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Why Deference: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore Administrative Law Discussion Forum

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WHY DEFERENCE?: IMPLIED DELEGATIONS, AGENCY EXPERTISE, AND THE MISPLACED LEGACY OF *SKIDMORE*

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INTRODUCTION

Since the Supreme Court handed down its landmark decision in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*,[1] legal academics, practicing attorneys, and federal court judges have puzzled over the precise rationale undergirding the requirement that reviewing courts defer to reasonable agency interpretations of ambiguous statutes.[2] Justice Stevens'

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1. 467 U.S. 837 (1984).

2. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (critiquing *Chevron* and arguing that judicial deference to administrative agencies undermines the separation of powers in favor of the executive branch); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187 (1992) (noting that reviewing courts cite *Chevron* with extraordinary frequency and suggesting the decision leads reviewing courts to abjure their supervisory duties over federal agencies); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1259 (1997) ("[T]he principal question about judicial deference to administrative constructions has become, not whether the courts can live with *Chevron*, but how they can domesticate it for everyday use."); Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511 (discussing the standard of deference promulgated in *Chevron*);

opinion offers several reasons for the *Chevron* rule, any one of which might be thought sufficient to justify federal courts applying a margin of appreciation to the work product of a federal administrative agency. The principal justification rested on a theory of implied delegation of lawmaking power; courts should presume that Congress intends agencies to write regulations that have the force of law.

Consistent with this argument, a reviewing court lacks legitimacy if it attempts to displace an agency's reasonable interpretation of an ambiguous statute with its own interpretation of the statute. After all, Congress vested the agency, not the federal judiciary, with the authority to resolve the meaning of ambiguous statutory text.

The idea of judicial deference to agency interpretations of vague statutory text was, however, hardly a new invention. For decades prior to *Chevron*, the U.S. Supreme Court directed lower federal courts to review agency work product with some measure of deference. Indeed, *Chenery*, one of administrative law's golden oldies, squarely held that federal judges should afford persuasive force to the work product of agencies based on the assumption that agencies possessed greater expertise over their own statutes and polices than did federal courts.[3]

These rationales for deference will, inevitably, lead to conflicting results in some circumstances. Absent an express or implied delegation of lawmaking power, a federal court could deny an agency's work product deference. This would remain so even if the agency possesses greater familiar-

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Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1058-59 (arguing that *Chevron* buttressed the deference principle in four important ways); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 84-87 (1994) (noting the disagreement among *Chevron* commentators on the propriety and scope of the *Chevron* doctrine); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2106 (1990) (maintaining that statutory ambiguities should be sorted out on basis of assessment of which interpretation is reasonable); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 240-47 (1999) (discussing the tendency to utilize the *Chevron* framework without actually citing the case); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 243 (1996) (citing cases demonstrating the high frequency with which D.C. Circuit judges disagree about whether Congress has expressed clear intent, or whether there is an ambiguity for the agency to resolve and noting that this suggests reviewing courts may manipulate the *Chevron* decision to reach desired results); Russell L. Weaver, Chevron*:* Martin*, Anthony, and Format Requirements*, 40 U. KAN. L. REV. 587 (1992) (noting the importance of *Chevron* doctrine and contending that *Chevron* deference should be applied to interpretive rules).

3. *See* SEC v. Chenery Corp., 332 U.S. 194, 209 (1947) (explaining that agency decisions reflecting "the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts" are "entitled to the greatest amount of weight by appellate courts.").

ity and expertise with the subject matter, and even if the agency used procedures that generally will ensure that its work product reflects the benefit of the agency's expertise (i.e., notice-and-comment rulemaking or formal adjudication). Such a result would be consistent with the implied delegation rationale of *Chevron*, but not with the expertise rationale set forth in cases like *Chenery* and *Skidmore v. Swift & Co.*[4]

In two recent cases, the Supreme Court has not merely reaffirmed, but substantially broadened, the implied delegation rationale for according agency work product deference. In *Christensen v. Harris County*,[5] the Justices held that informal agency guidelines did not merit *Chevron* deference because such materials, in the context of the Fair Labor Standards Act (FLSA), were not enacted under an implied delegation of lawmaking power to the Department of Labor.[6] In the following term, the Court reaffirmed the *Christensen* principle in *United States v. Mead Corp.*,[7] holding that unless Congress delegates formal lawmaking power to an agency, the agency's work product, in whatever form, does not merit *Chevron* deference.[8]

This Article will explore the tension between the implied delegation theory set forth in *Chevron* and competing expertise-based rationales for judicial deference to agency work product. In my view, the expertise rationale provides a stronger justification for giving deference to agency work product than does the implied delegation theory. If one finds this argument persuasive, the Supreme Court asked the wrong question in *Christensen* and *Mead*. Whether *Chevron* deference applies in a given case should not turn on the legal fiction of an implied delegation of lawmaking power, but rather on whether the materials at issue reflect and incorporate agency expertise.[9]

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4. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 680-81, 686-90 (1996) (arguing federal courts reviewing administrative agency action should take into account agency's expertise and experience, and provide more deferential review of agency action reflecting benefit of considered application of expertise).

5. 529 U.S. 576 (2000).

6. *See id.* at 586-88.

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

8. *See id.* at 226-27 ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

9. *But cf.* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1, 43-44 (1990) ("[T]he key inquiry in each case should be the delegation inquiry: whether Congress intended an interpretation in this format to have the force of law."); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J.

