make legislative rules in several contexts without observing notice-and-comment procedures.[39] Thus, the relationship between procedural formality and the force of law is at most empirical, not analytic.

The majority appeared to acknowledge this point, although it did so in a manner that was itself empirical rather than analytical. The majority noted that although "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication[,]" "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."[40] This, of course, does not explain *why* an instruction to use formal procedures should – or should not – be regarded as relevant to whether there has been the right kind of delegation. The Court appeared to be invoking a kind of stare decisis – the lack of procedural formality cannot be decisive because in past cases the Court did not treat it as decisive.[41] For whatever reason, the Court

[38] *Mead*, 121 S.Ct. at 2180 (dissenting opinion).

[39] Justice Scalia referenced rules involving grant and benefit programs. *See* 5 U.S.C. § 553(a)(2). The APA also exempts rules involving "military or foreign affairs functions," *id.*, and it authorizes agencies to issue binding legislative rules without notice-and-comment procedures where the agency finds "good cause" to forego these procedures or when the agency adopts rules of "agency organization, procedure, or practice." *Id.* § 553(a)(3) (A) & (B).

[40] *Mead*, 121 S.Ct. at 2173. Actually, the Court cited only one such case – NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995). (Justice Scalia cited four others, all decided within six years of *Chevron*. *See Mead*, 121 S.Ct. 2184-85.)

[41] This was a feeble argument, since the question whether *Chevron* applies notwithstanding the absence of any directive to use formal procedures had merely passed in silence in the handful of cases referenced by the Court. Thus, these were not

acknowledged that whether Congress has prescribed formal procedures is neither a sufficient nor even a necessary condition of finding the relevant delegation; it is at most a factor positively correlated with the likelihood that such a delegation has occurred.

After the convoluted discussion of formal procedures, there ensue two paragraphs even more obscure in their import.[42] My interpretation of these paragraphs is that they boil down to a single second factor: whether Congress has authorized rulings that have a legal effect that generalizes beyond a single case. In other words, a delegation to act with legal force will ordinarily authorize rules that bind all persons who come within their terms or, at the very least, orders that invoke decisional rules that are then treated as precedents in future controversies.

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holdings about the scope of the *Chevron* doctrine that would require overruling if they could not be accommodated to the "force of law" test.

[42] Lest I be accused of exaggerating, here they are (with citations omitted):

> No matter which angle we choose for viewing the Customs ruling letter in this case, it fails to qualify under *Chevron*. On the face of the statute, to begin with, the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law. We are not, of course, here making any global statement about Custom's authority, for it is true that the general rulemaking power conferred on Customs authorizes some regulations with the force of law, or 'legal norms' as we put it in [*United States v. Haggar Apparel Co*.]. It is true as well that Congress had classification rulings in mind when it explicitly authorized, in a parenthetical, the issuance of 'regulations establishing procedures for the issuance of binding rulings prior to entry of the merchandise concerned.' The reference to binding classifications does not, however, bespeak the legislative type of activity that would naturally bind more than the parties to the ruling, once the goods classified are admitted into this country. And though the statute's direction to disseminate 'information' necessary to 'secure' uniformity seems to assume that a ruling may be precedent in later transactions, precedential value alone does not add up to *Chevron* entitlement; interpretative rules may sometimes function as precedents, and they enjoy no *Chevron* status as a class. In any event, any precedential claim of a classification ruling is counterbalanced by the provision for independent review of Customs classifications by the [Court of International Trade]; the scheme for CIT review includes a provision that treats classification rulings on par with the Secretary's rulings on 'valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters.' It is hard to imagine a congressional understanding more at odds with the *Chevron* regime.
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> It is difficult, in fact, to see in the agency practice itself any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these. Customs does not generally engage in notice-and-comment practice when issuing them, and their treatment by the agency makes it clear that a letter's binding character as a ruling stops short of third parties; Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued, and even then only until Customs has given advance notice of intended change. Other importers are in fact warned against assuming any right of detrimental reliance.

Mead, 121 S.Ct. at 2173-74.

If this was what the Court was saying, then it is undoubtedly correct. Any interpretation eligible for judicial deference must invoke some rule of decision – some legal principle or rationale. An administrative scheme that disclaims any binding effect beyond the party to the ruling – even if it is only precedential effect – is one that generates no "law" in the relevant sense and hence cannot have the "force of law."[43]

It is unclear whether the majority understood this factor, like the first, to be merely empirical and predictive of the required type of delegation, or whether it was suggesting some analytical connection between authority to make decisional rules and the power to act with "the force of law." At one point the majority says that "precedential value alone does not add up to *Chevron* entitlement; interpretative rules may sometimes function as precedents and they enjoy no *Chevron* status as a class."[44] This would seem to negative any claim that authority to articulate a rule of decision is a *sufficient* condition of power to act with the force of law. Whether this factor is even a *necessary* condition, the majority did not say.

A third factor stressed by the Court is also somewhat cryptic but easier to unpack. The Court observed that the Customs generates thousands of tariff classifications each year from different ports of entry, with no systematic effort at coordination. The Court thought it "simply self-refuting" to suggest that Congress intended such a system to have the force of law.[45] The suggestion here seems to be that a delegation to an agency to act with the force of law will usually generate *uniform* rules throughout the agency's jurisdiction. A regulatory system unconcerned with whether like cases are treated alike is also

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[43] For discussion of the role of rules in systems of precedent, see Larry Alexander, *Constrained by Precedent*, 63 S.Cal. L. Rev. 1 (1989); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987).

