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Journal

Loyola of Los Angeles Law Review, 38(5)

Author

Aprill, Ellen P

Publication Date

2005-12-01

**LOYOLA LAW SCHOOL
(LOS ANGELES)
LEGAL STUDIES RESEARCH**

**Research Paper No. 2005-3
Feb 2005**

The Interpretive Voice

Professor Ellen P. Aprill

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THE INTERPRETIVE VOICE

*Ellen P. Aprill**

Theories of statutory interpretation usually focus on the “what” of statutory interpretation—whether it should be, for example, textual, dynamic, purposive, or pragmatic.¹ Equally important, however, is the choice of interpreter—the “who” of statutory interpretation. As Cass Sunstein and Adrian Vermeule recently urged, theories of statutory interpretation need to spotlight the institutional capacities of legal interpreters rather than overlook them: “[D]ebates over legal interpretation cannot be sensibly resolved without attention to those capacities. The central question is not ‘how, in principle, should a text be interpreted?’ The question instead is ‘how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?’”²

In our modern administrative state, Congress writes federal statutes and the other branches of government share responsibility for interpreting them. Under current Supreme Court jurisprudence, sometimes courts assume primary interpretive authority; at other times, that task falls to the executive branch in the form of an administrative agency.

In *Chevron v. Natural Resources Defense Council*,³ the Supreme Court established the now-famous two-step analysis for

* Ellen P. Aprill is Associate Dean for Academic Programs and the John E. Anderson Professor of Tax Law at Loyola Law School, Los Angeles. She thanks Michael Asimow, Linda Galler, Beth Garrett, Kristin Hickman, Katherine Pratt, and Gregg Polsky for their extraordinarily helpful and skeptical comments on an earlier draft of this piece as well as Steven Bank and Kirk Stark for the opportunity to present it at the UCLA Tax Policy and Public Finance Colloquium.

1. See generally WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* (2000) (providing description and discussion of theories of statutory interpretation).

2. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

3. 467 U.S. 837 (1984).

assigning interpretive responsibility. In what became known as “*Chevron’s Step One*,” the Court declared courts need not give deference to administrative agencies’ interpretations when “Congress has directly spoken to the precise question at issue” because, in such cases “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁴ If, however, the “statute is silent or ambiguous,” *Chevron* instructs courts to defer to the agency so long as “the agency’s answer is based on a permissible construction of the statute.”⁵ Under “*Chevron’s Step Two*,” when the Congressional voice is unsung or unclear, the interpretive voice is to be that of the administrative agency, not the court.⁶

Over time, the reach of *Chevron’s* holding seemed to grow. A variety of decisions gave *Chevron’s* Step Two deference to interpretations developed through informal agency decisionmaking procedures such as policy statements, manuals, and opinion letters.⁷ *United States v. Mead Corp.*,⁸ however, cut back on the reach of *Chevron* Step Two⁹ and gave renewed prominence to the tests of *Skidmore v. Swift & Co.*¹⁰ Under *Skidmore*, while the degree of deference given by a court to an administrative interpretation varies based on a number of factors, final interpretive authority rests with the court.¹¹ Thus, *Skidmore’s* interpretive voice is ultimately a

4. *Id.* at 842–43.

5. *Id.* at 843.

6. *See id.* at 843–44 (stating legislative regulations are given controlling weight unless they are “arbitrary, capricious, or manifestly contrary to the statute”).

7. *See Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 452–53 (1999) (*Chevron* deference to Medicare manual); *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995) (*Chevron* deference to Comptroller of the Currency opinion letter); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256–58 (1991) (some, but not complete, *Chevron* deference to EEOC guidelines); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 642, 647–48 (1990) (*Chevron* deference to agency opinion letters); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 978–80 (1986) (*Chevron* deference to no-action decision of the Food and Drug Administration).

8. 533 U.S. 218 (2001).

9. *Id.* at 225–31.

10. 323 U.S. 134 (1944).

11. *Id.* at 139–40. Renewed reliance on *Skidmore* was foreshadowed in *Christensen v. Harris County*, 529 U.S. 576, 586–88 (2000) (stating that no *Chevron* deference will be given to agency opinion letter).

judicial one. The reasoning of *Mead* can be expected to amplify the judicial voice further by reducing the influence of *Bowles v. Seminole Rock & Sand Co.*¹² and *Auer v. Robbins*,¹³ which held that courts should defer to administrative interpretations of an agency's own regulations.¹⁴

The discussion that follows adopts the approach of Neil Komesar by focusing on comparative institutional competency and institutional choice.¹⁵ The article addresses these questions in terms of "interpretive voice" because it considers not only the abilities and limitations of courts and administrative agencies, but also how both of these institutions express their conclusions; that is, the relationship between what they do and what they say they do. Who has primary authority to interpret the law can affect the substantive law itself.

Because of their different institutional capacities and different roles, these interpreters in our constitutional system have very different points of view and thus produce very different interpretive voices. Courts review administrative interpretations only sporadically and, when they do, they have a duty to limit their rulings to the isolated context of a particular case. Administrative agencies make interpretive decisions based on a broad range of policy considerations within the context of the entire range of their administrative responsibilities. Requiring agencies to justify interpretive decisions from the judicial point of view risks distorting administrative decisionmaking, not only by diverting precious resources, but also by decreasing administrative freedom to make necessary tradeoffs regarding such matters as policy priorities and enforcement capability.

This article explores these issues using examples from tax law. It does so for several reasons. Consideration of administrative law doctrines should include consideration of tax law. As the Supreme Court observed in *Dobson v. Commissioner*, "[n]o other branch of

12. 325 U.S. 410 (1945).

13. 519 U.S. 452 (1997).

14. *Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 457, 462.

15. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMIC, AND PUBLIC POLICY (1994) (providing a strategy for comparative institutional analysis that assesses variations in institutional abilities by identifying social goals, and determining which institution—the market, political process, or adjudicative process—is best equipped to implement those social goals).

the law touches human activities at so many points.”¹⁶ In addition, tax law exposes certain aspects of administrative law particularly well. For example, tax has a certain legal purity. With the exception of some environmental taxes, tax law seldom involves questions at the frontier of science that can complicate consideration of action by administrative agencies such as the Environmental Protection Agency (EPA) or Occupational Safety and Housing Administration (OSHA). Interpretations of tax law by the Treasury Department and Internal Revenue Service (IRS) are subject to review by both generalist and specialist federal courts. Thus, tax law provides a useful set of cases for exploring whether interpretive authority should rest with courts or administrative agencies.¹⁷

Part I of this article describes the interpretive voices of courts and agencies. Part II demonstrates the reach of *Chevron*’s Step One by contrasting the trial court’s opinions in a tax case with the appellate court decision. Part III considers the impact of *Mead* on *Chevron*’s Step Two and on the resulting resurgence of *Skidmore*. Part IV discusses *Mead*’s effect on *Seminole Rock* and *Auer*. Finally, Part V revisits *Skidmore*. The article concludes that courts, like most of us, are most comfortable when they hear their own accents. Indeed, the administrative interpretive voice may be so different from the judicial one that each has difficulty in understanding the subtleties of the other.

Using the metaphor of the interpretive voice and examples from tax law, this article demonstrates how *Mead*, while purporting to clarify *Chevron*, in fact moves away from its core principles. *Mead* expands the judicial interpretive voice by putting additional pressure on administrative agencies to imitate the judicial interpretive voice.¹⁸

16. 320 U.S. 489, 494–95 (1943).

17. Focus on tax in this piece is personal as well as practical, as tax is the area of law I know best.

18. One scholar recently wrote: “As Peter Strauss, Todd Rakoff, and Cynthia Farina have suggested, courts expand the adjudicatory implications of the . . . [Administrative Procedure Act] because of their own familiarity with the adjudicatory process. The result is that rulemaking, although conceived as agency legislation, has been subjected to requirements that are largely judicial in nature.” Edward Rubin, *It’s Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 111–12 (2003) (citing PETER STRAUSS ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS 510–15, 549 (10th ed. 2003)). Rubin believes “[f]urther judicial resistance to the APA’s apparent analogy between legislation and rulemaking

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Because I fear that intensive judicial review leads to judicial micromanagement of agency decisions and ossification of the notice-and-comment rulemaking process,¹⁹ I regret this result.

I. THE INTERPRETIVE VOICES OF COURTS AND OF AGENCIES

Institutional differences between courts and administrative agencies produce different interpretive voices. As *Chevron* itself recognizes, administrative agencies are politically accountable in ways that courts are not:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.²⁰

In *Chevron* this democratic pedigree justifies deference by the courts to policy decisions made by administrative agencies regarding matters left open by Congress.²¹ Of course, political accountability also means that administrative agencies are subject to political considerations. Not only do political pressures on the President influence administrative agencies,²² administrative agencies also are

is provided by the Supreme Court's decision in *Chevron, U.S.A., Inc. v. NRDC* [T]he Chevron Court, in its effort to fashion a standard of review for statutory interpretation in agency rulemaking, turned to the judicial model" *Id.* at 140–142 (footnote omitted). Rubin's article seeks to demonstrate the extent to which *United States v. Mead Corp.*, 533 U.S. 218 (2001), has exacerbated imposition of the judicial, rather than legislative, model on agency rulemaking.

19. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 528, 545 (2003). Arguments against intensive judicial review include its being too burdensome and unpredictable, that it causes agencies to devote too much time and effort to insulating rules from reversal, and that it displaces appropriate political judgments. See *id.* at 484 n.109 (listing and summarizing positions regarding the ossification debate); see *infra* Part V; see also sources cited *infra* notes 183, 209 (providing additional sources discussing the ossification debate).

20. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 865–66 (1984).

21. See *id.*

22. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335–36 (2001) (describing the influence of the President on individual

subject to Congressional oversight and pressures through hearings, investigations, budget, reviews, and legislative sanctions.²³ As Peter Strauss has argued, one consequence of this relationship with Congress is that, as a practical matter, agencies attend to legislative history in interpreting statutory language.²⁴

Administrative agencies specialize in the statutes they administer; they have technical competence and expertise. Administrative agencies interpret individual statutory provisions in light of the entire statutory scheme entrusted to it and with awareness of all parties affected by their interpretation, some of whom have competing or even contradictory concerns. Agencies must continually reconcile and accommodate a myriad of competing interests, including whether a particular interpretation would be feasible to administer. Agencies' understanding of the statutory scheme is both broad and deep, and they must be active rather than reactive in administering it. "[A]gencies essentially *live* the process of statutory interpretation[.]"²⁵ They must consider whether an interpretation of a provision is administrable by considering its impact on other aspects of the agency's responsibilities including the resources available for enforcement, the impact of compliance, including the burden of compliance on those affected by the interpretation.²⁶ The agency must also assess a particular interpretation's impact on available human and financial resources as well as its impact on enforcement of other statutory provisions under its aegis.

Not only do administrative interpretations reflect all these pressures, they also generally arise from a bureaucratic and hierarchical process that involves many individuals, including interested parties from outside the agency. There is seldom a single

regulatory issues).

23. See U.S. S. COMM. ON GOV'T OPERATIONS, STUDY ON FEDERAL REGULATION, VOL. II: CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES, S. DOC NO. 95-26, at ix-x (1st Sess. 1977) (recommending ways to enhance systematic congressional review of regulatory agencies).

24. See Peter Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 329-30 (1990) (describing the importance of legislative history to agency decisionmaking).

25. *Id.* at 329.

26. See *id.* at 327-29 (describing various factors that influence agencies' interpretation of statutes).

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author responsible for an administrative interpretation's language. To the extent that agencies engage in formal or informal rulemaking rather than adjudication, they often issue interpretations *ex ante* with the intent of influencing future events rather than responding to past ones.²⁷

Students of bureaucracies warn about some aspects of the administrative voice. Administrative agencies risk capture by the interest groups they regulate; the administrative voice may become a ventriloquist for private interest groups. Administrative agencies, acting out of their own self-interest, will tend to increase their power and prestige by claiming regulatory authority over as broad an area as possible.²⁸

Courts interpret statutes in a very different context. Article III judges are generalists, not specialists. Because they hold lifetime appointments, Article III judges are largely shielded from political and policy considerations. Moreover, judicial encounters with statutory interpretation are unpredictable, episodic, and *ex post*; the court's responsibility is only to the parties and the particular question in the concrete case before it. Further, judges do not have as their primary duty the administration of a particular statutory scheme. Thus, considerations about the administrability or practical effects an interpretation will impose on the system, individual citizens, and other provisions of the statutory scheme are not salient to courts.