If an administrative agency resolves a statutory ambiguity, whether through an adjudication, a rulemaking, or a policy statement, the relevant question to be asked and answered is whether the agency possesses relevant expertise over the subject matter and whether, on the record, the agency actually brought that expertise to bear in creating the work product in question. Agency interpretations developed in formal adjudications and notice-and-comment rulemakings involve procedures that force agencies to think carefully about the matter at hand.

Such proceedings also provide potentially affected parties more than ample opportunities to question and test the agency's assumptions.[10] Work product resulting from such proceedings will almost invariably reflect the benefit of expertise, and therefore should merit deference.

Conversely, when agencies issue informal guidelines, policy statements, or interpretive rules, federal courts should reflexively withhold *Chevron* deference absent a persuasive showing that the work product in fact incorporates and reflects the benefit of agency expertise. To be sure, federal courts may not order agencies to use particular procedures to enact new policies implementing statutes within their jurisdiction.[11] Nor may the federal courts impose procedural requirements not set forth in either the agency's organic statute or the Administrative Procedure Act (APA).[12] Nevertheless, neither *Bell Aerospace* nor *Vermont Yankee* precludes the federal courts from giving agencies an incentive to provide process in exchange for deference on review. Absent such an explicit trade, there is good reason to fear that agencies may attempt to claim *Chevron* deference for policies that are ill-considered, if not irrational. Poorly conceived regulations often do more harm than no regulations at all. Accordingly, the Supreme Court should reorient the *Christensen/Mead* rule to reward dili-

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833, 870-73 (2001) (arguing that the scope of *Chevron* deference should depend on whether agency can advance persuasive argument in favor of finding that Congress delegated lawmaking authority whether expressly or by implication).

10. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1396-98, 1436-43 (1992) (arguing notice-and-comment rulemaking proceedings under section 553 of the APA already afford regulated entities many opportunities to delay rulemaking process, causing additional delay and expense for federal administrative agencies).

11. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-95 (1974) (holding administrative agency may modify policy developed through adjudication in subsequent adjudication rather than through rulemaking proceeding because agencies generally enjoy freedom to make policy through rulemakings or adjudications).

12. *See* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 541-49 (1978) (holding federal courts may not impose procedural requirements beyond those set by Congress, but may review substance of agency action pursuant to section 706 of the APA).

gent agencies and punish agencies that attempt, like the Queen of Hearts,[13] to reach ultimate conclusions without process adequate to ensure the reliability of the result.

I. A BRIEF REVIEW OF JUDICIAL DEFERENCE TO AGENCY WORK PRODUCT

The Supreme Court's recent decisions in *Christensen* and *Mead* resolved a lingering tension in the case law regarding the precise source of judicial deference to the work product of administrative agencies. In a line of cases pre-dating the APA, the Court established a rule of deference on the theory that agencies possess superior expertise over the matters within their jurisdiction. When an agency decision appears to be the product of this specialized expertise, reviewing courts must afford some measure of deference to the agency's decision.

In 1984, the Supreme Court restated the general rule that agencies, and not courts, enjoy principal responsibility for interpreting ambiguous statutes. The *Chevron* decision, however, relied upon a novel theory of implied delegation, rather than agency expertise, as the foundation of this rule of deference.[14] *Chevron* did reference agency expertise as a background consideration supporting a rule of deference;[15] nevertheless, an implied delegation of lawmaking power, rather than agency expertise, compelled the result.[16] As will be explained more fully below, these rationales, at least in some circumstances, will lead to conflicting results.

A. The Expertise Rationale

The Supreme Court established a sliding scale of deference for the work product of administrative agencies in *Skidmore*.[17] In considering the application of the FLSA to a group of company firemen, the Court affirmed the Department of Labor's interpretation of the Act, which was favorable to the claims of the firemen. Justice Jackson explained that "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

13. *See* LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 245-61 (Charles E. Tuttle Co. Pub. 1968) (reporting on cognitive dissonance Alice experienced in response to arbitrary procedures associated with decision making in Court of Hearts).

14. *See Chevron*, 467 U.S. at 844-45.

15. *See id.* at 843-44.

16. *See id.* at 844.

17. 323 U.S. 134 (1944).

come to a judge in a particular case."[18] Accordingly, the Administrator's formal interpretations of the FLSA "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[19]

In any particular case, the weight that a reviewing court should afford an agency's interpretation of a federal statute should 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."[20] This reasoning uses agency expertise—not an implied delegation to promulgate quasi-statutory rules—as the basis for federal courts affording agency work product deference.

Three years later, the Justices reaffirmed expertise, rather than an implied delegation, as the source of judicial deference to agency work product. In *SEC v. Chenery Corp.* (*Chenery II*),[21] the Supreme Court held that in the absence of an express congressional command to proceed through rulemaking or adjudication, reviewing courts should give deference to an agency's decision to establish new policies through adjudication rather than rulemaking. "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[22]

Justice Murphy justified this result as follows:

> The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.[23]

Although *Chenery II* focused upon a procedural choice rather than a substantive interpretation of an ambiguous statute, the Supreme Court's rationale for providing deference to an agency's choice of procedural vehicle for policy making—expertise—should be equally applicable to an agency's attempt to resolve statutory ambiguities. If a particular agency decision

18. *Id.* at 139.
19. *Id.* at 140.
20. *Id.*
21. 332 U.S. 194 (1947).
22. *Id.* at 203.
23. *Id.* at 209 (citations omitted).

plainly reflects the benefit of "administrative experience," a reviewing court should afford the decision some measure of deference.