[44] *Id.* at 2174. The court here cited to Peter Strauss, *The Rulemaking Continuum*, 41 Duke L. J. 1463, 1472-73 (1992), which makes the point that interpretative rules are often treated by agency personnel as having approximately the same force as agency precedent.

[45] *Mead*, 121 S.Ct. at 2175.

an unlikely candidate for the appellation "law."

This too seems correct as an empirical generalization. Implicit in the ideal of the rule of law is the understanding that the same legal rules will be applied to similar transactions wherever the legal regimes applies. When Congress establishes a regime that is not designed to maintain legal uniformity, it is implausible to describe the rulings generated by that regime as having the force of law. Once more, however, the Court did not suggest that uniformity is either a necessary or sufficient condition of finding the relevant type of delegation. This factor, like the first (and possibly the second), is implicitly treated as predictive rather than analytical.

Justice Scalia, for his part, would apply *Chevron* to any agency interpretation that is "authoritative."[46] By "authoritative," however, Justice Scalia did not hone in on any single variable, as would typically be the case with a rule. To the contrary, he mentioned a variety of variables that might be relevant in determining whether a particular interpretation reflects the "official position of the agency." These include whether the interpretation has been endorsed at the "highest level" in the agency as opposed to by "some underlings;" whether the general counsel has defended the interpretation in court; whether the interpretation has been supported by a brief filed by the Solicitor General; and whether the interpretation is more than a "post hoc rationalization" or a legal position developed by the agency in litigation.[47] Thus, "authoritative" is also a type of standard rather than a rule. Justice Scalia acknowledged at one point that "[t]he authoritativeness of the agency ruling may not be a bright-line standard." But, he quickly added, "it is infinitely brighter than the line the Court asks us to draw today."[48]

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[46] *Mead*, 121 S.Ct. at 2187 (Scalia, J. dissenting).

[47] *Id.* at 2187-88 & n. 6 (Scalia, J., dissenting).

[48] *Id.* at 2188 n. 6 (Scalia, J. dissenting).

The majority and Justice Scalia were engaged in a version of the perennial debate over rules versus standards. But they were largely talking past one another. Justice Scalia's sarcasm about "th' ol' totality of the circumstances test" was directed at employing *Skidmore* at the primary decisional level in cases where the more rule-like *Chevron* does not apply.[49] He devoted relatively little energy to chastising the majority for adopting a meta-standard for fixing the boundary between *Chevron* and *Skidmore.* [50] The majority opinion, in contrast, was not much interested in defending standards or attacking rules at the primary level. Rather, the majority was content to have both a rule and a standard at this level, and was preoccupied with identifying the factors that are relevant at the meta-level in determining the line of division between the two. As to this meta-question, it is not clear that either side fully appreciated that the rules versus standards debate was replicating itself once again. In any event, at this level both the majority and the dissent ultimately opted for a standard rather than a rule.

II. THE CASE FOR A META-RULE

The voluminous literature on rules and standards suggests a number of justifications for rules.[51] At least four are relevant to the choice between meta-rules and meta-standards for determining the

[49] Most of Justice Scalia's arguments about the bad consequences of "the *Mead* doctrine" were directed to the majority's countenance of continued use of *Skidmore.* Thus, he argued that *Skidmore* was a recipe for "uncertainty, unpredictability, and endless litigation," *id.* at 2183; that the majority's approach would lead to an artificial increase in rulemaking by agencies in an effort to escape the uncertainties of *Skidmore* and gain *Chevron* deference, *id.* at 2181; and that *Skidmore* deference would lead to "ossification" of statutory law, since agency interpretations upheld under *Skidmore*, unlike those sustained under *Chevron*, cannot be reversed by agencies at some later date. *Id.* at 2182.

[50] Indeed, Justice Scalia appeared at times to understand the majority as advocating something akin to a meta-rule for these purposes – that *Chevron* applies when agencies utilize relatively formal procedures but not otherwise. *Id.* at 2179 (describing the majority's "background rule" to be "while there is no single touchstone for [an intent to delegate authority to act with the force of law] it can generally be found when Congress has authorized the agency to act through (what the Court says is) relatively formal procedures such as informal rulemaking and formal (and informal?) adjudication, and when the agency in fact employs such procedures.").

[51] *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987); FREDERICK SCHAUER, PLAYING BY THE RULES (1991); Issac Erlich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L. J. 557 (1992); Scalia, *supra* note 5; Sullivan, *supra* note 17 at 62-69.

proper scope of the *Chevron* doctrine.[52] (1) Rules are better than standards in confining the discretion of actors at lower levels within a hierarchy, and hence are useful in overcoming principal-agent problems within complex organizations.[53] (2) Rules are better than standards in providing a basis for security of expectation about the future behavior of the government, and thus they encourage investment and planning.[54] (3) Rules are better than standards in communicating information about legal options, and hence they facilitate coordination among different government actors.[55] (4) Rules are more efficient than standards, because they conserve on the need to expend resources on legal advice and litigation.[56]

Each of these justifications links up with a different audience affected by whether the Court selects a meta-rule or meta-standard for fixing the scope of *Chevron*: the first applies to the lower courts, the second to agencies, the third to Congress, and the fourth to nongovernmental entities. I consider each in turn.[57]

A. Lower Courts: Confining Discretion

[52] These are by no means the only or even the most important justifications for rules. They are, however, the ones that I think are most relevant in considering whether a meta-rule is appropriate for delimiting the scope of the *Chevron* doctrine.

