Essay

Confusion in the Circuit Courts: How the Circuit Courts Are Solving the *Mead*-Puzzle by Avoiding It Altogether

*Daniel S. Brookins**

Abstract

Chevron *deference is possibly the most discussed legal issue in recent history. Despite this prolific scholarship, relatively little empirical attention has been devoted to* Chevron*'s impact in the circuit courts. To shed light on the situation in the circuit courts, this Essay addresses the issue of how circuit courts handle the "*Mead*-puzzle" in cases where a federal agency has informally interpreted a statute it administers. After presenting findings from an empirical review of circuit court decisions, this Essay argues that* Chevron *avoidance is now the norm in the circuit courts. In fact,* Chevron *avoidance is so abundant that it is distorting agency win rates for informal interpretations that receive* Chevron *deference.* Chevron *avoidance flourishes because courts are still avoiding the confusion associated with* Mead *and* Barnhart*. To remove that confusion, this Essay argues that* Chevron *should be limited to legislative rulemaking and formal adjudication.*

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> *We will be sorting out the consequences of the Mead doctrine, which today has replaced the Chevron doctrine, for years to come.*
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> —Justice Antonin Scalia (2001)[1]

Introduction

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[2] is one of, if not the most, cited Supreme Court case of all time.[3] Thousands of law review articles, books, and cases have discussed its

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

2 467 U.S. 837 (1984).

3 *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 2 (2017) ("Indeed, as of this writing, *Chevron* has been cited in nearly 80,000 sources available on Westlaw, including in roughly 15,000 judicial decisions and nearly 18,000 law review articles and other secondary sources.").

relevance and value at great length.[4] This Essay addresses a lacuna in this copious body of literature. Specifically, relatively little empirical attention has been devoted to *Chevron*'s descriptive impact at the circuit court level,[5] and consequently, there is a lack of scholarship regarding how the lower courts are tackling the "*Mead*-puzzle."[6]

The term "*Mead*-puzzle" refers to the Supreme Court's trio of cases—*Christensen v. Harris County*,[7] *United States v. Mead Corp.*,[8] and *Barnhart v. Walton*[9]—which govern informal interpretations.[10] Informal interpretations are essentially nonlegislative rules and informal adjudication.[11] As other authors have noted, there is confusion about how the *Mead*-puzzle cases should be interpreted and applied.[12] Indeed, some authors have even documented instances where courts avoid the *Chevron* question altogether because they want to avoid the *Mead*-puzzle cases.[13] However, the extent of the problem is currently unknown.[14]

This information deficit was recently highlighted by Kent Barnett and Christopher J. Walker in their article: Chevron *in the Circuit*

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4 *See, e.g.*, Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273 (2011).

5 *See generally* Barnett & Walker, *supra* note 3, at 18–21 (discussing prior studies). For other studies regarding *Chevron*'s impact in both the Supreme Court and the circuit courts, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1089–90 (2008) (considering *Chevron*'s impact in the Supreme Court); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1235 (2007) ("document[ing] an empirical study of five years worth of *Skidmore* applications in the federal courts of appeals"); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 24 (1998) (evaluating "253 agency interpretations" in the circuit courts); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825–26 (2006) (evaluating *Chevron* patterns based on the political view agency interpretations represented and the political leaning of the judge deciding the case).

6 The best scholarship currently available is probably a 2005 article by Lisa Schultz Bressman, discussed at length below. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005).

7 529 U.S. 576 (2000).

8 533 U.S. 218 (2001).

9 535 U.S. 212 (2002).

10 *See* Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1, 56–58 (2015) (using the term "*Mead* puzzle" in collectively referring to *Christensen*, *Mead*, and *Barnhart*).

11 *See generally* Barnett & Walker, *supra* note 3, at 35–37 (using "informal interpretations" to refer to informal adjudication and nonlegislative rules).

12 *See, e.g.*, Bressman, *supra* note 6, at 1445–47 (discussing the confusion associated with *Mead* and *Barnhart*).

13 *See, e.g.*, *id.* at 1464–66.

14 *See* Barnett & Walker, *supra* note 3, at 42–44 (noting some surprising findings, but being unable to offer an explanation).

Courts.[15] In the article, Barnett and Walker present findings from a study of 1,558 agency interpretations.[16] The results of their comprehensive research came as a surprise to administrative law scholars,[17] and one of their most surprising findings has possible implications for how circuit courts are approaching the *Mead*-puzzle. Barnett and Walker found that in cases where *Chevron* is applied, agencies win at higher rates when they use informal interpretation, rather than notice-and-comment rulemaking, to interpret the statutes they administer.[18]

This unexpected finding highlighted the uncertainty noted above: What are circuit courts doing when they encounter *Chevron*-eligible informal interpretations? Has *Chevron* avoidance become more prevalent? If it has, why are the win rates affected? Or, has *Barnhart* become the primary case for informal interpretations and inserted factors from *Skidmore v. Swift & Co.*[19] into the step zero inquiry? In light of these unanswered questions, this Essay addresses a specific issue: What do circuit courts do when they face the question of whether to apply *Chevron* to an informal interpretation? In other words, how are the circuit courts tackling the *Mead*-puzzle?

To answer that question, this Essay presents the results of an empirical review of cases decided in the circuit courts. Specifically, the author-reviewed cases from Barnett and Walker's dataset.[20] Out of the 1,558 agency interpretations in their dataset, 386 (a total of 340 individual cases) were coded for informal interpretation. This Essay reflects a detailed review of approximately seventy of those informal interpretations.

Due to its empirical nature, this Essay does not make any arguments regarding *Chevron*'s place in administrative law. That question has already been thoroughly discussed and debated by many administrative law scholars.[21] Instead, this Essay seeks to describe how the

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15 *Id.*; *see also* Richard Pierce, *Circuit Courts Do Strange Things with* Chevron, JOTWELL (Sept. 6, 2016) (reviewing Barnett & Walker, *supra* note 3), http://adlaw.jotwell.com/circuit-courts-do-strange-things-with-chevron/ (noting how Barnett and Walker's findings were "surprising").

16 *See* Barnett & Walker, *supra* note 3, at 23.

17 *See, e.g.*, Pierce, *supra* note 15.

18 *See* Barnett & Walker, *supra* note 3, at 39–44.

19 323 U.S. 134 (1944).

20 Barnett and Walker graciously shared their dataset with the author.

21 *See, e.g.*, RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION 18 (2016) (arguing against the federal judiciary's practice of giving deference—in a number of instances, including *Chevron*—because it violates the constitutional intent that individual citizens, not governmental bodies, are sovereign); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 12 (2014) (arguing against the entire body of administrative law, including *Chevron*, because it gives too

circuit courts are currently tackling the *Mead*-puzzle when faced with informal interpretations, and discusses how the *Mead*-puzzle problems may be solved.

To that end, this Essay proceeds in three parts. Part I begins with a brief survey of the relevant step zero caselaw. Part I then discusses Barnett and Walker's findings, the methodology used in this Essay, and existing theories on how courts approach the *Mead*-puzzle. Part II describes the findings of this Essay regarding the circuit courts' approach to the *Mead*-puzzle: confusion is widespread, and circuit courts' use of *Chevron* avoidance has dramatically increased. In fact, Part II explains that *Chevron* avoidance is now so prevalent that it has actually started to impact agency win rates for informal interpretations that receive *Chevron* deference. Part III begins by offering a normative analysis of *Chevron* avoidance and concludes that *Chevron* avoidance creates harmful uncertainty, frustrates a chief goal of *Chevron*, and arguably violates a constitutional norm. To fix these problems, Part III proposes that federal courts should only offer *Chevron* deference to legislative rulemaking and formal adjudication, and that courts can begin implementing this solution by narrowly reading *Mead* and abandoning *Barnhart*.