Justice Jackson, joined by Justice Frankfurter, argued in dissent that the invocation of "administrative experience" should not insulate an agency's decision from probing judicial review. He argued that "administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law."[24]

Later in *FTC v. Cement Institute*,[25] the Supreme Court sustained the marriage of executive, legislative, and judicial functions in a single administrative body. Writing for the majority, Justice Black explained that agencies undertake duties associated with all three federal branches precisely because Congress seeks to create an entity with specialized knowledge and experience in interpreting and enforcing a federal regulatory regime. "We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty."[26] Marriage of functions permits agencies to develop and maintain expertise, expertise that will be brought to bear when the agency goes about its business.[27]

In Justice Black's view, prior experience with a problem enhances an agency's ability to respond to the problem effectively. Permitting agencies to perform both investigative and prosecutorial functions would improve, rather than debase, the agency's work product. If courts embraced a strict separation of functions, "experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress."[28]

Skidmore, *Chenery*, and *Cement Institute* all invoke enhanced agency expertise as the rationale for affording agency work product deference on judicial review. None of these cases rests the deference principle on an implied delegation of authority to make binding interpretations of ambiguous statutory text. One should also note that two of these three cases (*Chenery* and *Cement Institute*) *post-date* the enactment of the APA. Thus, at least arguably, the expertise rationale for affording agency work product deference survived the enactment of the APA.[29]

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24. *Id.* at 215 (Jackson, J., dissenting).

25. 333 U.S. 683 (1948).

26. *Id.* at 720.

27. *See id.* ("The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice . . . .").

28. *Id.* at 702.

29. *Cf.* Christensen v. Harris County, 529 U.S. 576, 589-91 (2000) (Scalia, J., concurring in part and concurring in the judgment) (arguing that any "authoritative" agency inter-

B. Chevron: *Expertise and Delegation Distinguished*

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,[30] restated the *Skidmore* rule of deference, but relocated the basis for judicial deference from expertise to an implied delegation of lawmaking power. Justice Stevens explained that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[31] Of course, "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[32] In either case, Justice Stevens admonished that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[33]

As a justification of this rule, Justice Stevens quoted from a *Skidmore*-era precedent holding that when "'a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations'" a reviewing court should not disturb the agency's decision "'unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'"[34] In consequence, when a statute contains ambiguous language, a reviewing court should defer to an administrative agency's reasonable interpretation of the language, rather than displace the agency's interpretation with an interpretation of its own choosing.

A careful reader should note that Justice Stevens substituted an implied delegation for the *Skidmore* presumption that agency work product reflecting the application of specialized agency expertise merits deference. Under the *Skidmore* principle, a reasonable construction of a statute that does not reflect the benefit of agency expertise would not receive reflexive deference; the "power to persuade" depends on the agency's ability to demonstrate that it actually brought to bear its superior understanding of the problem. By way of contrast, *Chevron* deference is not contingent on proof that an agency decision actually reflects and incorporates expertise. Strictly speaking, an agency could roll dice to pick from among reasonable

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pretation of an ambiguous statute, whether or not arrived at via a notice-and-comment rulemaking or formal adjudication, should receive *Chevron* deference). In *Christensen*, Justice Scalia explains that although "*Chevron* in fact involved an interpretative regulation, the rationale of the case was not limited to that context . . . ." *Id.* at 589-90.

30. 467 U.S. 837 (1984).

31. *Id.* at 843-44.

32. *Id.* at 844.

33. *Id.* (footnote omitted).

34. *Id.* at 844-45 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)).

interpretations of ambiguous statutory text and the dice roll choice should be entitled to receive *Chevron* deference.

Obviously, an agency decision that, by sheer luck, happens to be a reasonable interpretation of an ambiguous statute should not receive reflexive deference from a reviewing court. Yet, *Chevron* seems to command just such a result. A reviewing court must afford a reasonable, but ill-considered, agency decision just as much deference as a well-considered agency decision that happens to be reasonable.

Justice Stevens does reference, albeit implicitly, the importance of agency expertise in defending the *Chevron* rule of deference:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. 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.[35]

He concluded by noting that:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . .[36]

Although Justice Stevens presupposes that agency expertise will be brought to bear when a federal agency interprets an ambiguous statutory text, it is the implied delegation—and not the agency's expertise—that commands deference.

C. Christensen *and* Mead: *Deference and Expertise Divorced*

In *Christensen v. Harris County*,[37] the Supreme Court had to decide whether *Chevron* deference applied to informal agency interpretations of ambiguous statutes. *Christensen* involved the proper construction of a FLSA provision regarding the use of compensatory time for overtime hours

35. *Id.* at 865-66.
36. *Chevron*, 467 U.S. at 866.
37. 529 U.S. 576 (2000).

worked. Section 207 of the FLSA permits certain public employers to give employees compensatory time in lieu of cash compensation.[38] The statute limits the amount of compensatory time that a public employee may accrue; if a public employee reaches the maximum amount of bankable compensatory time, the public employer must begin compensating the employee for overtime work with cash.