[53] *See* Scalia, *supra* note 5 at 1179.

[54] *See* Schauer, *supra* note 51 at 137-145; Carol M Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 590-92 (1988).

[55] For commentary on the communicative function of rules, developed in the context of standardized units of ownership in property law, see Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: the Numerus Clausus Principle*, 110 Yale L. J. 1 (2000).

[56] *See* Schauer, *supra* note 51 at 145-149.

[57] I will not consider at any length one possible objection to this inquiry: that the legal rubric for deference has little effect on judicial behavior, so there is no point in quibbling about it. Whether *Chevron*'s two-step approach results in more acceptance of agency interpretations than *Skidmore*'s multi-factoral standard is, of course, an empirical question. Although more and better studies are needed in order to resolve this question, there is reason to believe that, at least at the margins, use of the *Chevron* formula will produce greater deference by courts to agency interpretations of law than would an open-ended standard like *Skidmore*. This is particularly likely to be true in the lower courts. *See* Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Court of Appeals*, 15 Yale J. on Reg. 1 (1998) (collecting studies).

The lower federal courts are obviously a primary audience for any meta-test devised by the Supreme Court for fixing the boundary between *Chevron* and *Skidmore*. The issue here is how important it is that the Court be able to control the behavior of the lower courts. Rules are generally more predictable and easier to enforce than standards. Hence they generally are a superior mechanism for controlling the behavior of subordinate actors within a hierarchy. In the federal judicial system, the problem of control is greatly exacerbated by the extremely limited number of cases the Supreme Court can review in any given year.[58] If the Court had the capacity to review every court of appeals decision, then it could indulge in the luxury of engaging in case-by-case reasoning in defining the scope of the *Chevron* doctrine. But when the Court has the ability to review only a small percentage of cases, effective control of the behavior of the lower courts may require that the Court adopt a meta-rule.

The issue of control of lower courts is especially important where part of the objective is to assure that lower courts follow a rule-like approach, i.e., *Chevron*, over a significant range of controversies. Although *Christensen* and *Mead* cut back on the scope of the *Chevron* doctrine, there is no sign that the Court is less committed to *Chevron* where it properly applies. If anything, the Court's commitment appears to be growing as it comes to see *Chevron* deference as the only plausible strategy for preserving uniformity and coherence within complex federal statutory regimes.[59] Yet if we adopt a meta-standard to govern the choice between rule and standard at the primary decisional level, there is obviously a danger that lower courts will employ this meta-standard to favor the use of the discretion-maximizing primary standard. In other words, using a meta-standard to choose between a rule and standard creates an opportunity for lower courts to make it standards all the way down.[60]

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[58] *See* Peter L. Strauss, *One-Hundred-Fifty Cases Per year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1118-29 (1987).

[59] *See* Merrill and Hickman, *supra* note 19 at 861-62.

[60] An analogy is the contrast in choice of law between Joseph Beale's vested rights doctrine (a meta- rule) and Brainerd Currie's interests analysis (a meta-standard). *See* Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of*

I do not wish to overstate the danger of lower court discretion here. If lower courts look beyond the Court's nebulous meta-standard and heed the holdings of its recent decisions, their discretion clearly will be constrained to a significant degree. No lower court is going to apply *Chevron* rather than *Skidmore* to an agency interpretation adopted in an opinion letter. And no lower court is going to apply *Skidmore* rather than *Chevron* to an agency interpretation adopted pursuant to an express grant of substantive rulemaking authority. The area of uncertainty has been narrowed to things like interpretative regulations adopted after notice-and-comment procedures, and informal adjudications that are treated like precedents by the agency. Moreover, the problem of lower court discretion in these intermediate areas is likely to be only temporary. As the Court gradually decides cases in these intermediate areas, it will eventually transform the meta-standard into something more like a complex meta-rule, thereby reducing lower court discretion.

Still, if it is generally desirable that lower courts give *Chevron* deference to agency interpretations, such a goal will be undermined to a degree if lower courts are given broad discretion under a meta-standard to decide whether *Chevron* applies over a range of situations not yet addressed by the Supreme Court. The risk that lower courts will undermine the systemic benefits of greater deference to agency interpretations thus provides some basis for preferring a meta-rule over a meta-standard.

B. Agencies: Encouraging Investment

Agencies are also affected by the choice between meta-rule and meta-standard. Here, the relevant justification for using rules rather than standards is that they make the behavior of those who wield the coercive power of the state more predictable, and in so doing facilitate planning and encourage investment. This justification applies to agencies in the following way. Agencies regard *Chevron*

Contractual Choice of Law, 53 Vand. L. Rev. 1151, 1158-60 (2000). One consequence of adopting a meta-standard for choice of law purposes is that it effectively gives the court that hears the controversy discretion to determine which substantive law to apply.

deference as a good thing. Agencies very much want judges – state actors who review their decisions and have the authority to set them aside – to accept their legal interpretations, so they can more effectively implement the statutes they have been charged with administering. Yet, it is now clear that agencies must make a certain investment in administrative processes in order to obtain the *Chevron* payoff. In the vocabulary of *Christensen* and *Mead*, they must take whatever procedural steps are necessary to assure that their interpretation has the "force of law." It is a matter of considerable importance to agencies that they know in advance what investment they must make before they get the *Chevron* payoff. Otherwise, they may end up foregoing opportunities to obtain *Chevron* deference because they assume the price is too high, or they may end up losing *Chevron* deference because they assume the price is lower than it really is.