I. THE *MEAD*-PUZZLE: WHEN DOES *CHEVRON* DEFERENCE APPLY TO INFORMAL INTERPRETATIONS?

A. Chevron *Step Zero*

In *Chevron*, the Supreme Court held that deference should be given to an agency's reasonable interpretation of an ambiguous statute that the agency administers.[22] This created the famous "two-step" *Chevron* deference test.[23] At step one, courts must decide whether the

much power to the executive branch); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757, 759–61 (1991) (arguing *Chevron* is unconstitutional because it violates separation of powers); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 189 (1992) (arguing that *Chevron* should be constrained); Cory R. Liu, Chevron*'s Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391, 392–93 (2016) (arguing against *Chevron* because of its instability and separation of powers problems); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623 (1996) (arguing for *Chevron* as a canon of construction); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (same); Seidenfeld, *supra* note 4, at 276 (arguing that *Chevron* is a constitutional doctrine grounded in Article III as a "judicially self-imposed constraint to assuage concerns about the court's countermajoritarian role under the Constitution").

22 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

23 *See id.*; Emily Hammond et al., *Judicial Review of Statutory Issues Under the* Chevron

statute is ambiguous or clear on the specific issue presented.[24] If the statute is ambiguous on that issue, the court proceeds to step two.[25] Under step two, courts must decide whether the agency's interpretation of the ambiguous statute is reasonable.[26] If the statute is not ambiguous on the issue presented, then the court does not proceed to step two.[27] In such cases, the agency interpretation must comply with the clear meaning of the statute.[28] If the agency action is not true to the clear meaning, then the court should overturn the agency interpretation.[29]

Chevron left open an important question: to which interpretations should courts defer? This inquiry of whether *Chevron* deference applies is defined as "*Chevron* step zero." For purposes of this Essay, "step zero" is used narrowly, referring only to cases and issues discussed in this Section, i.e., whether *Chevron* applies to informal interpretations.[30]

The Supreme Court addressed the step zero question almost twenty years ago in *Christensen v. Harris County*, where it considered whether an opinion letter, authored by the acting director of the Department of Labor's Wage and Hour Division, deserved *Chevron* deference.[31] The Court held that "[i]nterpretations 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."[32] Rather, those interpretations warrant *Skidmore* deference.[33]

Doctrine, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 65 (Michael E. Herz et al. eds., 2d ed. 2015) (discussing the *Chevron* two-step test).

24 *See Chevron*, 467 U.S. at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue.").

25 *See id.* at 842–43.

26 *See id.* at 843–45.

27 *See id.* at 842–43 ("If 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.").

28 *See id.*

29 *See id.* at 842–45.

30 Step zero may also include cases and issues not discussed in this Section, such as the "major questions doctrine" established by the Supreme Court in *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120 (2000).

31 *See* Christensen v. Harris Cty., 529 U.S. 576, 580–81 (2000).

32 *Id.* at 587.

33 *Id.* ("[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore* . . . ."). *See generally* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

Deference under *Skidmore v. Swift & Co.* is less respectful to agency interpretations than *Chevron* deference.[34] Under *Skidmore*, agency interpretations are entitled to deference to the extent that they have the "power to persuade."[35] Whether an interpretation carries the power to persuade depends 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."[36]

Christensen arguably created a bright line rule: agency interpretations carrying the *force of law* receive *Chevron* deference and others receive *Skidmore* deference.[37] But this clarity was called into question a year later in *United States v. Mead Corp.* In *Mead*, the Supreme Court considered whether a ruling letter issued by the United States Customs Service should receive *Chevron* deference.[38] Presumably, if *Christensen* had actually created a bright-line rule, the Court could have decided the issue solely on the fact that "[r]uling[] [letters] . . . 'do not carry the force of law.'"[39] The Court's discussion, however, was more nuanced.

Specifically, the Supreme Court held that procedural formality is not dispositive, and "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."[40] As a result, "*Mead* declares that *Chevron* applies where: (a) Congress has granted an agency power to imbue a statutory construction with the 'force of law' and (b) the agency used this power."[41]

Under this framework, one indicator that "Congress delegated authority to the agency . . . to make rules carrying the force of law" is that the agency has the "power to engage in adjudication or notice-and-comment rulemaking."[42] Moreover, *Mead* emphasized that for-

34 *Compare Skidmore*, 323 U.S. at 140 (giving deference to *persuasive* interpretations), *with Chevron*, 467 U.S. at 842–43 (giving deference to *reasonable* interpretations).

35 *See Skidmore*, 323 U.S. at 140.

36 *Id.*

37 *See Christensen*, 529 U.S. at 587.

38 *See* United States v. Mead Corp., 533 U.S. 218, 222–23 (2001).

39 *Id.* at 226 (quoting Mead Corp. v. United States, 185 F.3d 1304, 1307 (Fed. Cir. 1999)).

40 *Id.* at 226–27.

41 Steven Croley & Richard Murphy, *The Applicability of the* Chevron *Doctrine*—"Chevron *Step Zero*," *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 23, at 101, 107.

42 *Mead*, 533 U.S. at 226–27.

mal agency procedures, specifically those stemming from notice-and-comment rulemaking and formal adjudication, are also indicators that the interpretation was promulgated as an "exercise of [the agency's lawmaking] authority."[43] However, as Mark Seidenfeld noted, examining the procedures is actually not that helpful if force of law is the touchstone (which *Mead* ostensibly holds) because "procedures do not affect the 'force of law' of an action."[44] For example, "there is no difference in the legal impact of an agency order issued after formal adjudicatory procedures and an order issued after informal adjudicatory procedures."[45]

Nevertheless, *Mead* is clear: interpretations promulgated through notice-and-comment rulemaking, or formal adjudication, should be thought of as "safe harbors."[46] For other agency interpretations, i.e., informal interpretations, things are a little fuzzier, but *Chevron* deference is probably still possible if the interpretation passes the two-step *Mead* test.[47]

One year after *Mead*, the Supreme Court returned to the issue of informal interpretations in *Barnhart v. Walton*. In *Barnhart*, Justice Breyer, writing for the majority, explained in dictum that informal interpretations—presumably even those that do not carry the force of law—can receive *Chevron* deference.[48] The issue in *Barnhart* was whether the Social Security Agency's definition of the term "disability"—arrived at through notice-and-comment rulemaking—deserved *Chevron* deference.[49] Justice Breyer reasoned that even if the Agency had not arrived at its interpretation through notice-and-comment rulemaking (which it had) the Agency's interpretation would still receive *Chevron* deference.[50]

In reaching this conclusion, Justice Breyer opined that "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

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43 *Id.* at 227.

44 Seidenfeld, *supra* note 4, at 279.

45 *Id.*

46 *See* Croley & Murphy, *supra* note 41, at 107.

47 *See Mead*, 533 U.S. at 227–30.

48 *See* Barnhart v. Walton, 535 U.S. 212, 221 (2002) ("[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." (citation omitted)).

49 *See id.* at 220–21.

50 *See id.* at 221.

Agency has given the question over a long period of time" indicate that an interpretation deserves *Chevron* deference.[51] Essentially, then, dicta from *Barnhart* suggests a factor-based approach to assess whether *Chevron* deference applies to informal interpretations.[52] Applying those factors to the facts of *Barnhart*, Justice Breyer found *Chevron* applied because, among other things, the Agency had adopted the interpretation—the one contained in the regulation—as early as 1957 in an opinion letter.[53] The longstanding nature of the interpretation weighed heavily in favor of affording deference.[54]

To recapitulate, *Christensen* ruled that agency decisions that do not carry the force of law do not get *Chevron* deference.[55] *Mead* advises that formal procedures—notice-and-comment rulemaking and formal adjudication—are not necessary for *Chevron* deference, but will usually be sufficient because they will typically comply with the two-step test.[56] Finally, *Barnhart* suggests that informal interpretations—even those outside of *Mead*'s "safe harbors"—may receive *Chevron* deference.[57]

Unfortunately, *Barnhart* left open many lingering questions.[58] For example, should lower courts even apply the *Barnhart* test at all (or should it be ignored because the test is contained in dictum)? Moreover, *how* should it be applied? Should the factors be applied systematically, like a test? Or, are those factors merely a manifestation of a deeper rationale for affording deference (such as the comparative advantage of the agency's decisionmaking ability in a given case or the longstanding nature of the interpretation)?[59] Moreover, how exactly do *Mead* and *Barnhart* fit together? Part II of this Essay presents findings on how the lower courts have answered these questions. Before discussing those findings, however, it is necessary to first describe the methodology of this study.

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51 *Id.* at 222.

52 *See id.*

53 *See id.* at 219–21.