Although political insulation has traditionally produced an image of courts as disinterested, recent scholarship has pointed out how courts are also subject to interest group influence.²⁹

27. See *id.* at 346 (noting the difference between agencies' rational, proactive approach and courts' episodic, retroactive approach).

28. See generally ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1967) (arguing that because bureaucratic officials are significantly motivated by their own self interests analysts can predict bureaucratic behavior and incorporate that understanding within a generalized theory of social decisionmaking); WILLIAM A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (analyzing bureaucratic behavior under economic theories).

29. See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1249, 1314–22 (1999) [hereinafter Cross, *Shattering*] (describing biases that affect the litigation process); Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 360–68 (1999) (describing how “[c]ourts are simply another venue in which influence may be brought to bear upon government policy”); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 80–

Administrative interpretations that burden the wealthier are more likely to be challenged in court than those that burden the less well-off. Only those that challenge administrative interpretations have the opportunity to prevail. Assuming that the wealthy will challenge administrative interpretations more often, and that they will win at least some of the time, the result of judicial decisions regarding statutory interpretations may drift toward interpretations favoring the rich and well-organized. This scholarship suggests that courts too, can be expected to act in ways that increase their power.

Considerations that do not influence the administrative voice do influence the judicial voice. As Jerry Mashaw has recently pointed out,³⁰ Article III courts, unlike administrative agencies, have the capacity and perhaps the duty to give coherence to the general legal order,³¹ including statutory schemes administered by different agencies. Courts, far more than agencies, see upholding the Constitution as one of their primary duties and therefore have a tendency to interpret to avoid raising Constitutional questions. As a result, lower courts may be bound by precedent in a way that agencies are not. Moreover, courts, unlike administrative agencies, are expected to explain fully the basis for their interpretation in their opinions.³²

83 (1991) (noting interest group pressure on judicial appointments); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1055–56 (1995) (describing judicial incentives for decisionmaking in administrative law).

30. Jerry L. Mashaw, *Agency Statutory Interpretation*, 3 ISSUES IN LEGAL SCHOLARSHIP 9 (Nov. 2002), at <http://www.bepress.com/iis/iss3/art9/>.

31. Mashaw observes, “Guido Calabresi and Ronald Dworkin have, for instance, suggested that fitting statutory language within the overall topography of the law is the principal responsibility of courts as independent interpreters.” *Id.* at 6 (citing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing that courts should enlarge the common law and be the primary authority for statutory interpretation and revision); RONALD DWORKIN, *LAW’S EMPIRE* (1986) (discussing various theories of how judges determine what the law is)).

32. As Mashaw observes:

We know the answer to occasion, form and process questions when considering judicial interpretation of statutes. The occasion is a lawsuit. The form of interpretation is a judicial opinion rationalizing the court’s resolution of the lawsuit. The process is the conventional judicial process of adversary argument followed by independent judicial consideration.

In the case of tax, citizens can choose to litigate in a generalist Article III court, a specialist Article III court, or a specialist Article I court, namely, a United States District Court, the United States Court of Federal Claims, and the United States Tax Court, respectively.³³ Decisions of the United States Court of Federal Claims are reviewable by the Court of Appeals for the Federal Circuit; decisions of the Tax Court and the district courts are reviewable by the federal court of appeals for the circuit in which the taxpayer resides.³⁴ Only for suits in the Tax Court may a taxpayer litigate without first paying the tax,³⁵ and most tax cases begin in the Tax Court.³⁶

Specialized courts, such as the Tax Court, have characteristics of both Article III courts and administrative agencies and thus are good testing grounds for the reach and doctrinal underpinning judicial deference rules such as those in *Mead*. Although the nineteen Tax Court judges do not hold lifetime appointments, their fifteen-year terms insulate them considerably from politics.³⁷ Like other courts, their encounters with administrative interpretations are sporadic and dependent on issues the parties bring to them. While Tax Court judges may consider the impact of a particular interpretation on other provisions of the Code, they, like generalist judges, must focus on the dispute before them. Moreover, the administrability of a particular position is not a key concern to Tax Court judges. Tax Court judges, however, do not necessarily consider salient constitutional issues or strive for general legal coherence.³⁸ In these

Id. at 18.

33. See I.R.C. § 6213 (West 2003); 28 U.S.C. §§ 1346(a)(1), 1491(a)(1) (2000).

34. See 28 U.S.C. § 1295(a)(3) (2000); I.R.C. § 7482(b) (West 2003).

35. See I.R.C. § 6213 (West 2003).

36. The Tax Court hears the vast majority of tax cases. See INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK 2003, Table 29 Chief Counsel Workload: Tax Litigation, by Type of Case 37 (2003). For history of the Tax Court, see Harold Dubroff, *The United States Tax Court: An Historical Analysis*, 40 ALB. L. REV. 7 (1975). There is a large body of scholarship considering the role of specialized courts more generally. See, e.g., Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377; Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

37. See I.R.C. § 7443(e) (West 2003).

38. For example, in a recent case involving the exclusion from income for the value of housing provided a “minister of the Gospel” by I.R.C. section 107,

regards, the Tax Court resembles an administrative agency.

The institutional capacities of different legal interpreters affect how each one views and decides questions of statutory interpretation. Institutional capacities affect not only how each goes about the task, but also how they describe and explain their conclusions. Significantly, these institutional capacities also affect the extent to which each is able to understand the approach and concerns of the other interpreter. Institutional capacities frame and therefore limit understanding.

II. *CHEVRON* STEP ONE

Mead addresses only *Chevron*'s Step Two and leaves in place the judicial voice of *Chevron*'s Step One. Step One, however, is important to assessing the impact of *Mead*. Step One applies when "Congress has directly spoken to the precise question at issue" because when "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."³⁹ Under Step One, a court does not defer to or even consider the administrative interpretive voice. Since *Chevron* reads statutory ambiguity or silence as an implicit delegation to the administrative agency, it follows that there is no such delegation when there is sufficient clarity as to Congressional intent. Since administrative preferences are not taken into account, decisions under Step One of *Chevron* are made without considerations of administrative expertise, whether in the form of knowledge of the statute, administrability of a rule, or technical knowledge.

The Step One language referring to clear congressional intent suggests that under Step One there is, in fact, no interpretive voice. Other language in *Chevron* along with actual judicial practice, however, shows that such is not the case; Step One of *Chevron* paves the way for a judicial interpretive voice. *Chevron* itself explained:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions

the Ninth Circuit raised the constitutional issue of the Establishment Clause while the Tax Court did not. *Compare* Warren v. Comm'r, 282 F.3d 1119 (9th Cir. 2002) (raising the constitutional issue), *with* Warren v. Comm'r, 114 T.C. 343 (2000) (ignoring the constitutional issue).

39. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.⁴⁰

As Beth Garrett explains, traditional tools of statutory construction include more than the statutory language; they encompass statutory context, structure, framework, purpose, and, for various courts and judges, dictionary definitions, canons of statutory construction, and legislative history.⁴¹ These are judicial tools; their use in determining that Step One of *Chevron* applies in a given situation gives rise to the judicial interpretive voice.

Indeed, judicial decisions analyzing administrative action under Step One generally invalidate administrative interpretations; they represent a rejection of the administrative voice in which policy considerations play an important role. A Step One decision is a judicial decision that the agency's interpretation, while not unreasonable, goes beyond "the acceptable parameters of possible statutory meaning"⁴² A pair of recent tax opinions illustrates this dynamic. The lower court upheld an administrative interpretation only to have the appellate court invalidate the interpretation by relying on what it characterized as clear congressional direction. In *Tax Analysts v. IRS*,⁴³ a non-profit publisher of tax news and commentary sought disclosure of IRS documents denying or revoking tax-exempt status. The IRS denied the request, relying on regulation section 301.6110-1(a),⁴⁴ which states that revocations and denials of tax-exempt status are not available for inspection under either sections 6110 or 6104 of the Internal Revenue Code, which require disclosure of certain IRS determinations.⁴⁵

40. *Id.* at 843 n.9 (citations omitted).

41. Elizabeth Garrett, *Step One of Chevron v. Natural Resources Defense Council* 2001 ABA ADMINISTRATIVE LAW & REGULATORY PRACTICE 2-6 (3d draft), at http://www.abanet.org/adminlaw/apa/chevron_revised_3.doc.

42. *Id.* at 18, at http://www.abanet.org/adminlaw/apa/chevron_revised_3.doc.

43. 215 F. Supp. 2d 192 (D.D.C. 2002), *rev'd*, 350 F.3d 100 (D.C. Cir. 2003).

44. Treas. Reg. § 301.6110-1(a) (2004).

45. I.R.C. section 6110(a) states: "Except as otherwise provided in this section, the text of any written determination and any background file

The district court granted the IRS's motion for summary judgment. It first categorized such denials and revocations as "return information" under section 6103 of the Internal Revenue Code⁴⁶ and thus not subject to disclosure.⁴⁷ It relied on case law to define "return" under section 6103 as factual information necessary to determine federal tax liability of a taxpayer-specific nature.⁴⁸ It found that the revocations and denials were not "written determinations" requiring disclosure under section 6110.⁴⁹ It reasoned that Congress did not specify what types of rulings or determination letters constituted "written determinations" under section 6110. The statutory language was therefore ambiguous; *Mead* and *Chevron* obligated the court to defer to the IRS's reasonable regulation promulgated after notice and comment.⁵⁰ The district court concluded that the regulation was a reasonable interpretation of section 6104, which required disclosure only for organizations that are granted tax-exempt status and thus left a gap regarding disclosure of denials of tax exemption.⁵¹

For the court of appeals, in contrast, the case clearly fell under Step One of *Chevron*, requiring "traditional tools of statutory interpretation—text, structure, purpose, and legislative history."⁵² It found nothing ambiguous in the text of section 6110, which requires disclosure of redacted versions of "written determinations."⁵³ Resolution of the case turned on the application of section 6104's

document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe." I.R.C. § 6110(a) (West 2003). Section 6110(l)(1), however, provides that this disclosure rule does not apply to "any matter to which section 6104... applies..." *Id.* § 6110(l)(1). Section 6104(a)(1)(A) states: "If an organization... is exempt from taxation... the application filed by the organization... together with any papers submitted in support of such application or notice... shall be open to public inspection..." I.R.C. § 6104(a)(1)(A) (West 2003).

46. Section 6103(a) provides in pertinent part, "Returns and return information shall be confidential." I.R.C. § 6103(a) (West 2003).

47. *Tax Analysts*, 215 F. Supp. 2d at 197.

48. *Id.*

49. *Id.* at 198.

50. *Id.*

51. *Id.*

52. *Tax Analysts*, 350 F.3d at 103 (quoting *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001)).

53. *Id.*

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exceptions to the disclosure requirements of section 6110. According to the court, section 6104(a)(1)(A), on which the IRS relied, is limited to exempt organizations; it “says nothing about documents relating to non-exempt organizations.”⁵⁴ Moreover, the court explained, section 6104(a)(1)(B), which applies to any “application” regarding tax exemption for certain pension, retirement, profit-sharing, or stock bonus plans, demonstrates that Congress knew “exactly how to refer to denials and revocations when it so intended.”⁵⁵ So clear was the statute’s language that the court concluded that it had “no need to resort to legislative history.”⁵⁶ The court nonetheless observed that its interpretation advanced the purpose of the Tax Reform Act of 1976 to disclose written determinations while protecting taxpayer privacy.⁵⁷

The court of appeals thought there was no question that Congress had indicated its clear intent on the issue, although neither the IRS nor the district court had been able to discern this clarity. The court of appeals preferred the judicial point of view to that of the administrative agency. In this case, the court of appeals perhaps feared that a desire to resist the administrative burden of disclosure colored the administrative point of view.⁵⁸

This pair of opinions highlights the difficulty of reconciling *Chevron*’s two steps. *Chevron* states that “if the statute is silent or ambiguous . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”⁵⁹ The district court found the statutory scheme silent as to the treatment of revocations or denials of tax-exempt status; the court of appeals read the statute as addressing the question through its interpretation of “written determination.”