Naturally enough, public employers would prefer to avoid incurring unbudgeted salary expenses for employees working overtime hours. The sheriff's department in Harris County, Texas, decided to resolve the problem by requiring employees approaching the statutory limits on accrued compensatory time to use the time before exceeding the limits. If an employee refused to use the time voluntarily, the sheriff's department would simply require the employee to take paid leave.[39]

In an opinion letter, the Department of Labor held that a public employer could schedule forced compensatory time off only incident to a prior negotiated agreement between the employer and the employees.[40] In the absence of such an agreement, the public employer could not force an employee to use vested compensatory time. The Harris County, Texas Sheriff's Department had not obtained any prior agreement regarding the forced-use of compensatory time from its employees. Accordingly, the Department of Labor found that the department's forced-use policy violated the FLSA.[41]

Notwithstanding the opinion letter, the sheriff's office proceeded to order employees approaching the maximum limits on vested compensatory time to use the paid leave time or face mandatory use of the time at their supervisor's discretion. Employees, who were potentially affected by the new policy, brought suit seeking to block the implementation of the department's policy of forced-use of compensatory time.[42]

Although the district court found the employees' claim to have merit,[43] the U.S. Court of Appeals for the Fifth Judicial Circuit reversed.[44] The Fifth Circuit held the Department of Labor's opinion letter did not constitute a reasonable interpretation of an ambiguous statutory provision.

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38. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 207(o) (2000) (mandating employers provide enhanced compensation for overtime hours worked).

39. *See Christensen*, 529 U.S. at 580-81.

40. *See id.*

41. *See id.*

42. *See id.* at 581.

43. *See* Moreau v. Harris County, 945 F. Supp. 1067 (S.D. Tex. 1996), *rev'd*, 158 F.3d 241 (5th Cir. 1998).

44. *See* Moreau v. Harris County, 158 F.3d 241, 247 (5th Cir. 1998), *aff'd*, Christensen v. Harris County, 529 U.S. 576 (2000).

On review, the Supreme Court affirmed the decision of the Court of Appeals. Writing for the majority, Justice Thomas explained:

> In *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute. . . .
>
> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or a notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.* . . .[45]

The majority found "unpersuasive the agency's interpretation of the statute at issue in this case."[46] Justice Thomas did not provide any additional explanation for the majority's refusal to afford the Department of Labor's opinion letter *Chevron* deference.

Because of the extreme brevity of Justice Thomas's explanation, *Christensen* did not really make clear precisely *why* an agency opinion letter does not merit *Chevron* deference.[47] On the one hand, the majority suggests that an agency interpretation that lacks the process associated with a formal adjudication or a notice-and-comment rulemaking is not entitled to *Chevron* deference because such interpretations "lack the force of law."[48] Viewed in this light, *Chevron* deference flows from a delegation of lawmaking power from Congress, rather than as a matter of deference to superior agency expertise.[49]

On the other hand, however, the majority also suggests that process values support the result. Because an opinion letter does not necessarily constitute an agency's considered judgment—after all, such materials may or may not reflect the careful application of agency expertise—a reviewing court should not be required to give such agency interpretations *Chevron* deference.[50]

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45. *Christensen*, 529 U.S. at 586-87 (citations omitted).

46. *Id.* at 587.

47. *See* Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1121-24 (2001) (noting "[a]lthough the Court does not fully explain its rationale," one can posit several reasons that support the result, including the lack of an implied congressional delegation, the absence of process, and separation of powers concerns).

48. *Christensen*, 529 U.S. at 587.

49. *See* Anthony, *supra* note 9, at 43-44.

50. *See* Rossi, *supra* note 47, at 1123 (noting that process values might relate to *Chevron* deference and suggesting that "[w]here the agency's interpretation is adopted without such public participation and with no guarantee of an explanatory record, heightened judi-

A process-rationale for withholding *Chevron* deference has a great deal of persuasive force: if an agency can obtain the benefit of *Chevron* deference without incurring the cost of using rulemaking or adjudication to arrive at the interpretation, a rational bureaucrat might often dispense with the process.[51] If *Chevron* rests on the assumption that an agency interpretation of an ambiguous statute reflects and incorporates the agency's superior expertise, an agency should not be permitted to claim the benefit of *Chevron* deference in circumstances where the reviewing court is uncertain that the decision at bar actually is the product of agency expertise.

Although *Vermont Yankee* prohibits a reviewing court from demanding more process than Congress requires in the organic statute authorizing the agency to act,[52] it would not be inconsistent with *Vermont Yankee* to make a reviewing court's deference to agency work product turn on the quality of process associated with the agency's decision. Absent a congressional command to use rulemaking or adjudication to resolve statutory ambiguities, under the implied delegation doctrine theory, an administrative agency would be free to cast bones to pick from among possible reasonable interpretations of an ambiguous statute. After casting the bones, the agency would simply publish an interpretative rule or guideline announcing the result.