54 *See id.*

55 *See* Christensen v. Harris Cty., 529 U.S. 576, 580–81 (2000).

56 *See* United States v. Mead Corp., 533 U.S. 218, 226–27, 229–30 (2001).

57 *See Barnhart*, 535 U.S. at 219–21.

58 *See infra* Part II.

59 *See* Bressman, *supra* note 6, at 1488–91 (arguing *Barnhart* merely stands for the simple proposition that longstanding agency interpretations should receive *Chevron* deference); Croley & Murphy, *supra* note 41, at 108 (suggesting that perhaps the real takeaway from *Barnhart* is an emphasis on agency expertise and comparative decision-making ability).

B. Barnett and Walker's Dataset, and the Methodology of This Study

As noted above, the data presented in this Essay is based on a review of cases contained in Barnett and Walker's dataset. Barnett and Walker's dataset was compiled by running various Westlaw searches for *Chevron* and other related terms.[60] They pulled cases from all the federal circuit courts, including both the Federal Circuit and the D.C. Circuit.[61] Additionally, Barnett and Walker focused on reported cases decided between 2003 and 2013.[62] This timeframe is important because the Supreme Court had decided *Christensen*, *Mead*, and *Barnhart* by 2003.[63] Consequently, the information in this dataset is unique in relation to many other studies because it offers a complete picture of how the circuit courts have reacted to the *Mead*-puzzle cases.[64]

Barnett and Walker's final dataset contained 1,558 agency interpretations.[65] The term "agency interpretation" should not be confused with "cases," because some cases may contain multiple, distinct interpretations (the final dataset contained 1,327 cases).[66] Next, Barnett and Walker coded the interpretations for thirty-seven different factors (e.g., who won the case, which agency was being challenged, etc.).[67] One of those factors was the "agency format," i.e., what procedure the agency used to interpret the statute.[68] Barnett and Walker coded for five agency format categories: (1) formal rulemaking, (2) informal rulemaking, (3) formal adjudication, (4) informal interpretation, and (5) FERC proceedings.[69]

This Essay focuses on informal interpretations. To perform this study, the author narrowed Barnett and Walker's dataset to just the entries coded for informal interpretation (386 of the 1,558 interpretations).[70] This Essay presents the findings from a detailed review of seventy interpretations, with a focus on the *Mead*-puzzle cases and how the lower courts are tackling the issues contained therein.

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60 *See* Barnett & Walker, *supra* note 3, at 21–27.

61 *See id.* at 44.

62 *Id.* at 21–27.

63 *See id.*

64 *Cf.* Kerr, *supra* note 5 (evaluating 253 interpretations in the circuit courts that were all decided before *Christensen*, *Mead*, and *Barnhart*).

65 *See* Barnett & Walker, *supra* note 3, at 23.

66 *See id.*

67 *Id.* at 24 & n.147.

68 *Id.*

69 *See id.* at 27–28, 28 n.164.

70 *See id.* at 37.

C. *Barnett and Walker's Findings and Their Implications for Existing Models on Lower Court Interpretations of the* Mead-*Puzzle*

Barnett and Walker found that in cases where *Chevron* is applied, agencies win 77.4% of the time.[71] When no deference regime is selected, agencies win 66.4% of the time.[72] If *Skidmore* is applied, then agencies win 56.0% of the time.[73] Finally, when de novo review is applied, agencies win 38.5% of the time.[74] When the win rates are analyzed by agency format, agencies win 72.8% of the time when they interpret through informal rulemaking, 74.7% of the time when they interpret through formal adjudication, and 65.0% of the time when they interpret through informal means.[75] Additionally, *Chevron* is applied 91.9% of the time to informal rulemaking, 76.7% of the time to formal adjudication, and 44.8% of the time to informal interpretations.[76] These findings are relatively unsurprising and more or less consistent with prior studies.[77]

However, in cases where *Chevron* is applied, agencies prevail 74.4% of the time when they interpret through informal rulemaking, 81.7% of the time when they interpret through formal adjudication, and 78.6% of the time when they interpret through informal means.[78] In contrast to the overall success rates, these findings *are* surprising. Specifically, it is surprising that when *Chevron* is applied, agencies win approximately four percent more of the time under informal interpretation than informal rulemaking (i.e., notice-and-comment rulemaking).[79] One would likely expect that in the cases where *Chevron* is applied, the win rates would be *lowest* for informal interpretations. This is especially true if the data is viewed through a legal process lens. From a legal process viewpoint, "the best criterion of sound legislation is . . . whether it is the product of a sound process of enactment."[80] In other words, better processes result in more reasonable

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71 *Id.* at 29–30, 30 fig.1.

72 *Id.* at 30 fig.1.

73 *Id.*

74 *Id.*

75 *Id.* at 35–37.

76 *Id.* at 39 fig.5.

77 *See id.* at 28–39.

78 *Id.* at 41 fig.6.

79 Pierce, *supra* note 15; *see also* Barnett & Walker, *supra* note 3, at 41–43 (discussing this finding).

80 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 695 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

legislation.[81] If this thinking is applied to the agency interpretation context, formal adjudication and notice-and-comment rulemaking should result in more reasonable interpretations because they have (arguably) better processes.[82] Therefore, the informal interpretation win rates under *Chevron* should have been significantly lower than the win rates for notice-and-comment rulemaking.

Is it possible to reconcile these numbers with preexisting scholarship? Lisa Schultz Bressman has set forth perhaps the best descriptive theory to date on how circuit courts handle step zero for informal interpretations.[83] Bressman has argued that generally, circuit courts are all over the map; more specifically, courts tend to limit their focus to only *Mead* or only *Barnhart*.[84] Bressman also suggests that courts sometimes engage in *Chevron* avoidance, i.e., they avoid step zero altogether and either (1) analyze under *Skidmore*, or (2) say that the agency interpretation would prevail under both *Skidmore* and *Chevron*.[85]

In a similar vein, Adrian Vermeule has documented another type of *Chevron* avoidance in the circuit courts.[86] According to Vermeule, some courts avoid *Chevron* by finding that the statute is clear.[87] Thus, these courts issue what would be a step one win for the agency, but rule for the agency without ever actually applying *Chevron*.[88] However, *Chevron* avoidance does not—at least on its face—explain why agencies are successful at such high rates when *Chevron* deference is applied to informal interpretations.

By contrast, Judge Posner's conception of *Barnhart* may explain the high win rates for informal interpretations under *Chevron*. Posner has argued that *Barnhart* merged *Chevron* and *Skidmore* into a single test.[89] According to Posner, *Barnhart*'s factors represent an infusion of

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81 *See id.*

82 *See id.*

83 *See* Bressman, *supra* note 6.

84 *See id.* at 1445, 1459.

85 *See id.* at 1464–65.

86 Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1128–30 (2009).

87 *See id.* at 1128–29.

88 *See id.* at 1128–30.

89 *See* Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002) (suggesting a "merger"); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 219 (2006) (discussing Posner's endorsement of a single test). Others have noted the similarity between *Barnhart*'s factors and *Skidmore*. *See, e.g.*, Barnett & Walker, *supra* note 3, at 14 ("The [*Barnhart*] Court then referred to other considerations, reminiscent of *Skidmore*'s.").

Skidmore into the *Chevron* test at step zero.[90] Because *Skidmore* is less deferential than *Chevron*, the agency would first have to pass the more difficult test (under *Skidmore*) at step zero before the agency can even reach *Chevron* step one. It would be quite anomalous if an interpretation passed *Skidmore* at step zero and then lost at either *Chevron* step one or step two. Consequently, if Judge Posner is correct, and if many of the cases in Barnett and Walker's dataset are actually applying *Barnhart* at step zero, then it is not surprising that the informal interpretation cases are faring better than their notice-and-comment counterparts, because the latter did not have to first pass *Skidmore*. Part II will show, however, that *Chevron* avoidance—despite its facial lack of relevance—is causing this four percent difference.

II. How Circuit Courts Are Solving the *Mead*-Puzzle

Much of what Lisa Schultz Bressman observed ten years ago about the federal circuits' treatment of the *Mead*-puzzle still holds true today. Her general claim that *Mead* has caused plenty of confusion is clearly evident.[91] However, courts have gone beyond what she (and Vermeule) documented and have found more ways to engage in *Chevron* avoidance.