Professor Levin has observed that when the Supreme Court, “utilizes the *Chevron* framework, it either upholds the agency or reverses on the strength of step one.”⁶⁰ This observation is true of

54. *Id.*

55. *Id.*

56. *Id.* at 104.

57. *Id.*

58. See William A. Dobrivar, *Anatomy of a Regulation: How Far the IRS Will Go to Hide Its Law*, TAX NOTES TODAY, Mar. 30, 2004, at 1669, available at LEXIS, 2004 TNT 61-39.

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

60. Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72

other courts as well. What this article suggests is that the choice between *Chevron*'s Step One and Step Two is in good measure a choice between the judicial and administrative voices. Statutory language challenged in court is seldom if ever pellucid. As *Tax Analysts* demonstrates, statutory language can relatively easily be characterized as clear or as ambiguous; much depends on which and how many of the tools of traditional statutory construction a court chooses to deploy at Step One,⁶¹ a decision within the control of the court.

Since it is up to a court to determine whether a decision is under Step One or Step Two, *Chevron* has not undermined the directive of *Marbury* that it is "the province and duty of the judicial department to say what the law is."⁶² As Jonathan Molot wrote, "outcomes at *Chevron* Step I are not all pre-ordained by Congress Whether a statute is clear or ambiguous at Step I itself is often an important interpretive question—a question which judges have reserved for themselves."⁶³ At times it may seem that the judiciary has not simply reserved this question, but has in fact appropriated it. As Professor Mashaw concluded after a recent study of the EPA and Health and Human Services (HHS):

Perhaps most striking are the cases in which an agency's highly nuanced interpretation—based on text, legislative history, statutory history, past agency practice, the balance of competing congressional purposes, and industry or scientific understandings—were rejected in favor of judicial approaches based on pure textual analysis, plain meaning or the invocation of grammatical rules.⁶⁴

The choice between Step One and Step Two is a choice by a

CHI.-KENT L. REV. 1253, 1261 (1997). *But see* AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366 (1999) (invalidating agency action as unreasonable and thus implicitly invalid under Step Two of *Chevron*).

61. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (1989).

62. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

63. Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1267 (2002).

64. Mashaw, *supra* note 30, at 26, at <http://www.bepress.com/cgi/viewcontent.cgi?article=1028&context=ils>.

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court whether to hear the particular accents of the administrative voice.

III. CHEVRON'S STEP TWO AFTER MEAD

If a court reaches Step Two of *Chevron*, however, the result is very different. The administrative voice is likely to prevail: “[O]nce a reviewing court reaches the second step of this framework, the agency interpretation of the statute is usually sustained, often in a perfunctory way.”⁶⁵ There is little question under Step Two of *Chevron* as to the nature of the interpretive voice. Moreover, because *Chevron*’s Step Two is based on an implied congressional delegation and sounds in notions of constitutional structure and accountability rather than expertise, it follows that even specialized courts such as the Tax Court are to defer to the administrative agency under *Chevron*’s Step Two. In *United States v. Hagggar Apparel Co.*,⁶⁶ the Supreme Court required the Court of International Trade to give regulations “*Chevron* deference,” where appropriate.⁶⁷ For the Supreme Court, the expertise of the Court of International Trade did not eliminate the need for the Court of International Trade to defer to the administrative agency; expertise instead made the Court expert in applying *Chevron*.⁶⁸

Uncertainty about *Chevron* deference in the case of informal

65. M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, 2001 A.B.A. ADMIN. L. & REG. PRAC. 2 (4th draft), at www.abanet.org/adminlaw/apa/abachevron1.doc. She also observes that *Chevron*’s Step Two “is a strong rule of deference—a rule meaning that the agency will nearly always be sustained.” *Id.* at 10.

66. 526 U.S. 380 (1999).

67. *Id.* at 394.

68. The Court observed, “The expertise of the Court of International Trade, somewhat like the expertise of the Tax Court, guides it in making complex determinations in a specialized area of the law; it is well positioned to evaluate customs regulations and their operation in light of the statutory mandate to determine if the preconditions for *Chevron* deference are present.” *Id.* This language, however, could be read as encouraging specialized courts to make decisions under *Chevron*’s Step One rather than Step Two and in that way decreasing the need for the specialized court to defer to the administrative agency. Whether specialized courts have favored *Chevron*’s Step One more than generalist courts would be an interesting topic for further study. *Cf.* Sunstein & Vermeule, *supra* note 2, at 922–23 (suggesting need for study of interpretive techniques of specialized courts where decisions are reviewed by generalist courts).

interpretations triggered *Mead*. The rule announced in *Mead*, however, introduces considerable uncertainty about when an administrative interpretation falls under Step Two. *Mead* purported to lay down ground rules for application of Step Two that go beyond the presence of a statutory ambiguity or gap: “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 of that authority.”⁶⁹ This additional criterion clearly limits the administrative voice. The opinion continues, “Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”⁷⁰ *Mead*, however, does not define or describe these other indications and thus does not establish any bright-line rule for applying *Chevron*’s Step Two.

Judicial interpretations of tax regulations promulgated under the authority of section 7805(a) of the Internal Revenue Code demonstrate the difficulty in applying this rule of *Mead* regarding *Chevron*’s Step Two and how *Mead* can be read as limiting the administrative interpretive voice.⁷¹ Section 7805(a) provides that the

69. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

70. *Id.* at 227.

71. Determining judicial standards for the validity of tax regulations is further complicated by the fact that both before and after *Chevron*, the Supreme Court and lower courts reviewing tax regulations often relied on the test announced in *National Muffler Dealer’s Ass’n v. United States*. 440 U.S. 472 (1978). This test examined whether the regulation at issue harmonized with the plain language, origin, and purposes of the statute, the manner in which the regulation evolved, and the length of time the regulation had been in effect. *Id.*; see Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 759–63 (2004). “The *National Muffler* analysis melds aspects of *Skidmore* and *Chevron*. Like *Skidmore*, it considers many factors, but like *Chevron*, it evidences a high degree of deference to administrative decisions. . . . The relationship between *Chevron* and *National Muffler* has long puzzled lower courts.” *Id.* at 760, 763. I was one of the authors of the Report, and this article draws upon it at various points, particularly for descriptions of cases, statutes, and regulations. This article is to a large extent the mirror image of the Task Force Report which looked at tax law through the lens of *Mead*. This article, however, looks at *Mead* through the lens of tax law.

Secretary of the Treasury “shall prescribe all needful rules and regulations for the enforcement” of the Internal Revenue Code.⁷² That is, it grants general authority to the Secretary of the Treasury. In the tax world, regulations promulgated pursuant to section 7805(a) are known as interpretive regulations; only regulations promulgated under such specific grants of authority are known as legislative.⁷³ The Supreme Court has long recognized the distinction tax law draws between interpretive and legislative regulations. The Supreme Court wrote in *Rowan Cos. v. United States*,⁷⁴ and reiterated in *United States v. Vogel Fertilizer Co.*,⁷⁵ that when a regulation is issued under the general authority of section 7805(a), “we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision.”⁷⁶

In promulgating interpretive regulations, the Treasury and IRS invariably specify that “section 553(b) of the Administrative

72. I.R.C. § 7805(a) (West 2003).

73. In other areas of the law, grants of authority similar to that of section 7805 are deemed to be grants to promulgate rules carrying the force of law. That is, in other areas of the law, regulations promulgated under grants similar to that of section 7805(a) would be “legislative” rather than “interpretative” rules under the Administrative Procedure Act, requiring notice and comment rulemaking, but valid if such procedures are followed unless found to be arbitrary and capricious. See *United States v. Haggard Apparel Co.*, 526 U.S. 380 (1999); *United States v. O’Hagan*, 521 U.S. 642 (1997); *Sullivan v. Zebley*, 493 U.S. 521 (1990); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). Such is not the case for tax law. Tax law reserves the category “legislative” regulations for regulations promulgated pursuant to grants of regulatory authority under specific substantive provisions of the Internal Revenue Code. See Salem et al., *supra* note 71, at 728–29. Examples of such specific regulatory authority include I.R.C. sections 1502, 337(d), and 469(f). Section 1502, perhaps the most famous legislative delegation, provides:

The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return . . . in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability.

I.R.C. § 1502 (West 2003).

74. 452 U.S. 247 (1981).

75. 455 U.S. 16 (1982).

76. *Rowan*, 452 U.S. at 253; *Vogel*, 455 U.S. at 24.

Procedure Act does not apply to these regulations”⁷⁷ Section 553(b) requires agencies to follow notice and comment procedures when they promulgate legislative rules that bind the public. Thus, the Treasury and IRS could be viewed as taking the position that regulations issued pursuant to section 7805 are not legislative regulations that bind the public within the meaning of the Administrative Procedure Act. At the same time, however, it is the customary practice of the IRS to follow notice and comment procedures for interpretive regulations,⁷⁸ the very procedure the Administrative Procedure Act requires for regulations to bind the public. Moreover, Treasury regulations describe regulations as the “most important” tax rules without distinguishing between interpretive and legislative regulations.⁷⁹

The IRS and Treasury deny the applicability of section 553(b) to interpretive tax regulations, and longstanding authority establishes that courts owe such regulations less deference than legislative tax regulations.⁸⁰ Thus, some judges and thoughtful commentators have argued that they do not warrant the strong deference of *Chevron*’s

77. See, e.g., T.D. 9043, 68 Fed. Reg. 10,190, 10,192 (Mar. 4, 2003) (to be codified at 26 C.F.R. pt. 1) (internal citation omitted). The Internal Revenue Manual, which comprises the Regulations Drafting Handbook, is consistent on this point: “5 U.S.C. 553(b) requires that a notice of proposed rulemaking be published in the Federal Register and that interested persons be given the opportunity to comment on the proposed regulations before final regulations are adopted However, these requirements do not apply if the rules are interpretative.” INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 30(15), <http://www.irs.gov/irm/part1/ch02s04.html>.

78. For recent examples, see Split-Dollar Life Insurance Arrangements, 68 Fed. Reg. 24,898 (May 9, 2003); Proposed Regulations on Changes in Accounting Method, 68 Fed. Reg. 25,310 (May 12, 2003); Proposed Regulations on Private Activity Bond Definition, 68 Fed. Reg. 25,845 (May 14, 2003). The IRS at times expands the notice and comment period by announcing its intent to issue proposed regulations and inviting comments even before proposed regulations are published. See, e.g., Advance Notice of Proposed Rulemaking on Credit for Increasing Research Authority, 69 Fed. Reg. 43 (Jan. 2, 2004).

79. Treas. Reg. § 601.601(a) (2004). For a thoughtful pre-*Mead* judicial discussion of the difficulty in determining the degree of judicial deference due interpretative tax regulations, see *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973 (7th Cir. 1998).

80. See *Vogel*, 455 U.S. at 24 (finding that longstanding authority gives interpretive regulations less deference than legislative tax regulations); *Rowan*, 452 U.S. at 253 (same).

Step Two under *Mead*'s requirement that interpretations be issued pursuant to a delegation of Congressional authority that has the force and effect of law to merit *Chevron* deference.⁸¹ These courts and commentators argue that regulations promulgated under section 7805 merit only the lesser and uncertain deference of *Skidmore*,⁸² under which courts retain final interpretive authority and can reject even reasonable administrative interpretations if judges prefer another interpretation. Other courts and commentators, however, reach the opposite conclusion by emphasizing the statement in *Mead* that *Chevron* deference does not require notice and comment rulemaking.⁸³

The vast majority of tax regulations rely in whole or in part on section 7805(a) for their authority.⁸⁴ *Mead* puts into doubt the degree of deference due such guidance. It is not clear whether these regulations should receive deference under *Chevron* or *Skidmore*. Tax regulations are promulgated with substantive and procedural care, with preambles that provide elaborate explanations of the reasoning behind the regulations in the preamble.⁸⁵ Thus, it is likely that most interpretive tax regulations would be upheld even if a court applied *Skidmore* rather than *Chevron* deference. Given the

81. See *Robinson v. Comm'r*, 119 T.C. 44, 156–57 (2002) (Vasquez, J., dissenting); John F. Coverdale, *Chevron's Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 39 (2003) (agreeing that interpretative regulations are entitled only to *Skidmore* deference post-*Mead*); cf. Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731 (2002) (arguing that while both interpretive and legislative regulations have been given *Chevron* deference, they both should receive the deference they earn under *Skidmore*).

