

REMARKS BY THE HONORABLE ANTONIN
SCALIA FOR THE 25TH ANNIVERSARY OF
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JUSTICE SCALIA: Twenty years ago I was invited to give a talk similar to this at another law school¹ on the occasion of *Chevron*'s² fifth anniversary. At the time it was already clear that *Chevron* was a watershed decision. Still in its infancy, the Court's opinion had already been cited hundreds of times by the lower courts. With the passage of time that number has grown into the thousands. Of course *Chevron* did not break entirely new ground. Courts had long deferred to agency determinations, including determinations concerning the law, and in my view the same theory underlies both the pre- and the post-*Chevron* regimes, namely the theory that courts must defer to agency decisions because and to the extent that Congress has delegated law-making authority to administrative agencies.³

In the rest of this talk, I will speak of the "delegation" of lawmaking authority because that's the standard terminology. But of course you all know that Congress cannot delegate any legislative authority. So, when you talk of an "unconstitutional" delegation of legislative authority you don't mean, "Oh, this is an unconstitutional delegation," as opposed to a constitutional delegation. There is no such thing as a constitutional delegation. It would be more accurate to refer to a "conferral" of lawmaking authority upon an agency—and to say that there are constitutional limits on how much lawmaking authority can be conferred, rather than limits on how much lawmaking authority can be delegated. So I'll use the word delegation now and then, but bear in mind that I wish the law professors would get another word.

As I was saying, the same theory underlies both pre- and post-*Chevron* deferral cases, namely that Congress has delegated law-making authority to the agencies. *Chevron*'s innovation, as I saw it two decades ago, was the

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

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

3. See Scalia, *supra* note 1, at 512–13 (quoting S. DOC. NO. 8, 77th Cong., 1st Sess. 90–91 (1941)).

adoption of a blanket default rule, which presumed that statutory ambiguity constituted a conferral of delegation from the Congress. Pre-*Chevron*, the question whether there was agency discretion was answered on a statute-by-statute basis, or indeed on a case-by-case basis, resting on various factors that courts deemed relevant as evidence of congressional conferral of authority.⁴ *Chevron*, as I said at the time—this is five years later—“replaced this statute-by-statute evaluation . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.”⁵

This presumption was, I conceded, like all presumptions, imperfect, but it was no worse than the proxies courts had long used as evidence of congressional so-called delegation, and in any event the existence of genuine congressional intent regarding delegation is largely a fiction. And so I believed it best to adopt a straightforward default rule that courts could easily administer and that Congress, if it wished, could legislate around. I concluded my remarks with the following prediction, which I tempered with the standard caveats that go with predicting the future: “I tend to think, however, that in the long run *Chevron* will endure and be given its full scope—not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves [government’s] needs.”⁶

Eight years ago my Court proved that prediction wrong, when in its decision *United States v. Mead Corp.*⁷ the Court returned in large part to the case-by-case, statute-by-statute mode of analysis that preceded the decision in *Chevron*, with all the harmful side effects that generally attend that mode of analysis. I made a series of predictions at the time the Court took this wrong turn—in my dissent in the case⁸—and now, with some water having gone under the bridge, it may be time to reflect on those predictions. While my prediction about *Chevron*’s endurance may have been optimistic, I believe I can safely say that my predictions about the harmful effects of *Mead* were if anything not pessimistic enough.

In *Mead*, the Court considered whether certain tariff classification decisions made by the United States Customs Service were entitled to

4. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of . . . a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, the consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

5. Scalia, *supra* note 1, at 516.

6. *Id.* at 521.

7. 533 U.S. 218 (2001).

8. *Id.* at 245–50 (Scalia, J., dissenting).

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Chevron deference.⁹ The Court answered no, holding that *Chevron* deference is only warranted “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.”¹⁰ How would we know when Congress had so delegated? The formality of the administrative procedure used was one such way, the Court said; but formality, the Court also said, was not a necessary condition.¹¹ The predictions I made in my dissent have, to the extent they can be tested, either come to pass or have been averted only by further wrong turns, or further elaborations at least, in our administrative law jurisprudence.

I first predicted that the Court’s decision would create a perverse incentive for agencies to adopt bare-bones regulations, because acting by regulation showed that you were acting pursuant to congressional delegation.¹² The agency could, with the benefit of substantial judicial deference, later interpret or clarify those regulations, by adjudication or even by simple agency pronouncement, without any bothersome procedural formality.¹³ The initial regulation having been adopted via notice-and-comment would earn *Chevron* deference, and the subsequent agency clarification would earn the so-called *Auer*¹⁴ deference, which we accord to an agency’s interpretation of its own regulations.¹⁵ Thus would an agency receive deference through evasion of the very procedural formalities that *Mead* sought to impose.