A. Chevron *Avoidance and Its Impact on Agency Win Rates Under* Chevron

This Essay defines *Chevron* avoidance broadly. For purposes of this Essay, *Chevron* avoidance is any measure a court takes to avoid step zero. Consequently, even cases where *Chevron* ultimately applies are viewed as *Chevron* avoidance *if* the court avoided step zero when it was arguably in question. In fact, this type of *Chevron* avoidance occurs frequently in informal adjudication cases. In these cases, it is common to find that lower courts neglect the step zero analysis and simply hold that *Chevron* just applies.[92]

However, courts also engage in this type of *Chevron* avoidance in other informal interpretations (e.g., policy guidelines and opinion letters). In *Cohen v. JP Morgan Chase & Co.*,[93] the Second Circuit addressed the question of whether a policy statement issued by the

90 *See Krzalic*, 314 F.3d at 879.

91 *See* Bressman, *supra* note 6, at 1443–48.

92 *See, e.g.*, Alvin Lou Media, Inc. v. FCC, 571 F.3d 1, 8–9 (D.C. Cir. 2009); Aerolineas Argentinas S.A. v. U.S. Dep't of Transp., 415 F.3d 1, 6–7 (D.C. Cir. 2005).

93 498 F.3d 111 (2d Cir. 2007).

Department of Housing and Urban Development ("HUD") deserved *Chevron* deference.[94] Specifically, HUD had interpreted section 8 of the Real Estate Settlement Procedures Act[95] to preclude "unearned fees" in three instances.[96] The opinion completely bypasses step zero, proceeds straight to the *Chevron* two-step test, and upholds the Agency's interpretation as reasonable at *Chevron* step two.[97]

Another creative way courts avoid the step zero analysis is by holding that an agency interpretation is *so unreasonable* that it would fail under *Chevron* (and accordingly under all the other deference regimes), so it is irrelevant whether *Chevron* applies. In *California Department of Social Services v. Thompson*,[98] the Secretary of the Department of Health and Human Services interpreted a provision of the Social Security Act[99] to mean that children in the foster system are eligible for federal aid.[100] The Secretary relied in part on both a regulation and also on an opinion letter.[101] The Ninth Circuit noted at the outset that, after *Barnhart* and *Mead*, whether *Chevron* applies to an interpretation (such as the one at issue) has "become a complex task."[102] The court then held that "[b]ecause we ultimately find that the Secretary's interpretation cannot withstand scrutiny under even the high level of deference afforded by *Chevron*, we need not wade further into the *Mead*/*Barnhart* quagmire."[103]

Similarly, in *Cook v. FDA*,[104] the D.C. Circuit avoided addressing whether the FDA's policy statement deserved *Chevron* deference.[105] In *Cook*, the central problem was whether the FDA's refusal to regulate thiopental (an essential drug in lethal injection mixtures) was a violation of the FDA's statutory mandate to regulate the importation of certain drugs and substances.[106] The plaintiffs argued that the statutory term "shall" meant "must," i.e., the FDA *had* to regulate drugs

94 *See id.* at 114, 120–21.

95 Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601–2617 (2012).

96 *See Cohen*, 498 F.3d at 114.

97 *See id.* at 120–26.

98 321 F.3d 835 (9th Cir. 2003).

99 Social Security Act of 1935, 42 U.S.C. §§ 301–1397mm (2012).

100 *See Thompson*, 321 F.3d at 838–39.

101 *See id.* at 847–48.

102 *Id.* at 848.

103 *Id.*

104 733 F.3d 1 (D.C. Cir. 2013).

105 *See id.* at 5. Notably, in this case, the court was also dealing with another tricky *Chevron* question: whether *Chevron* applies to matters which the agency claims are given to its discretionary authority. *See id.*

106 *See id.* at 4. The FDA policy statement stated that the FDA "'neither approves nor reviews [thiopental] for use in lethal injections.' Rather, in 'defer[ence] to law enforcement'

like thiopental.[107] The court agreed with the plaintiffs' interpretation of the statute.[108] As a result, the court dodged step zero because the disputed statute "unambiguously impose[d] mandatory duties upon the FDA," and consequently, it did not matter whether *Chevron* applied.[109]

Additionally, courts continue to employ the types of *Chevron* avoidance noted by Bressman and Vermuele.[110] In *City of Arcadia v. EPA*,[111] the Ninth Circuit considered whether the EPA acted within its statutory authority when it approved the State of California's "total maximum daily load" plan—a measure of how much trash the state can dump into the Los Angeles River per day.[112] The court did not discuss whether *Chevron* applied.[113] Rather, the Ninth Circuit simply found that the statutory scheme clearly gave this power to the EPA.[114] Accordingly, the EPA's interpretation of the statute was consistent with the clear meaning of the statute.[115]

Further, in *Ammex, Inc. v. United States*,[116] the Sixth Circuit considered the IRS's position that "delivery of fuel into the fuel supply tank of a motor vehicle is use of that fuel, and that the subsequent movement of the vehicle into a foreign country *does not constitute exportation* of that fuel for purposes of motor fuel excise taxes" was a reasonable interpretation of 26 U.S.C. § 4221(a), which exempted from taxation goods sold for the purpose of export.[117] Ammex was required to pay taxes under the IRS policy and argued that the policy was an incorrect interpretation of "export" in the statute.[118] The Sixth

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agencies, henceforth it would exercise its 'enforcement discretion not to review these shipments and allow processing through [Customs'] automated system for importation.'" *Id.*

107 *See id.* at 7–8.

108 *See id.*

109 *Id.* at 5.

110 Bressman, *supra* note 6, at 1464–65; Vermeule, *supra* note 86, at 1128–30; *see, e.g.*, Int'l Internship Program v. Napolitano, 718 F.3d 986, 987 n.1 (D.C. Cir. 2013) ("Because we conclude that the agency's interpretation of the statute is the better reading, we need not determine whether the agency's interpretation is entitled to Chevron deference.").

111 411 F.3d 1103 (9th Cir. 2005).

112 *See City of Arcadia*, 411 F.3d at 1105–06.

113 *See id.*

114 *See id.*

115 *See id.* Dicta in the opinion indicates the Ninth Circuit believed that *Chevron* would have applied if the statute was unclear. *Id.* at 1106–07 ("Even if the language of the statute were not clear, we would uphold as reasonable the EPA's interpretation of the Clean Water Act to require approval or disapproval of California's [total daily maximum load].").

116 367 F.3d 530 (6th Cir. 2004).

117 *Id.* at 535 (emphasis added).

118 *See id.* at 532–33.

Circuit dodged the issue of whether *Chevron* applied to the IRS's interpretation, holding that even if *Skidmore* applied, the IRS's interpretation still had the "power to persuade."[119] According to the court, federal tax law is complex, the IRS is a "relative expert[]," and this was a "longstanding and sensible interpretation of the statutory scheme."[120] Consequently, the IRS's interpretation deserved deference—even under *Skidmore*—and the Sixth Circuit did not need to decide whether *Chevron* applied.[121]

As these examples illustrate, *Chevron* avoidance is incredibly pervasive. In fact, *Chevron* avoidance is now the norm for circuit courts facing an informal interpretation. Nearly half of the cases surveyed engaged in one of the methods of *Chevron* avoidance.[122] This claim is substantiated by the number of times the step zero cases (*Christensen*, *Mead*, and *Barnhart*) are cited in the cases coded for informal interpretation in Barnett and Walker's dataset. As Table 1 depicts, *Mead* was cited in only 145 out of the 340 circuit court cases surveyed (42.6%). *Christensen* was cited in only 92 of the 340 (27.1%) cases. Lastly, only 31 of the 340 cases (9.1%) cited *Barnhart*. In contrast to the step zero cases, *Chevron* was cited in 294 of the 340 cases (86.5%).[123]

119 *See id.* at 535.