Consistent with *Vermont Yankee*, a reviewing court could not require the agency to use additional process to inform its decision. That said, in applying the "arbitrary and capricious" standard of review mandated by section 706(2)(a) of the APA, a reviewing court would be perfectly entitled to weigh the arbitrary selection mechanism in determining whether the agency decision is rational. In this sense, an expertise-based rationale for judicial deference would work in tandem with section 706 of the APA. *Chevron*'s requirement of reflexive judicial deference, regardless of the quality of the process associated with the agency's work product, does not well comport with section 706's requirement that a reviewing court make an independent determination that the agency's decision reflects something more than whim or caprice.[53]

Although *Christensen* relied upon both the implied delegation and process value rationales, in *Mead*[54] the Supreme Court squarely located the requirement of *Chevron* deference on a theory of an implied delegation of

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cial scrutiny of the agency's statutory interpretations enhances the legitimacy of the agency's action.").

51. *See* William Funk, *When Is a "Rule" a Regulation? Marking A Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659 (2002).

52. *See Vermont Yankee*, 435 U.S. at 542-44, 546-49.

53. *See generally* Rossi, *supra* note 47, at 1144-46 (suggesting that the quality of the agency's process and reasoning should factor into the application of *Skidmore* deference).

54. 533 U.S. 218 (2001).

lawmaking power. Under *Mead*, federal courts should afford *Chevron* deference to agency interpretations of ambiguous statutory texts only when the agency enjoys congressionally-delegated power to make quasi-statutory interpretations.[55]

Mead involved the U.S. Customs Service's decision to characterize certain Mead Corporation day planners as "diaries" rather than as "other items" of a similar sort.[56] If characterized as "other items," no tariff would be due upon importation of the articles into the United States. On the other hand, if the Customs Service deemed the day planners "diaries," a four percent tariff would apply to each day planner that Mead Corporation sought to import into the United States.[57] The Customs Service makes its designations of particular items on an ad hoc basis, using interpretive rules that are neither the product of notice-and-comment rulemaking nor codified in the *Code of Federal Regulations*.[58]

Thus, *Mead* presented the Justices with an opportunity to clarify the precise rationale of the result in *Christensen*. In an eight to one decision, the Court held that interpretative rules or guidelines are not entitled to *Chevron* deference unless the organic statute authorizing the agency to act vests the agency with the power to enact quasi-statutory rules implementing the law. According to Justice Souter, only when Congress delegates lawmaking power can an agency claim the benefit of *Chevron* deference: "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."[59]

Nevertheless, Justice Souter strangely equates relatively formal agency process as an effective proxy or marker for an implied delegation of lawmaking power:

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. . . . That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.[60]

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55. *See id.* at 227-30.

56. *See id.* at 220-26.

57. *See id.* at 225.

58. *See id.* at 220-24 (describing the agency's process of establishing its classification rules for imported goods).

59. *Id.* at 229.

60. *Mead*, 533 U.S. at 230-31 (citations omitted).

Of course, there is no reason to believe that the amount of *process* associated with an agency's decision necessarily bears any relationship to *congressional intent* regarding the agency's ability to issue binding interpretations of the statutes under its jurisdiction. There is, of course, good cause to equate process with the exercise of expertise, yet the benefit of agency expertise, per se, has nothing to do with whether *Chevron* deference applies to a particular agency statutory interpretation.

The *Mead* majority concluded that the Customs Service's classification rulings did not qualify for *Chevron* deference because such materials "present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here."[61] Although a congressional delegation of lawmaking authority may be either express or implied, a reviewing court must find that such a delegation has occurred before affording agency work product *Chevron* deference.

Even if implied delegations can trigger *Chevron* deference, it seems very odd for the *Mead* majority to invoke the lack of formality and uniformity in the creation and enforcement of customs classifications as evidence that they should not have the force of law.[62] "It is difficult, in fact, to see in the agency practice itself any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these."[63] If the relevant question really relates to congressional intent, the quality of the process associated with establishing the classification rulings should not be outcome determinative. In fact, Congress itself often exercises its own lawmaking powers with little or no process, enacting bills that no member of either house has even seen, much less bothered to read. Although Congress may hold agencies to a higher standard of procedural regularity than it observes itself, there is really no reason to use process as an effective proxy for congressional intent.

Remarkably, the fact that Congress requires the Customs Service to use notice-and-comment procedures to revoke or modify an existing classification also failed to demonstrate the requisite delegation of lawmaking authority. "The statutory changes [requiring the use of rulemaking] reveal no new congressional objective of treating classification decisions generally as rulemaking with the force of law, nor do they suggest any intent to

61. *Id.* at 231.

62. *See id.* at 231-34 (citing the ad hoc nature of the agency's classification rules as supporting conclusion that Congress did not delegate power to enact regulations with the force of law, even though to modify an existing classification ruling Congress required the Customs Service to use rulemaking procedures).

63. *Id.* at 233.

create a *Chevron* patchwork of classification rulings, some with force of law, some without."[64]

Although *Chevron* deference did not apply, the majority held that the lower court erred by failing to apply *Skidmore* deference to the classification ruling. "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: whether the daily planner with room for brief daily entries falls under 'diaries' . . . ."[65] Thus, Justice Souter orients *Skidmore* deference as a function of agency expertise, whereas, at least as a formal matter, *Chevron* deference revolves around the fiction of a congressional delegation to create statutory glosses with the force of law. The majority remanded the case to permit the U.S. Court of Appeals for the Federal Circuit to apply *Skidmore* to the Customs Service's ruling regarding Mead's day planners.[66]

Justice Scalia authored an angry dissent.[67] As he had suggested earlier in *Christensen*,[68] he argued that all "authoritative" agency interpretations should receive *Chevron* deference.[69] In Justice Scalia's view, the majority approach simply allows reviewing courts to displace agency interpretations of ambiguous statutes with their own interpretations by refusing to find an express or implied delegation of lawmaking power.[70]

Mead arguably completes the turn that *Chevron* itself began: the degree of deference that an agency interpretation of an ambiguous statute will receive is contingent on a reviewing court finding a congressional delegation of lawmaking power to the agency. Judicial deference to agency interpretations of ambiguous laws is not a function of greater agency expertise, but rather flows from the reviewing court's recognition that Congress vested a particular interpretive task with the administrative agency rather than the federal courts.