Well, it’s hard to confirm or to refute this particular prediction. I really don’t know if agency rules have in fact become less detailed and more ambiguous since the Court’s decision in *Mead*. I’m not even sure how one would measure that or how one would control for the various other factors that undoubtedly bear upon a regulation’s clarity. But that may not matter, because in any event the Court has in at least one instance refused to defer to an agency interpretation of its own regulation because the regulation did not give “specificity to a statutory scheme,” but rather did “little more than restate the terms of the statute itself.”¹⁶ A new administrative law doctrine,

9. *Id.* at 221.

10. *Id.* at 226–27.

11. *Id.* at 230–31.

12. *Id.* at 246 (Scalia, J., dissenting).

13. *Id.*

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

15. *Id.* at 461 (an agency’s interpretation of its own regulation is “controlling unless plainly erroneous or inconsistent with the regulation”) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

16. *Gonzales v. Oregon*, 546 U.S. 243, 244 (2006).

the so called anti-parroting principle—first discovered in the Court’s 2006 decision in *Gonzales v. Oregon*¹⁷—limits agencies’ ability to take advantage of *Mead*’s loophole. To that extent I suppose the doctrine is useful, but I had never heard of it before and you are now going to have to decide case-by-case whether an agency is parroting or not. But the perverse incentive for ambiguous agency rulemaking remains, and time may tell whether agencies get wise to this gimmick.

I next predicted in *Mead* that the Court’s decision would lead to the ossification of our statutory law because, and I quote, “Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency’s ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion.”¹⁸ That is one reason we elect a President every four years, because there’s a lot of play in the joints of all of the statutes. And under *Chevron*, when an agency must be deferred to by the Court and the Court does not itself define what the statute says, the agency remains free in a new administration to change its mind about what the statute means—which is precisely what happened, with respect to the “bubble concept,” in *Chevron*.¹⁹

With *Chevron*’s scope more limited however, more statutory ambiguities would be resolved by the courts, and agency discretion would be similarly constrained or simply pre-empted—as in the case where the Court just happens to reach the question before the agency does. Well, that problem was also “fixed,” when four years later in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*²⁰ the Court held that—and this was a staggering revelation to me—even where a court had resolved a statutory ambiguity and thereby determined the meaning of the statute, an agency could still decide to the contrary, so long as the court’s decision did not rest on the determination that the statute was unambiguous to begin with.²¹ As I stated at the time, that decision cured one of *Mead*’s infirmities only by inventing yet another breathtaking novelty, judicial decision subject to reversal by executive officials.²² In my view, the cure is worse than the disease, but it has at the very least rendered one of my *Mead* predictions moot.

17. 546 U.S. 243 (2006).

18. *United States v. Mead Corp.*, 533 U.S. 218, 247 (Scalia, J., dissenting).

19. *Chevron*, 467 U.S. at 841.

20. 545 U.S. 967 (2005).

21. *Id.* at 982 (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).

22. *Id.* at 1016 (Scalia, J., dissenting).

My third *Mead* prediction was an easy one. I anticipated that the lower courts and the agencies and litigants who appear before them would not know what to make of the Court's new approach.²³ The Court had given virtually no guidance as to which types of agency actions would henceforth merit *Chevron* deference. Notice-and-comment rulemaking and formal adjudication appeared to be safe harbors, but outside of those rather narrow confines deference would depend on a host of factors. And since the whole *Chevron* game is (now) about divining congressional intent, the field was potentially cast wide open.

Well, you can take that prediction to the bank. Lower courts are indeed utterly confused as to what triggers *Chevron* deference. Take, for example, a set of cases from the courts of appeals dealing with informal policy statements issued by the Department of Housing and Urban Development. Two courts of appeals, reviewing the policy statements, determined that they warranted *Chevron* deference.²⁴ A third said they did not.²⁵ All three courts, of course, noted that the statements were not the product of notice-and-comment rulemaking, but *Mead* declared that that was not a necessary condition, though it was a sufficient one.²⁶ And having been given some running room, it is not surprising that the courts would reach different results. The two courts granting *Chevron* deference noted that the agency had the authority to promulgate rules carrying the force of law—although they didn't make this determination by rule they had rulemaking authority.²⁷ The agency had published the policy statement in the Federal Register, and, per the agency's own declaration, its policy statements constitute rules and regulations of the agency.