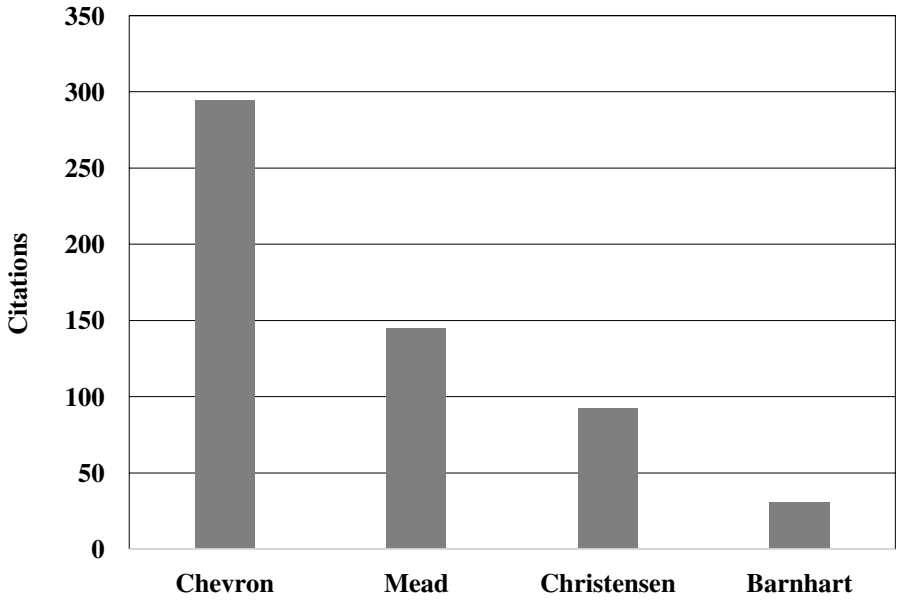
120 *Id.*

121 *See id.*

122 *See infra* Table 1.

123 The data in Table 1 was compiled by running all of the case citations coded for informal interpretation through the "BriefCheck" feature in LexisNexis. The search results were narrowed to retrieve only the "Table of Authorities" for each case citation. Table 1 was compiled based on how frequently each case was referenced in the "Table of Authorities" documents.

TABLE 1. CIRCUIT COURT CITATIONS TO *CHEVRON*, *MEAD*, *CHRISTENSEN*, AND *BARNHART* (N=340)

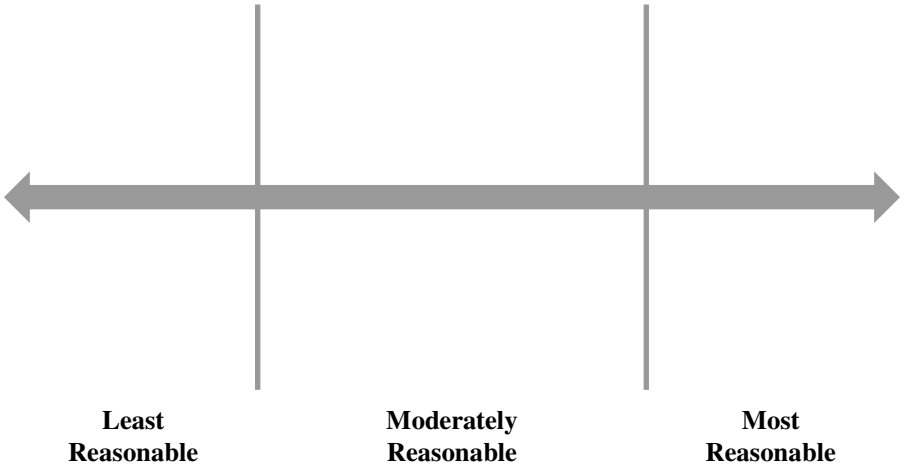


Two important takeaways emerge from this data. First, full step zero analysis is rare; *Chevron* avoidance is the norm. Second, *Barnhart*'s descriptive relevance is minimal. As discussed in Part I, *Barnhart* had the potential to be the central case for informal interpretations.[124] Consequently, *Barnhart*'s low cite rate of 9.1% is rather unexpected.[125] But this low rate is even more surprising when considered in light of the fact that all the other *Mead*-puzzle cases were cited more frequently by the circuit courts. Because *Barnhart* is rarely cited, it likely does not explain the win rate differentiation Barnett and Walker documented. This Essay posits that *Chevron* avoidance, not *Barnhart*, is the primary explanation for the four percent difference. To conceptualize how *Chevron* avoidance has created this anomaly, consider Figure 1, below.

124 *See supra* Part I.

125 *See supra* Part I.

FIGURE 1. MARGINAL VERSUS MODERATE INTERPRETATIONS



In Figure 1, the "Least Reasonable" and "Most Reasonable" interpretations are located at the margins. The "Least Reasonable" interpretations are remote, far-fetched readings of the statute; the "Most Reasonable" interpretations are modest, conservative conceptions of the statute. Over time, courts employing *Chevron* avoidance will dispense with these interpretations—as the most modest and outlandish interpretations—outside of *Chevron* at a proportionally higher rate than the moderately reasonable interpretations.

To illustrate, consider a couple of examples that would likely fall in the "Least Reasonable" category. In *Cook*, the FDA's policy statement contradicted the plain meaning of the statute.[126] Because this interpretation was clearly unreasonable, it was easy to resolve outside of *Chevron*. Indeed, this is exactly what the D.C. Circuit did when it held that it did not matter whether *Chevron* applied because the statute "unambiguously imposes mandatory duties upon the FDA."[127] Additionally, consider *Thompson*, where the Secretary's interpretation was so unreasonable that it could not "withstand scrutiny under even the high level of deference afforded by *Chevron*."[128] If the interpretation in *Thompson* was so extreme that it would fail under *Chevron*, then the court could (and eventually, did) resolve the case without "wad[ing] further into the *Mead*/*Barnhart* quagmire."[129]

Consider also the "Most Reasonable" interpretations. In *City of Arcadia*, the Ninth Circuit found that the interpretation was consistent

126 *See* Cook v. FDA, 733 F.3d 1, 11 (D.C. Cir. 2013).

127 *Id.* at 5.

128 Cal. Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 848 (9th Cir. 2003).

129 *Id.*

with the clear meaning of the statute.[130] Similarly, in *Ammex* the Sixth Circuit found that the interpretation was so reasonable that it would survive under *Chevron* or *Skidmore*.[131] Both cases were prime candidates for *Chevron* avoidance because they could easily be resolved outside the *Chevron* framework.

If the interpretation in *Ammex* had been slightly *less* reasonable, then it would have no longer been subject to *Chevron* avoidance, because (presumably) the court could not have found that the interpretation would also pass under *Skidmore*. Similarly, if the interpretation in *Thompson* had been slightly *more* reasonable, then it too would not have been a candidate for *Chevron* avoidance because the court could not have held that the interpretation would fail under *Chevron*. Thus, "Moderately Reasonable" interpretations are harder to resolve through the leading *Chevron* avoidance techniques. Consequently, where courts are using the *Chevron* avoidance techniques described in this Essay, proportionally more of the "Moderately Reasonable" cases will make it to the *Chevron* two-step analysis than their marginal counterparts.

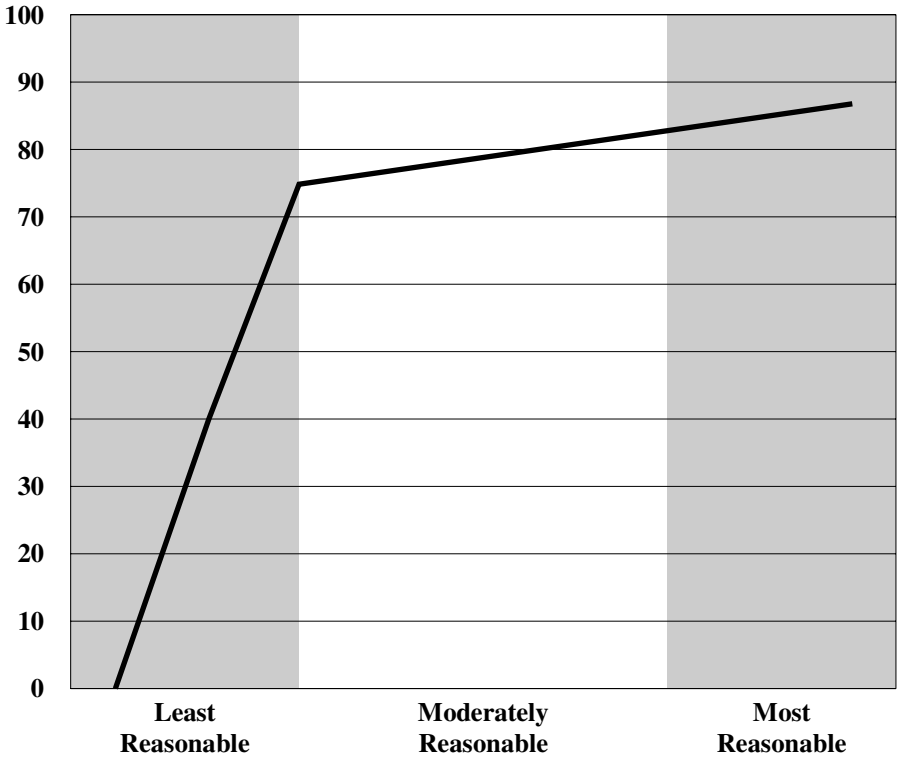
In other words, *Chevron* avoidance will likely weed out interpretations at the margins. This has important implications for agency win rates under *Chevron*. Because *Chevron* is quite deferential to agency interpretations,[132] the only cases that have a real chance of losing under *Chevron* are those at the very left side of Figure 1 (the "Least Reasonable" interpretations)—all other interpretations will probably prevail if *Chevron* is applied. Figure 2 depicts the likelihood of an interpretation prevailing under *Chevron* in relation to the reasonableness of the interpretation.