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64. *Id.* at 234.

65. *Id.* at 235.

66. *See Mead*, 533 U.S. at 239 (vacating judgment and remanding with direction to apply *Skidmore*).

67. *See generally id.* at 239-61 (Scalia, J., dissenting).

68. *See* Christensen v. Harris County, 529 U.S. 576, 589-91 (2000) (Scalia, J., concurring in part and concurring in the judgment) (rejecting *Skidmore* deference as "an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules') authoritative effect" and observing that "we have accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats." (citations omitted)).

69. *See Mead*, 533 U.S. at 239, 256-58 (Scalia, J., dissenting) (arguing where an administrative agency's authoritative interpretation is reasonable, courts should give deference).

70. *See generally id.* at 239-45.

II. A MODEST PROPOSAL: *SKIDMORE* DEFERENCE AND THE QUEST FOR RATIONAL AGENCY BEHAVIOR

Both *Chevron* and *Mead* fail to accord adequate weight to the expertise rationale for affording deference to agency interpretations of ambiguous texts. To be sure, if Congress signals a desire for courts, rather than agencies, to have the last word in construing the meaning of a particular statute, then the federal courts should undertake principal responsibility for filling in statutory gaps. In the absence of an express indication that the agency charged with enforcing a particular statute would have primary responsibility for its interpretation or enforcement, the delegation question should not be particularly difficult: Congress intends for agencies, and not the courts, to interpret and apply the laws over which it has given a particular agency jurisdiction.[71]

The *Mead* Court's search for a legal fiction—an implicit delegation of lawmaking power—simply makes no sense. Surely Congress anticipated that the Customs Service, and not the federal judiciary, would have primary responsibility for deciding whether a Mead day planner constitutes a "diary" for purposes of applying the nation's tariff laws. Congress almost never directly vests an agency with an express lawmaking power over all aspects of its operation. Some statutes directly authorize agencies to write rules and issue orders incident to enforcement of a particular chapter or title, but a sufficiently ingenious court could always find some way of distinguishing the specific agency action at issue from the sorts of actions that come within the scope of the express congressional delegation.

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71. Ironically, the decision to apply *Chevron* deference has in past cases appeared to be a function of how much the reviewing court liked the agency's gloss. The Equal Employment Opportunity Commission (EEOC), in particular, has routinely failed to receive *Chevron* deference for its interpretations of civil rights laws, even though the agency arguably has relevant experience and expertise in dealing with job discrimination that the federal courts do not possess. *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471, 478-84 (1999) (disregarding the EEOC's interpretation of the American with Disabilities Act (ADA) in favor of its own construction of the statute); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257-58 (1991) (disregarding the EEOC's interpretation of Title VII, which favored extraterritorial effect, in favor of its own construction, which limited the law to domestic effect); *see also* S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 661-66 (2001) (noting the judiciary's failure to accord EEOC interpretations of the ADA much deference and suggesting that the judiciary's alternative interpretations have failed to incorporate important differences between the ADA and Title VII); Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532 (2000) (noting the Supreme Court's failure to give deference to the EEOC's interpretations of ambiguous statutory provisions); *cf.* Washington v. Davis, 426 U.S. 229, 263-64 (1976) (Brennan, J., dissenting) (arguing EEOC regulations are "entitled to great deference" and applying administrative law precedents mandating deference to an EEOC regulation).

The implied delegation prong of the *Mead* test represents a naked power grab by the federal courts. A reviewing court that wishes to sustain an agency interpretation will find an implied delegation, whereas a court that wishes to displace an agency's interpretation will find that such an implied delegation of lawmaking power does not exist. Because the inference will arise not from any direct language in the statute, but rather from the overall structure and operation of the law, a reviewing court will face few practical constraints in granting or withholding *Chevron* deference.

Moreover, even if an agency interprets ambiguous statutory language incident to a notice-and-comment rulemaking or formal adjudication, in the absence of an express or implied delegation of "lawmaking authority," the amount of process associated with the decision is, at least as a formal matter, wholly irrelevant to the degree of deference that a reviewing court owes to the agency's work product.[72] Considered from the perspective of pre-*Chevron* cases, this makes no sense.