The court denying *Chevron* deference considered largely the same factors. It too noted that the statement was not a product of notice-and-comment rulemaking. Sure, the agency treated this statement as the equivalent of a rule or regulation, but the process by which the rule was created was not the deliberative public process that generally attends rulemaking. Sure, the statement was published in the Federal Register,²⁸ but as the court of

23. *Mead Corp.*, 533 U.S. at 245–46 (Scalia, J., dissenting).

24. *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 61 (2d Cir. 2004); *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002).

25. *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002); *see also* *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 296 n.* (2009) (Scalia, J., concurring) (noting the above circuit split).

26. *Compare Kruse*, 383 F.3d at 61, *and Schuetz*, 292 F.3d at 1012, *and Krzalic*, 314 F.3d at 881, *with Mead Corp.*, 533 U.S. at 230–31 (2001).

27. *See Kruse*, 383 F.3d at 59–60; *Schuetz*, 292 F.3d at 1012.

28. Real Estate Settlement Procedures Act Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,057 (Oct. 18, 2001) [hereinafter HUD Policy Statement].

appeals phrased it, it was “a simple announcement” that “[o]ne fine day . . . simply appeared in the Federal Register.”²⁹ (I don’t know what it is that appears in the Federal Register but does not appear one fine day.) And sure, the agency has some expertise, but the agency’s discussion of the contested issues in the policy statement was perfunctory, and it failed to provide an explanation of the factors that justified its interpretation of the statute.³⁰

So what do we have? We know some formality is needed, but we don’t know how much. Some expertise, but how much? Some public participation, but how much? So, some courts look at a policy statement and see a document that the agency treats as a rule or regulation that is published in the Federal Register and that is promulgated by an expert agency. Other courts see in the same thing a document that was produced without public involvement, without the formality of notice-and-comment rulemaking, and without sufficient explanation to invoke the agency’s expertise. Since under *Mead* the universe of relevant factors is wide open, and the quantum of each factor needed to trigger *Chevron* deference is unknown, it would be hard to say which of these decisions is right and which is wrong. Surely a decision that cannot give guidance to lower courts is not very helpful.

A parallel set of cases involving informal adjudication establishes the same point. In a recent decision,³¹ the D.C. Circuit gave *Chevron* deference to a decision by the Secretary of the Department of Veterans Affairs regarding the scope of certain exclusions to VA employees’ collective bargaining rights.³² Despite the lack of formality attached to the agency’s adjudicative procedure, the Court of Appeals found that *Chevron* deference was owed because the statute delegated to the Secretary the authority to “decide” disputes regarding these statutory exemptions,³³ and the agency was acting within the scope of that precise delegated authority.³⁴ That is certainly the *Mead* test, but how we know it is satisfied is unclear. Was it within the scope of the delegated authority?

In contrast, the Ninth Circuit reviewing the same type of agency action withheld *Chevron* deference.³⁵ The Court of Appeals characterized the

29. *Krzalic*, 314 F.3d at 881.

30. See HUD Policy Statement, *supra* note 28.

31. *Am. Fed’n of Gov’t Emps., AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341 (D.C. Cir. 2007).

32. *Id.* at 354.

33. *Id.* at 355.

34. *Id.*

35. *Am. Fed’n of Gov’t Emps., AFL-CIO Local 2152 v. Principi*, 464 F.3d 1049 (9th Cir. 2006).

Secretary's decision (it was technically the Under Secretary who had been delegated the authority by the Secretary) as "an opinion letter and not . . . the result of a formal proceeding."³⁶ Focusing on the agency's lack of formality rather than on the statutory text that authorized the agency to "decide" this very question (which is what the D.C. Circuit did) the Ninth Circuit held that the agency's decision was entitled only to a lesser form of deference, though in that case the agency prevailed anyway.³⁷ So here we have the other side of the coin. The court stopped at the informality of the procedure without considering whether the statute might have delegated the authority to the agency to proceed in precisely that informal fashion.

Given the emerging mess in the courts of appeals, one might have hoped that the Court in subsequent decisions would have clarified matters, but it seems headed in just the other direction. In *Barnhart v. Walton*,³⁸ just one year after *Mead*, the Court added to the grab bag of factors that trigger *Chevron* deference, and I quote, "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."³⁹ All of those factors were identified as relevant in the *Chevron* inquiry. Throw those in with the factors discussed in *Mead* and we are left with what I have described as "th'ol' totality of the circumstances test."⁴⁰ Which is of course no test at all.