82. For a detailed discussion of possible meanings of *Skidmore* deference see *infra* Part V.

83. See, e.g., *Alfaro v. Comm'r*, 349 F.3d 225 (5th Cir. 2003); *Hosp. Corp. of Am. v. Comm'r*, 348 F.3d 136 (6th Cir. 2003); *Salem et al.*, *supra* note 71, at 737–38; See also *Barhart v. Walton*, 535 U.S. 212 (2002) (finding that *Mead* does not require notice and comment for *Chevron* to apply; *Chevron* deference given to interpretation stated in ruling, manual, and letter).

84. See, e.g., *Boeing Co. v. United States*, 537 U.S. 437, 448 (2003) (noting that the Treasury could have promulgated a regulation addressing the issue in the case under specific authority but chose instead the general authority of section 7805 and calling for deference to the general authority regulation); IRS Semiannual Regulatory Agenda, 69 Fed. Reg. 38,029–38,102 (June 28, 2004); IRS Semiannual Regulatory Agenda, 68 Fed. Reg. 73,418–73,487 (Dec. 22, 2003).

85. See *Salem et al.*, *supra* note 71, at 738–41.

malleability of results under *Skidmore*,⁸⁶ however, it is possible that at least some interpretative tax regulations could be invalidated under the factors of *Skidmore*.

Consider Treasury regulation section 1.701-2, a controversial partnership anti-abuse regulation.⁸⁷ This regulation requires that the provisions of subchapter K (the subchapter of the Internal Revenue Code dealing with partnerships) and the regulations thereunder be applied “in a manner that is consistent with the intent of subchapter K”⁸⁸ and authorizes the Commissioner of Internal Revenue to “recast” any transaction that does not.⁸⁹ When this regulation was first proposed, it raised a storm of protest. One practitioner declared that the date of the notice of rulemaking was “a day that will live in infamy.”⁹⁰ Two authors who support the regulation acknowledge that, “[t]he Treasury’s approach was both novel and aggressive. The Treasury had never been this assertive before, especially in the absence of a specific legislative mandate.”⁹¹ Critics of the regulation, on the other hand, charge that in the absence of a specific legislative mandate, the Treasury lacked authority to promulgate general anti-abuse regulations.⁹²

The regulation’s validity has yet to be tested in court. The

86. See *infra* text accompanying notes 127–136.

87. Treas. Reg. § 1.701-2 (2004).

88. *Id.* § 1.701-2(b).

89. *Id.*

90. Douglass J. Antonio et al., *Chicago Group Calls for OMB Investigation of Treasury’s Decision Not to Analyze Partnership Antiabuse Reg.’s Effect on Economy*, TAX NOTES TODAY, July 22, 1994, at 38, available at LEXIS, 94 TNT 142-38; see Sheldon I. Banoff, *Anatomy of an Antiabuse Rule: What’s Really Wrong with Reg. Section 1.701-2*, 66 TAX NOTES 1859 (1995); James A. Gouwar, *The Proposed Partnership Anti-Abuse Regulation: Treasury Oversteps Its Authority*, 11 J. PARTNERSHIP TAX’N 287, 289–90 (1995); Richard Lipton, *Controversial Partnership Anti-Abuse Prop. Regs. Raise Many Questions*, 81 J. TAX’N 68 (1994).

91. Noel B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 34 (2004).

92. See Samuel C. Thompson, Jr., *Ex-Government Officials Challenge Partnership Anti-Abuse Reg: An Analysis*, 69 TAX NOTES 1395, 1397–99 (1995) (summarizing letters); Donald C. Alexander et al., *Commentators Say Partnership Antiabuse Rule Doesn’t Satisfy Fundamental for a Workable Tax System*, TAX NOTES TODAY, Sept. 7, 1995, at 28, available at LEXIS, 95 TNT 175-28; Lawrence B. Gibbs et al., *Partnership Antiabuse Rule is Broader than Necessary Say Miller & Chevalier Attorneys*, TAX NOTES TODAY, Sept. 7, 1995, at 27, available at LEXIS, 95 TNT 175-27.

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outcome of any such test, however, could well turn on whether courts judge the regulation, an interpretive regulation promulgated primarily under the authority of section 7805(b), under *Chevron* or *Skidmore*. Supporters of the regulation defend it under *Chevron*'s Step Two.⁹³ Should, however, interpretive regulations that the Treasury and IRS proclaim are not subject to section 553(b) prove to be entitled only to the lower level of deference possible under *Skidmore*, the regulation would be far more vulnerable. Under *Skidmore*, judges have ultimate interpretive authority and can invalidate even reasonable interpretations if they decide a better approach is possible.⁹⁴ Moreover, under *Skidmore*, the novelty of the anti-abuse regulations would count against their validity.⁹⁵ Thus, testing interpretive regulations under *Skidmore* could well render invalid regulations that would have been upheld under *Chevron*'s Step Two.

The example of interpretive tax regulations demonstrates the uncertainty of *Chevron*'s Step Two after *Mead*. A recent Supreme Court decision compounds the problem. In *Boeing Co. v. United States*,⁹⁶ the Court ignored both *Chevron* and *Mead*, despite the lower court's reliance on these cases in its opinion,⁹⁷ and the government's reliance on them in its briefs.⁹⁸ The Court observed that the Treasury Department could have promulgated a regulation to address the issue in the case under the specific authority delegated to it by section 994, but instead promulgated the regulation under the general authority of section 7805(a).⁹⁹ According to the decision,

93. Cunningham & Repetti, *supra* note 91, at 50–55. Unlike some commentators and courts, these authors see “no significant difference” between *Chevron* and *Nat'l Muffler*. *Id.* at 47. See also Rebecca S. Rudnick, *Boston University Professor Praises Antiabuse Reg.*, TAX NOTES TODAY, July 19, 1994, at 69, available at LEXIS, 94 TNT 139-69 (relying on *Chevron*). Of course, many who object to the regulation would also find it impermissible under Step One of *Chevron* because of the lack of statutory authority and unreasonableness if tested under Step Two of *Chevron*. See sources cited *supra* note 92.

94. See *infra* text accompanying notes 164–165.

95. See discussion *infra* Part V.B.

96. 537 U.S. 437 (2003).

97. *Boeing Co. v. United States*, 258 F.3d 958, 963 (9th Cir.2001) (relying on *Chevron*).

98. Brief for Respondent, *Boeing Co. v. United States*, 537 U.S. 437 (2003) (Nos. 01-1209, 01-1382).

99. *Boeing Co.*, 537 U.S. at 447–48.

even if the regulation at issue was “interpretive because it was promulgated under § 7805(a)’s general rulemaking grant rather than pursuant to a specific grant of authority,” a court “must still treat the regulation with deference.”¹⁰⁰ The Court concluded that the taxpayer’s “arguments based on statutory text [were] plainly insufficient to overcome the deference to which the Secretary’s interpretation is entitled.”¹⁰¹ The opinion did not make clear, however, what level of deference the interpretation merited; the Court cited neither *Chevron* nor *Skidmore* for this proposition.¹⁰² Perhaps in this case the regulation would have been upheld under either set of standards. In other situations, however, the test applied may well dictate the result. Until case law clarifies the issue, the uncertainty regarding the level of deference given to interpretive tax regulations in our post-*Mead* world remains unresolved.

IV. DEFERENCE UNDER *SEMINOLE ROCK* AND *AUER*

Mead also undermines a series of Supreme Court cases that accepted the administrative interpretive voice for administrative interpretations of its own regulations. For example, *Seminole Rock* involved a dispute over the meaning of the words “highest price” in regulations issued by the Office of Price Administration pursuant to the Emergency Price Control Act of 1942.¹⁰³ The Court stated:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.¹⁰⁴

100. *Id.* at 448.

101. *Id.* at 451.

102. *See id.* The Sixth Circuit in *Hospital Corp. of America v. Commissioner*, 348 F.3d 136 (6th Cir. 2003) reads *Boeing* as requiring *Chevron* deference for interpretive regulations. *Id.* at 140–41.

103. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

104. *Id.* at 413–14.

In *Auer*, the Supreme Court gave *Seminole Rock* deference to the Department of Labor's clarification of a regulation set forth in an amicus brief filed at the request of the Court.¹⁰⁵ The court explained, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."¹⁰⁶ In *Thomas Jefferson University v. Shalala*,¹⁰⁷ the Department of Health and Human Services interpreted its own regulations as barring reimbursement for certain educational costs incurred by a teaching hospital.¹⁰⁸ The Court wrote:

We must give substantial deference to an agency's interpretation of its own regulations This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns."¹⁰⁹

The rationale for this line of cases is, in part, *Chevron*'s notion of delegation. If Congress has delegated power to an agency to fill in legislative gaps, then courts should defer to any reasonable interpretation that an agency provides with respect to its own regulations. Because agencies are part of the executive branch under an elected President, it is more appropriate that an agency, rather than a court, undertake that function.¹¹⁰ According to this line of cases, these kinds of situations require interpretation from the administrative agency's point of view, the cadences of the administrative rather than the judicial voice.¹¹¹

So long as courts read *Chevron* broadly, there is no need to sort out the different justifications underlying *Seminole Rock* deference.

105. *Auer v. Robbins*, 519 U.S. 452 (1997).

106. *Id.* at 462.

107. 512 U.S. 504 (1996).

108. *Id.* at 506.

109. *Id.* at 512 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

110. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 627–44 (1996).

111. *Thomas Jefferson Univ.*, 512 U.S. at 512.

Mead, however, casts the *Seminole Rock* line of cases' authority into question by conditioning *Chevron* deference not only on Congress delegating rulemaking authority to the agency, but also on the agency's interpretation being promulgated in the exercise of that authority. Although *Mead* never mentions *Seminole Rock*, and thus does not address its continuing viability, lower courts have begun to do so, both implicitly and explicitly.

For example, the Seventh Circuit implicitly questioned the continued vitality of *Seminole Rock* in *Matz v. Household International Tax Reduction Investment Plan*¹¹² (*Matz II*). This 2001 decision reversed the Court of Appeal's earlier decision in *Matz v. Household International Tax Reduction Plan*¹¹³ (*Matz I*) in which the Supreme Court had vacated and remanded in light of *Mead*.¹¹⁴ In *Matz II* the court had to decide whether both vested and non-vested participants, or only non-vested participants, should be counted in determining whether partial termination of a retirement plan has occurred.¹¹⁵ In the first opinion, the Seventh Circuit, pursuant to *Chevron*, deferred to the IRS's position in its amicus brief that both categories should be counted.¹¹⁶ On remand, the court rejected the IRS's interpretation, holding that only non-vested participants should be counted. The court wrote:

[u]pon reading *Mead*, we find that a litigation position in an *amicus* brief, perhaps just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals, and enforcement guidelines are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*.¹¹⁷

In *Matz II* the court interpreted *Mead* as requiring reliance on *Skidmore* rather than on *Auer* and its progeny in giving judicial deference to informal agency interpretations. In its list of citations, the court used a "but see" signal to introduce *Auer* and *Jones v.*

112. 265 F.3d 572 (7th Cir. 2001).

113. 227 F.3d 971 (7th Cir. 2000), *vacated by* 533 U.S. 925 (2001), *remanded to* 265 F.3d 572 (7th Cir. 2001).

114. *Id.*

115. *Matz*, 265 F.3d at 575–76.

116. *Matz*, 227 F.3d at 976.

117. *Matz*, 265 F.3d at 575 (citation omitted).

American Postal Workers Union.¹¹⁸ In *Jones*, a lower court deferred to interpretations in agency amicus briefs because they were not *post hoc* rationalizations, and they reflected the agency's fair and considered judgment.¹¹⁹ Thus, the *Matz II* court did not consider these precedents binding post-*Mead*.¹²⁰

Another Seventh Circuit decision, *Keys v. Barnhart*,¹²¹ explicitly questions *Auer* and *Seminole Rock*. At issue was whether to defer to the government's amicus brief position that old rather than new regulations should govern a disabled child's eligibility for Social Security benefits.¹²² Judge Posner, citing both *Mead* and *Matz II*, wrote "briefs, it seems, get limited deference."¹²³ He continues, "[o]ur hedge ('it seems') is because *Auer v. Robbins* gave full *Chevron* deference to an agency's amicus curiae brief."¹²⁴ Judge Posner's opinion relies on *Mead* to conclude, "[p]robably there is little left of *Auer*."¹²⁵ He reasons that, as interpreted by *Mead*, the "theory of *Chevron* is that Congress delegates to agencies the power to make law to fill gaps in statutes" and "[i]t is odd to think of agencies as making laws by means of statements made in briefs"¹²⁶

Insofar as *Mead* calls for rejecting *Seminole Rock* and *Auer*, it has the effect of limiting the administrative interpretive voice. The justification for deference to administrative interpretations of regulations rests in part on the need to hear the administrative voice and its distinctive accents. The reasoning of *Mead* mutes this point of view.