To make the problem more concrete, consider two examples. Agencies often face the choice between making policy by substantive or interpretative rule. Substantive rules entail certain costs that interpretative rules do not: Substantive rules usually require that the agency engage in cumbersome notice-and-comment procedures, and once adopted, a substantive rule cannot be retroactively amended.[61] If both substantive and interpretative rules were entitled to *Chevron* deference, many agencies would prefer to use interpretative rules to make policy. But if only substantive rules get *Chevron* deference, then there is a tradeoff. The agency will have to decide whether obtaining the higher degree of judicial deference is worth the additional procedural costs associated with substantive rules.

One can tell a similar story about the choice between formal adjudication and opinion letters. Formal adjudication requires a greater investment in procedures than opinion letters do, and formal

[61] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979) ("Certainly regulations subject to the APA cannot be afforded the 'force and effect law' if not promulgated pursuant to the statutory procedural minimum found in that Act"); Bowen v. GeorgetownUniv. Hosp., 488 U.S. 204, 216-25 (1988) (Scalia, J. concurring) (arguing that absent express statutory authority to the contrary the APA prohibits substantive rules with retroactive effect).

adjudication typically creates a precedent that can be cited in future cases, whereas opinion letters often do not. So if agencies can get *Chevron* deference for opinion letters, many agencies would prefer go this route. If only formal adjudication gets *Chevron* deference, however, it's a more difficult call because the price of such deference is higher.

Adopting a meta-rule to determine the scope of the *Chevron* doctrine would reduce uncertainty about what sorts of agency interpretations are eligible for *Chevron* deference. Agencies would thus find it easier to predict what sort of payoff they will receive for using different types of procedural formats to advance interpretations of law. Greater predictability about payoffs should reduce the incidence of over- or under-investment in administrative procedures, and should reduce the number of episodes in which agency initiatives are frustrated by what happens on judicial review. All of this seems desirable, and provides a second reason to prefer a meta-rule to a meta-standard for defining the ambit of *Chevron*.

C. Congress: Communicating Information About Legal Options

A third audience affected by the Court's choice between a meta-rule and a meta-standard is Congress. Here, we encounter yet another advantage of rules relative to standards: Because they are relatively predictable, rules send clearer signals than standards about what legal options exist. Better communication about legal options not only enhances individual reliance interests, it also facilitates coordination among governmental institutions.[62] This is relevant to Congress, because *Christensen* and *Mead* make clear that Congress has the authority to turn *Chevron* deference on and off; Congress can do this by either delegating power to an agency to act with the force of law with respect to a particular issue (*Chevron* on) or by not delegating such power to the agency (*Chevron* off). But Congress can exercise this authority only if it knows what it must say in a statute in order to convey the message that an agency

[62] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term, Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 66 (1994).

has been given power to act with the force of law.[63] If acting with the force of law is defined by a meta-rule, then Congress will have a relatively clear signal about what it must do to confer primary interpretative authority on an agency. Conversely, if acting with the force of law is defined by a blurry meta-standard, whether Congress has succeeded in designating an agency (or the courts) as the primary interpreter often cannot be established until after the issue has been litigated. Adopting a meta-rule therefore serves to preserve and protect the role of Congress that the Court has identified as the very foundation of the *Chevron* doctrine.

In this regard, it is important to note that *Christensen* and *Mead* represent a significant step toward revitalizing the principle of legislative supremacy, or if you will, the nondelegation doctrine. By grounding *Chevron* in congressional intent to delegate power to make rules with the force of law, the Court has resuscitated the axiom that Congress is the primary source of authority to make law within our system of separation of powers. With narrow exceptions, neither the executive nor the courts have inherent power to act with the force of law.[64] They derive such power only pursuant to a valid delegation from Congress.[65] If this principle is worth reaffirming, then presumably it is important that

[63] See Finley v. United States, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretative rules, so that it may know the effect of the language it adopts."). For recognition of this point in the context of *Chevron*, see Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 Stan. L. Rev. 1 (2000); Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can it be Done in the Post-Chevron Era?*, 13 J.L. & Pol. 105 (1997); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J 511, 516-17.

[64] *See* JAMES HART, THE ORDINANCE MAKING POWER OF THE PRESIDENT OF THE UNITED STATES 110-119 (1925) (discussing the lack of inherent executive power to make law); Thomas W. Merrill, *The Judicial Prerogative*, 12 Pace L. Rev. 327 (1992) (discussing the lack of inherent judicial power to make law).

[65] For a clear statement of this principle, which has never been overruled, see ICC v. Cincinnati, New Orleans, & Tex. Pac. Ry Co., 167 479, 494 (1897) (holding that the ICC cannot be given substantive rulemaking authority by implication, but only by express grant).

Congress and all other actors within the system of separation of powers understand what it takes for Congress to delegate the power to make rules with the force of law.[66]

A possible objection to these arguments is that, at least as to the future, Congress should have no trouble directing whether agencies have authority make interpretations that have the force of law. Congress simply has to include a statement in the statute that agency rules or orders will or will not have "the force of law." (For that matter, Congress could simply specify whether reviewing courts should or should not apply "the *Chevron* doctrine.")

This is true as to new legislation. But it overlooks the problem of what happens under existing legislation. Congress does not have the time or institutional capacity to review and amend all existing delegations to agencies to add the appropriate tag line to assure that the desired allocation of interpretational authority is reached. If the Court adopts a clear meta-rule about what kinds of delegations will sustain *Chevron* deference, however, then Congress (and affected agencies and interest groups) usually can ascertain by examining existing statutes what conclusion courts will reach. In this way, the relevant parties will be in a position to know which statutes can be left alone, and which should be targeted for revision.