130 *See* City of Arcadia v. EPA, 411 F.3d 1103, 1105–07 (9th Cir. 2005).

131 *See* Ammex, Inc. v. United States, 367 F.3d 530, 535 (6th Cir. 2004).

132 *See supra* Section I.C.

FIGURE 2. THE RELATIONSHIP BETWEEN *CHEVRON* WIN RATES AND THE REASONABLENESS OF THE AGENCY INTERPRETATION INVOLVED



The gray areas in Figure 2 display where *Chevron* avoidance will have the most significant impact. This explains why Barnett and Walker found that in cases where *Chevron* is applied, agencies win at slightly higher rates through informal interpretation than notice-and-comment rulemaking. *Chevron* avoidance likely occurs less in the *Mead* safe harbor cases (i.e., notice-and-comment rulemaking and formal adjudication). Consequently, in those cases, the "Least Reasonable" interpretations reach the *Chevron* two-step test. In contrast, *Chevron* avoidance artificially weeds out many of the "losing" informal interpretation cases. The result is that win rates for informal interpretations are four percent higher than notice-and-comment rulemaking.

Perhaps, however, this explanation proves too much. If *Chevron* avoidance really was "weeding out" the losing cases before the courts apply *Chevron*, then why are agencies not winning at even higher rates under informal interpretation? There are two explanations for this. First, *Chevron* avoidance is not applied in every informal inter-

pretation case.[133] Consequently, some of the "losing" informal interpretation cases are still making it to *Chevron*. Second, as noted in Part I, the four percent disparity is significant if the data is considered from a "legal process" standpoint.

B. Mead *Only,* Barnhart *Only, and Both*

Unfortunately, even in cases where courts do perform step zero, confusion still abounds. As Lisa Bressman documented in *How* Mead *Has Muddled Judicial Review of Agency Action*, courts often focus on just *Mead* or just *Barnhart*.[134] In other words, courts analyze the interpretation under one of the two tests and completely ignore the other.[135] There are, however, at least some courts that are attempting to engage in a full step zero analysis, i.e., they are considering both *Mead* and *Barnhart*.

In *Fournier v. Sebelius*,[136] the Ninth Circuit considered whether the Secretary of the Department of Health and Human Services' informal interpretation (released in a policy manual) deserved *Chevron* deference.[137] The Secretary had interpreted the Social Security Act to deny dental coverage to the appellants.[138] First, the court addressed whether the interpretation passed the two-step *Mead* test.[139] After finding that Congress had implicitly delegated lawmaking authority to the Secretary (through the ambiguous statute), the court next considered the second step under *Mead*: whether the interpretation had been promulgated as an exercise of that authority.[140] Interestingly, the Ninth Circuit read *Barnhart* as providing the proper test for determining whether an informal interpretation satisfies the second step of the *Mead* test.[141] Applying the *Barnhart* factors, the court concluded "the Secretary's interpretation of § 1395y(a)(12) warrants *Chevron* defer-

133 *See, e.g.*, Fournier v. Sebelius, 718 F.3d 1110, 1119–22 (9th Cir. 2013) (thoroughly discussing, in a significant portion of the opinion, the Federal Reporter to work through step zero analysis).

134 *See* Bressman, *supra* note 6, at 1458–59.

135 *See id.*; *see, e.g.*, Crawfish Processors All. v. United States, 477 F.3d 1375, 1380 (Fed. Cir. 2007) (focusing only on *Mead*); Mylan Labs., Inc. v. Thompson, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004) (focusing mostly on *Barnhart*).

136 718 F.3d 1110 (9th Cir. 2013).

137 *See id.* at 1117–18.

138 *See id.*

139 *See id.* at 1119–20.

140 *See id.*

141 *See id.* at 1120.

ence."[142] The court then ruled for the Agency at step two of *Chevron*.[143]

Notably, *Fournier* is an excellent example of Judge Posner's view that *Barnhart* infused *Skidmore* into *Chevron* at step zero.[144] *Fournier*'s entire step zero analysis spanned over four pages of the opinion.[145] By contrast, *Fournier*'s entire *Chevron* analysis totaled only two paragraphs.[146] Notwithstanding the superficial nature of the metric, this length disparity is exactly what one would expect to see if *Skidmore* (the more difficult test) was functioning as the step zero inquiry—that is, the bulk of the court's analysis would be frontloaded at step zero. Moreover, the *Barnhart* analysis in *Fournier* does resemble *Skidmore*'s "power to persuade" analysis.[147]

Regardless, the crux of Part II is that circuit courts are so confused about how to apply the *Mead*-puzzle cases that *Chevron* avoidance is now the norm. Confusion in the law is never desirable. But is *Chevron* avoidance itself really that harmful? Part III addresses this very question.

III. To Eliminate the Confusion Created by the *Mead*-Puzzle, *Chevron* Should Be Limited to Legislative Rulemaking and Formal Adjudication

A. Chevron *Avoidance Has Created Serious Problems for Administrative Law*

Chevron avoidance is undesirable because it creates harmful uncertainty, undermines one of *Chevron*'s primary purposes, and arguably violates a constitutional norm. As Bressman argued, *Chevron* avoidance creates uncertainty for the agency because the long-term implications of the decision are unclear.[148] The implications are unclear because in cases where *Chevron* applies, the agency "retains the ability to change its position in the future" (i.e., the agency, *not the court*, has discretion).[149] Whereas if *Skidmore* applies, the court retains "interpretive control."[150] Consequently, if a court decides to uphold an interpretation because it would pass review under either

142 *Id.* at 1122.

143 *See id.* at 1122–23.

144 *See supra* Section I.C.

145 *See Fournier*, 718 F.3d at 1119–23.

146 *See id.* at 1122–23.

147 *Compare id.* at 1119–23, *with* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

148 *See* Bressman, *supra* note 6, at 1466–69.

149 *Id.* at 1466.

150 *Id.* at 1467.

Chevron or *Skidmore*, the agency is left wondering how much flexibility it has in the future (i.e., whether the agency or the court has interpretive control going forward).[151]

Cass Sunstein responded directly to Bressman's argument, and suggested that the "uncertainty [generated by *Chevron* avoidance] is unlikely to create serious problems" because ultimately "*Skidmore* [still] permits agencies to make changes so long as they have good reasons for doing so."[152] Despite being correct in a technical sense (the agency *can* still change its position), Sunstein's response is unpersuasive. Sunstein's response ignores the crucial distinction between *Chevron* and *Skidmore*: *Chevron* gives the agency interpretive control, whereas *Skidmore* gives the court interpretive control.[153] In other words, the important issue that Bressman highlighted was not whether the agency can change its position at all, but rather how *easily* the agency can change its position.[154] It is more difficult for an agency to change its position when a court upholds an interpretation as persuasive under *Skidmore* than when a court upholds an interpretation as reasonable under *Chevron*.[155] If a court concludes that an interpretation is both reasonable and persuasive (as in some types of *Chevron* avoidance), the agency is left wondering what it must do to successfully change its position in the future.[156]

Additionally, *Chevron* avoidance undermines a primary public policy that supports *Chevron*: removing discretion from unelected federal judges and giving it to the politically accountable, elected branches.[157] Under *Chevron*, the agency is the primary interpreter of a statute it administers.[158] In contrast, *Chevron* avoidance puts the court in the driver's seat because it creates an opportunity for the court to place the agency in a position of uncertainty.[159] Essentially, *Chevron* avoidance allows the courts to tie the agency's hands.[160]

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151 *See id.* at 1466–69.