V. SKIDMORE REVIVED

Mead does not silence the administrative voice. Step Two of *Chevron* remains, albeit in diminished form. Moreover, *Mead* gives prominence to *Skidmore*. Although the Supreme Court held in *Mead* that a tariff classification ruling issued by the United States Customs

118. 192 F.3d 417 (4th Cir. 1999).

119. *Id.* at 427.

120. *Matz*, 265 F.3d at 575.

121. 347 F.3d 990 (7th Cir. 2003).

122. *Id.* at 992.

123. *Id.* at 993 (citing *Mead* and *Matz II*).

124. *Id.* (citation omitted).

125. *Id.*

126. *Id.* at 993–94.

Service was not entitled to the strong deference of *Chevron*'s Step Two,¹²⁷ the Court determined that the administrative ruling was "eligible to claim respect according to its persuasiveness" under *Skidmore*.¹²⁸ However uncertain *Skidmore*'s reach, it seems at least to require courts to consider the possibility of giving the deference to administrative voice by analyzing the factors that could lead to accepting the administrative interpretation.

This reincarnation of *Skidmore* will diminish deference to administrative agencies in some cases and expand it in others. As a result of *Mead*, some agency interpretations that previously received deference under *Chevron*'s Step Two will now receive only the possibility of deference under *Skidmore*. For example, prior to *Mead*, the Sixth Circuit granted *Chevron* deference to IRS revenue rulings,¹²⁹ but after *Mead*, decided such rulings were entitled to *Skidmore*'s more limited deference.¹³⁰ In other cases, interpretations that received no deference under *Chevron* may now be entitled to deference under *Skidmore*. For example, final decisions of the Patent and Trademark Office have not been entitled to any deference under Step Two of *Chevron* because Congress has not vested the office with "any general substantive rulemaking power."¹³¹ *Mead* also requires that agencies have rulemaking power to be given *Chevron* deference, but after *Mead*, the decisions of the Patent and Trademark Office may receive deference under *Skidmore*. Thus, *Mead* strengthens the weight of Patent and Trademark Office decisions and permits judicial deference to them in a way not possible before *Mead*.

According to *Skidmore*, "[t]he weight [accorded to an administrative] judgment in a particular 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."¹³² The Court in *Mead* quotes this language from *Skidmore*

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

128. *Id.*

129. For a more detailed discussion of revenue rulings, see *infra* Part V.A.

130. *Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173, 181 (6th Cir. 2003). For a more detailed discussion of this case, see *infra* text accompanying notes 223–241.

131. *Merck & Co. v. Kessler*, 80 F.3d 1543, 1550 (Fed. Cir. 1996).

132. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994).

and then offers a slightly different list: “[T]he degree of the agency’s care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency’s position.”¹³³ Later, *Mead* gives yet another list of factors for deference: “[T]he merit of [the] writer’s thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.”¹³⁴

Thus *Skidmore* is a multi-factor and open-ended test. It does not specify or limit the factors for a court to consider. It gives no guidance as to what weight each factor should bear. As Justice Scalia observes in his dissent in *Mead*, *Skidmore* represents “that test most beloved by a court . . . th’ol’ ‘totality of the circumstances’ test.”¹³⁵ Nonetheless, the various formulations of *Mead* and its application in cases make three factors particularly important: expertise, consistency, and validity of reasoning. As discussed below, on balance, these key *Skidmore* factors direct administrative agencies to act like courts.¹³⁶

A. The Role of Expertise

Under *Chevron*, both before and after *Mead*, expertise does not ensure deference, as the example of the Patent and Trademark Office discussed above demonstrates.¹³⁷ All formulations of *Skidmore* deference, however, assign an important role to expertise. Since expertise is a particular strength of administrative agencies, this factor seems to favor judicial deference to administrative agencies. In *Skidmore* itself, the administrative agency was not even a party to the action, which involved a dispute between employees and their employer over overtime compensation.¹³⁸ It was expertise that triggered possible deference to the ruling of the Administrator of the Wage and Hour Division, since “the Administrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.”¹³⁹ *Skidmore* further explains

133. *Mead*, 533 U.S. at 228 (footnotes omitted). For a list of *Skidmore* factors, see *infra* Part V.B–C.

134. *Mead*, at 235.

135. *Id.* at 241.

136. See *infra* Part V.A–C.

137. See *supra* text accompanying note 131.

138. *Skidmore v. Swift & Co.*, 323 U.S. 135 (1944).

139. *Id.* at 139.

that the views of the agency implementing a statute “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁴⁰ *Mead* also assigns a high value to expertise: “There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case”¹⁴¹

When however, as in *Mead* itself there is a specialized court reviewing the administrative agency, the *Skidmore* factor of expertise does not so neatly support granting deference to the administrative agency. As noted earlier, in tax, the specialized Tax Court hears the vast majority of tax cases.¹⁴² The Tax Court’s attitude toward revenue rulings highlights the tensions inherent in application of *Skidmore* by specialized courts.

Revenue rulings are official interpretations by the IRS issued by the Office of the Chief Counsel of the IRS and published in the Internal Revenue Bulletin as the IRS’s legal conclusions based on stated facts.¹⁴³ Revenue rulings are an important source of administrative interpretation for tax law.¹⁴⁴ The IRS describes revenue rulings as promoting uniform application of tax laws and assisting taxpayers in attaining maximum voluntary compliance.¹⁴⁵ The weekly Internal Revenue Bulletin states explicitly that revenue rulings and revenue procedures “do not have the force and effect of Treasury Department regulations,” but they may be used as precedents.”¹⁴⁶

In *Mead Corp. v. United States*,¹⁴⁷ the Court of Appeals for the Federal Circuit, comparing trade and tax matters, observed: “Customs’ classifications rulings are in some ways an even less

140. *Id.* at 140.

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

142. *See* sources cited *supra* note 36.

143. *See* Treas. Reg. § 601.601(d)(2)(i)(a) (2004); Rev. Proc. 2003-1, 2003-1 C.B. 5.

144. In 2003, for example, the IRS published 128 revenue rulings. 2003 I.R.B. 1211.

145. Rev. Proc. 89-14, 1989-14 C.B. 814, 814–15.

146. *Id.* at 815.

147. 185 F.3d 1304 (Fed. Cir. 1999), *vacated*, 533 U.S. 218 (2001), *rev’d*, 283 F.3d 1342 (Fed. Cir. 2002).

formalized body of interpretation than IRS revenue rulings.”¹⁴⁸ If, according to the Supreme Court in *Mead*, tariff classifications might deserve some deference under *Skidmore*,¹⁴⁹ it is unclear whether the more formalized body of interpretations represented by revenue rulings require the strong deference of *Chevron*’s Step Two.

The Tax Court has traditionally afforded revenue rulings no deference whatsoever. *Mead*’s invocation of *Skidmore* for tariff rulings, however, seems to undermine the Tax Court’s attitude toward revenue rulings, and *Mead* has in fact begun to influence the Tax Court’s attitude toward revenue rulings. In *Lunsford v. Commissioner*,¹⁵⁰ Judge Halpern’s concurring opinion, while it acknowledges that the Tax Court has taken the view that revenue rulings receive no deference because they are merely opinions of a lawyer in the agency,¹⁵¹ it also refers to *Mead* in a “but see” citation, “for a discussion of the deference, less than *Chevron* deference, owed to certain agency interpretations of a statute.”¹⁵² In *Medical Emergency Care Associates v. Commissioner*,¹⁵³ the Tax Court discussed *Mead* and its invocation of *Skidmore* but nevertheless declined to defer to a revenue ruling, concluding, “we are unable to ascertain the thoroughness of the agency’s consideration or the validity of its reasoning.”¹⁵⁴ Thus, while *Mead* does not require or ensure deference by the Tax Court to IRS revenue rulings, *Medical Emergency Care Associates* demonstrates that its reasoning increases the likelihood of such deference by requiring the Tax Court to give weight to IRS expertise and to justify any decision not to defer to a revenue ruling through an analysis of *Skidmore* factors.

Depending on the degree to which *Mead* narrows *Chevron*’s reach in the long run, applying *Skidmore* may decrease rather than increase the Tax Court’s deference to the IRS. In 1943, the Supreme Court wrote of the Tax Court, which had not yet been constituted as

148. *Id.* at 1308.

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

150. 117 T.C. 159 (2001).

151. *Id.* at 174 n.6 (Halpern, J., concurring).

152. *Id.* Recent decisions of the Courts of Appeals have generally afforded revenue rulings *Skidmore* deference. *See Salem et al.*, *supra* note 71, at 768–70.

153. 120 T.C. 436 (2003).

154. *Id.* at 445.

an Article I court.¹⁵⁵

[E]very reason ever advanced in support of administrative finality applies to the Tax Court. The court is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. It deals with a subject that is highly specialized Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer. Individual cases are disposed of wholly on records publicly made, in adversary proceedings, and the court has no responsibility for previous handling.¹⁵⁶

Such a view of the Tax Court reflects factors like those of *Skidmore* and demonstrates the judicial preference for the judicial voice. If courts find that *Skidmore* applies to many administrative interpretations and if expertise is deemed a particularly important *Skidmore* factor, the reasoning of *Mead* may over time serve to decrease, rather than increase, deference by specialized courts such as the Tax Court to the administrative agencies they review.¹⁵⁷ Thus, the Tax Court exposes tensions inherent in application of *Skidmore* by specialized

155. The body, originally called the Board of Tax Appeals, was created as an independent executive agency outside the Treasury Department by the Revenue Act of 1924 and remained as such until 1942. The Revenue Act of 1926 provided for direct appeal of its decisions to the circuit courts of appeals. In 1941, the Attorney General's Committee on Administrative Procedure described it as "a court in all but name." REPORT OF THE COMM. ON ADMIN. PROCEDURE, S. DOC. NO. 77-8, at 205 (1st Sess. 1941). In 1942, its name was changed to the Tax Court of the United States. It became an Article I court in 1969. See David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629, 632-36 (1996).

156. *Dobson v. Comm'r*, 320 U.S. 489, 498-99 (1943) (footnotes omitted).

157. The use of *Skidmore* and *Chevron* by specialist courts would thus seem a fruitful area for further study.

courts.¹⁵⁸

Of course, the dispute in *Mead*, as to whether the United States Customs Service properly classified day planners as bound diaries under the Harmonized Tariff Schedule, was heard by both a specialized trial court and appellate court—the Court of International Trade¹⁵⁹ and the United States Court of Appeals for the Federal Circuit, respectively.¹⁶⁰ The Court of International Trade has jurisdiction over suits arising out of agency actions on import transactions.¹⁶¹ The jurisdiction of the Court of Appeals for the Federal Circuit includes appeals in the areas of tax, patent, trade, trademarks, takings, and contracts.¹⁶² Nowhere in *Mead*'s majority opinion, however, does the Supreme Court suggest that the specialized nature of trial and appellate courts eliminates the need to consider the possibility of deference under *Skidmore*. Quite to the contrary, *Mead* calls for consideration of *Skidmore* deference even in the face of such specialized review.¹⁶³

But neither does *Mead* indicate how strongly the factor of expertise shall be weighed. It refers to “*Skidmore*’s recognition of various justifications for deference depending on statutory circumstances and agency action”¹⁶⁴ *Skidmore*, unlike *Chevron*, does not rely on theories of Congressional delegation that would require even an expert and specialized court to defer to the administrative agency. Under *Skidmore*, courts decide what the best interpretation of statutory language is and which of the many *Skidmore* factors to emphasize. A statutory scheme that involves judicial review by specialized bodies will likely reduce judicial deference to administrative agencies on the basis of the agency’s expertise. A specialized tribunal with its own expertise can be expected as a general matter to

158. Examples of other specialized courts include the Court of International Trade and the Court of Veterans Appeals. See Revesz, *supra* note 36 at 111–13.