D. Nongovernmental Entities: Efficiency

Finally, nongovernmental entities subject to the regulatory oversight have an interest in whether the scope of the *Chevron* doctrine is defined by a meta-rule or a meta-standard. Because rules are more predictable than standards, lawyers generally can provide better advice about the probable outcome under a rule than under a standard.[67] Similarly, when issues are drawn into litigation, arguments about

[66] The linkage between *Mead* and the nondelegation doctrine has already been perceived by the D.C. Circuit. *See* State of Michigan v. EPA, No. 99-1152 (October 30, 2001), slip op. at 9-10 (relying upon *Mead* in striking down EPA rule as being unsupported by any delegation of authority to make rules with the force of law).

[67] *See* Schauer, *supra* note 51 at 145-49; *cf.* Kaplow, *supra* note 51 (arguing that rules are more efficient when fewer resources are expended in determining the content of the law ex ante rather than ex post).

the proper application of a rule will generally require less effort to develop than arguments about the proper application of a standard. Where meta-issues are concerned, these disparities in the relative efficiency of rules are standards are multiplied.

Consider a regulated entity that seeks advice from a law firm about whether an agency interpretation of law is likely to be sustained on judicial review. If it is unclear whether the reviewing court will apply *Chevron* or *Skidmore*, and the choice between the two is governed by a meta-standard, the advice will have to cover three issues: (a) the probable outcome under *Chevron*, (b) the probable outcome under *Skidmore*, and (c) whether it is more likely that the interpretation will be reviewed under *Chevron* or *Skidmore*. In contrast, if the dividing line between *Chevron* and *Skidmore* is marked by a rule, the legal advice very likely will have to address only point (a) or point (b). In effect, the use of a meta-rule reduces the issues that must be considered to one-third what would be required under a meta-standard.

Similarly, consider a regulated entity that seeks to challenge an administrative interpretation on judicial review. If it is unclear whether the court will apply *Chevron* or *Skidmore*, then each of the three issues mentioned above – (a), (b), and (c) – must be briefed by the parties. If the choice is governed by a rule, chances are the briefs will have to cover only (a) or (b). Thus, determining when *Chevron* applies by use of a meta-rule would almost certainly result in efficiency gains, in terms of conserving on the resources expended by nongovernmental entities on legal advice and litigation.

* * * *

In sum, there is a substantial case, at least in the abstract, for determining the scope of the *Chevron* doctrine by means of a meta-rule rather than a meta-standard. The rule-based approach promises to constrain the discretion of the lower courts, encourages agencies to make the correct investments in administrative procedures when formulating policy, provides a clear signal that Congress

can use to allocate interpretational power between agencies and courts, and conserves on expenditures on legal advice and litigation by regulated entities. This conclusion is consistent with the meta-tests found in other areas of administrative law, where questions about applicable procedures or standards of review are often resolved by using relatively bright-line, single-variable rules. Examples include the question whether formal or informal procedures apply in rulemaking, and whether adjudications are subject to the substantial evidence standard of review, both of which are resolved by asking whether Congress has specified that the agency action is to be "on the record."[68]

The main vice of rules, as emphasized in the literature on rules and standards, is that they are almost always either over- or underinclusive with respect to the underlying goals of the legal system.[69] In other words, rules will always generate suboptimal results relative to an ideal system that would *costlessly* apply a standard that reflects those goals. But, of course, standards are not costless. As emphasized here, standards generate principal-agent problems, uncertainty costs, communications difficulties, and increased expenses devoted to legal services. The question then becomes whether there is any meta-rule that will delineate *Chevron*'s domain in a way that achieves the cost savings associated with rules, but without generating excessive problems of over- or underinclusion.

III. WHEN AGENCIES ACT WITH THE FORCE OF LAW

In determining whether there is a satisfactory meta-rule for determining the scope of the *Chevron* doctrine, I take it as a given that the basic inquiry is whether Congress has delegated power to an agency to make rules with the force of law. *Christensen* and *Mead* so hold. And Kristin Hickman and I have spelled out more fully elsewhere why this foundational proposition is consistent with the underlying

[68] *See* United States v. Florida East Coast Ry., 410 U.S. 224 (1973) (formal rulemaking procedures required only when statute requires hearing "on the record"); Camp v. Pitts, 411 U.S. 138, 141 (1973) (substantial evidence review applies only when reviewing findings made on a hearing record).

[69] *See* Schauer, *supra* note 51 at 31-34; Kelman, *supra* note 51 at 40-41; Sullivan, *supra* note 17 at 58.

rationale of the *Chevron* doctrine.[70] We can therefore narrow our search by asking whether it is possible to articulate a satisfactory rule for identifying when Congress has delegated power to act with the force of law.

A. The Key Variable: Legislated Consequences for Violations of Agency Action

Traditional administrative law readily suggests a candidate for such a rule: An agency acts with the force of law when it adopts a rule or order that, once final, is no longer open to challenge and subjects a person who violates the rule or order to the imposition of some sanction, disability, or other adverse consequence. Administrative- law types will recognize that this is a restatement of the familiar "legal effects" test for identifying substantive rules. As stated in the leading decision of the D.C. Circuit:

> A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency.[71]

A parallel understanding exists with respect to adjudications. Agency orders adopted in adjudications are understood to have the force of law when, once they are final, the order is regarded as res judicata and is no longer open to challenge on the merits.[72] In a subsequent action to enforce such an order, the only issues are whether the order was violated and if so, what sanction for violation is appropriate.