Perhaps more importantly, it also makes no sense from the perspective of fitting *Skidmore* and *Chevron* into the structural framework of the APA. Surely the federal judiciary has some obligation to apply the framework for review that Congress established—in this case, section 706(2) of the APA[73]—when reviewing the legality of agency action. Of course, in *Chevron* itself Justice Stevens never bothered to explain how or why the *Chevron* rule comports with section 706. As Justice Scalia has observed, "[t]here is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite."[74]

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72. Again, one should note that Justice Souter seems to conflate an agency using formal process with a congressional intention to delegate lawmaking power to the agency. *See Mead*, 533 U.S. at 230-33 (suggesting that informal procedures associated with creation of classification rulings belies agency's claim that Congress intended them to have force of law). If the application of agency expertise triggered *Chevron*, such an approach would make sense. However, if the true test is congressional intent, a careful search of floor statements and committee reports seems a more useful source of relevant information than the agency's behavior in enforcing a particular statutory provision. Justice Souter's approach turns the search for congressional intent into a consideration of the formality of process that the agency provided when establishing the rule. One wonders, however, if the EEOC's use of formal adjudication or notice-and-comment rulemaking to establish a policy would insulate it from judicial invalidation. *See supra* note 71 and accompanying text. Justice Scalia's objection that the *Mead* test is too easily subject to judicial manipulation therefore has a good deal of merit. *See Mead*, 533 U.S. at 241-50 (Scalia, J., dissenting) (objecting that the majority's approach relies on irrelevant factors to find congressional intent and suggesting that the test is capable of infinite judicial manipulation).

73. *See* 5 U.S.C. § 706(2) (2000) (setting forth scope of review standards that govern when a court reviews an agency's action).

74. *Mead*, 533 U.S. 243 (Scalia, J., dissenting) (footnote omitted).

One could infer that an agency interpretation of an ambiguous statute is presumptively rational if it does not conflict with a plainly expressed congressional objective and seems to be an otherwise reasonable interpretation of the text. Yet, if it is the reasonable nature of the interpretation that drives the result, *Chevron* deference should not turn on whether a reviewing court can find an implied delegation of lawmaking authority. Instead, *Chevron* deference should turn on the apparent reliability of the agency's decision.

When an agency engages in notice-and-comment rulemaking or formal adjudication, and the decision enjoys substantial support in the record, a reviewing court should not lightly displace the agency's decision—including agency interpretations of ambiguous statutory text. This result flows in part from the fact that Congress delegated the decision to the agency. More importantly, however, the agency has brought to bear its institutional expertise in sifting through the materials laid upon the record. Given the agency's superior knowledge of the area, and Congress's delegation of responsibility for regulating to the agency, a reviewing court should defer to the agency's resolution of a debatable question of statutory interpretation.

This result is certainly consistent with Congress's delegation of responsibility to the agency. But, under the APA, the reviewing court retains an independent obligation to ensure that an agency has acted rationally.[75] Although a reviewing court cannot demand that an agency utilize particular procedures to ensure that the agency's end product is not arbitrary or capricious, a reviewing court logically could indulge in a strong presumption that an agency interpretation that results from a notice-and-comment rulemaking or formal adjudication is not irrational (again, assuming that the record supports the agency's factual assumptions).

If an agency, consistent with *Vermont Yankee*, elects not to engage in notice-and-comment rulemaking or formal adjudication, a reviewing court could reasonably demand some indication that the agency has actually brought its expertise to bear on the matter in question. In other words, when the process values associated with an agency decision do not themselves ensure the rationality of the decision, section 706(2) of the APA requires courts to engage in more demanding review. In such circumstances, agency work product should have the power to persuade, but not compel.

Viewed in this light, *Skidmore* deference applies when an agency elects to forego a process that usually ensures the considered application of

75. *See* 5 U.S.C. § 706(2) (stating that reviewing court shall hold unlawful and set aside any agency action that is "arbitrary and capricious"); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-16 (1971) (discussing the obligation of a reviewing court to apply carefully the "arbitrary and capricious" standard of review and to disallow agency action that fails to meet this test).

agency expertise. The agency remains free to make the choice: invest substantial time and effort in process, in exchange for deferential judicial review or avoid procedural bells and whistles, but face a less reflexively deferential reviewing court. This choice flows not from some legal fiction of implied delegation, but directly from the APA's mandate to reviewing courts to ensure that agency work product is demonstrably rational.

Under the theory of *Mead*, an agency decision that reflects the benefit of open participation among affected entities and careful application of agency expertise would receive only limited deference in the absence of either an express or implied delegation of lawmaking power. At the same time, a poorly conceived agency decision, made with limited or nonexistent public participation, might enjoy *Chevron* deference if the reviewing court finds an express or implied delegation of lawmaking authority. This turns judicial review of agency efforts at statutory interpretation into a bad farce.

The Supreme Court should correct this mistake at the soonest available opportunity. *Christensen* correctly noted the relationship between process and deference; an agency that desires judicial deference must be prepared to provide sufficient process to assure a reviewing court that the agency decision reflects the benefit of considered agency expertise. Conversely, an agency that wishes to forego process in favor of speed remains free to do so, but must be willing to justify its decision on judicial review to a degree that would not be the case if the agency had provided additional process.

Such an approach would not transgress the rule of *Vermont Yankee*, because an administrative agency would always be free to choose whether or not to engage in process in order to obtain judicial deference. *Vermont Yankee* simply precludes a reviewing court from forcing an agency to adopt particular procedural devices regardless of its willingness or ability to defend its decision on the merits based on the record before the court.