159. *Mead Corp. v. United States*, 22 Ct. Int’l Trade 707 (1998), *rev’d*, 185 F.3d 1304 (Fed. Cir. 1999), *vacated*, 533 U.S. 218 (2001), *rev’d*, 283 F.3d 1342 (Fed. Cir. 2002).

160. *Mead Corp. v. United States*, 283 F.3d 1342 (Fed. Cir. 2002).

161. See Hon. Gregory W. Carman, *The Jurisdiction of the United States Court of International Trade: A Dilemma for Potential Litigants*, 22 STETSON L. REV. 157, 160–62 (1992).

162. See 28 U.S.C. § 1295 (2004).

163. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

164. *Id.* at 237.

give less weight to administrative expertise as a factor favoring deference and thus decline to find the agency's expert opinion persuasive in a particular case.¹⁶⁵

The presence of a specialized court also complicates review by generalist appellate courts.¹⁶⁶ Courts of appeals in such cases will have to consider the reasoning of two expert bodies, the administrative agency and the specialized court, and decide which, if either, persuades it.

For generalist courts, expertise may be of diminished importance under *Skidmore* in another way as well. Language in *Skidmore* and *Mead* can be read as treating expertise as the trigger for deference under *Skidmore*.¹⁶⁷ In other words, expertise could be seen not as an independent factor supporting deference, but as the reason a court "cannot ignore the agency interpretation" and "must assess that interpretation against multiple factors and determine what weight they should be given."¹⁶⁸ Thus, given the presence of specialized courts and the view of expertise as the trigger for

165. Revesz, *supra* note 36, at 1139–55. Revesz reasons that specialist courts may decrease the effectiveness of congressional delegation of legislative authority to administrative agencies because they are more likely to show systematic biases. *Id.* at 1146. If such is the case, greater reliance on *Skidmore* would exacerbate this problem. Cf. Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 964 (2003) (noting that specialized judges "are more likely to see themselves as helping the legislature achieve the goals of a program").

166. In the case of the Tax Court, this question is further complicated by disputes about the meaning of Internal Revenue Code section 7482, in which section 7482(a)(1) provides that Tax Court decisions shall be reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury," and in which section 7482(c)(1) provides for reversal of Tax Court decisions if they are "not in accordance with law." I.R.C. § 7482 (a)(1), (c)(1) (2003); see Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235 (1998); Shores, *supra* note 155, at 631–32; David F. Shores, *Deferential Review of Tax Court Decisions: Taking Institutional Choice Seriously*, 55 TAX LAW. 667 (2002). For cases that are appealed to the Court of Appeals for the Federal Circuit, as was the case in *Mead*, the specialized nature of that court's jurisdiction is itself a further complication.

167. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994); *Mead*, 533 U.S. at 228.

168. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 855 (2001).

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deference under *Skidmore*, expertise may prove to have a surprisingly small role in the ultimate degree of deference courts accord an administrative agency.

B. Skidmore's Reliance on Consistency

Another key factor under both *Skidmore* itself and *Mead*'s understanding of *Skidmore* is an administrative interpretation's "consistency with earlier and later pronouncements."¹⁶⁹ Professor Rossi writes, "[o]f all the *Skidmore* factors, consistency seems most widely used."¹⁷⁰ "Consistency," of course, can have many meanings. In one sense, it may mean looking at a snapshot of administrative interpretations to ask whether an agency interpretation is consistent with other agency interpretations outstanding at the time of judicial review. If the interpretation is inconsistent, it is unlikely to receive deference under *Skidmore*.¹⁷¹ In another sense, emphasizing consistency directs courts to give weight to interpretations that have not changed over time, affording longstanding administrative interpretations respect, in part, simply because they are longstanding.¹⁷² To the extent *Skidmore* promotes the second sense of consistency, "remaining unchanged," it calls on administrative agencies to adhere to a kind of *stare decisis* in order to merit judicial deference. Many of the explanations and justifications for *stare decisis*, however, are particularly judicial and do not apply to the administrative process.

169. *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140). The *Mead* court quotes *Skidmore*'s list and then restates the factors as the "degree of the agency's care, its consistency, formality, and relative expertness" as well as the "persuasiveness of the agency's position." *Id.* (citing *Skidmore*, 323 U.S. at 139–40) (footnotes omitted).

170. Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1144 (2001).

171. For example, in *United States Freightways Corp. v. Commissioner*, 270 F.3d 1137, 1147 (7th Cir. 2001), the court found that the IRS position in revenue rulings and other cases regarding the requirements for capitalizing expenses evidenced no consistent practice and thus rejected the IRS's litigating position in the case. See *infra* text accompanying notes 220–222.

172. See, e.g., *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 209 (2001) (upholding revenue ruling that reflects agency's longstanding interpretation). Commentators have emphasized the importance of an interpretation being longstanding under the *Skidmore* calculus. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 14 (1990); Merrill & Hickman, *supra* note 168, at 856.

Reliance on *stare decisis* is closely linked to common law cases that lack statutory language as a source to limit the freedom of the judiciary.¹⁷³ For example, before his appointment to the Supreme Court, Stanley Reed wrote that “‘the doctrine of *stare decisis* has a philosophic necessity in the common law system which is not found elsewhere,’ because the common law ‘amounts to no more than a collection of decided cases.’”¹⁷⁴ In contrast, administrative interpretations reflect interpretations of statutory language and thus raise very different concerns.

Commentators also link *stare decisis* to the judiciary’s lack of expertise. Jonathan Macey writes:

Stare decisis enables judges to leverage a single skill—the ability to tell when like cases are alike—into a facility for deciding a wide variety of cases that involve substantive legal issues about which the judges may know next to nothing. In a complex world dominated by courts of general jurisdiction, in which lawyers may specialize but judges are expected to master hundreds of disparate areas of law, this attribute of stare decisis should not be minimized.¹⁷⁵

Administrative agencies, on the other hand, have no need to look to substitutes for expertise.

Another proffered justification for precedent is that it encourages judges to exercise care and foresight when announcing a new rule in deciding a case. Knowing that future courts will treat their decision as a precedent, judges “must attempt to anticipate the range of future cases to which a rule will apply . . . [and] predict the consequences of future applications of the rule in the process of

173. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (“Antebellum Americans embraced *stare decisis* to restrain the discretion that legal indeterminacy would otherwise give judges . . .”).

174. *Id.* at 22 (quoting Stanley Reed, *Stare Decisis and Constitutional Law*, 9 PA. BUS. ASS’N Q. 131, 133 (1938)).

175. Jonathan R. Macey, *Symposium on Post-Chicago Law and Economics: The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 95 (1989); *see also* Nelson, *supra* note 173, at 56 (“To the contrary, judges often will *not* be well positioned to decide cases of first impression; the judges who happen to confront an issue first may have only average abilities and be relatively unfamiliar with the relevant body of law.”).

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deciding . . . a case as well as in choosing the rule to announce.”¹⁷⁶ A court is expected to undertake this kind of consideration while deciding the dispute between the two parties before it. Administrative agencies also can, and do, devote considerable time and resources to predicting the impact of its rules and regulations. Agencies, unlike courts however, hear from and can consult with a variety of parties likely to be affected by their rules.

Stare decisis has come to represent a key component of the judiciary’s legitimacy. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justices Souter, Kennedy, and O’Connor’s joint decision declared that “[t]he Court’s power lies . . . in its legitimacy,” and that preserving that legitimacy required not overruling *Roe v. Wade*.¹⁷⁷ Although dissenting in the case, Justice Rehnquist nonetheless agreed with the principle:

The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.¹⁷⁸

The legitimacy of administrative decisions stands on very different grounds. As *Chevron* recognizes, administrative agencies can claim the democratic pedigree of the elected President.¹⁷⁹ They are subject to congressional oversight. They have the advantage of expertise as well as input from affected parties. Their interpretations are not the result of a single judge or even a panel of judges.

176. Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2238 (1997).

177. 505 U.S. 833, 865 (1992).

178. *Id.* at 963 (Rehnquist, C.J., dissenting), *see also* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 600 (1987) (“[T]his subordination of decisional and decisionmaker variance is likely in practice to increase the power of the decisionmaking institution. If internal consistency strengthens external credibility, then minimizing internal inconsistency by standardizing decisions within a decisionmaking environment may generally strengthen that decisionmaking environment as an institution.”)

179. *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (recognizing that agencies may legitimately make policy choices because they derive their power from Congress, while judges lack expertise and are not members of the executive or legislative branches of government).

Some of the justifications for reliance on precedent do apply to administrative agencies. Consistency promotes notions of equity, the notion that likes are treated alike. It acknowledges reliance and promotes predictability, which is useful for planning. But as Professor Schauer has observed, *stare decisis* through reliance on precedent represents a focus on “stability for stability’s sake.”¹⁸⁰ Stability for stability’s sake is only one important value for the administrative state. By forcing administrative agencies to speak in a judicial voice, it furthers the ossification of the administrative process and limits agencies’ ability to make changes to respond to new technologies, new political realities, and new circumstances.

Tax interpretive regulations, those regulations promulgated under the authority of section 7805(a), illustrate how an expansion of *Skidmore* may mute the administrative interpretive voice. As discussed earlier, *Mead* requires that an administrative interpretation be promulgated in the exercise of authority carrying the force of law in order to merit *Chevron* deference, and this requirement has led some commentators and courts to conclude that tax interpretive regulations merit only *Skidmore* rather than *Chevron* deference.¹⁸¹ If courts apply the various factors of *Skidmore*’s weak deference to such regulations, the likely result in most cases is likely to be judicial validation of such regulations. Such regulations are subject to careful consideration as well as notice and comment procedures and include elaborate preambles explaining the agency’s decisions and reasoning process.¹⁸²

But validation of the regulations will not always be the case. Regulations promulgated under section 7805(a) also reflect policy needs and often require amendment in order to respond to changes in political and economic circumstances. The *Skidmore* factors give prominence to the conservative judicial values of consistency with prior interpretations. A court applying *Skidmore* may feel obligated to look skeptically upon interpretive tax regulations that modify a long-settled position.

That is, even if courts were generally to uphold interpretive tax regulations under *Skidmore* deference, *Mead*’s expansion of *Skidmore* could nonetheless contribute significantly to the ossification of the

180. Schauer, *supra* note 178, at 601.

181. See *supra* note 81 and accompanying text.

182. See Salem et al., *supra* note 71, at 733–35.

administrative process. As Justice Scalia points out in his dissent in *Mead*, *Skidmore* and *Chevron* differ sharply in how they view a change in an agency's position.¹⁸³ For any interpretation that has been subject to deference under *Skidmore*, it is possible that administrative agencies will be powerless to revise the rejected position. "What a court says is the law after according *Skidmore* deference will be the law forever, beyond the power of the agency to change even through rulemaking."¹⁸⁴

Justice Scalia draws this conclusion from a trilogy of cases,¹⁸⁵ all of which were decided after *Chevron*, holding that if a Supreme Court statutory interpretation precedes that of the agency, the Supreme Court interpretation becomes part of the statute's meaning, resolving any inherent ambiguity and foreclosing the administrative agency from making a different choice under *Chevron* Step Two.¹⁸⁶

183. *United States v. Mead Corp.*, 533 U.S. 218, 247–48 (2001) (Scalia, J., dissenting); see Bressman, *supra* note 19, at 540 ("Agencies that forego law-like procedures and settle for *Skidmore* deference run the risk of losing the ability to change their interpretations in the future.").

184. *Mead*, 533 U.S. at 249–50 (Scalia, J. dissenting).

185. *Neal v. United States*, 516 U.S. 284 (1996); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). Only one case has relied on this trilogy to invalidate a tax regulation. In *Bankers Trust New York Corp. v. United States*, 225 F.3d 1368, 1375–76 (Fed. Cir. 2000), the Court of Appeals for the Federal Circuit relied on *Neal* and *Maislin* in deciding that a preexisting precedent trumped *Chevron* deference to a tax regulation involving foreign tax credits.