These traditional understandings can be adopted as the basis for a meta-rule defining what it means for an agency to act with the force of law – with one important qualification. The inquiry that is

[70] *See* Merrill and Hickman, *supra* note 19 at 863-882.

[71] Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974).

[72] *See, e.g.*, ICC v. Locomotive Eng'rs, 482 U.S. 270, 278 (1987) (decision of ICC not to reopen prior order not subject to judicial review once time for appeal of underlying order has passed); Califano v. Sanders, 430 U.S. 99, 111 (1977) (no judicial review of decision declining to reopen benefits determination after time for appeal of initial decision lapsed).

typically undertaken today in asking whether an agency rule or order has the force of law focuses on whether *the agency intended* its action to give rise to sanctions, disabilities or other adverse legal consequences once it becomes final.[73] In effect, courts have assumed that agencies have the power to act with the force of law, and have asked whether the agency, in its discretion, has exercised this power.[74] In the context of determining the scope of the *Chevron* doctrine, the threshold inquiry, following *Mead*, must be whether *Congress has delegated power* to the agency to act with the force of law. In other words, before asking whether the agency intended to act with the force of law, we must first determine whether, under the agency's organic legislation, Congress has given the agency power to make rules or orders that have the force of law. *The critical inquiry for these purposes is whether Congress has provided by statute that persons who violate an agency's rules or orders will be subject to the imposition of sanctions, disabilities, or other adverse consequences.* In other words, the key variable under the proposed meta-rule is whether Congress has included a provision in the statute that prescribes sanctions or other legal consequences for violations of agency action.

To illustrate, consider the contrast between the rulemaking grants in the Securities Act of 1933 and the National Labor Relations Act of 1935. The Securities Act provides in Section 19(a) that "[t]he Commission shall have authority from time to time to make, amend, and rescind such regulations as may be necessary to carry out the provisions of this subchapter…." [75] This is clearly a grant of authority to make rules having the force of law, because Section 24 of the Act specifically provides that "[a]ny person who willfully violates any of the provisions of this subchapter, *or the rules or regulations promulgated by the Commission under the authority thereof*,…shall upon conviction be fined not more

[73] *See, e.g.*, General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1983) ("if by its action the agency intends to create new law…the rule is properly considered to be a legislative rule").

[74] *But see* American Postal Workers Union, AFL-CIO v. U.S. Postal Service, 707 F.2d 548, 558 (D.C. Cir. 1983) ("A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue").

[75] 15 U.S.C. § 77s(a).

than $10,000 or imprisoned not more than five years, or both." [76] Section 6(a) of the National Labor Relations Act provides, in terms very similar to Section 19(a) of the Securities Act, that "[t]he Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of the Title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter." [77] This is not a grant of authority to make rules having the force of law, however, because the NLRA contains no provision imposing any sanction, disability, or other adverse legal consequence on persons who violate such regulations.[78]

Focussing on the presence or absence of congressionally-prescribed legal consequences is more than just a convenient formalism. It also makes sense as a guide to congressional intent, provided one adopts a couple fairly plausible assumptions. One assumption is that most members of Congress understand that agencies act with the force of law when they adopt rules or orders backed by sanctions, broadly understood to mean civil or criminal penalties, disabilities or other legal consequences. That is to say, most members of Congress, at least when drafting regulatory statutes, embrace an Austinian or positivist conception of "law" as rules backed by the coercive power of the state.[79] The other assumption is that most members of Congress believe that agencies can act with the force of law only if

[76] 15 U.S.C. § 77x (emphasis added).

[77] 29 U.S.C. § 156.

[78] The phrase "in the manner prescribed by subchapter II of chapter 5 of the Title 5," i.e., the Administrative Procedure Act, was added by amendment by the Taft-Hartley Act in 1947. If, as I maintain, the Labor Board was not given any authority to promulgate rules with the force of law, this amendment is puzzling, since the APA generally prescribes procedures only for substantive rules. The *Mead* approach, which puts great weight on whether Congress has directed the use of notice-and-comment procedures for rulemaking, requires that we try to decipher the significance of this amendment in determining whether Congress has delegated authority to the Labor Board to make rules with the force of law. My approach, which would look only to whether Congress has attached consequences to the violation of rules, renders the mysterious amendment irrelevant.

[79] J.L. Austin defined law to mean general commands backed by the threat of sanctions. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfred Rumble ed. 1995, 1st ed. 1832). Austin's command theory was a central tenet of Landellian legal formalism of the late 19th and early 20th centuries. See ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 83-104 (1998). Although the Legal Realists attacked the Langellian conception, they did so largely because they objected to what they regarded as the deductive nature of formalism, not because they disagreed with the command theory. *Id.*

Congress gives them this power, either expressly or by clear implication. In other words, members of Congress embrace the version of the nondelegation doctrine that denies that agencies have any inherent power to make law. Put these assumptions together, and it follows that most members of Congress understand that agencies have been given authority to make rules or orders with the force of law only if Congress has prescribed some sanction or other legal consequence for the violation of the agency's rules or orders.