To make things worse, at least one of my colleagues on the Court has suggested that "the existence of a formal rulemaking proceeding is neither a necessary *nor* a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute."⁴¹ So even the so-called *Mead* safe harbors of notice-and-comment rulemaking and formal adjudication may not be so safe at all. And indeed there are at least a few cases in the courts of appeals where *Chevron* deference has not been afforded to agency decisions promulgated in the course of notice-and-comment rulemaking.

Perhaps the best evidence of the mess left by *Mead* is the sheer reluctance of courts to engage the question at all. The phenomenon is so pervasive that it has earned its own name—in a law review article it is called "*Chevron* avoidance."⁴² Lower courts have repeatedly noted their preference for

36. *Id.* at 1057.

37. *Id.* at 1059–60.

38. 535 U.S. 212 (2002).

39. *Id.* at 222.

40. *Mead Corp.*, 533 U.S. at 241 (2001) (Scalia, J., dissenting).

41. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (emphasis added).

42. *E.g.*, Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*,

avoiding the muck of *Mead*. The Second Circuit in a recent decision observed rather coolly that “we have at times simply avoided the question of whether an agency’s interpretation is entitled [to] *Chevron* or some lesser degree of deference.”⁴³ A recent decision from the First Circuit made the same point rather more colorfully.⁴⁴ After noting the confusion in the courts of appeals the panel, seemingly exhausted, remarked as follows: “This is an interesting legal conundrum, but the task of a federal appellate court is to resolve particular cases and controversies, not merely to satisfy intellectual curiosity (whether its own curiosity or that of others). In the last analysis, we agree with the district court that the level of deference is not determinative here; whether viewed through the prism of *Chevron* or the less forgiving prism of *Skidmore*, the [agency’s] interpretation . . . withstands scrutiny.”⁴⁵ *Chevron* avoidance.

Perhaps this suggests that the whole exercise is not worth the candle. If there is little practical difference between *Skidmore* and *Chevron* deference then why fret over whether and when *Chevron* applies? Of course this argument cuts both ways. If the question is easily ducked perhaps it is not as much of a burden on the lower courts as I suppose. Conversely, if there is little practical difference—and this is the course I would propose—why create a complex totality of the circumstances standard for determining when deference is triggered? If it matters so little let’s just have an easily administrable rule and be done with it.

And of course, even if courts can dodge the bullet, litigants cannot. They must go through the effort of explaining why *Chevron* deference is or is not merited. They cannot take the chance that the level of deference will not matter. And so they are forced to expend resources arguing a preliminary question whose answer cannot be predicted and whose impact may be slight.

There is a further reason why the Court’s case-by-case approach in *Mead* is not worth the candle. *Mead* of course implicates the age-old debate between rules and standards. It is assumed that flexible standards are more accurate but less administrable, whereas rules are more administrable but less precise, less accurate. And our choice is simply one of two imperfect approaches. But I’m not certain that is the case here. As I’ve argued previously, judicial deference to agency decisionmaking is a function of congressional delegation of authority to an agency. I have also argued previously that, generally speaking, statutory ambiguity is a product not of

58 VAND. L. REV. 1443, 1464 (2005).

43. *Kruse*, 383 F.3d at 58 n.8.

44. *Doe v. Leavitt*, 552 F.3d 75 (1st Cir. 2009).

45. *Id.* at 80.

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consensus on the part of Congress, but rather of congressional omission. That is, usually it is the case that where there is a statutory ambiguity or a silence, Congress simply failed to consider the matter altogether. You don't really think that where it's ambiguous Congress said, "Let's leave it ambiguous and leave it up to the agency." That may happen sometimes, but surely not as a general rule.

The inference of congressional delegation is thus a legal fiction. If that is true then it makes no sense to ask which approach, *Chevron's* or *Mead's*, more closely or accurately predicts a congressional intent that probably does not exist. There simply is no congressional intent to discern, there is only a legal fiction to construct. If courts are inventing congressional intent rather than discerning it, then there is no right answer, and if there is no right answer we might as well have a clear answer. Put somewhat differently, *Mead* produces all the costs and none of the benefits of a flexible standard, while a clear consistent rule would achieve the opposite. And since our deference regime rests upon a default assumption that is subject to legislative alteration, it's no big deal. If Congress does not like the default rule it can act to override it. This is thus not simply another battlefield in the ongoing debate between rules versus standards. It is an area where a flexible standard simply serves no purpose and makes no sense.

So, I told you so. *Mead* has proven as troublesome as I predicted. It has befuddled the courts of appeals and left them ducking for cover. It has led the Supreme Court to invent new and, at least in one case, highly questionable doctrines to cure other of its predicted effects. And it hasn't even been a decade yet. Would that my earlier prediction had come true, and we all could have avoided the trouble.