186. *Neal*, *Lechmere*, and *Maislin* rest on the premise that Congress, and not the courts, must act to revise statutes and that congressional inaction is tantamount to approval of the Court's interpretation. See generally Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1291 (2002) (citing *Neal*, *Lechmere*, and *Maislin* to argue that despite *Chevron*'s adjustments to the rule of judicial interpretive primacy, the Supreme Court squarely rejected expansion of agencies' interpretive authority of administrative statutes); Merrill & Hickman, *supra* note 164, at 839 (citing *Neal*, *Lechmere*, and *Maislin* in arguing that the Court insists that *Chevron* does not trump prior interpretations of statutes adopted by the Court itself); Richard W. Murphy, *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 36 (2004) (noting that the court has failed to reconcile these three cases with the *stare decisis* effect of non-*Chevron* judicial constraints); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 188 (2004) (asserting that based on *Neal*, *Lechmere*, and *Maislin*, the *Chevron* issue should never be reached when assessing the validity of "check-the-box" regulations).

In *Neal* a unanimous Supreme Court found, because of its prior decision in *Chapman v. United States*,¹⁸⁷ the Sentencing Commission was powerless to change an interpretation of a statute that the weight of blotter paper bearing LSD must be considered for determining whether the quantity crossed a weight threshold for triggering a minimum ten year sentence, even though this interpretation produced a “significant disparity of punishment meted out to LSD offenders relative to other narcotics traffickers.”¹⁸⁸ The *Neal* Court explained, “[o]nce we have determined a statute’s meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency’s later interpretation of the statute against that settled law.”¹⁸⁹

In this trilogy of cases, the Court invokes *stare decisis*, the mainstay of the judicial voice, to reject the administrative voice. Deference under *Skidmore* will likely have the same effect. Shifts in position resulting from changing policy or changing needs are particularly difficult to accommodate under *Skidmore*’s emphasis on consistency.

C. Validity of the Agency’s Reasoning

Another set of *Skidmore* factors considers the thoroughness and validity of the agency’s reasoning. These factors, which are in my view the most important, further demonstrate the Court’s “judicializing” of administrative agencies,¹⁹⁰ making them behave more like courts than legislatures. We require courts, especially appellate courts, to explain the basis for their decisions. We do not, however, ask the same of legislatures. As Professor Schauer has observed, “Typically, drafters of statutes, like sergeants and parents, simply do not see the need to give reasons, and often see a strong need not to”¹⁹¹

The reasoned decision-making factor is further complicated by current statutory criteria for agency reasoning. The Administrative Procedure Act requires agencies to incorporate “a concise general

187. 500 U.S. 453 (1991).

188. *Neal*, 516 U.S. at 295.

189. *Id.*

190. See Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (criticizing the Supreme Court for requiring Congress to act like a court in assembling evidence to define constitutional rights).

191. Schauer, *supra* note 174, at 636.

statement of their basis and purpose” into rules adopted after notice and comment.¹⁹² Under section 706 of the Administrative Procedure Act, a court has the authority to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁹³

In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,¹⁹⁴ the Supreme Court explained what an agency must do to survive arbitrary and capricious review. The requirements set forth far exceed the “concise general statement” of the Administrative Procedure Act.¹⁹⁵ According to the Court, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”¹⁹⁶ The reviewing court must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹⁹⁷ Moreover,

an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁹⁸

192. 5 U.S.C. § 553(c) (2001).

193. *Id.* § 706(2)(A) (2001).

194. 463 U.S. 29 (1983).

195. 5 U.S.C. § 553(c) (2001). Professors Shapiro and Levy have observed that the Court in *State Farm* “left the doctrinal basis of the requirement[s] unclear.” Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 425 (1987).

196. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In an observation of relevance to the *Skidmore* factor of consistency, the Court also wrote that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Id.* at 42.

197. *Id.* at 43 (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1975)).

198. *Id.*

To avoid being found arbitrary and capricious, the agency must also consider certain policy alternatives.¹⁹⁹ All of these considerations must be made during the decision-making process as “courts may not accept appellate counsel’s *post hoc* rationalizations for agency action. It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”²⁰⁰

A number of administrative law scholars have explored the relationship between stringent judicial review of administrative reasoning, known as “hard look” review, and the reasonableness requirement for agency interpretations under Step Two of *Chevron*. For example, Elizabeth Magill suggests it is possible to characterize *Chevron* as “an outcome-driven test; it asks whether a reasonable reader could adopt the agency’s interpretation of the statute. *State Farm*, on the other hand, looks to the reasoning process followed by the agency.”²⁰¹ Nonetheless, she and others argue that reasonableness review under Step Two of *Chevron* should be the Administrative Procedure Act’s arbitrary and capricious test—that is, the criteria of *State Farm*.²⁰² If both *Chevron*’s Step Two and arbitrary and capricious review under the Administrative Procedure Act apply to agency actions with the force of law, logic requires that the same set of requirements apply to the agency’s reasoning.

If such is the case, then judicial review of agency reasoning under *Skidmore* should be even more demanding. In a thoughtful article written before the Supreme Court’s decision in *Mead*, Professor Rossi speculated that the *Skidmore* test appeared “notably

199. *Id.* at 51.

200. *Id.* at 50.

201. Magill, *supra* note 65, at 10.

202. *Id.* at 9–11; KENNETH C. DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 7.4 (3d ed. Cum. Supp. 2000); William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719 (2002); Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996); Ronald Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994). In *Mead* itself, the Court quotes the reasonableness test of *Chevron* Step Two and then gives a compare cite to the arbitrary and capricious test of section 706 of the Administrative Procedure Act. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

more rigorous than the routine reasonableness inquiry at *Chevron*'s step two *Skidmore* might be considered a hard look with a special emphasis on consistency and the depth of reasoning—rather than routine rationality review, which focuses more on coherence than the thoroughness or depth of the agency's reasoning"²⁰³ Professor Rossi, however, advocates "conceptualizing *Skidmore* deference as a type of step-two inquiry,"²⁰⁴ as "a hard look with a special emphasis on consistency and the depth of reasoning"²⁰⁵

The metaphor of the interpretive voice highlights the differences between *Chevron*'s Step Two and *Skidmore*. It exposes the doctrines not simply as different varieties of a single deference doctrine or points on a continuum, but as fundamentally opposed approaches to how courts view administrative agencies.²⁰⁶ *Skidmore* accepts a judicial model for administrative actions. Similarly, hard look review asks administrative agencies to sound and reason like courts. Thus, within *Skidmore*'s judicial model, hard look review seems to make sense. *Chevron*, in contrast, adopting a legislative model for administrative interpretation, recognizes that Congress has delegated administrative agencies the authority to make policy decisions.²⁰⁷ Under this legislative vision, *Chevron* Step Two should indeed be a highly deferential, outcome-driven review, limited to determining

203. Rossi, *supra* note 170, at 1143, 1146.

204. *Id.* at 1144.

205. *Id.* at 1146. See also Jordan, *supra* note 202, at 727, 732–33 (arguing for *Chevron* Step Two instead of *Skidmore*, finding *Skidmore* insufficiently deferential).

206. See Merrill & Hickman, *supra* note 168, at 858 (characterizing *Chevron* and *Skidmore* as two "distinctly different doctrines").

207. Professor Cross would take this vision so far as to eliminate judicial review of rulemaking:

Abolishing judicial review of rulemaking may seem radical, but, in fact, the elimination is little more than a recognition of the "quasi-legislative" function of promulgating rules "Political principles would support basing a regulatory process on a legislative model instead of its current reliance on judicial-like procedure." . . . It is appropriate, therefore, for courts to treat agency discretion like they treat congressional discretion and to stop second-guessing agency judgments.

Cross, *Shattering*, *supra* note 29, at 1330 (quoting Phillip J. Harter, *The Political Legitimacy of Judicial Review of Consensual Rules*, 32 AM. U. L. REV. 471, 475 (1983)).

whether the agency has made a clear error.²⁰⁸ *Chevron's* Step Two appropriately allows the administrative voice to speak loudly and clearly.

Viewing the Supreme Court's decision in *Mead* through the lens of the interpretive voice provides a new perspective on the long-running debate about ossification of the rulemaking process. Commentators sharply disagree as to whether rigorous judicial review harms or improves the rulemaking process,²⁰⁹ whether it diverts agency resources and encourages agency inaction, or whether it encourages careful deliberation and prevents arbitrariness. Use of the interpretive voice as a tool for analysis supports the position that judicial review leads to ossification. For example, *State Farm's* requirements compel administrative agencies to speak in the judicial voice even when agencies are acting in a legislative mode by promulgating rules which have the force of law. Thus, vigorous judicial review of agency reasoning requires agencies to think and act like courts, even when doing so is inappropriate and inconsistent with the framework the court is attempting to apply.

Nonetheless the examples of interpretive tax regulations and revenue rulings show how, both in theory and practice, neat distinctions become blurred. Interpretive tax regulations are entitled some degree of deference, although it is unclear whether it is that of *Chevron's* Step Two or *Skidmore*.²¹⁰ Assume for the moment that

208. Cf. Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2674 (2003) (noting that the "best way to think about this sort of judicial review is to understand it as a method to detect clear mistakes").

209. See Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013 (2000); William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997); Mark Seidenfeld, *Cognitive Loafing, Social Conformity and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002) [hereinafter Seidenfeld, *Cognitive Loafing*]; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997).

210. See *supra* sources cited *supra* note 81.

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the appropriate level of deference given to interpretive tax regulations is *Chevron* deference. Under Step Two's highly deferential review, a court would subject the agency's reasoning to only a cursory examination. In practice, however, the Treasury and IRS prepare lengthy preambles containing exhaustive explanations of agency reactions to public comments and the reasoning behind the regulations.²¹¹

Because a consensus is emerging that revenue rulings are entitled to *Skidmore* deference,²¹² less uncertainty surrounds the level of deference applied to revenue rulings than to interpretive tax regulations. The Internal Revenue Manual explains "conclusions expressed in Revenue Rulings will be directly responsive to and limited in scope by the pivotal facts stated in the Revenue Ruling."²¹³ Revenue rulings are seldom more than a few pages long. They generally posit a fact pattern, briefly set forth the applicable Internal Revenue Code provisions, regulations, or other authorities, and recite a holding.²¹⁴

Revenue rulings, however, seldom include detailed expositions of their reasoning. Revenue rulings generally leave it to the reader to discern the reasoning that led from the stated law to the holding. Thus, application of the *Skidmore* factors that call for vigorous review of agency reasoning may not support granting deference to revenue rulings.

It would be an enormous misallocation of agency resources to devote energy to explaining the basis of informal interpretations

211. For recent examples, see, for example, T.D. 9142, 2000-34 I.R.B. 308 (regulations providing guidance under section 408 for setting up deemed individual retirement accounts within employer-provided retirement plans); T.D. 9141, 2004-34 I.R.B. 359 (regulations on foreign tax credit limitations under section 904); T.D. 9137, Treas. Dec. Int. Rev. 9137 (2004) (regulations under section 460 regarding partnership transactions involving long-term contracts).

212. Salem et al., *supra* note 71, at 729-30, 735-36; *see supra* text accompanying notes 143-146, 150-154.

213. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL para. 1.2.1.11.12 (2005), <http://www.irs.gov/irm/part1/ch02s04.html>.

214. For recent examples, see Rev. Rul. 2004-80, 2004-32 I.R.B. 164, which subjected towing vehicle to retail excise tax; Rev. Rul. 2004-78, 2004-31 I.R.B. 108, which characterized debt instruments as a security in corporate reorganizations; and Rev. Rul. 2004-64, 2004-27 I.R.B. 7, which, in certain circumstances, considered gift and estate tax to be consequences of a grantor trust.

lacking the force of law merely to survive *Skidmore* review. Yet by expanding *Skidmore*'s reach, *Mead* encourages agencies to do precisely that. Undoubtedly, it is more important for agencies to expend their resources developing and explaining rules that bind the public. Thus *State Farm*'s exacting demands on legislative regulations are understandable. Moreover, *Chevron* deference tempers these demands. Under *Skidmore*, however, no such presumptive deference balances the burden imposed on the agency to explain its reasoning. Thus, *Skidmore* encourages more elaborate explanation for less important interpretations, and *Mead*'s expansion of the judicial voice is likely to contribute to further ossification of the administrative process. It encourages agencies to make choices that bring with them *Chevron* deference even when such choices may be more burdensome than the issue merits or may unduly complicate the procedures used in developing informal interpretations.