Historically speaking, there is also surprising support for the proposition that the presence of legislated sanctions for violations of agency rules has been regarded by Congress as the key variable in determining whether statutes authorize agencies to act with the force of law. The legislative histories of a number of important regulatory statutes of the Progressive and the New Deal eras indicate that Congress regarded the inclusion of sanctions for violations of agency rules as the critical point of differentiation between grants of substantive and mere interpretative power.[80] Commentaries by attorneys who were actively involved in advising Congress on this issue, and materials assembled by the Attorney General's Committee on Administrative Procedure, also confirm this understanding.[81] Whether Congress continues to adhere to this understanding is harder to say, since modern courts have not focused on the presence of legislated sanctions in determining whether agencies have substantive rulemaking power.[82] But at least during the formative years of the administrative state this was the

[80] The evidence is detailed in Thomas W. Merrill and Kathryn A. Tongue, Agency Rules with the Force of Law: The Original Convention (unpublished ms., October 22, 2001).

[81] *See* Frederick P. Lee, *Legislative and Interpretative Regulations*, 29 Geo. L.J. 1 (1940) (article by former House and Senate legal counsel); FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 27 (1941).

[82] *See* National Petroleum Refiners Assn. v. FTC, 482 F.2d 672 (1974) (holding that FTC has substantive rulemaking power even though grant of rulemaking contains no mention of sanctions or other legal consequences of violating rules); National Assn. of Pharmaceutical Manufacturers v. FDA, 637 F.2d 877 (2d Cir. 1981) (holding that FDA has general substantive rulemaking authority notwithstanding absence of any provision imposing sanctions or other legal effects for violations of rules promulgated under general rulemaking authority).

congressional practice, and that practice forms part of the backdrop of understanding reflected in the APA.

B. Over- and Underinclusion

Like all rules, the proposed meta-rule keyed to whether Congress has prescribed sanctions or other legal consequences for violations of agency action is both over- and underinclusive, in the sense that it would identify power to act with the force of law in certain circumstances where it may be objectionable, and would deny such power in certain circumstances where it may be desirable. The question, as always, is whether the costs of over and underinclusion are sufficiently great to cause us to abandon the use of rules (or at least, of *this* rule), in favor of a standard.

The principal problem of overinclusion is that the proposed meta-rule includes within its sweep certain kinds of agency action as to which the public has no notice or opportunity to comment before an interpretation is adopted. Before turning to these instances, it is important to stress that, on the whole, the proposed meta-rule does a pretty good job of limiting *Chevron* deference to situations in which some kind of public notice and input is in fact available. The rule excludes from the realm of *Chevron* deference all interpretative rules and policy statements – the most important exemptions from notice-and-comment requirements under Section 553 of the APA. Neither interpretative rules nor policy statements give rise to sanctions or other adverse legal consequences immediately upon violation; the agency must bring some independent action to achieve this result, in which the norm reflected in the interpretative rule or policy statement will be open to challenge.[83] In addition, the proposed rule eliminates from the scope of *Chevron* all opinion letters, agency manuals, press releases, amicus briefs, and so forth – all of which lack any legislative sanction for violation and also lack any requirement of public input before promulgation.

[83] *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR. ADMINISTRATIVE LAW TREATISE 228-248 (1994).

Still, there are a few instances of agency action that have the force of law under proposed meta-rule but are exempt from any public notice-and-comment requirement. These include substantive rules for which good cause exists to omit these requirements, certain types of rules associated with benefit and grant programs, and procedural rules.[84] For one who believes (as I do) that *Chevron* deference should generally be confined to circumstances in which there has been some opportunity for public input before an interpretation is adopted, these exceptions are troubling. On the other hand, it should be noted by way of mitigation that substantive rules adopted under the good cause exception are usually only be interim rules, procedural rules will generally be of lesser consequence than substantive rules, and modern benefit and grant statutes often are implemented by notice-and-comment rulemaking even if not required by the APA.[85]

There are two problems of underinclusion. One is that the legislative-sanctions test would deprive certain agencies of *Chevron* deference for interpretations contained in rules, because, under this definition, they would have no authority to promulgate substantive rules. Included most prominently here are the National Labor Relations Board (NLRB) and the Food and Drug Administration (as to rules promulgated under its general rulemaking authority). Both agencies have grants of rulemaking authority that make no provision for sanctions or other adverse consequences for rule violations.[86] This is a genuine problem, however, only if one is prepared to reject as irrelevant the intentions of the Congresses that adopted the organic legislation establishing these agencies. It is quite clear that the Congresses that enacted the National Labor Relations Act in 1935 and the Food and Drug Act of 1938 did not intend to

[84] See 5 U.S.C. § 553(a)(2); *Mead*, 121 S.Ct. at 2180 (Scalia, J. dissenting).

[85] On the interim status of rules adopted under the good cause exception and the limited consequences of procedural rule exception, see Merrill and Hickman, *supra* note 19 at 905-07. For an example of benefit and grant rules made subject to APA procedures, see Batterton v. Marshall, 648 F.2d 694, 700 (D.C. Cir. 1980) (noting general policy of the Labor Department to waive any invocation of APA exemption for benefit and grant rules).