152 Sunstein, *supra* note 89, at 229 n.184.

153 *See* Bressman, *supra* note 6, at 1466–69.

154 *See id.*

155 *See id.*

156 *See id.*

157 *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 861 (2001) ("One reason for preferring agency interpretations, which is alluded to by *Chevron* itself, is that agencies are more politically accountable than are courts." (citation omitted)).

158 *See* Bressman, *supra* note 6, at 1466–69.

159 *Cf. id.* (arguing that *Chevron* avoidance creates uncertainty for the agency).

160 *Cf. id.* (same).

This is particularly troubling in light of the fact that that *Chevron* avoidance targets the most reasonable interpretations.[161] Because the "most reasonable" interpretations are, by definition, closest to the meaning of the statute, they are also the clearest examples of instances where the agency is obeying a command given by the elected members of Congress. Therefore, the rationale of political accountability is strongest in these cases.

However, not only is *Chevron* avoidance undesirable from a policy perspective, it may also violate the structural requirements of the United States Constitution. Mark Seidenfeld persuasively argued that Article III imposes a "soft constitutional norm" that requires courts to exercise judicial self-restraint because policymaking functions are constitutionally allocated to the elected branches (i.e., the executive and legislative branches).[162] Therefore, when a court shirks its duty to decide the step zero issue by resorting to *Chevron* avoidance, and ties the agency's hands in the process, the court is arguably violating the separation of powers.[163]

In sum, *Chevron* avoidance is undesirable. But even if *Chevron* avoidance was "unlikely to create serious problems,"[164] Part II demonstrated that the confusion created by the *Mead*-puzzle has become perilously widespread. This confusion was depicted by the vast array of approaches lower courts have taken in order to solve the *Mead*-puzzle. Indeed, the substantial confusion is sufficient reason to change the law.

B. Courts Should Narrowly Read Mead *and Stop Following* Barnhart

The discord on display in the lower courts—including *Chevron* avoidance—is the result of the complicated, perplexing, and even conflicting *Mead*-puzzle cases.[165] In order to resolve this confusion, the test needs to be both simplified and clarified. One option that would accomplish both of these goals is to adopt Justice Scalia's "rule based" conception of *Chevron*.[166]

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161 *See supra* Part II; *cf.* Merrill & Hickman, *supra* note 157, at 861 (discussing the *Chevron* rationale in that agencies are more politically accountable than the courts).

162 *See* Seidenfeld, *supra* note 4, at 288–94.

163 *See id.* (arguing that the structure of the Constitution requires courts to accord mandatory deference—in the form of *Chevron*—to certain agency interpretations).

164 Sunstein, *supra* note 89, at 229 n.184.

165 *See supra* Part II and accompanying footnotes.

166 *See* Bressman, *supra* note 6, at 1478–81 (highlighting this advantage of Scalia's position).

Scalia believed that *Chevron* created an "across-the-board presumption" that statutory ambiguities mean "Congress intended agency discretion."[167] Under this view, any interpretation that "represents the official position of the agency [] must be accepted by the courts if it is reasonable."[168] In other words, deference should be given to all "authoritative" positions of the agency.[169] Moreover, Scalia viewed deference as an-all-or-nothing proposition—he would have preferred to eliminate *Skidmore* deference.[170] While Scalia's approach is both clearer and simpler than the *Mead*-puzzle, it has its own pitfalls. For one, *Skidmore* provides important incentives for agencies to be transparent, thoughtful, and reasonable when they interpret statutes through informal interpretations.[171] Discarding *Skidmore* may have the unintended, unwanted side-effect of decreasing visibility and weakening the agency's accountability for many informal interpretations.[172] Additionally, as Bressman noted, Scalia's approach also has constitutional problems because "'[a]uthoritative' positions have never been considered sufficiently law-like to comport with our constitutional structure."[173]

In contrast to Justice Scalia's sweeping conception of *Chevron*, some scholars have called for limiting *Chevron* to formal agency procedures, i.e., legislative rulemaking and formal adjudication. For example, Thomas Merrill and Kristin Hickman have advocated for the "force of law" approach.[174] Under this theory, "force of law" is the touchstone, and the key questions are (1) whether the agency has the statutory power to act with the force of law, and (2) whether the agency truly acted with the force of law.[175] In other words, agency actions that do not actually carry the force of law should not receive

167 United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting). Notably, Justice Scalia's views on *Chevron* probably changed later in his career (some of his decisions and writings towards the end of his career indicate that he stopped supporting an "across-the-board" application of *Chevron*). *See* Adam White, *Scalia and* Chevron*: Not Drawing Lines, But Resolving Tension*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 23, 2016), http://yalejreg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white/ (discussing Scalia's changing views on *Chevron*).

168 *Mead*, 533 U.S. at 257.

169 *See* Bressman, *supra* note 6, at 1448–49.

170 *See id.*

171 *See* Manning, *supra* note 21, at 686–90 (arguing for *Skidmore* deference to replace *Auer*, but also discussing the incentives *Skidmore* provides to agencies).

172 *See* Manning, *supra* note 21, at 691.

173 Bressman, *supra* note 6, at 1449.

174 *See* Merrill & Hickman, *supra* note 157, at 875–76.

175 *See id.* at 882, 884.

Chevron deference.[176] For an action to carry the force of law, it must be binding on members of the public.[177] Additionally, the determination of whether the agency had the statutory power to act with the force of law is not a complicated inquiry into legislative intent, but rather a simple question of whether "Congress [gave] an agency the power either to promulgate legally binding rules or to render legally binding adjudications."[178] But while Merrill and Hickman's solution ultimately focuses on the force of law, it only grants *Chevron* deference to legislative rulemaking and formal adjudication due to important public participation concerns.[179]

Similarly, Nina Mendelson has argued that agency actions that do not go through formal procedures have a negative effect on the indirect beneficiaries of agency regulation (i.e., "groups [that] benefit from the government's regulation of others") because indirect beneficiaries are often unaware of informal agency actions, and are often denied participation and petition rights when agencies interpret statutes through informal means.[180] Formal procedures—legislative rulemaking and formal adjudication—solve these problems by providing greater transparency for indirect beneficiaries and automatic participation and petition rights.[181]

This Essay proposes that federal courts should limit *Chevron* to formal agency procedures, and give *Chevron* deference to legislative rulemaking and formal adjudication so long as the agency had the statutory power to act with the force of law.[182] This Essay builds upon Merrill and Hickman's and Mendelson's persuasive reasons for limiting *Chevron* to formal procedures by adding additional support: limiting *Chevron* to these procedures would solve the problems caused by the *Mead*-puzzle because it is both manageable and clear.

The first requirement is easy to administer. A court can determine whether an agency performed legislative rulemaking or formal adjudication by comparing the agency's procedures to the legal requirements.[183] Similarly, the second requirement is also simple to administer. Whether the agency had the statutory power to act with the

176 *See id.* at 904.

177 *See id.* at 905.

178 *Id.* at 882.

179 *See id.* at 884–85.

180 *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 414–16 (2007).

181 *Cf. id.* 420–33.

182 *See* Merrill & Hickman, *supra* note 157, at 883–84.

183 *See, e.g.*, 5 U.S.C. § 557 (2012) (listing the legal requirements for formal rulemaking).

force of law can be determined by reviewing the agency's statutory mandate to see if Congress gave that agency the power to interpret through legislative rulemaking or binding adjudication.[184] This solution will eliminate much of the *Mead*-puzzle confusion because it is straightforward and clear.