Finally, this approach would relate, in a meaningful way, the Supreme Court's doctrines of deference with section 706 of the APA. An agency decision that is demonstrably the product of expertise will enjoy a high presumption of rationality; as the agency abandons process values, the presumption of rationality will correspondingly decline. *Chevron* simply represents a case in which the presumption of rationality should be at its zenith, precisely because the EPA had demonstrably brought its expertise to bear in the context of a process that afforded widespread participation rights to myriad interested parties (i.e., notice-and-comment rulemaking). Where an agency's decision has already been tested in a reliable fashion, and a reviewing court has the benefit of a full record against which to judge the agency's action, an agency's decision should be presumptively valid. As one moves away from this paradigm, judicial scrutiny must increase in

order to ensure that the agency's work product is, in fact, not arbitrary or capricious.

All of this would suggest that *Skidmore* actually states the more general rule of law: an agency's decision should receive a level of judicial deference that is more or less proportionate to the degree of confidence that the reviewing court has in the procedure associated with the agency reaching its decision. When an agency relies upon a procedure that is virtually certain to result in a sound decision (e.g., formal rulemaking or adjudication), a court should invalidate the agency action only when it is demonstrably inconsistent with the expressly declared intent of Congress. When an agency does not utilize procedures likely to ensure a rational decision, a reviewing court must take a closer look at the agency's decision and the reasons that support it.

CONCLUSION

In my view, *Chevron* departed from the primary justification for affording agency interpretations of ambiguous statutes deference: administrative agencies possess greater expertise than the generalist courts that review their decisions.[76] If expertise, rather than some sort of fictional delegation of lawmaking power, undergirds judicial deference to administrative interpretations of ambiguous statutory texts, judicial review will have to rely upon a sliding scale of deference, depending on the indicia of expertise associated with a particular agency decision. If the goal of judicial review is to ensure rational agency action, such an approach is not a mere convenience, but rather a necessity. Given the mandate of section 706 of the APA, it is difficult to understand why an agency decision should be afforded a strong presumption of validity when the agency has an express delegation of lawmaking power, but the process associated with the agency's use of that power leaves a reasonable person doubtful about the reliability of the decision.

Administrative regulations can prove bankrupting to affected industries. In *United States v. Nova Scotia Food Products Corp.*,[77] the Food and Drug Administration (FDA) adopted uniform standards for the processing of

76. *See generally* Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges In It?*, 1991 DUKE L.J. 647, 657-59 (questioning plausibility of dialogic model of judicial review of agency action because judges lack familiarity with esoteric information crucial to agency decision making and noting that "asking judges to familiarize themselves enough with the policies and operations of the dozens of agencies that appear in hundreds of cases a year, and whose functions vary from labor to shipping to nuclear energy to gas regulation, so that we can participate as equals in their good governance, is asking a great deal.").

77. 568 F.2d 240 (2d Cir. 1977).

canned fish products, rather than standards specific to each kind of fish. Whitefish producers claimed that the preparation requirements would make it impossible to process whitefish in a way that would result in a commercially viable product; essentially, compliance with the FDA's regulations would have bankrupted the industry.[78] The FDA undoubtedly possessed an express delegation of power to write statutory rules regarding food preparation, so as to avoid the sale of adulterated foods. Under the logic of *Mead*, a reviewing court would owe the FDA's regulations on commercial fish preparation *Chevron* deference.

To the extent that *Mead* and *Christensen* ratify *Chevron*'s departure, rather than correct it, the U.S. Supreme Court has drifted even further away from the roots of deference—agency expertise and experience.[79] Congressional intent does, of course, provide an important rationale for permitting agencies, rather than the courts, to parse ambiguous statutory texts. For purposes of applying the doctrine of separation of powers, congressional intent, whether expressed or implied, justifies a general posture of judicial deference.[80]

When deciding whether a particular agency effort is "arbitrary and capricious" for purposes of applying section 706 of the APA, however, federal courts must look to the indicia of reliability associated with the agency action and not to the legitimacy of the agency's claim to primacy in interpreting the ambiguous statutory text. The fact that Congress preferred that

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78. *See id.* at 248-53 (finding that FDA failed to consider material issues associated with incidence of botulism in whitefish, failed to properly discuss and disclose pertinent scientific data, and as a result, adopted generic health regulations for processed fish products that would likely destroy whitefish as a commercial product).

79. The *Mead* rule also does little to explain why agency interpretations of ambiguous regulations should receive *Chevron* deference. Even if an agency enjoys the authority to parse ambiguous statutes within its jurisdiction, this does not explain or justify a similar rule of deference when the implementing regulations are themselves ambiguous. *But see* Auer v. Robbins, 519 U.S. 452, 457-63 (1997) (holding that agency's interpretations of ambiguous regulations should receive judicial deference); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (giving broad deference to agency interpretations of its own regulations and suggesting such action is especially appropriate when complex technical regulations are at issue); Stinson v. United States, 508 U.S. 36, 44-47 (1993) (requiring that lower courts give agency's interpretation of arguably ambiguous regulations deference). An expertise-based justification for *Chevron* deference avoids this difficulty: an agency's application of expertise to ambiguous text merits deference because the agency possesses more competence than does a reviewing court and the agency also has demonstrated that its decision reflects the benefit of its special competence.

80. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (explaining that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

the agency, rather than the reviewing court, fill in the blanks says nothing of value regarding the reliability or rationality of the particular agency action at bar. To the extent that the agency can demonstrate that the action at issue reflects and incorporates the benefit of agency expertise, a reviewing court should afford deference; to the extent that it cannot make such a demonstration, deference is not justified in light of the APA's mandate.