[86] For details, see Merrill and Tongue, *supra* note 80.

give either agency general substantive rulemaking authority.[87] If this state of affairs is deemed to be inconsistent with contemporary views of appropriate agency authority, then Congress can amend the statutes to give these agencies substantive rulemaking authority, as it did in the case of the similarly-situated Federal Trade Commission, which also lacked substantive rulemaking authority until it was conferred by Congress in 1975.[88]

The other problem is that certain agencies that engage in relatively formal adjudication would be denied *Chevron* deference for interpretations rendered in adjudications, because their orders are not self-executing. The NLRB, for example, issues cease and desist orders that do not result in any imposition of sanctions for violations, unless and until a court enters an order enforcing the Board's order.[89] Thus, it is the court's order, not the Board's, that gives rise to the imposition of sanctions for violations. Since the proposed meta-rule focuses on whether Congress has prescribed some sanction for violation of the *agency's* rule or order, this means NLRB orders would not be entitled to *Chevron* deference. This result seems somewhat counterintuitive, since NLRB orders are issued after a relatively formal adjudicatory process, and the Court has often stressed that the NLRB's interpretations are entitled to deference (although it has not expressly held that they are entitled to *Chevron* deference[90]). On the other hand, the fact that Congress declined to give NLRB orders the force of law unless they have been reviewed and sustained by a court tells us something about whether Congress intended to give the Board primary interpretational authority.

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[87] *See* id.

[88] *See* Federal Trade Improvement Act of 1975, 88 Stat. 2183 (1975) (amending the Federal Trade Commission Act of 1914 to confer substantive rulemaking authority on the FTC). The D.C. Circuit held in 1974 that the FTC has substantive rulemaking authority, National Petroleum Refiners Assn. v. FTC, 482 F.2d 672 (D. C. Cir. 1974), but this was contrary to the original understanding of the FTC Act of 1914 and to longstanding practice.

[89] *See* 2 PATRICK HARDIN ET AL., THE DEVELOPING LABOR LAW 1877 (3d ed. 1992).

[90] See Merrill and Hickman, supra note 19 at 838 n. 23.

Whether these instances of over- and underinclusion are sufficiently troubling to warrant the use of a standard rather than a rule, or to warrant abandonment of the proposed meta-rule in favor of some other (possibly more complex) rule, is necessarily a judgment call. My own judgment is that the advantages of a clear and simple rule are sufficiently great, and the known instances of over- and underinclusion sufficiently minor, that the proposed rule warrants our allegiance. In other words, I see no reason why the Court could not have offered a single-variable triggering definition for what it means for an agency to act with the force of law, consistent with traditional administrative law precepts: Agencies have been given power to act with the force of law when Congress has prescribed some sanction or other legal consequence for violations of agency action. In so doing, it could have avoided the "utter flabbiness"[91] of its list-of-factors approach.

Conclusion

On the whole, "the *Mead* doctrine" is a sound development. *Mead* clarifies that *Chevron* rests on congressional intent, and correctly concludes from this that *Chevron* applies only when Congress has given some signal that the agency, rather than the court, is to be the primary interpreter of statutory ambiguity. The decision also correctly concludes that the relevant signal of Congress's intent in this regard is a delegation of power to act with the force of law. By linking *Chevron* and congressional intent, *Mead* helps achieve a reconciliation between *Chevron* and the judicial review provisions of the APA.[92] Indeed, by insisting that the agency gets strong deference only when it acts within the scope of

[91] *See Mead*, 121 S.Ct. at 2181 (Scalia, J. dissenting).

[92] The APA provides that reviewing courts are to "decide all relevant questions of law." 5 U.S.C. § 706. This directive arguably can be reconciled with mandatory deference to agency interpretations, however, if Congress, by delegating power to an agency to take action with the force of law, is understood implicitly to direct courts to accept reasonable agency interpretations. Justice Scalia argues in his *Mead* dissent that this "implied repeal" theory is inconsistent with Section 559 of the APA, which says that a subsequent statute may be held to supersede the APA only if "it does so expressly." 5 U.S.C. § 559; see *Mead*, 121 S.Ct. at 2179 n.2. But surely identifying a duty to defer to the agency based on the express presence of legislated sanctions for violations of agency orders comes closer to superseding the APA "expressly" than does Justice

delegated power to act with the force of law, and not otherwise, *Mead* goes part way toward restoring an important aspect of the nondelegation doctrine, which otherwise fared poorly last Term.[93]

To be sure, the decision comes up short in terms of articulating a meta-rule to guide lower court in future controversies. *Mead* says that *Chevron* applies only when Congress has delegated authority to an agency to act with the force of law, but it treats "force of law" as (at most) a standard to be applied by looking to a variety of factors. The Court's decision to treat "force of law" as a standard rather than a rule is regrettable. But nothing the Court did or said precludes future decisions that brush away the fuzziness in Justice Souter's exposition, leaving us with a clear and defensible meta-rule.

Finally, notwithstanding Justice Scalia's fulminations, *Mead* secures a bright future for the *Chevron* doctrine. It is now clear that *Chevron* deference is significantly more powerful than ordinary deference. It is also clear that *Chevron* applies whenever agencies exercise delegated lawmaking authority from Congress. With these propositions established, judges are more likely to take *Chevron* seriously. This includes the Justices of the Supreme Court. In the past, a number of Justices have ignored *Chevron* or applied a watered down version of *Chevron*.[94] In *Mead*, eight Justices trimmed back on the scope of *Chevron*, but gave it a sounder jurisprudential foundation and signaled that it enjoys the full support of the Court in its new, slimmed-down form. In the long run, this compact but powerful *Chevron* doctrine should enhance, rather than retard, the transfer of interpretational power from courts to agencies.

Scalia's theory, which rests the duty to defer on a generalized "legal presumption of congressional intent" untethered to any specific legislative directive. *Id.* at 2179 (Scalia, J., dissenting).

[93] *See* Whitman v. American Trucking Assns., Inc., 121 S.Ct. 903 (2001) (rejecting once again a claim that Congress had unconstitutionally delegated power to an agency by failing adequately to limit agency discretion).

[94] *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 980-993 (1992).