D. Post-Mead Practice

In his dissent in *Mead*, Justice Scalia worries that invocation of *Skidmore* strengthens the administrative voice. He writes "whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference."²¹⁵ This fear has not been realized. To the contrary, courts following *Mead*'s direction to apply *Skidmore* have felt free to reject administrative interpretations.

Tax cases aptly illustrate this judicial response to *Mead*. The *Matz* and *Medical Emergency Care Associates* opinions, discussed above, provide two examples.²¹⁶ *O'Shaughnessy v. Commissioner*,²¹⁷ presents another. In *O'Shaughnessy*, the Court of Appeals for the Eighth Circuit rejected the IRS's argument that *Mead* calls for deference to a 1975 revenue ruling concluding that tin used in the manufacture of glass was not depreciable property.²¹⁸ The court found that substantial changes to the applicable statutory scheme governing depreciation deductions

215. United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

216. See *supra* text accompanying notes 112–120, 153–154.

217. 332 F.3d 1125 (8th Cir. 2003).

218. *Id.* at 1131.

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since passage of the 1975 ruling undermined its authority.²¹⁹ Similarly, in *U.S. Freightways Corp. v. Commissioner*,²²⁰ the Court of Appeals for the Seventh Circuit rejected an IRS revenue ruling determining that benefits extending “substantially” beyond the tax year had to be capitalized.²²¹ The Seventh Circuit based its holding partly on its conclusion that the IRS’s position in revenue rulings and other cases evinced no consistent practice and that examples in the applicable regulations favored the taxpayer.²²²

The opinions in *Aeroquip-Vickers, Inc. v. Commissioner*²²³ illustrate many of the difficulties and issues discussed in this article. The case involved recapture of investment tax credits under now-repealed provisions of the Internal Revenue Code.²²⁴ The provisions required recapture when a subsidiary that was part of a group filing a consolidated tax return acquired property for which such investment tax credits had been taken in an intercompany transfer and was then transferred to a shareholder in a tax-free transaction.²²⁵ An example in the regulations applicable to affiliated corporations filing consolidated returns stated that sale of the stock of the subsidiary a year after transfer of the property was not a disposition triggering recapture of the investment tax credit.²²⁶ IRS Revenue Ruling 82-20, however, required recapture whenever the intercompany transfer of the property was part of a planned transfer outside of the consolidated group.²²⁷ The revenue ruling did not discuss or mention consolidated group regulations.

The Tax Court opinion,²²⁸ decided after *Chevron* but prior to *Mead*, relied on the consolidated return regulations to find there had

219. *Id.* at 1130–31.

220. 270 F.3d 1137 (7th Cir. 2001).

221. *Id.* at 1147.

222. *Id.* at 1145.

223. 347 F.3d 173 (6th Cir. 2003), *cert. denied*, 125 S. Ct. 37 (2004).

224. *Id.* at 175.

225. *Id.* at 177–78.

226. Treas. Reg. § 1.1502-3(f)(3) (1990).

227. Rev. Rul. 82-20, 1982-1 C.B. 6 (1982).

228. *Trinova Corp. v. Comm’r*, 108 T.C. 68 (1997), *rev’d sub nom. Aeroquip-Vickers, Inc. v. Commissioner*, 347 F.3d 173 (6th Cir. 2003). *Trinova* was a fully reviewed decision, that is, a decision in which the entire Tax Court participates rather than a decision by a single judge, pursuant to a decision by the Chief Judge. See I.R.C. § 7460(a) (West 2003). The opinion made no reference to *Chevron*.

been no disposition requiring recapture even when, as in *Aeroquip-Vickers*, the transfer was part of a plan to transfer the property outside of the consolidated group.²²⁹ The eleven judges in the majority adhered to this position while acknowledging that it had been rejected by two Courts of Appeals, both of which had looked to the revenue ruling for guidance and found it neither unreasonable nor inconsistent with prevailing law.²³⁰ The Tax Court disagreed “with both the result and the reasoning of the Courts of Appeals” and concluded that “the Courts of Appeals for the Second and Ninth Circuits accorded the ruling undue weight and that revenue rulings play a lesser role than the language of the opinions of those Courts of Appeals seem to indicate.”²³¹

On appeal, the Sixth Circuit reconsidered its position that revenue rulings deserve *Chevron* deference. It concluded, in light of the then-recent *Mead* decision, that revenue rulings merit only *Skidmore* deference.²³² In reaching this conclusion, the court of appeals emphasized that the IRS does not claim revenue rulings have the force and effect of regulations.²³³ Nonetheless, it also found that by failing to acknowledge that some deference to revenue rulings is proper, “the Tax Court mischaracterized the degree of deference accorded to revenue rulings.”²³⁴ The Sixth Circuit decided that consideration of various *Skidmore* factors, particularly the validity of the IRS’s reasoning, called for some deference to the applicable revenue ruling.²³⁵ It found significant the fact that the example in the regulations assigned the asset transfer and the spin-off to different years.²³⁶ It also relied on the substantial deference owed to an agency’s longstanding interpretations of its own regulations.²³⁷

A lengthy dissent by Judge Clay agreed with the majority about the importance of *Mead* and the application of *Skidmore* deference to revenue rulings, but disagreed about the level of deference *Skidmore*

229. *Trinova Corp.*, 108 T.C. at 76.

230. *Id.* at 75–76 (discussing *Walt Disney Inc. v. Comm’r*, 4 F.3d 735 (9th Cir. 1993); *Salomon, Inc. v. United States*, 976 F.2d 837 (2d Cir. 1992)).

231. *Trinova Corp.*, 108 T.C. at 76–77.

232. *Aeroquip-Vickers*, 347 F.3d at 181.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 182.

237. *Id.*

entails. According to Judge Clay, *Skidmore* deference, as explicated in *Mead*, is not automatic deference to interpretive authority because deference under *Skidmore* requires “persuasive reasoning” by the administrative agency.²³⁸ The dissent disapproved of giving deference to the revenue ruling simply because the Commissioner had drafted it and favored granting deference to the Tax Court because of its expertise and lack of stake in the outcome.²³⁹ The dissenting opinion explained “to the extent this Court finds the Treasury Department’s rationale unpersuasive, we have no obligation to defer.”²⁴⁰ The dissent found the revenue ruling inconsistent with the language, assumptions, and basic approach of the consolidated return regulations.²⁴¹

These opinions demonstrate the difficulties in understanding the meaning and role of *Skidmore*, particularly when a specialized court hears cases. Unless given further direction by the Supreme Court, lower courts will continue to disagree over whether *Skidmore* grants administrative agencies a presumption of validity. It may be that an administrative agency’s task of persuading the court under *Skidmore* differs little from that of any litigant—to claim respect according to the persuasiveness of its position.²⁴² The modern reincarnation of *Skidmore* may do no more than direct courts to consider various factors that they might otherwise ignore. In other words, *Skidmore* may simply be a limited deference consisting of a required judicial checklist, a kind of outline for writing an opinion involving an

238. *Id.* at 186.

239. Following up on this suggestion, Aeroquip-Vickers filed a writ of certiorari on the issue of what level of deference is owed to decisions of the Tax Court, given its special expertise and its role as a court of national jurisdiction. *Aeroquip-Vickers, Inc. v. Comm’r*, 347 F.3d 173 (6th Cir. 2003), *cert. denied*, 125 S. Ct. 37 (2004). For a discussion of issues related to such deference, see sources cited *supra* notes 150–155.

240. *Aeroquip-Vickers*, 347 F.3d at 186 (Clay, J., dissenting).

241. *Id.* at 196.

242. As Colin S. Diver has observed in speculating about the meaning of *Skidmore*, “[o]f course, the ‘weight’ assigned to *any* advocate’s position is presumably dependent upon the ‘thoroughness evident in its consideration’ and the ‘validity of its reasoning.’ Deference in this sense is no more than ‘courteous regard.’” Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565 (1985). He observes, however, that “[c]ourts generally use ‘deference’ in an intermediate sense, between ‘courteous regard’ and ‘submission.’” *Id.* at 565–66.

administrative interpretation.²⁴³ Another possible view of *Skidmore* would be more generous to administrative agencies. This last interpretation of *Skidmore* would require courts to put a thumb on the scale in favor of the administrative agency on the basis of assumed experience and expertise.

Both under its earlier and current applications, *Skidmore* fortifies the judicial voice. As Professor Merrill explains, historically under *Skidmore*, “[t]he default rule was one of independent judicial judgment. Deference to the agency interpretation was appropriate only if a court could identify some factor or factors that would supply an affirmative justification for giving special weight to the agency views.”²⁴⁴ Today as well, courts ultimately determine what the law is under *Skidmore*. Under *Skidmore*, a court is free to adopt what it views as the better interpretation of the statute. Although *Skidmore*’s list of factors pays lip service to the particular institutional strengths of administrative agencies, particularly expertise, *Skidmore* ultimately requires agencies to persuade courts on judicial terms through formality, consistency, and reasoned deliberation. Notably, the list of considerations lacks several factors of considerable importance to an administrative agency, such as a particular interpretation’s administrability or impact on other statutory provisions for which the agency is responsible. Unlike Step Two of *Chevron*, *Skidmore* deference fails to address the policy-driven needs of administrative agencies. *Mead* has elevated *Skidmore* to the same level of importance as *Chevron* and has thereby diminished the authority afforded to administrative interpretations.

VI. CONCLUSION

Mead vastly expands the judicial voice. It does nothing to limit the reach of *Chevron*’s Step One, the domain of the judicial voice, while cutting back on *Chevron*’s Step Two, the domain of the administrative voice. It also accords *Skidmore*, which asks

243. Cf. Merrill & Hickman, *supra* note 168, at 855 (noting “*Skidmore* is properly regarded as a deference doctrine because the court cannot ignore the agency interpretation—the court must assess that interpretation against multiple factors and determine what weight they should be given”).

244. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972 (1992).

administrative agencies to act like courts, an important role.

Almost a decade ago, I observed in piece written about *Chevron* that judges, like all people, “act in their own interest to maximize utility by increasing power or decreasing workload.”²⁴⁵ Deference to administrative agencies decreases judicial workload, but it does so at the expense of decreased power. The article predicted that “we will see cycles in which a court will assert authority to interpret rules until such interpretation imposes too great a burden on judicial resources and then will announce a rule that husbands resources. Over time, the rule preserving resources will decrease power, and the cycle will begin again.”²⁴⁶

In part, the reduced deference to administrative agencies reflected in *Mead* may well represent the current stage of such an ongoing cycle. But I now also believe reduced deference reflects the difficulty that judges have in hearing and understanding the administrative voice.²⁴⁷ Judges understand best the endeavor and approach in which they themselves engage.²⁴⁸ Like most of us, judges are more comfortable with the familiar. Agencies will have to do what courts ask of them—as for example, by providing detailed explanations of how expert consideration leads to a change in a longstanding interpretation. But agencies might also be well-advised to include in the preambles to regulations their own concerns, such as administrability or the impact of an interpretation on the statutory scheme that are more salient to administrative agencies than to judges. Administrative agencies need to amplify and translate their uniquely administrative concerns so that the judicial voice can hear

245. Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 88 (1996).

246. *Id.* at 88, n.213; cf. Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001) (explaining cycles in terms of self-defeating assumptions judges and legislators make about one another).

247. “Judicial review consistently ignores the external political and practical factors that must lie at the heart of effective administrative action.” Cross, *supra* note 209, at 1039.

248. In the terminology of cognitive psychologists, judges, like all of us, exhibit the “egocentrism bias,” which is “an inability to take another’s perspective, which is tantamount to assuming that another’s perspective is precisely one’s own” Raymond S. Nickerson, *How We Know—and Sometimes Misjudge—What Others Know: Imputing One’s Own Knowledge to Others*, 125 PSYCHOL. BULL. 737, 738 (1999), *quoted in* Seidenfeld *Cognitive Loafing*, *supra* note 209, at 496.

and understand them. The uncertainties introduced by *Mead* regarding the scope of *Chevron*'s Step Two and its expansion of *Skidmore*'s role has heightened the need for such action by administrative agencies. In the long run, or in particular cases, it may be necessary for Congress to direct the courts to accept the administrative voice as authoritative, perhaps by clarifying what is required under the Administrative Procedure Act to survive arbitrary and capricious review, or perhaps by clarifying what kinds of agency actions qualify for *Chevron* deference.