Although critics may consider this return to formalism an extreme step, it is a necessary one. Ten years ago when Bressman documented that *Mead* and *Barnhart* were beginning to cause confusion in the lower courts, she noted that a return to formalism would bring clarity to the law.[185] However, while Bressman proposed a solution that moved towards formalism, her solution did not embrace it completely.[186] Specifically, Bressman argued that the lower courts could resolve the confusion by narrowing both *Mead* and *Barnhart*.[187] In her view, *Mead* and *Barnhart* collectively stand for "minimum lawmaking values."[188] Thus, both *Mead* and *Barnhart* offer *Chevron* deference to legislative rulemaking, formal adjudication, *and* longstanding informal interpretations.[189]

Bressman's reading of these cases is undoubtedly clearer, and consequently more desirable, than the disarray currently on display in the circuit courts. However, a solution that moves towards formalism without embracing it completely is unlikely to offer the clarity needed to overcome *Chevron* avoidance. Lingering functionalist exceptions, such as Bressman's exception for longstanding informal interpretations, are part of the problem.[190] When functionalist uncertainty is present at step zero, *Chevron* avoidance is an appealing, simple—in many cases effortless—escape taken advantage of by the circuit courts. Therefore, in the context of judicial review of agency interpre-

184 *See generally* Merrill & Hickman, *supra* note 157, at 890 (discussing the method to determine whether an agency has the statutory power to act with the force of law).

185 *See* Bressman, *supra* note 6, at 1486–88.

186 *See id.*

187 *See id.* at 1488.

188 *Id.* at 1489.

189 According to Bressman, the opinion letter in *Barnhart* was entitled to *Chevron* deference because it was a longstanding interpretation. *See id.* Consequently, *Barnhart* stands for the proposition that longstanding agency interpretations can receive *Chevron* deference even if they are not the product of formal procedures. *See id.* Bressman persuasively expounded on her views of *Barnhart* a couple years after in *Procedures as Politics in Administrative Law*. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1776–77 (2007) (arguing for the "information-oversight" model of *Chevron*).

190 *See supra* Part II.

tations, courts need a bright-line rule to remove the uncertainty that makes *Chevron* avoidance attractive in the first place.[191]

Ideally, the Supreme Court should overrule *Mead* in order to accomplish this move to formalism. In the meantime, however, circuit courts should begin taking independent steps. Specifically, courts should: (1) abandon *Barnhart* (which, as noted above, they have already started to do),[192] and (2) narrowly interpret *Mead*. Importantly, it is completely within the courts' power to discontinue *Barnhart*. Although *Barnhart* exists as Supreme Court precedent, Breyer's four-factor test for informal interpretations was not part of the holding.[193] Thus, because the test was merely contained in dictum, lower courts are not required to follow it.[194]

Additionally, courts should narrowly interpret *Mead* as emphasizing the requirement—already established in *Christensen*—that agency actions must carry the *force of law* to receive *Chevron* deference.[195] Applying *Chevron* deference to legislative rulemaking and formal adjudication is consistent with this command because these procedures carry the force of law.[196] That said, limiting *Chevron* to *only* formal interpretations is in obvious tension with *Mead*.[197] *Mead* clearly stated that "the want of that procedure here does not decide the case."[198] However, that statement—and similar statements within the opinion—were contained in dicta. *Mead* ultimately held that the opinion letter did not deserve *Chevron* deference because it was unclear whether Congress had given the agency the power to act with the force of law, and the opinion letter itself did not carry the force of law.[199] Further, the Court's commentary on "the want of . . . procedure[s]"[200] was unnecessary to adjudicate the dispute because the force of law issues inherently decided the case.[201] Consequently, lower

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191 *See supra* Part II, Section III.A.

192 *See supra* Section II.A.

193 *See supra* Section I.A. (discussing *Barnhart*); *see also* Judith M. Stinson, *Teaching the Holding/Dictum Distinction*, 19 PERSP.: TEACHING LEGAL RES. & WRITING 192, 192 (2011) (discussing the difference between holding and dictum).

194 *See* Stinson, *supra* note 193, at 192.

195 *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); Christensen v. Harris Cty., 529 U.S. 576, 587 (2000).

196 *See generally* Merrill & Hickman, *supra* note 157, at 921.

197 *See Mead*, 533 U.S. at 231.

198 *Id.*

199 *See id.* at 231–33.

200 *Id.* at 231.

201 *See id.* at 231–33; Stinson, *supra* note 193, at 192 ("[M]ost typically 'holding' is defined as that portion of a legal opinion that is 'necessary to the result.'").

courts are not bound by those statements.[202] As a result, they can begin moving towards limiting *Chevron* to legislative rulemaking and formal adjudication.[203]

Under this view of *Chevron*, informal interpretations would receive *Skidmore* deference.[204] In a sense, giving Skidmore deference to informal interpretations sustains *Barnhart*. If *Barnhart* infused *Skidmore* into step zero, then all informal interpretations should receive *Skidmore* deference by undergoing *Skidmore* at step zero. However, not only was this formulation redundant, it was also very difficult and costly for the courts to apply.[205] By contrast, this solution removes the analytical redundancy by removing *Barnhart*, while keeping the proper substantive test in place.

Finally, this solution avoids the incentive-based problems in Justice Scalia's conception of *Chevron*.[206] In contrast to Scalia's view, the proposed approach suitably allocates agency incentives. By limiting *Chevron* deference to legislative rulemaking and formal adjudication, this solution provides a needed incentive for agencies to undergo these procedures.[207] Both legislative rulemaking and formal adjudication are incredibly time consuming.[208] However, they are also the most transparent agency processes, and they serve an important role in legitimizing agency actions.[209] It is therefore vital that *Chevron*—the most deferential system—be left as a reward for agencies that engage

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202 *See* Stinson, *supra* note 193, at 192.

203 *See* Merrill & Hickman, *supra* note 157, at 921.

204 Many Supreme Court cases have suggested that informal interpretations deserve *Skidmore* deference. *See, e.g.*, Christensen v. Harris Cty., 529 U.S. 576, 587 (2000). Likewise, several authors have also argued that informal interpretations should receive *Skidmore* deference. *See, e.g.*, Bradley Lipton, Note, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 YALE L.J. 2096, 2118 (2010).

205 *See supra* Part II; *see also* Croley & Murphy, *supra* note 41, at 108 (noting that *Barnhart* is "indeterminate and thus costly to apply").

206 *See supra* Section III.B.

207 *See* Merrill & Hickman, *supra* note 157, at 886. Additionally, Bressman has argued that, notwithstanding some of the confusing language in the opinion, this was the Supreme Court's goal in *Mead* (to increase access to information by suggesting that formal procedures should be "safe harbors"). *See* Bressman, *supra* note 189, at 1791–95.

208 Some have even argued that formal procedures are so time consuming that rulemaking has become ossified. *See* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995) ("For more than a decade, administrative law scholars have complained that the agency rulemaking process has become ossified."). *But see* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1420–22 (2012) (arguing that empirical data does not support the sweeping claims of rulemaking ossification).

209 *See* Bressman, *supra* note 6, at 1486–88 (presenting advantages of formal procedures).

in these "extra" processes.[210] Under this approach, agencies would be incentivized to use sound reasoning, remain thoughtful, and maintain transparency during informal interpretations because *Skidmore* is still quite deferential to agencies.[211]

Conclusion

Mead and *Barnhart* have created so much confusion that the lower courts now frequently engage in *Chevron* avoidance. In fact, *Chevron* avoidance has become so prevalent that many marginal informal interpretations fail to ever reach *Chevron* step one. As a result, agency informal interpretation win rates in cases where *Chevron* is applied are artificially increased. Moreover, even in cases where courts do engage in step zero, there is still substantial confusion. The obvious takeaway from this chaos is the need for clarity. Towards that end, this Essay proposes limiting *Chevron* to legislative rulemaking and formal adjudication. This promotes the benefits already noted by other scholars who have also advocated for it, while also solving the problems presented in this Essay. This solution also has the additional benefit of incentivizing desirable agency procedures. Circuit courts should begin immediately implementing this solution by abandoning *Barnhart* and narrowly interpreting *Mead*.

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210 *See generally* Barnett & Walker, *supra* note 3 (documenting that agencies have the greatest success under *Chevron*).

211 *See* Manning, *supra* note 21, at 686–90 (discussing the incentives *Skidmore* has on agency interpretation).